

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

BOOK OF AUTHORIES OF BRUCE LIVESEY
(Anti-SLAPP Motion under s. 137.1 of the *Courts of Justice Act*)

May 5, 2021

**A. Dimitri Lascaris Law
Professional Corporation**
G101-360 Rue Saint-Jacques
Montreal, QC H2Y 1P5

A. Dimitri Lascaris (LSO #50074A)
alexander.lascaris@gmail.com
Tel: (514) 941-5991
Fax: (519) 660-7845

A.J. Freedman (LSO# 73196R)
aj@kalloglianmyers.com
Tel: (647)-968-9560
Fax: (647)-243-6620
c/o A. Dimitri Lascaris Law P.C.

Lawyers for the Defendant, Bruce Livesey

TO: **SERVICE LIST**

INDEX

TAB	CITATION	PAGE
1.	<i>1654776 Ontario Limited v. Stewart</i> , 2013 ONCA 184	1
2.	<i>1704604 Ontario Ltd. v. Pointes Protection Association</i> ,, 2020 SCC 22	55
3.	<i>910938 Ontario Inc. v. Moore</i> , 2020 ONSC 4553	129
4.	<i>A.I. Enterprises Ltd. v. Bram Enterprises Ltd.</i> , 2014 SCC 12	154
5.	<i>Agribrands Purina Canada Inc. v. Kasamekas</i> , 2011 ONCA 460	204
6.	<i>Barrick Gold Corp v Lopehandia</i> , 2004 CanLII 12938 (ON CA)	235
7.	<i>Berry v. Pulley</i> , 2015 ONCA 449	283
8.	<i>Catalyst Capital Group Inc. v. West Face Capital Inc.</i> , 2019 ONSC 128	319
9.	<i>Catalyst Capital Group Inc. v. West Face Capital Inc.</i> , 2021 ONSC 125	346
10.	<i>Fournier Leasing Company Ltd. v. Mercedes-Benz Canada Inc.</i> , 2012 ONSC 2752	401
11.	<i>R. v. Kopyto</i> , [1987] OJ No 1052, 1987 CarswellOnt 124 (ON CA)	432
12.	<i>Shah v. LG Chem Ltd.</i> , 2018 ONCA 819	481
13.	<i>Thompson v. Cohodes</i> , 2017 ONSC 2590	533

TAB 1

COURT OF APPEAL FOR ONTARIO

CITATION: 1654776 Ontario Limited v. Stewart, 2013 ONCA 184
DATE: 20130327
DOCKET: C55493

Laskin, Juriansz and Tulloch JJ.A.

BETWEEN

1654776 Ontario Limited

Applicant (Appellant)

and

Sinclair Stewart and The Globe and Mail Inc.

Respondents (Respondents)

Paul Bates, A. Dimitri Lascaris, Douglas M. Worndl and Robert L. Gain for the appellant

Peter M. Jacobsen, Paul LeVay, Tae Mee Park, and Justin Safayeni for the respondents

Heard: September 17, 2012

On appeal from the judgment of Justice Edward P. Belobaba of the Superior Court of Justice, dated April 20, 2012, with reasons reported at 2012 ONSC 1991.

Juriansz J.A.:

A. INTRODUCTION

[1] This appeal is from the judgment of Justice Edward P. Belobaba dismissing the appellant's application for an order that the respondents disclose

the identities of confidential sources for a story written by the respondent Sinclair Stewart and published by the respondent the Globe and Mail Inc. The appellant, whose sole officer, director and shareholder is Jeffrey G. MacIntosh, holder of the Toronto Stock Exchange Chair in Capital Markets Law at the University of Toronto Law School, seeks their identities to proceed with a proposed class action relying on the provisions of the *Securities Act*, R.S.O. 1990, c. S.5, that create private rights of action.

[2] The law regarding the type of relief the appellant sought, a “*Norwich order*”, originated in *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133, and was most recently considered by this court in *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619, 96 O.R. (3d) 481. Cronk J.A. explained the origin and nature of the remedy at para. 41:

The remedy of pre-action discovery derives from the ancient bill of discovery in equity. Contemporary consideration of this type of equitable relief began with the 1974 decision of the House of Lords in *Norwich Pharmacal*, a case of suspected patent infringement. *Norwich Pharmacal* holds that, in certain circumstances, an action for discovery may be allowed against an "involved" third party who has information that the claimant alleges would allow it to identify a wrongdoer, so as to enable the claimant to bring an action against the wrongdoer where the claimant would otherwise not be able to do so.

[3] The appellant’s *Norwich* application has to be considered in the context of the respondents’ claim of journalist-source privilege. The respondents’ claim of

privilege must be determined by the four-part Wigmore test for establishing journalist-source privilege as set out in the Supreme Court's decision in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477.

[4] The application judge regarded the appellant's proposed claim as serving private interests and concluded it had little merit and would likely fail. Consequently, he found the public interest in preserving journalist-source privilege outweighed any interest in the appellant's claim.

[5] I would dismiss the appeal. The appellant has put forward a claim that, except for the respondents' claim of privilege, would entitle it to disclosure. The apparent strength of the case, however, is weak. The public interest in free expression must always be weighed heavily in the balance. Upholding the privilege would not leave the appellant without a remedy. It can proceed against the companies involved. The public interest in promoting compliance with the disclosure regime regulated by the *Securities Act* can be adequately served without granting disclosure.

B. FACTS

[6] The appellant brought its application for a *Norwich* order on March 31, 2011. The application was not heard until March 21-23, 2012. Meanwhile, the appellant filed a statement of claim against BCE Inc., 6796508 Canada Inc.

(“Canada Inc.”) and John or Jane Doe on June 27, 2011, and amended it on March 20, 2012.

[7] In the action, the appellant seeks \$30 million in general damages and \$5 million in punitive damages arising from fluctuations in the price of BCE shares over a four-day period during the attempted leveraged buy-out of BCE in 2007-2008. BCE announced the leveraged buyout in a press release dated June 30, 2007. The press release stated that BCE had entered into an agreement with Canada Inc. for the acquisition of all of BCE’s common shares by means of an all-cash bid of \$42.75 per share.

[8] In compliance with the requirements of the Ontario *Securities Act* BCE filed a material change report dated July 5, 2007 concerning the transaction and describing the future events that could affect its completion, including financing covenants, regulatory approvals, and conditions precedent.

[9] Ultimately on June 20, 2008, after proceedings that reached the Supreme Court of Canada, the courts approved the transaction. BCE and Canada Inc. issued a joint public statement confirming their continued commitment to the transaction.

[10] On June 30, 2008 the Globe and Mail published a story in its business section that the buyout would likely be delayed, if it proceeded at all. The Globe

and Mail's story reported information supplied by the confidential sources. In the lead paragraph, Stewart wrote:

[The] problem-plagued \$35 billion takeover of BCE Inc. will likely be delayed until the end of the year owing to the increasingly fractious negotiations between the company's private equity buyers and a syndicate of lenders who are pushing to lower the value of the buyout, according to people involved in the negotiations.

[11] Stewart then went on to provide a more detailed discussion, which included references to confidential sources who were "at the bargaining table" and "participating in negotiations":

Sources close to the talks say the banks financing the deal are balking at the proposed purchase price of \$42.75 a share, and are instead insisting that the company should be valued on the same basis as rival Telus Corp., which would imply a steeply discounted price of between \$35 and \$38 a share.

Although the two sides are still talking, several sources described the tenor of the discussions as grinding and suggested that the parties remained far apart on a number of key issues.

'Everyone has underestimated when this deal gets done,' said one executive at the bargaining table. 'It's Christmas'.

The source added he did not think the buyers and the banks would reach an agreement over the financing terms this summer, if at all.

Sources say given the current uncertainty around the acquisition, there is almost no chance BCE will pay out [its \$294 million quarterly dividend].

Two high-level sources, one at BCE and another that is participating in negotiations, insisted that the company's embattled board had little appetite for lowering the price of the offer.

'They're at \$42.75 and damn the torpedoes,' said one of the sources.¹

[12] Stewart, on cross-examination, indicated that the "high-level" source at BCE was privy to the BCE board negotiating position and that the source consented to being identified as being with BCE.

[13] The appellant claims that on the trading day following the publication of the article, the price of BCE shares fell 3.3% and the market price of BCE call options fell precipitously. On July 2, 2008 the appellant disposed of BCE shares and BCE call options at a loss of \$35,900.

[14] On July 4, four days after the article was published, BCE issued a press release announcing that a "final agreement" had been achieved and the transaction would proceed at the purchase price of \$42.75 per share. After the July 4 announcement, the appellant claims the shares jumped from \$35.15 to \$39.50, about 12%; and the call options from \$0.17 the day before to \$1.90, an increase of over 1000%.

[15] Ultimately the transaction did not proceed.

¹ The entire article is reproduced as an appendix to these reasons.

[16] The appellant believed that the confidential sources had breached the Ontario *Securities Act*. MacIntosh wrote to and spoke with enforcement officers of the Ontario Securities Commission attempting to prompt it to commence a formal investigation. He wrote two op-ed pieces in the *National Post* opining that the OSC should investigate the possible manipulation of the options market during the failed BCE bid.

[17] With a view to commencing an action, the appellant requested that Stewart and the *Globe and Mail* provide him with the identities of the unnamed sources quoted in the article, but they refused to do so. The appellant then brought its *Norwich* application and then issued its statement of claim.

[18] The defendants named in the claim are BCE, Canada Inc., and John or Jane Doe. Among other relief, the action claims a declaration that the defendants breached s. 76, s. 126.1, and/or s. 126.2 of the Ontario *Securities Act*. Section 76(2) prohibits a person “in a special relationship with a reporting issuer” from informing another person of “a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.” Section 126.1 prohibits a person from perpetrating a fraud on any person or company. Section 126.2 prohibits a person from making a misleading or untrue statement that would reasonably be expected to have a significant effect on the market price or value of the security.

[19] The statement of claim alleges that the statements made by Doe to Sinclair and attributed to Doe in the story “were false and/or materially misleading”. The claim alleges that Doe made the statements for tactical reasons in the negotiations and the statements were not intended to be a true and accurate description of the status of the transaction.

[20] The claim goes on to allege that the appellant, relying on the false and/or materially misleading statements, disposed of its shares and call options at prices artificially depressed by the story. The claim asserts that the prices rebounded sharply four days later, when BCE announced by press release that a final agreement had been reached.

[21] The statement of claim seeks to assert the rights of action provided for in s. 138.3(2), (3) and (4) of Part XXIII.1 of the Ontario *Securities Act* relating to “civil liability for secondary market disclosure”. Section 138.3(2) creates a right of action for damages when a person with actual, implied or apparent authority to speak on behalf of a responsible issuer has made a public oral statement relating to the business or affairs of the responsible issuer that contains a misrepresentation. Section 138.3(3) creates a right of action for damages when an “influential person” has made a public oral statement relating to the business or affairs of a responsible issuer that contains a misrepresentation. Section 138.3(4) creates a right of action for damages against a responsible issuer for

the failure to make timely disclosure of material changes required to be disclosed under the Act.

[22] As provided by s. 138.8(1), actions under s. 138.3 cannot be commenced without leave of the court “granted upon motion with notice to each defendant.” Since the appellant is unable to give notice to John or Jane Doe, the statement of claim filed indicates the appellant intends to bring a motion for leave under s. 138.8(1).

[23] The appellant in his action also claims damages for “negligent misrepresentation”. It claims that the applicable standard of care required the defendants to not make misleading or untrue statements that violated s. 126.2 of the Ontario *Securities Act*, and to not engage in illegal tipping contrary to s. 76(2).

[24] The action also claims oppression and indicates an intention to seek certification as a class action.

C. THE DECISION OF THE APPLICATION JUDGE

[25] The application judge declined to grant the *Norwich* order. He noted that the *Norwich* and Wigmore analyses intersect when an applicant is seeking disclosure of confidential journalist sources. In order to obtain a *Norwich* order, the application judge stated that the applicant must show that:

- (i) it has a valid, *bona fide*, or reasonable claim; or in cases such as this one where freedom of expression² interests are engaged, that it has a *prima facie* case;
- (ii) the respondents are somehow involved in the acts complained of;
- (iii) the respondents are the only practical source of the information;
- (iv) the respondents can be indemnified for any costs of disclosure; and
- (v) the interests of justice favour the obtaining of the disclosure.

[26] I explain later that the first requirement is not correctly stated.

[27] The Wigmore framework for establishing journalist-source privilege requires that the party asserting the privilege show that:

- (i) the communication originated in a confidence that the source's identity will not be disclosed;
- (ii) anonymity is essential to the relationship in which the communication arises;
- (iii) the relationship is one which should be sedulously fostered in the public interest;

² Section 2(b) of the Charter guarantees the fundamental freedom of expression "including freedom of the press and other media of communication".

(iv) the public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth.

[28] Having set out the legal framework, the application judge proceeded to apply the *Norwich* criteria. The respondents submitted that the appellant had not established a *prima facie* claim under the first stage of the analysis because none of the statements was actionable and, in any event, the actions were time-barred under s. 138.14 of the *Securities Act* and s. 4 of the *Limitations Act*, S.O. 2002, c. 24, Schedule B. The application judge preferred to address the strength of the applicant's case when balancing the interests in the final stage of the *Norwich* analysis. He proceeded to "assume, without deciding" that a *prima facie* claim had been established under the first stage of the *Norwich* test.

[29] At the final stage of the *Norwich* analysis, the application judge applied the Wigmore test for journalist-source privilege to determine whether "the interests of justice favour obtaining the disclosure." He stated, at para. 40:

When the *Norwich* and Wigmore tests intersect, such as here, the Wigmore test becomes almost the entire "interests of justice" analysis that is conducted in the fifth step of the *Norwich* test. In other words, if the four-part Wigmore test is satisfied by the media respondents, it probably will not be in the interests of justice to order disclosure. If the Wigmore test is not satisfied at any of the four steps, it probably will be in the interests of justice to order disclosure. [Citations omitted].

[30] The appellant argued that step one of the Wigmore test was not satisfied because Stewart failed to ask his sources why they were willing to disclose the

information and whether they were aware that disclosure might violate provincial securities law. The application judge held that journalists are not required to ask these types of questions in order to establish journalist-source privilege. He relied on the Supreme Court of Canada's decision in *Globe and Mail v. Canada (Attorney General)* ("Groupe Polygone"), 2010 SCC 41, (2010) 2 S.C.R. 592, which stated at para. 84 that "[a] journalist is under no obligation to act as legal advisor to his or her source of information."

[31] The second Wigmore criterion was satisfied because the relationship originated in a confidence that the sources' identities would not be disclosed.

[32] The appellant took issue with the third criterion of the Wigmore test. It argued that the relationship between a deal-insider and a business journalist should not be "sedulously fostered" where the insider discloses information in a manner that breaches securities law.

[33] The application judge rejected this argument at para. 36 saying that the concern "is the legitimacy and status of the journalist: is he or she an accredited professional or a less than credible, one-off blogger?" He continued, "Assuming the journalist can show professional standing with a legitimate news organization, the third step is readily satisfied". As authority for this conclusion, he cited Binnie J.'s remark at para. 57 of *National Post*, "[I]n general, the relationship between

professional journalists and their secret sources is a relationship that ought to be sedulously fostered."

[34] Another reason for rejecting the appellant's approach to step three, the application judge said, was because any evaluation of the content of the communication is properly addressed at step four of the analysis, not at step three.

[35] The application judge found that step three was satisfied.

[36] Moving to the fourth and final criterion the application judge observed at para. 37 that, "The 'weighing up' will include the nature and seriousness of the alleged wrong-doing and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality."

[37] In assessing the probative value of the evidence the application judge revisited the merits of the appellant's cause of action and engaged in a thorough analysis of the alleged *Securities Act* violations.

[38] In support of its position that the sources' statements may have been misleading or untrue, the appellant pointed to the improbability that negotiations of this magnitude could have been collapsing on Monday and then resulted in an agreement on Friday. The application judge found this submission to be "contrary to common sense and common knowledge", as "[n]egotiations that are on the

verge of collapsing on day one can and do result in an agreement on day four”, at para. 46. He also found that the contents of Stewart’s article were substantially similar to the information contained in articles published by other newspapers at the time. The application judge stated that it “strains credulity” to suggest that all of these articles were misleading or untrue, at para. 48.

[39] If the information provided by the sources was true, the application judge also found that it was unlikely that the respondents’ sources contravened the insider tipping provisions of the Act. In his view, the June 30 article did not contain any “material” information. The application judge found that the information in the article “was neither new nor different from what had already been published over the previous ten days” and therefore “would not reasonably be expected to have a significant effect’ on the market price of BCE securities”, at para. 56.

[40] The application judge concluded that the statements of the sources in the June 30 article were “probably not” in breach of the *Securities Act*, though they could “possibly” be in breach of the Act. He stated, at para. 42:

In my view, none of what was said by the confidential sources was clearly or even likely in breach of provincial securities law. I find that the most that can be said about the sources’ statements as published in the article is that they were *possibly* in breach of the *Securities Act*. In other words, the level of criminality or quasi-criminality at its very highest is very low – at most, there was *possible* wrong-doing. [Emphasis in original.]

[41] The public interest in free expression and the “special position of the media” weighed in favour of protecting the sources. This was particularly important given that the BCE leveraged buy-out was a matter of national and international importance. Conversely, the public interest favouring disclosure was minimal given that there was only a “possible” breach of securities law. Accordingly, the final Wigmore factor favoured protecting the identity of the respondents’ sources.

[42] The application judge declined to grant a *Norwich* order.

[43] As a final comment, at para. 74, the application judge added: “No one denies that great damage can be done to the integrity of capital markets and to shareholders and investors by secret and selective disclosure of confidential corporate information by deal-insiders in violation of provincial securities law.” He observed that “[t]here may well be cases where the information provided by the confidential financial sources is in contravention of securities law and a claimed journalist-source privilege will be trumped by a greater public interest in the criminal investigation and prosecution of wrong-doers.” This was not one of those cases because, in his view, the appellant’s action lacked merit.

D. ANALYSIS

[44] I agree with much of the application judge’s analysis, but take a different view of some issues.

[45] This case, as the application judge noted, requires the application of the *Norwich* test for determining when an applicant is entitled to learn the identity of a wrongdoer and the *Wigmore* test for determining whether a journalist can assert privilege to protect the identity of a confidential source. Only if the applicant is otherwise entitled to a *Norwich* order, is it necessary to consider the journalist's claim of privilege.

[46] I proceed to first consider whether the appellant is able to satisfy the *Norwich* test.

(1) The *Norwich* test

(a) The first *Norwich* factor

[47] The application judge did not consider whether the appellant satisfied the first step of the *Norwich* test. He simply assumed it had and proceeded on with the analysis. Although he assumed it was satisfied, his statement of the standard to be met is not correct. He said that at the first step the appellant was required to show a stronger case than an applicant in an ordinary *Norwich* application because freedom of expression was involved. In imposing an elevated standard he followed *Warman v. Fournier*, 2010 ONSC 2126, 100 O.R. (3d) 648, a decision of the Divisional Court, and *Morris v. Johnson*, 2011 ONSC 3996, 107 O.R. (3d) 311, a decision of the Superior Court that followed *Warman*. In my

view, these cases do not state the law correctly. I review the relevant jurisprudence to indicate the proper standard.

[48] In *Warman*, the applicant sought disclosure of the identities and email addresses of persons who, using pseudonyms, posted allegedly defamatory material on an Internet message board. At para. 42 the Divisional Court reasoned that since the case “engage[d] a freedom of expression interest, as well as a privacy interest, a more robust standard is required to address the chilling effect on freedom of expression that will result from disclosure.” The court went on to explain that “[t]he requirement to demonstrate a *prima facie* case of defamation furthers the objective of establishing an appropriate balance between the public interest in favour of disclosure and legitimate interests of privacy and freedom of expression.”

[49] In my view this approach is inconsistent with the proper application of both the *Norwich* and *Wigmore* tests. Generally, values like freedom of expression are to be considered at step five of the *Norwich* test. In this case the *Wigmore* test is the proper framework for considering the “chilling effect on freedom of expression” and attempting to strike the “appropriate balance” of the competing interests involved. Adopting a “more robust standard” at step one of the *Norwich* test overlooks the function of step five, which is to consider whether the interests of justice favour disclosure. At step five of the *Norwich* analysis the *Wigmore* test can be applied to determine whether the interests of justice favour disclosure.

Automatically applying a more robust standard at step one of all *Norwich* applications involving freedom of expression loses sight of the case-by-case approach required by *National Post* and *Groupe Polygone*, and of the fact that the onus is on the media to satisfy the Wigmore test.

[50] The most recent Court of Appeal decision on *Norwich* orders, *GEA*, adopted the factors set out in *Glaxo Wellcome PLC v. M.N.R.*, [1998] 4 F.C. 439 (C.A.) and *Alberta (Treasury Branches) v. Leahy*, 2000 ABQB 575, 270 A.R. 1. In *Glaxo*, Stone J.A., writing for the Federal Court of Appeal said that the applicants must have a *bona fide* claim against the alleged wrongdoers. In *Leahy*, Mason J. of the Alberta Court of Queen's Bench stated the first requirement is that the applicant provide "evidence sufficient to raise a valid, *bona fide* or reasonable claim" at para. 106. Cronk J.A. in *GEA* did not discuss these cases' different articulations of the test, as the strength of the claim required by the first *Norwich* factor was not an issue in *GEA*.

[51] In *Glaxo*, Stone J.A. said at para. 24:

It seems to me that the requirement that the appellant have a *bona fide* claim against the alleged wrongdoers is intended to ensure that actions for a bill of discovery are not brought frivolously or without any justification.

He noted, at para. 30, that some Canadian courts require that the applicant show that he or she is likely to succeed at trial. Observing that the defendants might

raise a number of defenses to the action, Stone J.A. said that seemed to him to go too far.

[52] Mason J. in *Leahy* stated that the purpose of requiring a “valid, *bona fide* or reasonable claim” was to exclude frivolous claims. At para. 122 he agreed with Stone J.A.’s comments at para. 24 of *Glaxo* “that consideration of the evidence presented by the applicant will assist in ensuring that these applications are not brought frivolously and without justification”. He went on to find that the applications before him “were neither frivolous nor unjustified” at para. 123.

[53] In an earlier decision of this court, *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1, Morden J.A. accepted Stone J.A.’s explanation of the first *Norwich* factor in *Glaxo*. Interestingly, *Straka* was a *Norwich* case that involved the application of the Wigmore test, much like this case does.

[54] The applicant in *Straka*, a doctor, sought the identities of persons who had written reference letters that led to the hospital refusing him staff privileges. After the hospital denied his request to see the letters, the doctor commenced an application for an order for production of the letters so he could pursue a possible action in defamation or for interference with economic relations, pursue staff privileges at the respondent hospital, *and evaluate whether or not to commence litigation to protect his reputation*. The hospital respondent claimed privilege as

the references had been obtained on promises of confidentiality. The production order was refused and the doctor appealed.

[55] In his analysis, Morden J.A. considered whether the applicant's potential claim against the persons who had given references was "*bona fide*". Ultimately the doctor's appeal was dismissed. However, what is important for our purposes is that it was not dismissed because he had failed to establish his proposed action had sufficient merit. Quite the contrary. The respondent hospital argued that a *Norwich* order was only available if the applicant has evidence of a legal wrong done to him or her and lacks only the name of the wrongdoer. In rejecting that argument, Morden J.A. referred to *P. v. T.*, [1997] 4 All E.R. 200, [1997] I.C.R. 887 (Ch. D.), in which *Norwich* relief was granted to permit an applicant to determine if, in fact, he had a cause of action against a suspected wrongdoer. Morden J.A. observed, at para. 52, that "If a narrow approach to determining the elements of an action for discovery were to govern this case, it would be difficult to say that a *bona fide* claim is asserted in this proceeding." The applicant was "unaware of what facts could have given rise to these letters" and "[h]e would like to find out so that he may take steps to clear his name through legal proceedings if this should prove necessary." At para. 53, Morden J.A. concluded in regard to the first *Norwich* factor:

On these facts, I do not think that the appellant should be "non-suited" because his claim is not a *bona fide* one, i.e. that his claim should fail because the threshold

requirement of a *bona fide* claim has not been shown. As I have said, we are concerned with an equitable remedy the granting of which involves the exercise of a discretion. The general object is to do justice. Accordingly, I do not think that a rigid view should be taken of the elements of the claim. With this approach in mind, I think that it is reasonable to accept that sufficient *bona fides* has been shown to justify consideration of the case as a whole. The nature and apparent strength of the appellant's case is a factor to be weighed together with the other relevant factors in arriving at the final determination of the claim.

[56] Morden J.A. concluded the applicant's claim was sufficiently *bona fide* to escape being dismissed at the threshold level. In reaching that conclusion he did not scrutinize the ultimate merits of the claim too closely. He observed at para. 78, that even assuming the letters of reference were defamatory, there would still likely be defenses of justification and qualified privilege to be met and overcome before the applicant could succeed.

[57] Cronk J.A. in *GEA* also referred to *P. v. T.* She explained, at para. 88, that the applicant in *P. v. T.* "obtained an order for pre-action discovery in circumstances where he was uncertain whether a tort had been committed so as to give rise to a cause of action." Cronk J.A. also noted with approval another case where pre-action discovery was ordered where its purpose was to obtain information required to determine whether a legal proceeding was appropriate. In *Isofoton S.A. v. Toronto Dominion Bank*, 85 O.R. (3d) 780, Spence J. of the Superior Court of Justice said at paras. 46-47:

[T]he standard is that the claim must not be frivolous or vexatious, as opposed to higher standards imposed for other types of interlocutory relief such as the "strong *prima facie*" case required to obtain various types of injunction" ... [T]he applicant merely seeks an opportunity to discover information that may or may not lead to a claim.

[58] What I draw from these authorities is that the threshold for granting disclosure is designed to facilitate access to justice by victims of wrongdoers whose identity is not known. Judicial treatment of the *Norwich* application procedure should reflect its nature as an equitable remedy.

[59] There is no requirement that the applicant show a *prima facie* case. The nature and apparent strength of the applicant's potential action should be weighed together with the other relevant factors.

[60] The lower threshold at step one does not make *Norwich* relief widely available. *Norwich* relief is not available against a mere witness. *Norwich* relief is only available, as Lord Reid explained in *Norwich* at p. 175, against a person who is "mixed up in the tortious acts of others so as to facilitate their wrongdoing" even though this is "through no fault of his own". Most significantly the apparent strength of the applicant's case may be considered in applying the other factors.

[61] Turning to this case, I would not subject the appellant's statement of claim to an exacting analysis. The statement of claim was available only because the application was not heard until a year after it was filed. In the typical *Norwich*

application there is no statement of claim to scrutinize and the court is only able to consider the general parameters of a potential action the applicant may have.

[62] The appellant claims to have a potential action under s. 138.3 of the *Securities Act*, which creates statutory causes of action for misrepresentation in relation to the secondary market. Subsection 138.3(2) creates a cause of action against “a person with actual, implied or apparent authority to speak on behalf of a responsible issuer” who makes a public oral statement that contains a “misrepresentation” that relates to the affairs of the “responsible issuer”. The responsible issuer in this case is BCE. Subsection 138.3(3) creates a similar cause of action for a misrepresentation by an “influential person”.

[63] The appellant has difficulty establishing the elements of these causes of action. Without knowing who the sources are and what positions they occupied it cannot show that they had “actual, implied or apparent authority” to speak on behalf of BCE or were “influential” persons as defined in the *Securities Act*. Under the definition, an “influential person” might be an officer or an individual who performs functions similar to an officer. Disclosure would enable the appellant to ascertain this if an action under these sections is warranted.

[64] Another question under both ss. 138.3(2) and s. 138.3(3) is whether the sources’ statements made to Stewart for publication contain a “misrepresentation”. “Misrepresentation” is defined in s. 1(1) of the *Securities Act*

to mean an untrue statement of “material fact” or “an omission to state a material fact”. At trial, the appellant will have to prove a statement was both “untrue” and was one of “material fact”. A fact is “material” if it “would reasonably be expected to have a significant effect on the market price or value of the securities”.

[65] A rigorous approach to these issues would lead one to the conclusion the application judge reached: the sources might have breached the *Securities Act*, but they “probably” did not.

[66] For example, as the application judge noted, the appellant is not in a position to prove the statements were not true. The essence of the quotation of the source who was “a high-level source at BCE” is that BCE board would not agree to lower the price. That source insisted “...the company’s embattled board had little appetite for lowering the price of the offer” and stated “They’re at \$42.75 and damn the torpedoes”. The unfolding of events would seem to indicate these statements were true. The BCE board did not agree to lower the price and a few days later agreement was reached to close the deal at \$42.75.

[67] Another difficulty the appellant faces is that other published stories had also expressed doubt that the deal would close soon if at all. This was the basis of the application judge’s finding that the statements were not “material” and therefore “would not reasonably be expected to have a significant effect” on the market price or value of BCE securities.

[68] I would not take a definitive view of such issues at this stage of the analysis. Later I explain that the goal of the amendments to the *Securities Act* that created statutory civil actions for secondary market misrepresentation was primarily to promote compliance with the regulated disclosure regime rather than to compensate investors. The ambit of these statutory rights of action is best determined on a full record. For example, the meaning of the phrase “person with actual, implied or apparent authority to speak on behalf of a responsible issuer” in s. 138.3(2) should not be judicially interpreted in a factual vacuum.

[69] As well, the appellant’s litigation is still at its earliest stage. Broadly viewed, the general state of the negotiations, whatever the positions of the various parties, was related to the affairs of BCE. The confidential sources stated that the negotiations were almost collapsing and specifically attributed a timeline to a potential deal, saying that it was unlikely to proceed until the end of 2008. One source said, as a result, there was almost no chance BCE would pay out its quarterly dividend.

[70] None of the other stories in the record attributed their information to a “high-level source...at BCE” who was “participating in the negotiations” or to an “executive at the bargaining table”. Materiality is a complex, nuanced, fact-based question that is best decided on a more complete record. Moreover, it may be that a public oral statement by a person with actual, implied or apparent authority to speak or by an influential person can satisfy the requirements of s. 138.3(2) or

(3) of the *Securities Act* even though the public oral statement made corresponds with general rumours that may have been published. I would leave for later the determination of whether the information disclosed was “material”.

[71] The appellant has pleaded that the statements in the story were not true but concedes it cannot now prove that claim. It submits that if the confidential sources were telling the truth, they breached the anti-tipping provision of s. 76(2) of the *Securities Act*. It submits that the breach of the anti-tipping provision informs a common law duty of care owed to shareholders and that but for the unlawful tipping it would not have sustained the losses that it did.³

[72] Whether the statements were true, whether, if true, they constituted “tipping”, and the merits of the appellant’s common law claims are best left for trial or a later stage of the litigation. I note in passing that s. 138.13 of the *Securities Act* expressly preserves any common law rights of action otherwise available.

[73] I would also leave for later the respondents’ argument that the appellant’s statutory-based claims were barred by the operation of ss. 138.8 and 138.14 of the *Securities Act*. It is not necessary to delve into the technical aspects of this

³ If the statements were true, the appellant would not have a private right of action under the *Securities Act* for insider tipping. The private right of action for insider tipping, created by s. 134(2), only provides recourse to persons who sell securities to, or purchase securities from, the person who obtained the inside information from the insider.

argument. I simply note that the Chief Justice has appointed a five judge panel to reconsider the court's interpretation of these sections in *Sharma v. Timminco Ltd.*, 2012 ONCA 107, 109 O.R. (3d) 569.

[74] Issues such as causation and damages are also best left for later in the litigation process.

[75] In short, like Morden J.A. in *Straka*, I would not apply a narrow approach at this stage of the analysis. The appellant is not engaged in "mere fishing". It is not seeking evidence but only the names of the alleged wrongdoers. Its proposed action is not frivolous. I would conclude that sufficient *bona fides* has been shown to justify consideration of the case as a whole. The apparent strength of the appellant's case can be revisited in the final weighing of all the relevant factors together.

(b) The second, third and fourth *Norwich* factors

[76] Little discussion is required of the second, third and fourth *Norwich* factors. As noted above, Stewart and the Globe and Mail are "somehow involved in the acts complained of", they are the only practical sources of the information, and they can be indemnified for any costs of making disclosure.

(c) The fifth *Norwich* factor

[77] The fifth *Norwich* factor is whether the interests of justice favour the obtaining of disclosure. This factor is broad and encompasses the interests of the

applicant, the respondents, the alleged wrongdoers and the administration of justice. The interests of the respondents and the greater public interest sweep in their claim of journalist-source privilege. The privilege claim must be determined by application of the Wigmore test. In this way the *Norwich* and Wigmore tests intersect, as the application judge noted.

[78] I also agree with the application judge that if the Wigmore test is satisfied by the media respondents, it probably will not be in the interests of justice to order disclosure, and on the other hand if the Wigmore test is not satisfied, it probably will be in the interests of justice to order disclosure.

[79] Applying the Wigmore test within the *Norwich* test requires close attention to the placement of the onus. The onus is on the appellant to establish the fifth *Norwich* factor, but the onus is on the respondents to satisfy the Wigmore test. The placement of the onus was a major issue in *National Post*. In that case, the newspaper argued that once the first three Wigmore criteria were established, the onus should switch to the party seeking disclosure to show why, on a balance of probabilities, disclosure should be ordered. However, Binnie J., writing for the majority, said at para. 60, “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.”

[80] As Binnie J. noted, “the evidence is presumptively compellable and admissible” until the journalist has satisfied the Wigmore test.

[81] In my view the onus is on the appellant to establish all aspects of the interests of justice other than the respondents’ claim of privilege. The respondents have the onus of establishing their claim of privilege.

(2) The Wigmore test

[82] I set the Wigmore test out again for the sake of convenience:

- (i) the communication originated in a confidence that the source's identity will not be disclosed;
- (ii) anonymity is essential to the relationship in which the communication arises;
- (iii) the relationship is one which should be sedulously fostered in the public interest; and
- (iv) the public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth.

(a) Wigmore factors one and two

[83] The first and second factors are easily satisfied in this case. The appellant does not contest that the communications originated in a confidence that the identities of the sources would not be disclosed and that confidence is essential to the relationship between Stewart and his sources.

(b) Wigmore factor three

[84] As summarized above, the application judge reasoned that as long as the journalist was an accredited professional with a legitimate news organization, the third step was readily satisfied. He rejected the appellant's argument that the relationship should be characterized more particularly as that between corporate insiders who breached the securities law disclosure regime and a business reporter who did not comply with his own newspaper's stated policy regarding the granting of confidentiality to sources. In rejecting this argument the application judge reasoned that the third and fourth steps of the Wigmore test must be kept analytically distinct. I share his concern.

[85] Characterizing the relationship with the narrow focus the appellant advocates, would lead to the two factors overlapping. Such overlapping would be unavoidable if the content of the impugned communication were taken into account at step three. It is the content of the communication that differentiates corporate sources such as those in this case from corporate sources who blow the whistle on companies defrauding the public. The content of the communication, as the application judge pointed out, is best analyzed at step four of the Wigmore test.

[86] Second, to avoid redundancy, the "public interest" that is considered at step three must be different in nature from the "public interest" considered at step

four. The redundancy can be avoided by considering, at step three, only the "public interest" in fostering the general relationship involved. A too fine consideration of the relationship at step three would involve public interest considerations that would duplicate some of the analysis at step four.

[87] I find the question a difficult one, though, because the appellant is able to point to much language in *National Post* that might seem to support its position. To begin with, the appellant points to the same paragraph that the application judge cited. The application judge relied on Binnie J.'s remark at para. 57 of *National Post* that "the relationship between the source and a blogger might be weighed differently than in the case of a professional journalist..." to support the conclusion that the relationship in this case should be viewed generally as one between "a source and a professional journalist". I set out the entire paragraph in which the remark appears:

The third criterion (that the source-journalist relationship is one that should be "sedulously 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.

[88] The appellant submits that while Binnie J. accepted that the relationship between journalists and sources should be fostered “in general”, he left open the possibility that “persuasive reason” could be offered “to discount the value to the public of the relationship...” in a particular case.

[89] Viewing the relationship generally as one between “a source and a professional journalist” does not allow for any differentiation among “sources”. Earlier, at para. 40, Binnie J. said that it was not wise to grant immunity to whichever “sources” “journalists” deem worthy of a promise of confidentiality. The general approach does not allow “flexibility in the court’s evaluation of different sources”, which Binnie J. specifically states this factor introduces.

[90] The appellant points out that the confidential sources in this case were not whistleblowers shedding light “on the dark corners of some private institutions”. They breached a law that, rather than prohibiting public disclosure, is designed to ensure the public receives full, true, plain and timely disclosure of all material facts.

[91] Characterizing the relationship generally also detracts from the “case-by-case” analysis that Binnie J. took great pains to emphasize must be used. As Binnie J. observed at para. 45 of *National Post*, there is a wide divergence even among legitimate news organizations. He observed that,

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.

[92] The appellant says that the analysis of this factor should take this variety into account. It submits that in this case the court should take into account that Stewart is a business reporter, in fact the editor of the business section of the Globe, that he promised absolute confidentiality to the sources without considering whether their misconduct might contravene Ontario securities laws, that he was unfamiliar with those laws, that he never turned his mind to whether the sources might have been attempting to use him to manipulate the capital markets, and that the Globe and Mail's *Editorial Code of Conduct* provides that journalists first ascertain why the sources are willing to provide the information before promising confidentiality.

[93] Viewing the relationship generally at step three of the Wigmore test has the consequence that almost all journalist-source cases will be determined by the fourth Wigmore factor. The fourth Wigmore factor is arguably the most subjective factor. Subjectivity reduces the capacity of structured analysis to guide decisions.

[94] While I recognize the force of the appellant's argument, I am unable to accept it. In *National Post* the relationship between the professional journalist

and the confidential source was accepted as one that ought to be sedulously fostered despite the fact the source appeared to be a fraudster rather than a true whistleblower. As noted above, focusing on the specific relationship in this case would result in blurring the analysis at steps three and four of the Wigmore test. In *National Post* Binnie J. observed that there was room for the law to grow and this may be an area in which it evolves further.

[95] In this case I would characterize the relationship generally and conclude that the relationship between a journalist and a source is one that should be sedulously fostered in the public interest.

[96] I proceed to consider the fourth Wigmore factor.

(c) The fourth Wigmore Factor

[97] The application judge set out the approach to the fourth Wigmore factor as summarized by Binnie J. in para. 64 of *National Post*. The court must weigh up the evidence on both sides, supplementing it with judicial notice, common sense, good judgment and appropriate regard for the “special position of the media”. The question, as the application judge put it at para. 69, is “whether the public interest in protecting the identity of the informant outweighs the public interest in getting at the truth.”

[98] I begin by discussing the competing general public interests, then turn to matters particular to this case, and finally compare the harm that would flow from

recognizing the privilege in this particular case with the harm that would flow from rejecting it.

(i) The public interest in the media's use of confidential sources

[99] The public interest in a free press is clear. Confidential sources are closely aligned with a free press. As Binnie J. observed at para. 28 of *National Post*, the public 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”. He added that many important controversies have been unearthed only because of secret sources.

[100] At para. 33, Binnie J. directed courts to recognize that an important element in the newsgathering function is the ability of the media to make use of confidential sources. 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 and important stories would be left untold.

[101] Anxiety among potential sources that journalists could be compelled to reveal their identity later would make it less likely these sources will provide information to journalists. If potential sources have to worry that a judge, after the fact, will override the journalist's promise of confidentiality, they will not confide information that the public has an interest in learning through the media.

[102] Professor Melanie Leslie of Yeshiva University's Cardozo School of Law put it well: "Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears".⁴

(ii) The public interest in compliance with the *Securities Act* is served by the appellant's private cause of action

[103] In this section I explain that the appellant's proposed claim serves the public interest by promoting compliance with the *Securities Act*.

[104] The *Securities Act* is designed to further the public interest by protecting investors and ensuring that capital markets are fair, efficient and transparent. These goals were set out in the *Report of the Attorney General's Committee on Securities Legislation in Ontario* (Toronto: Queen's Printer, 1965), the "*Kimber Report*", which forms the basis for modern Canadian securities regulation.

[105] Consistent with the *Kimber Report*, s. 1.1 of the *Securities Act* states that the purposes of the Act are "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". Section 2.1 indicates that a fundamental principle of disclosure is that it be "timely, accurate and efficient".

[106] Section 76(2) of the *Securities Act* provides:

⁴ Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, (2000) Wis. L. Rev 31 at 31.

No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

[107] The *Securities Act* Part XVIII sets out a “Continuous Disclosure Regime” (“CDR”) that regulates the flow of information to the public and prohibits deal insiders from communicating non-public, material information to anyone.

[108] The Continuous Disclosure Regime is in place to fulfill the objectives of the *Securities Act*. Mark R. Gillen, in *Securities Regulation in Canada*, 3rd ed. (Toronto: Carswell, 2007) at p.181, notes that the CDR “implements the broad objective of creating and maintaining confidence in Canadian capital markets by providing an information base from which investment decisions can be made”. The CDR aims to protect the public from receiving information that is incomplete, inaccurate or misleading. This is a broad public interest function.

[109] Adequate disclosure of information about companies that issue securities to the public has repeatedly been recognized by securities regulators as an important part of protecting investors and promoting efficient capital markets. *The Toronto Stock Exchange Committee on Corporate Disclosure, Final Report, Responsible Corporate Disclosure - A Search for Balance* (March 1997), the “Allen Committee Report”, which is the foundation for Part XXIII.1 of the

Securities Act (entitled “Civil Liability For Secondary Market Disclosure”), highlighted the importance of full and accurate disclosure at p. vi as follows:

The capital market system in Canada is built on a foundation of information – full, true and plain disclosure of all material facts in a prospectus and continuous disclosure of material changes and information. Companies are obliged to provide this information to their shareholders and the investing public. *Information is really the lifeblood of trading on securities markets.* [Emphasis added].

[110] The Allen Committee concluded in its report at p. vii that there was “a sufficient degree of non-compliance with the current continuous disclosure rules to cause concern.” In order to promote more effective compliance with the CDR, the Committee recommended “a limited statutory regime whereby issuers and others who are responsible for continuous disclosure violations may be liable in civil actions brought by injured investors to recover their damages.” The Committee’s concern was that the sanctions available to securities regulators provide an “inadequate deterrent”.

[111] The Committee also stated at p. 40 that the introduction of civil liability should complement existing public law enforcement mechanisms, which do not provide a sufficient level of enforcement on their own:

After extensive deliberations, the Committee has concluded that, while adequate funding for [securities regulators] is essential for regulation of capital markets, it will not, on its own, provide sufficient deterrent to continuous disclosure violations. The Committee believes that the additional deterrence represented by

private plaintiffs armed with a realistic remedy will be important in ensuring compliance with continuous disclosure rules in Canada. *All regulators to whom the Committee has spoken, including representatives of the SEC, believe strongly that compliance is best accomplished through a combination of regulatory enforcement and private enforcement.* These views, in part, prompted the recommendations for a regime of statutory civil liability. [Emphasis added].

[112] In 2000, the Canadian Securities Administrators, the umbrella organization of provincial securities regulators, proposed amendments to securities legislation that would implement the recommendations of the Allen Committee in CSA *Notice 53-302 - Proposal for a Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change"*, (2000) 23 O.S.C.B. 7383. These draft amendments were then recommended by the CSA to their respective member governments.

[113] The CSA *Notice 53-302* stated that the CSA was committed to advocating for the implementation of the amendments, “so investors are empowered with the tools to seek redress when they suffer damages as a result of misrepresentative disclosure, *resulting in improved continuous disclosure in Canada*” (emphasis added) at p. 7388. The CSA also noted how public and private regulation are both critical to the success of the regime: “[P]rivate rights of action and public regulation together provide important, effective and complementary incentives to

issuers and others involved in the prospectus process to ensure sound disclosure.”

[114] Bill 198, *Keeping the Promise For a Strong Economy Act (Budget Measures)*, 3rd Sess., 37th Leg., Ontario, 2002, which amended the *Securities Act* to include private civil liability in what is now Part XXIII.1, incorporated the recommendations of the Allen Committee, and generally mirrored the amendments put forward by the CSA. Several cases have held that the Allen Committee’s report may be used as evidence of legislative intent regarding Part XXIII.1⁵. The legislative history outlined above makes clear that the private causes of action created by Part XXIII.1 were designed to promote compliance with the CDR.

[115] The Five Year Review Committee, struck to review the Ontario *Securities Act*, also supported the civil liability recommendations of the CSA in its *Five Year Review Committee Final Report – Reviewing the Securities Act (Ontario)*, (Toronto: Queen’s Printer, 2003). This report encouraged the coming into force of the Bill 198 amendments, which finally occurred in 2005. The Five Year Committee noted, at p. 131, one commentator’s letter that supported the civil liability amendments because, “the competitiveness of the Canadian capital

⁵ See e.g. *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 (S.C.) at paras. 7-13; *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 (Ont. S.C.) at paras. 225-231; *Frank v. Farlie, Turner & Co.*, 2012 ONSC 5519 at paras. 71-77. *Abdula v. Canadian Solar Inc.*, 2012 ONCA 211, at paras. 50-66

markets depends, in part, on the ability to demonstrate that Canadian securities laws are as protective of investors' rights as those in other major markets".

[116] The purpose of the private civil liability provisions under Part XXIII.1 is to supplement public enforcement in order to bolster compliance with the overall regulatory scheme. Part XXIII.1 shows that the appellant's proposed claim should not be viewed as serving solely the private interests of an aggrieved investor. Rather, the appellant's action, based on the defendants' noncompliance with the regulatory disclosure regime, serves the public interest by promoting compliance with that regime.

(iii) The Securities Commission's decision not to investigate

[117] The Securities Commission's decision not to investigate the confidential sources was important to the application judge's final weighing up. He said at para. 72: "The OSC's decision not to investigate was a public interest decision. Any further public interest in "getting at the truth" is minimal to non-existent." It is clear he regarded the appellant's proposed action as serving purely private interests.

[118] I have noted above that the Allen Committee considered that public law enforcement by securities regulators was not sufficient protection and "that the additional deterrence represented by private plaintiffs armed with a realistic

remedy [would] be important in ensuring compliance with continuous disclosure rules in Canada." Part XXIII.1 was added to the *Securities Act* as a result.

[119] In this case the public interest in a free press is not pitted against the mere pursuit of a private cause of action. The appellant's proposed action would serve the important public interest of fostering compliance with the *Securities Act's* Continuous Disclosure Regime.

(iv) The public interest in knowing the status of the transaction

[120] The application judge found that news reports about when or whether the transaction would close were clearly in the public interest because the BCE leveraged buyout was a matter of national, even international, interest and importance.

[121] As I see it, the public's interest in information about the transaction supports the appellant as much as it does the respondents. The interest and entitlement of the public to reliable information about the transaction is served by promoting compliance with the *Securities Act's* Continuous Disclosure Regime. The CDR regulates the source, manner, timing and content of any public disclosure about the transaction in order to protect the public interest.

[122] This is not a case in which the sources used the media to provide the public with important information about corporate malfeasance that the public would not otherwise receive. Both freedom of the press and compliance with the

Continuous Disclosure Regime satisfy the public's interest in meaningful, timely, complete and accurate information about the status of the transaction.

(v) The National Newspaper Award

[123] The application judge weighed on the side of upholding the privilege the fact that the respondents' coverage of the BCE deal was nominated for a National Newspaper Award. I do not understand how the Award has any relevance to the legal issues that must be determined.

(vi) Stewart's promise of confidentiality

[124] The fact that Stewart gave the sources an absolute promise of confidentiality is not sufficient to make out the claim of privilege. At para. 69 of *National Post* Binnie J. noted that, "The bottom line is that no journalist can give a source a total assurance of confidentiality." He added that "[a]ll such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed." The risk is that the courts will determine after the fact whether a promise of confidentiality will be respected. He said "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." He noted at para. 30 that "most journalistic codes of ethics recognize that the promise of confidentiality cannot be absolute" and cited as an example, the Canadian Association of Journalists' *Guidelines for Investigative Journalism*.

[125] Binnie J. explained at para. 69 that “[w]hat 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.” It could not be plainer that in the legal regime after *National Post*, journalists and sources must understand that the courts may refuse to uphold the type of absolute promise of confidentiality that Stewart made in this case.

[126] The respondent’s main argument in this case is that Stewart’s promise of confidentiality to the sources should be upheld because of the importance of such promises to business journalism. The argument is akin to that advanced by the CCLA, and rejected, in *National Post*. Binnie J. summarized the CCLA’s argument at para. 37. The CCLA argued that upon a journalist showing that he or she is a journalist, was engaged in newsgathering activity, and acquired information under a promise of confidentiality, the journalist’s right to keep the source confidential would be constitutionally guaranteed by s. 2(b), subject to s. 1.

[127] The respondents’ argument here does not claim constitutional protection but does claim the same three elements should dictate the result of the Wigmore test. This argument, it seems to me, risks becoming circular – the fact the promise was made is justification for upholding it.

[128] In this case Stewart, in giving an absolute promise of confidentiality, does not appear to have turned his mind to the requirements of the *Securities Act*, the possible motivations of the sources in disclosing information to him, or why they consented to some identifying information being included in the story.

[129] Nevertheless, in this case I would attach limited weight to the fact that absolute guarantees of confidentiality are not justified in law. Stewart gave his guarantees to the sources before the Supreme Court's decision in *National Post*. And as Binnie J. explained at para. 30 of that decision, "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."

(vii) The strength of the appellant's proposed action

[130] The strength of the appellant's proposed action was the determining factor in the application judge's final balancing. As noted, after conducting a searching examination of the merits of the appellant's proposed action, he concluded it had little merit and would likely fail.

[131] Subjecting the merits of the action to a searching examination is the approach taken by the dissenting judge in *National Post*. An important part of the dissent's analysis was that there was very little prospect that the investigation

would prove fruitful if the envelope, which was sought in that case, were ordered produced.

[132] By contrast, Binnie J., writing for the majority, said that the “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” at para. 72. He went on to say that even if production of the envelope would be “extremely unlikely” to aid the investigation, the envelope should still be produced. The balancing of all the factors would still lead him to conclude that “the injury that is likely to result from disclosure does not outweigh the public interest in correctly disposing of the criminal investigation.”

[133] I draw from this that whether the investigation was ultimately successful or not, its correct disposal was an important public interest.

[134] *National Post* involved a criminal investigation. Our system also places value upon the correct disposal of civil litigation. *Groupe Polygone* was a civil case. Lebel J. repeatedly made the point that the public interest in maintaining journalist-source confidentiality should be weighed against the importance of disclosure to the administration of justice: see paras. 17, 68, 69.

[135] An apt illustration of the importance of the correct disposal of civil litigation is the case *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, which involved a claim for damages for sexual assault. The plaintiff claimed privilege in a psychiatrist’s

notes of communications with her. McLachlin J. (as she then was) writing for the majority, remarked that there was a compelling interest in protecting the communications from disclosure. However, she upheld the decision below that the notes should be produced saying at para. 31:

More, however, is required to establish privilege. For privilege to exist, it must be shown that the benefit that inures from privilege, however great it may seem, in fact outweighs the interest in the correct disposal of the litigation.

[136] The correct disposal of litigation is deserving of weight under the Wigmore test.

[137] That said, the Wigmore test is being applied as part of the fifth *Norwich* factor. Following the guidance provided by Morden J.A. in *Straka*, the nature and apparent strength of the appellant's case is to be weighed together with the other relevant factors. I refer to my earlier discussion of the difficult hurdles the appellant's action faces. The appellant has not put forward any evidence that the statements were false or materially misleading. I agree with the application judge that the fact there was a breakthrough just four days later does not support the inference the statements were untrue at the time they were made. The appellant's claim that the sources had ulterior motives to make the statements is speculative.

[138] On the evidence the appellant has put forward at this stage, I would agree with the application judge that the appellant's action is not likely to be successful.

(viii) The harm that would flow if the claim of privilege is rejected

[139] The respondents' position is that Stewart's absolute assurance of confidentiality to the sources should be upheld because of the importance of such promises to business journalism. It is worth highlighting that the argument is general and not specific to this case. The respondents do not argue that in this particular case the promise of confidentiality should be upheld because otherwise important undisclosed information would never have come to the attention of the public on this occasion. The respondents have not attempted to characterize the sources as whistleblowers. Rather, the respondents argue that if Stewart's absolute assurance of confidentiality given in this case is overridden by the courts, in the future all business sources, indeed all sources, will become more reluctant to share information with the media and the public's right to know will suffer generally.

[140] This is a forceful argument. It loses much of its force, however, when considered in light of the Supreme Court's decision in *National Post*. As noted, the legal regime following *National Post* is that a court may override a journalist's absolute assurance of confidentiality. Overriding the absolute promise Stewart made to the sources would simply apply the legal framework of *National Post* and would not usher in a new state of affairs.

[141] Given the law pronounced in *National Post*, a rejection of the privilege in this case would not result in any significant change in the confidence sources can repose in journalists' assurances in the future. Both before and after the decision in this case the situation remains the same. Journalists can seek and obtain information from business sources. Business sources have to keep in mind their obligations and liabilities under the law and that they may be called to account.

(ix) The harm that would flow from upholding the claim of privilege

[142] Upholding the privilege would not deny the appellant a remedy. If as the appellant alleges the sources had actual, implied or apparent authority to speak on behalf of BCE or were influential persons, and if, as it alleges, the sources' statements were false it can proceed with its statutory causes of action against BCE and its common law claims against BCE and Canada Inc. This observation should not be taken to express any view on the merits of the appellant's application for leave under s. 138.8 of the *Securities Act* that would be necessary no matter who are the defendants to the action.

[143] Upholding the privilege might be seen to result in the harm of providing deal insiders with comfort they are able to provide secret information to journalists in order to manipulate the markets and avoid accountability by sheltering behind impenetrable journalist-source protection. In my view, this potential harm would be greatly mitigated by the appellant's action against BCE.

Actions against responsible issuers will provide them with reason to discourage their officers and employees from making improper disclosures.

[144] As I see it, upholding the privilege would not neutralize the legislature's efforts to reduce the public harm of improper corporate disclosures by adding civil remedies to the *Securities Act* to complement regulatory enforcement mechanisms.

(x) The final weighing up

[145] In the final weighing up I would conclude that the greater public interest is served by upholding the respondents' claim of privilege. The public interest in free expression must always be weighed heavily in the balance. The balance may well have been shifted, had the apparent strength of the appellant's case been compelling; however the appellant has not put forward such a case. Whatever the merits of its case, the appellant can seek a remedy from BCE and Canada Inc. The public interest in promoting compliance with the disclosure regime regulated by the *Securities Act* can be adequately served by the appellant proceeding with its action against BCE.

E. CONCLUSION

[146] I would conclude that the respondents have satisfied the *Wigmore* test, and hence, the appellant has failed to satisfy the *Norwich* test. I would dismiss the appeal.

[147] This was a difficult case. Corporate executives who engage in the dangerous practice of providing journalists with information anonymously during the course of sensitive negotiations should understand the courts may not uphold a journalist's assurances of confidentiality.

[148] I would fix the successful respondents' costs of the appeal in the amount of \$15,000.00 all inclusive.

"R.G. Juriansz J.A."

"I agree John Laskin J.A."

"I agree M.H. Tulloch J.A."

Released:

APPENDIX

The Globe and Mail (Canada)

June 30, 2008 Monday
Correction Appended

**Haggling may stall BCE deal till year-end;
Lenders are balking at the purchase price as buyers dig in; ‘they’re at \$42.75, and damn the torpedoes’**

BYLINE: SINCLAIR STEWART

SECTION: REPORT ON BUSINESS: CANADIAN; TELECOM: TAKEOVERS; Pg. B1

LENGTH: 781 words

DATELINE: NEW YORK

The problem-plagued \$35-billion takeover of **BCE Inc.** will likely be delayed until the end of the year, owing to increasingly fractious negotiations between the company’s private equity buyers and a syndicate of lenders who are pushing to lower the value of the buyout, according to people involved in the negotiations.

Sources close to the talks say the banks financing the deal are balking at the proposed purchase price of \$42.75 a share, and are instead insisting that the company should be valued on the same basis as rival Telus Corp., which would imply a steeply discounted price of between \$35 and \$38 a share.

The banks are also seeking stricter covenants, more favourable interest rates on their loans and a host of other concessions that the buyers, led by the Ontario Teachers’ Pension Plan and New Jersey-based Providence Equity Partners, believe go well beyond the bounds of the commitment letters these lenders signed last June.

Although the two sides are still talking, several sources described the tenor of the discussions as grinding and suggested that the parties remain far apart on a number of key issues.

The plan was for BCE and its banks to begin marketing the deal to investors in mid-July, and then close it some time before the end of the third quarter. But participants now say that schedule is wildly optimistic, and have not ruled out the possibility that the private equity buyers will have to sue the banks to put the buyout back on track. Citigroup Inc., Deutsche Bank AG, Royal Bank of Scotland PLC and Toronto-Dominion Bank are helming the \$32-billion debt package.

Haggling may stall BCE till year-end; Lenders are balking at the purchase price as buyers dig in; ‘they’re at \$42.75, and damn the torpedoes’ The Globe and Mail (Canada) June 30, 2008 Monday Correction
Appended

“Everyone has underestimated when this deal gets done,” said one executive at the bargaining table. “It’s Christmas.”

The source added he did not think the buyers and the banks would reach an agreement over the financing terms this summer, if at all.

BCE is expected to announce today whether it will pay out its \$294-million quarterly dividend or retain the cash to improve its balance sheet and provide added comfort to nervous lenders. Sources say given the current uncertainty around the acquisition, there is almost no chance BCE will pay out the money.

If the deal doesn’t close until year end, that could mean the company’s cash position could be bolstered by an additional \$900-million.

The company and its buyers have received all the regulatory approvals needed to move forward by today’s deadline, though the bank financing remains tenuous.

Two high-level sources, one at BCE and another that is participating in negotiations, insisted that the company’s embattled board has little appetite for lowering the price of the offer. That would necessitate another shareholder vote, another round of court and regulatory approvals, and perhaps another year’s worth of delays. It would also be a black mark on the BCE directors, who were roundly criticized last year for running a clumsy auction.

“They’re at \$42.75, and damn the torpedoes,” said one of the sources.

If the board holds fast, the buyers and banks will have to find compromises in other places, such as covenants and rates. It appeared they were close to such an agreement in late May, but talks fell apart after a surprise Court of Appeal decision froze the deal, ruling BCE failed to take into account the interests of its bondholders when it agreed to be taken over in the largest private equity transaction in history.

The Supreme Court overruled that decision this month, paving the way for talks to resume, but the banks have dug their heels in deeper since then, according to people familiar with the matter.

A spokeswoman for the bank syndicate said the banks stand by their earlier commitment to the deal.

The banks issued a statement after BCE won its Supreme Court ruling that said they “expect that the transaction will close in accordance with the … agreement.”

Officials at BCE and the private equity buyers declined to comment.

The four banks pledged to supply what they called a “term loan A facility” worth \$4.2-billion and a \$16.5-billion “term loan B facility” when the deal was struck 12 months ago.

Haggling may stall BCE till year-end; Lenders are balking at the purchase price as buyers dig in; 'they're at \$42.75, and damn the torpedoes' The Globe and Mail (Canada) June 30, 2008 Monday Correction
Appended

Some of these banks, however, managed to wring price concessions from Clear Channel Communications Inc., after a similar fight with that company and its private equity buyers. The two sides compromised amid a legal battle in which Clear Channel alleged the lenders were not living up to their commitments.

Sources say that has emboldened the banks in the current negotiations.

Although Teachers and Providence have not ruled out suing their lenders if their stalemate continues, this is viewed as a last resort, sources said.

BCE INC. (BCE)

Friday's close: \$36.76, down 25¢

LOAD-DATE: July 1, 2008

LANGUAGE: ENGLISH

CORRECTION-DATE: July 1, 2008

CORRECTION: Providence Equity Partners is based in Rhode Island. Incorrect information was published yesterday.

PUBLICATION-TYPE: Newspaper

Copyright 2008 The Globe and Mail, a division of CTVglobemedia Publishing Inc.
All Rights Reserved.

TAB 2



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: Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis,
 (paras. 1 to 129) 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., *Lascaris 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 3

CITATION: 910938 Ontario Inc v. Moore, 2020 ONSC 4553
COURT FILE NO.: CV-18-4283-00
DATE: 2020 07 27

ONTARIO

SUPERIOR COURT OF JUSTICE

REASONS FOR JUDGMENT

D.E HARRIS J.

- 2 -

[1] The internet has conferred upon us all the role of professional critic. Our opinions on any manner of topics can be expressed and published on-line for the edification of all. This includes the rating of virtually everything: restaurants, hotels, businesses of all types, music, books, movies, people themselves. The lawyers who argued this case are rated on-line.

[2] On-line critics benefit from being protected by ostensible anonymity. They are just a name in cyberspace, often a pseudonym. This shield contributes to the not infrequent slide of postings into less than civil discourse. The reduced threat of personal exposure can embolden the commentary. That is what happened in this case.

[3] The defendants wrote a vicious on-line review of the plaintiffs' plumbing store soon after an in-person conflict in the store on July 18, 2018. The plaintiffs are suing for defamation, requesting \$100,000 in damages. The defendants, mother and daughter, are moving under the Anti-SLAPP provisions of the *Courts of Justice Act* R.S.O. 1990, c. C.43 (Strategic Lawsuits Against Public Participation) to dismiss the plaintiffs' defamation action.

BACKGROUND

[4] The numbered company plaintiff is said to operate as Plumbing Mart at 700 Dundas Street East in Mississauga and the individual plaintiff Mark Noonan is a principal

- 3 -

in the company. Susan Moore is 74 years old and Sandra is her daughter. They are disgruntled customers of Plumbing Mart.

[5] In January 2018, the Moores hired Plumbing Mart to do a bathroom renovation in their condominium. The work was delegated to a subcontractor and the Moores were satisfied with the work that was done.

[6] In May of 2018, the Moores decided they also wanted to replace a faucet in the bathroom and a toilet paper holder. They ordered the items from Plumbing Mart. Unhappy with the delay in receiving the items, the defendants personally attended the store on July 18, 2018 and demanded the items or a refund. The evidence from the plaintiff is that it was stated the items were special order and there could be no store refund, only a credit. Heated arguments between the defendants and the staff ensued. The defendants later admitted on Twitter that they themselves were going “blue blazes.”

[7] Mr. Noonan alleged that he had been assaulted by Susan Moore. The police were called. The police notes indicate that Mr. Noonan alleged that he was slapped. Later on, however, as reflected in the officer’s notes, Mr. Noonan retracted the allegation. In his affidavit on this motion, Mr. Noonan claims that it was a punch to his shoulder and back. He also alleged that several customers who had been in the process of contracting with Plumbing Mart for renovations, left the store after the loud altercations with the defendants, never to be heard from again.

- 4 -

[8] The day after the incident, the items arrived and were picked up at the store by Susan Moore who also paid the outstanding balance. The defendants allege that Mr. Noonan verbally threatened Susan on this occasion, saying that the incident would cost her \$63,000.

[9] The two postings that are the subject matter of the defamation action were written after the July 18, 2018 incident by one of the defendants. It is difficult to say exactly when although the print-out of one of them seems to suggest that it was posted on August 11, 2018. To say the posts were offensive and virulent fails to do them justice. It was more a personal attack than it was a true review of the Plumbing Mart store. One post was on the website Homestars.com under the name Persephone and a virtually identical review was placed under the same name on Google.com. These are the highlights of the Homestars review:

Pure Con Artists

Bathroom Renovation review in Mississauga

IF ANYONE WANTS TO JOIN A CLASS ACTION LAWSUIT - I HAVE A LAWYER AND THE KNOW HOW - CONTACT ME ON FACEBOOK

I was a returning customer. He had done an excellent job with the bathroom in my townhouse and I wanted to the final touch: a matching faucet. I paid 50% of the quote and then didn't hear a word for two months. I called periodically but nothing was moving forward. I went

- 5 -

into the shop and asked for my money back, at which point they said there were no refunds on special-ordered products. The attitude from the two dopes behind the counter is something out of a sci-fi thriller. The one named R. is morbidly obese. The other one is obviously slow. They live in a wasteland of stupidity. They have no interest in doing a good job for their customers. They also clearly hate women, which is a sign they hate themselves. I suspect this shop is a front for some other type of illegal business.

...

If you look at these reviews, there is a pattern. They manage to do very small jobs okay, but anything that takes a minute causes a problem. It seems to be getting worse in the last year. What I figure has happened is that the owner, MN, has bankrupted the company and is living paycheque to paycheque with suppliers that won't service him anymore. He is very proud to inform you that he has a young second wife, and between alimony and child support and impressing his new wife, he has probably run the company into the ground...

...

This shop stole my money, plain and simple.

IF ANYONE WANTS TO JOIN A CLASS ACTION LAWSUIT - I HAVE
A LAWYER AND THE KNOW HOW - CONTACT ME ON FACEBOOK

[10] The Google review named Mr. Noonan as opposed to just giving his initials. As well, there was a brief Twitter comment written by Sandra which alleged that the store had tried to "rip me off." The plaintiffs wrote the defendants a letter on August 27, 2018 announcing an intention to sue them for defamation. The reviews were taken down by the

- 6 -

defendants four days later. The Twitter account has been deleted. It cannot be determined by direct evidence how many people aside from the plaintiff read the posts.

DISCUSSION

THE ONTARIO ANTI-SLAPP LEGISLATION

[11] The provisions of the *Courts of Justice Act* which govern this motion are relatively new. They were enacted in 2015 following the recommendations of a report commissioned by the Ontario Government entitled “Anti-SLAPP Advisory Panel, Report to the Attorney General” (Ontario: Ministry of the Attorney General, 2010). SLAPP is an acronym for Strategic Lawsuit Against Public Participation. SLAPPs are a common occurrence in North America and have been for decades. The quintessential SLAPP action is a defamation action brought by a wealthy plaintiff not so much as to seek compensation for damage done but to silence and punish their enemies. However, the net cast by Ontario’s anti-SLAPP legislation is considerably broader than this very specific context. The key provision balances the right to freedom of expression against the damage done to personal reputation by the allegedly defamatory words. In practice, it serves to both protect the right to freedom of expression and to ensure that the courts are not inundated with inconsequential actions unduly burdening the judicial system.

[12] The purposes of the legislation are stated in Section 137.1(1):

- (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.

[13] In the summer of 2018, the Ontario Court of Appeal decided six grouped anti-SLAPP cases: see *1704604 Ontario Ltd. v. Pointes Protection Association* 2018 ONCA 685; *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686; *Platnick v. Bent*, 2018 ONCA 687; *Veneruzzo v. Storey*, 2018 ONCA 688; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689; *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690. The *Pointes* and the *Platnick* decisions were granted leave and heard by the Supreme Court in late 2019. Judgment was reserved and is pending.

[14] The Court of Appeal decisions obviate any need for extensive interpretation of the legislation. The task is to apply the law to the evidence in this case.

[15] The general methodology of the legislation is described by Justice Doherty in *Pointes* at paragraph 7,

The defendant must demonstrate [under Section 137.1] 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).

- 8 -

[16] Under the merits based requirement, for the action to survive, the plaintiff must show that there are grounds to believe it has “substantial merit” and that the defendant has “no valid defence.” Lastly, the public interest test dictates that the plaintiff must show that the reputational harm suffered is not outweighed by the public interest in protecting the defendant’s expression.

[17] In the end result, in my view the plaintiffs’ action founders on the last criteria, the balancing of the potential for reputational harm against the public interest in free expression. As a result, the plaintiffs’ defamation claim must be dismissed.

ISSUE #1: ARE THE IMPUGNED COMMENTS “EXPRESSION” ON A MATTER “RELATING TO THE PUBLIC INTEREST.”

[18] The defendant must show at the outset that their words are, 1. “expression” which, 2. “Relates to a matter of public interest”: Section 137.1(3). “Expression” is defined broadly in ss. (2) while public interest is not defined.

[19] The applicants’ reviews are unquestionably “expression.” They also clearly relate to a matter of public interest. A matter of public interest must be distinguished from a private matter: *Pointes* at para. 61. Here, if the expression consisted solely of a personal attack, it would not relate to a matter of public interest. Although I would characterize the posts as more personal attack than a matter of public interest, they were also, judged on an objective standard, a critique of the Plumbing Mart store, the management of the store

and the services offered at the store. The invective and malice tainting the critique does not alter its essential nature. The quality and the merit of the criticism, together with the manner of the expression, are irrelevant at this stage: *Pointes* at paras. 55, 65.

[20] The plaintiff attempts to separate the portions attacking the personal plaintiff from the parts reviewing the service at Plumbing Mart. This approach cannot prevail in light of *Pointes*: see para. 60. It would allow parsing of expression into components that themselves have no relation to the public interest and those that do. The purposes of the legislation to encourage expression and to promote participation in debate would be almost entirely defeated. The Supreme Court held in the defamation case of *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 101 that the communication as a whole, not the impugned words themselves, are what must be assessed.

[21] Two cases have stressed the public importance of reviews of products and services in a similar on-line context: *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587, [2019] O.J. No. 4217; *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517 at paras. 24-26, affirmed on other grounds, 2019 ONCA 141. As Justice De Sa said in *Bradford* (para. 31):

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.

- 10 -

[22] The impugned statements in this case being expression relating to a matter of public interest, the onus shifts to the plaintiff with respect to the merits of the action and the balancing of the potential reputational damage against the public interest in free expression.

ISSUE #2: THE MERITS: DOES THE PLAINTIFFS' ACTION HAVE SUBSTANTIAL MERIT AND IS THERE NO VALID DEFENCE?

[23] In my view, the plaintiffs have satisfied their burdens under Section 137.1(4)(a). This part of the statutory regime requires the plaintiff to satisfy the judge that there are grounds to believe that the plaintiffs' proceeding has "substantial merit" ((4)(a)(i)) and the defendants have "no valid defence" ((4)(a)(ii)).

[24] The "substantial merit" requirement is met. Defamation, a tort of strict liability, requires three elements to make out a case: 1. The lowering of reputation in the eyes of a reasonable person; 2. The words must refer to the plaintiff; and 3. The words must have been communicated to at least one person other than the plaintiff: *Grant v. Torstar* at para. 28. If these criteria are met, the onus turns to the defendant to demonstrate a defence.

[25] Maligning the plaintiff for trying to impress his young second wife and citing this as the motive for "running the store into the ground" and bankrupting it; the suggestion that the store is a front for an illegal business, and the pungent allegations of

- 11 -

stupidity; these would lower reputation on the face of it. So too would saying that Mr. Noonan's suppliers will no longer do business with him because they have not been paid.

[26] Counsel for the defendants mounted an elaborate argument, partially relying on the Court of Appeal judgment in *Able*, that the corporate plaintiff could not be connected to the alleged defamation and that there was therefore no merit to the action brought by the corporation. I would reject this argument. The situation in *Able* was quite different. Able was suing the personal defendant Vitu and added the corporate entity, Express, as a defendant on the supposition that it was Vitu's corporation. Vitu denied that there was any connection between him and Express and the bare pleading was the only indication to the contrary. At paragraph 27 of the judgment, Justice Doherty agreed with the motion judge that the absence of a link between the impugned postings and the corporate entity meant that there was no merit to the action *vis a vis* the company.

[27] In the present situation, the plaintiff has pleaded and attested in his affidavit that he owns the numbered company plaintiff and that it has the rights given by the personal plaintiff to use the Plumbing Mart name. Despite the defendants' argument that there is a violation of the *Business Names Act*, RSO 1990 c B 17 because the business was not identified to the public by its legal or registered name, I do not believe the argument amounts to much. All the plaintiffs were asserting in their statement of claim is that the business and Mr. Noonan were defamed and therefore the corporate plaintiff which runs

- 12 -

and owns the Plumbing Mart store suffered compensatory damages. The corporate plaintiff's alleged damages flowed from the damages to Mr. Noonan and the Plumbing Mart store.

[28] Furthermore, in this instance, the connection between the postings and the Plumbing Mart store is clearly made out. In the Google review, the Plumbing Mart business was named and its address was given. The individual plaintiff's full name was given. The Homestars review gives the name of the business and states that it is in Mississauga. The individual plaintiff's initials are given. With both reviews, as is generally the case, it can be presumed that they were grouped on-line together with other reviews of the same business. The issue is whether a reasonable person would associate the defamatory words with the plaintiff. I think that they would.

[29] The third criteria, that the postings would have been seen by at least one person is met. The evidence is weak but rises to the necessary threshold. The internet allows for almost universal access. In the one and a half month period in which they were available, it can be deduced that at least one person must have seen the post on either the Google or Homestars websites.

[30] It is true that the case for damages is virtually non-existent. There is no direct evidence that anyone visited or read the Plumbing Mart reviews on either platform. However, damages are not part of the *prima facie* defamation test. The defamation law

- 13 -

presumes damages. Given my conclusion with respect to the public interest balancing part of the anti-SLAPP test below, I need not conclusively decide whether the absence of evidence of damages deprives the plaintiffs' claim of substantial merit.

[31] With respect to the "valid defence" element incumbent on the plaintiff, the defendants do not rely on any defences to the action upon this motion with respect to the defamation aimed at the individual plaintiff. Again, the argument of the name of the business is advanced but for the reasons already stated, I do not believe that it can succeed. The plaintiffs have shown that at this stage, there appears to be no valid defence.

ISSUE #3: DOES THE HARM SUFFERED BY THE PLAINTIFFS OUTWEIGH THE PUBLIC INTEREST IN PROTECTING EXPRESSION?

[32] The essence of the anti-SLAPP legislation lies in Section 137.1(4)(b) which reads:

A judge shall not dismiss a proceeding ...if the responding party satisfies the judge that,

.....

(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] The plaintiffs cannot carry their onus on this balancing test. It is on this basis that I would grant the application and dismiss the action.

The Harm Suffered by the Plaintiff

- 14 -

[34] The provision requires a weighing of the harm likely suffered against the public interest in protecting expression. Looking first at the harm suffered by the plaintiff, this is to be measured primarily by the monetary damage but also secondarily by the general reputational damage. There must be a causal link between the expression and the damages: *Pointes*, at para. 88.

[35] In this instance, the evidence of likely harm to the plaintiffs is weak on several grounds. The record establishes that the total number of reviews as of August 2019 of Plumbing Mart were 26 on Google and 28 on Homestars. This is indicative of the limited number of people visiting the Plumbing Mart reviews. More people would have read the reviews than would write them, of course, but there is a rough correlation between the number of reviews and the number of people who read them. These are not well-travelled corners of cyberspace. Although I have found that it can reasonably be inferred that some people may have seen the toxic reviews posted by the defendants, the plaintiffs cannot go much beyond this vague conclusion.

[36] The other reviews of Plumbing Mart are on average quite mediocre, and there are a number of very critical comments. The before scores are not substantially different than the after scores, implying that there was insignificant reputational damage.

[37] What would the impact of the reviews be on a reasonable, informed person? As a form of advocacy against Plumbing Mart, they were woefully ineffective. Any person

- 15 -

with even a slight degree of discernment would realize at once that the post was malicious and motivated by a personal vendetta. Far from trying to disguise this, the reviews seemed to wallow in it. The initial praise of the store was the only persuasive part of the review. It went straight downhill from there. Why was an employee taunted because of their weight and another for their supposedly low mental functioning? The gratuitous allegation that the store was actually a front for criminal activity was spiteful and would have been easily seen through by a reasonable reader. The attack on the owner and his attempt to impress his second wife was uttered in the same mean-spirited tone as the rest of the review. Finally, the statement, “They also clearly hate women, which is a sign they hate themselves” was fatuous and, ultimately, unintelligible.

[38] The words of the review were their own undoing. The credibility of the author was thoroughly undermined. The impact of speech should be evaluated in part based on whether the source is reputable and trustworthy: *R. v. Kopyto* [1987] O.J. No. 1052, 39 C.C.C. (3d) 1 (C.A.) at para. 244 per Cory J. In their posting, the defendants exposed themselves as being irretrievably biased reviewers whose comments could not be taken at face value. Any harm to the plaintiffs was diminished as a result.

[39] In conclusion, there was almost a total absence of proof of damages general or specific from the defendants’ review. The harm to reputation was minimal: see *New Dermamed Inc. v. Sulaiman* at para. 15. Moving to the counterweight of the public

- 16 -

interest in protecting the defendants' expression, freedom of expression is at the centre of our constitutional democracy. Section 2(b) of the *Charter* confers special status on "freedom of thought, belief, opinion and expression, including freedom of the press and other media communication." These are "fundamental freedoms."

[40] The Supreme Court said in the seminal case of *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, at para. 42

Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec *Charter* so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H.R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

...is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

[41] If the speech in issue here could be described as "commercial speech," it is nonetheless of substantial value. In *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712; 54 D.L.R. (4th) 577 at p. 618 (D.L.R.), the Supreme Court said this about commercial speech:

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.

[42] The so-called “commercial speech” referred to in *Ford* was advertising. I would not place the speech here in issue into the same category. It is expression by individuals not to sell their own products or services but to express their views on products and services provided by others. That is a higher, more protected form of expression. The speaker will not generally have an economic motive and self-fulfillment and self-expression will be a more prominent animating theme.

[43] Reviews and criticism have been a human endeavour for eons. Reviews of theater, books, art, restaurants, political figures and movements and businesses were fixtures of our social life well before the internet existed. They could be found in various types of media including television, newspaper, magazines including trade magazines, periodicals and radio, amongst others. Now with the internet, everything gets a grade and a review. They are ubiquitous and difficult to avoid.

[44] The popularity of a particular expression does not enhance its value just as the lack of popularity does not diminish its value: *R. v. Keegstra*, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1 at para. 78; *R. v. Zundel*, [1992] 2 S.C.R. 731 at p. 753. But the mode of communication and its prevalence provide a clue to its social importance as a means of expression. Reviews on the internet are open to a wide-range of criticisms. Some are

frivolous, some are flippant, many are written without a great deal of thought or care. Anonymity may lead to irresponsible postings, writings that if the author had to defend them personally under their own name, might be written with a different tone and content. But whatever the integrity of online reviews, there is no denying that they are now a fixture of our world. Everyone reads them, many people write them. They have burgeoned over the last twenty years. Whether you like them or not, such reviews are now a common channel for personal expression. Those who write them believe they are lending us their considered, sage advice for our common benefit.

[45] The proliferation of this form of expression does not justify defamatory review posts. It does, however, counsel caution to ensure that defamation “chill” does not settle in. That is unlikely, given its force and volume. But it is a relevant consideration.

[46] In *R. v. Lucas*, [1998] 1 S.C.R. 439, 123 C.C.C. (3d) 97, the Supreme Court in its treatment of the constitutional attack on the *Criminal Code* defamatory libel legislation reiterated that in determining whether words are “expression”, their content cannot be taken into account: *Lucas* at para. 26, citing *Zundel* at p. 753.

[47] However, in the Section 1 analysis, that changes. Justice Cory said in *Lucas* at para. 34:

...the level of protection to which expression may be entitled will vary with the nature of the expression. The further that expression is from the core values of this right the greater will be the ability to justify the state’s restrictive action.

Also see *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, at pp. 1355-56

[48] The necessity of pigeonholing the nature of expression in order to determine the level of protection it is owed should be approached gingerly. If expression is truly an innate good, grading the level of protection that ought to be permitted is an exercise of great delicacy. It is unfortunate that it need be done but the authorities appear to leave little choice. The process should be undertaken with an awareness that determining the “core values” of free expression can lead to the downgrading of expression to the point where it could lose the Section 2(b) protections. The problem is that there is a good deal of subjectivity in evaluating the intrinsic worth of expression. For example, history has shown that what is valued and what is not can change drastically over time. The controversy surrounding D.H. Lawrence’s *Lady Chatterley’s Lover* is one of the more notorious examples.

[49] With these general comments, attention must shift to what the defendants actually said. Cutting through the thorns and brambles of personal attack in the defendants’ review, there was a criticism to be found in their post. The service at the store was poor. They were not motivated to help their customers. The store was not to be trusted. Of course, this all could have been unfounded. There are two sides to every story. The plaintiff’s version of their service and level of competence has not been fully told. In any case, the postings were, without doubt, expression worthy of protection.

- 20 -

[50] I am mindful of Justice Doherty's warning in *Pointes* that the public interest in protecting speech is lower where the opinions expressed are offensive as they were here: see *Pointes* para. 94, *Able Translations Ltd.*, at paras. 82-84 and 96-103, *Fortress* at para. 51. But there was a core of criticism in the review, albeit wrapped in personal vitriol.

[51] Performing the exercise mandated by 137.1(4)(b) of the *Courts of Justice Act*, the need to protect expression in my view clearly outweighs the relatively minimal harm to reputation. The plaintiff's lawsuit must be dismissed.

SHOULD DAMAGES BE ORDERED UNDER 137.1(9)?

[52] The defendants request Section 137.1(9) damages. Section 137.1(9) of the Anti-SLAPP sections of the *Courts of Justice Act* permits a judge in dismissing an action if "appropriate", to award costs if the proceedings were brought in "bad faith or for an improper purpose." In *United Soils Management Ltd. v. Mohammed* 2019 CarswellOnt 2370, 2019 ONCA 128 at para. 34 (leave dismissed [2019] S.C.C.A. No. 153), the Court of Appeal held that the subsection was

...an effort to separate out a subset of SLAPP cases which go beyond simply reflecting an effort to limit expression and include active efforts to intimidate or to inflict harm on the defendant.

[53] The prospect of a damages award may act as a further deterrent to SLAPP plaintiffs launching legal actions for the purpose or having the effect of quelling expression. In this case, I decline to make a finding of bad faith or improper purpose. In

- 21 -

determining whether the plaintiffs' defamation action was in bad faith or for an improper purpose, it is important to keep in mind the context in which the defamation action originated. Here, the defendants' postings goaded and provoked the plaintiff as they would have any reasonable people. While the defamation action which followed cannot be condoned, it was on the other hand quite understandable. Taken literally, the plaintiffs wanted the defendants to pay for their personal attack on them. The defendants had lashed out in their postings; the plaintiff struck back with a lawsuit. This is a variation on conflict sometimes referred to as "retail rage." In the total context of the dispute, the bad faith or improper purpose referred to in Section 137.1(9) were not present.

[54] In any case, only compensatory damages are permitted by Section 137.1(9), not punitive damages: *United Soils* at para. 38. The defendants attest to suffering stress and anxiety as a result of the defamation action against them. In my view, on the record presented here, these protestations do not give rise to a substantial case for compensatory damages.

INTERFERENCE WITH ECONOMIC RELATIONS

[55] At the hearing, counsel for the plaintiff was emphatic that there were two actions brought here: the defamation claim and the tort of intentional interference with economic relations. As there was no attack by the defendants on the latter, it must be maintained.

- 22 -

[56] This cause of action emerged for the first time in counsel for the plaintiffs' submissions on the hearing made in response to counsel for the defendants' submissions. The plaintiffs' factum did not even mention the economic interference tort. In my view, a reading of the statement of claim demonstrates that economic interference was not actually pleaded.

[57] There is a heading in the statement of claim entitled "*Defamatory Actions, Intentional Interference with Economic Relations*" but no other reference to it is made in the statement of claim. The heading appears in the part of the statement of claim just before the recounting of the defendants' visit to Plumbing Mart on July 18, 2018. In the summary of that event, it is alleged as mentioned above, that several customers left the store, never to return. However, under the damages heading, the focus is on damages from loss of reputation and defamation. No damages claim is made in reference to the loss of the customers who supposedly left the store on July 18, 2018 or for anything whatsoever besides the alleged defamation (see paras. 41-46).

[58] It is questionable whether the purported tort can be separated out from the defamation action. In order to be extricable from the defamation claim and thus capable of averting the reach of the Anti-SLAPP legislation, the allegation of intentional economic interference must focus on the defendants' non-expressive activity in the store on July 18, 2018. However, the statement of claim fails to provide the necessary factual

- 23 -

averments for the tort of intentional interference with economic relations arising from that event. In *Grand Financial Management Inc. v. Solemio Transportation Inc* 2016 ONCA 175 at para 62 (leave to appeal refused [2016] S.C.C.A. No. 183) the court set out the three elements of the tort: 1. There must be an intention to damage the plaintiff's economic interests; 2. The interference must be by illegal or unlawful means; and 3. The plaintiff must have suffered economic loss as a result.

[59] Rule 25.06(1) of the *Rules of Civil Procedure* requires that a statement of claim contain a statement of the facts upon which the plaintiff relies. Furthermore, Rule 25.06(8) provides that where, amongst other states of mind "...intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred." Here, to anchor the first element of the tort, the intent to damage economic interests must be grounded in factual assertions. The fact would have to be pleaded that the defendants *intentionally* drove away other customers in order to *intentionally* inflict economic detriment upon the plaintiffs. It was not pleaded, even circumstantially. Nor was the second element of the tort, an *illegal* or *unlawful* means which resulted in the damage. There was no factual averment implied or explicit that the argument in the store was somehow unlawful or illegal.

- 24 -

[60] In summary, I cannot interpret the plaintiffs' statement of claim as pleading intentional interference with economic relations. A mere passing mention of it in a heading in the statement of claim with an absence of underlying facts is insufficient. The failure to request damages attributed to the purported tort adds to the conclusion that it was not pleaded. I therefore make a declaration that the statement of claim does not plead the tort of intentional interference with economic relations and that there is nothing before the court with respect to that cause of action.

[61] In conclusion, the plaintiffs' defamation action is dismissed pursuant to Section 137.1(3) of the *Courts of Justice Act*. If the parties cannot agree on costs, the defendant shall deliver submissions of not more than 2 pages, not counting the bill of costs, within 30 days; the plaintiff shall have the same limit and shall file within 20 days of the defendant.

D.E HARRIS J.

Released: July 27, 2020

CITATION: 910938 Ontario Inc v. Moore, 2020 ONSC 4553
COURT FILE NO.: CV-18-4283-00
DATE: 2020 07 27

ONTARIO

- 25 -

SUPERIOR COURT OF JUSTICE

B E T W E E N:

910938 ONTARIO INC. and MARK
NOONAN

Plaintiffs

- and -

SUSAN MOORE and SANDRA MOORE

Defendants

REASONS FOR JUDGMENT

D.E HARRIS J.

Released: July 27, 2020

TAB 4

**A.I. Enterprises Ltd. and
Alan Schelew Appellants**

v.

**Bram Enterprises Ltd. and
Jamb Enterprises Ltd. Respondents**

and

**Attorney General of British
Columbia Intervener**

**INDEXED AS: A.I. ENTERPRISES LTD. v. BRAM
ENTERPRISES LTD.**

2014 SCC 12

File No.: 34863.

2013: May 22; 2014: January 31.

Present: McLachlin C.J. and LeBel, Fish, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
NEW BRUNSWICK**

Torts — Intentional torts — Unlawful interference with economic relations — Scope of liability — Minority owner of apartment building and its director interfering with attempts by majority owners to sell building to third parties — Whether minority owner and its director liable in tort for unlawful interference with economic relations.

Fiduciary duty — Breach by director — Minority owner of apartment building and its director interfering with attempts by majority owners to sell building to third parties — Whether director liable for breach of fiduciary duty.

Joyce, a corporation, owned an apartment building in Moncton, New Brunswick. Corporate entities Bram and Jamb together owned a majority of Joyce while a minority interest was held by corporation A.I., whose owner and sole director was A. A syndication agreement between Joyce, Bram, Jamb and A.I. contained a sale mechanism giving a majority of investors the right to

**A.I. Enterprises Ltd. et
Alan Schelew Appelants**

c.

**Bram Enterprises Ltd. et
Jamb Enterprises Ltd. Intimées**

et

**Procureur général de la
Colombie-Britannique Intervenant**

**RÉPERTORIÉ : A.I. ENTERPRISES LTD. c. BRAM
ENTERPRISES LTD.**

2014 CSC 12

N° du greffe : 34863.

2013 : 22 mai; 2014 : 31 janvier.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Rothstein, Cromwell, Karakatsanis et Wagner.

**EN APPEL DE LA COUR D'APPEL DU
NOUVEAU-BRUNSWICK**

Responsabilité délictuelle — Délits intentionnels — Atteinte illégale aux rapports économiques — Champ de la responsabilité — Entrave par le propriétaire minoritaire d'un immeuble d'habitation et son administrateur aux efforts déployés par les propriétaires majoritaires en vue de vendre l'immeuble à un tiers — Le propriétaire minoritaire et son administrateur sont-ils délictuellement responsables d'atteinte illégale aux rapports économiques?

Obligation fiduciaire — Manquement par un administrateur — Entrave par le propriétaire minoritaire d'un immeuble d'habitation et son administrateur aux efforts déployés par les propriétaires majoritaires en vue de vendre l'immeuble à un tiers — L'administrateur a-t-il manqué à son obligation fiduciaire?

La société Joyce possédait un immeuble d'habitation à Moncton au Nouveau-Brunswick. Les sociétés Bram et Jamb détenaient ensemble une participation majoritaire dans Joyce, la participation minoritaire étant détenue par la société A.I., dont le propriétaire et seul administrateur était A. L'entente de syndication conclue entre Joyce, Bram, Jamb et A.I. prévoyait un mécanisme

sell the building subject to a right of first refusal of any dissenting investor to purchase it at a professionally appraised value. In 2000, Bram and Jamb wanted to sell the property but A.I. and A did not. Notice was given to A.I. under the syndication agreement and the building was appraised at \$2.2 million. A.I. did not purchase the property and thus it was listed for sale. While the property was listed, A.I. and A attempted to invoke the arbitration process under the syndication agreement, filed encumbrances against the property, and denied entry to the property to prospective buyers. Potential sales to third party purchasers failed, and A.I. ultimately bought the building for the appraised value of \$2.2 million.

Subsequently, Bram and Jamb brought an action against A.I. and A claiming that, as a result of A.I. and A's wrongful conduct, the sale had been substantially delayed and was for less money than they could have obtained from a third party purchaser. The trial judge found that A.I. and A's conduct amounted to interference by unlawful means and awarded damages reflecting the difference between the sale price paid by A.I. and the price that could have been obtained from a third party. The Court of Appeal dismissed A.I. and A's appeal. Although the court found that the acts of A.I. and A did not meet the requirements for liability under the unlawful means tort, it held that liability could be imposed on the basis of a principled exception.

Held: The appeal should be dismissed.

The tort of unlawful interference with economic relations has also been referred to as “interference with a trade or business by unlawful means”, “intentional interference with economic relations”, “causing loss by unlawful means” or simply as the “unlawful means” tort. The unlawful means tort is an intentional tort which creates a type of “parasitic” liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant’s unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant’s unlawful act against the third party. The two core components of the unlawful means tort are that the defendant must use unlawful means and that the defendant must intend to harm the plaintiff through the use of the unlawful means.

de vente donnant à une majorité des investisseurs le droit de vendre l'immeuble sous réserve de l'exercice par tout investisseur dissident d'un droit de premier refus permettant l'achat de l'immeuble à sa valeur d'expertise. En 2000, Bram et Jamb voulaient vendre l'immeuble, ce à quoi s'opposaient A.I. et A. L'avis prévu à l'entente de syndication a été donné à A.I., et une expertise a établi la valeur de l'immeuble à 2,2 millions de dollars. A.I. n'a pas acheté l'immeuble, qui a donc été mis en vente. A.I. et A ont alors tenté de recourir à la procédure d'arbitrage prévue à l'entente de syndication et d'enregistrer des grèvements contre l'immeuble et ils ont refusé l'accès à la propriété à des acheteurs potentiels. N'ayant pu être vendu à un tiers, l'immeuble a finalement été acheté par A.I. à sa valeur d'expertise de 2,2 millions de dollars.

Bram et Jamb ont par la suite intenté une action contre A.I. et A, soutenant que la conduite fautive de ces derniers avait considérablement retardé la vente et avait résulté en un produit inférieur à celui qu'elles auraient obtenu d'un tiers. Le juge de première instance a conclu que la conduite de A.I. et de A constituait une atteinte par un moyen illégal et a accordé des dommages-intérêts équivalant à la différence entre le prix d'achat payé par A.I. et celui qui aurait pu être obtenu d'un tiers. La Cour d'appel a rejeté l'appel interjeté par A.I. et A. Elle a jugé que leurs actes ne satisfaisaient pas aux critères applicables en matière de responsabilité pour le délit d'atteinte par un moyen illégal, mais qu'on pouvait reconnaître leur responsabilité en application d'une exception de principe.

Arrêt : Le pourvoi est rejeté.

Le délit d'atteinte illégale aux rapports économiques a également été dénommé « atteinte aux rapports commerciaux par un moyen illicite », « atteinte aux intérêts économiques par un geste illégal », délit consistant à « causer une perte par un moyen illicite » ou simplement délit d’« atteinte par un moyen illégal ». Le délit d'atteinte par un moyen illégal est un délit d'intention emportant une responsabilité que l'on pourrait qualifier de « parasitaire » dans une situation mettant en cause trois parties : il permet au demandeur de poursuivre le défendeur pour la perte économique que lui a causée la conduite illégale de ce dernier envers un tiers. La responsabilité envers le demandeur découle de l'acte illégal du défendeur contre le tiers (ou en dépend, à la manière d'un parasite). Les deux éléments essentiels du délit d'atteinte par un moyen illégal sont les suivants : le défendeur a recours à un moyen illégal et il cause ainsi intentionnellement un préjudice au demandeur.

In order for conduct to constitute “unlawful means” for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct. The unlawful means tort should be kept within narrow bounds. Its scope should be understood in the context of the broad outlines of tort law’s approach to regulating economic and competitive activity. Several aspects of that approach support adopting a narrow scope: the common law accords less protection to purely economic interests; it is reluctant to develop rules to enforce fair competition; it is concerned not to undermine certainty in commercial affairs; and the history of the common law shows that tort liability, if unduly expanded, may undermine fundamental rights. The rationale underlying the unlawful means tort is the “liability stretching” rationale, which focuses on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct. It extends civil liability without creating new actionable wrongs, thereby closing a perceived liability gap where the wrongdoer’s acts in relation to a third party, which are in breach of established legal obligations to that third party, intentionally target the injured plaintiff. This rationale of the tort supports a narrow definition of “unlawful means”: the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party. Thus, criminal offences and breaches of statute will not be *per se* actionable under the unlawful means tort, but the tort will be available if, under common law principles, those acts also give rise to a civil action by the third party and interfered with the plaintiff’s economic activity. This approach avoids “tortifying” the criminal and regulatory law by imposing civil liability where there would otherwise not be any.

The unlawfulness requirement is not subject to principled exceptions. Providing trial judges with room to deal with cases that do not fall within the scope of the tort’s liability simply confers an unstructured judicial discretion to do what appears to the particular judge to be just in the particular circumstances. Allowing for exceptions without clearly outlining the principles to guide the development of the law invites the danger of *ad hoc*

Par « moyen illégal » dans le contexte de ce délit, on entend la conduite qui donne au tiers une cause d’action civile ou lui en donnerait une si elle lui avait causé une perte. Le délit d’atteinte par un moyen illégal doit être circonscrit étroitement. Il faut examiner sa portée à la lumière de la philosophie générale du droit de la responsabilité délictuelle quant à la régulation de l’activité économique et concurrentielle. Plusieurs aspects de cette philosophie justifient une définition étroite de ce délit : la common law ne protège pas autant les intérêts purement économiques que d’autres types d’intérêts, elle hésite à établir des règles pour forcer la concurrence loyale, elle veille à ne pas compromettre la certitude en matière commerciale, et son histoire démontre que l’expansion indue de la responsabilité délictuelle peut fragiliser des droits fondamentaux. Le fondement qui sous-tend le délit d’atteinte par un moyen illégal est celui de l’« extension du champ de la responsabilité », suivant lequel le droit d’action que peut exercer la victime directe de la conduite illégale est également reconnu à la personne que visait intentionnellement le défendeur par cette conduite. Le champ de la responsabilité civile est ainsi étendu sans que de nouvelles fautes ouvrant droit à action soient créées, ce qui permet de combler ce qui est perçu comme une lacune en matière de responsabilité, dans les cas où l’auteur d’un acte fautif commis à l’endroit d’un tiers en contravention aux obligations juridiques établies qu’il a à l’égard de ce dernier vise intentionnellement le demandeur lésé. Ce fondement du délit milite en faveur d’une définition étroite du « moyen illégal » : le délit a pour effet non pas de créer de nouvelles fautes ouvrant droit à action, mais simplement de reconnaître à d’autres personnes la possibilité de poursuivre pour un préjudice qui leur a été causé intentionnellement par une faute donnant déjà matière à procès à un tiers. Les infractions criminelles et contraventions aux lois ne permettront donc pas a priori d’intenter une action pour atteinte par un moyen illégal, mais une telle action sera possible si les actes en cause, suivant les principes de la common law, fondent également l’action civile du tiers et ont porté atteinte à l’activité économique du demandeur. Cette démarche évite de « délictualiser » le régime légal en matière criminelle ou réglementaire en imposant une responsabilité civile là où il n’y en aurait pas.

Le critère du caractère illégal n’admet pas d’exceptions de principe. Donner aux juges de première instance une marge de manœuvre permettant de régler les affaires débordant le cadre de la responsabilité qu’emporte ce délit ne fait que conférer aux juges un pouvoir discrétionnaire non structuré les autorisant à ordonner les mesures leur paraissant justes dans les circonstances particulières. Autoriser des exceptions sans définir

decisions tailored to achieve a vision of commercial morality — precisely the danger which the “unlawful means” requirement is meant to avoid.

Mere foreseeability of economic harm does not meet the requirement for intention in the unlawful means tort. The defendant must have the intention to cause economic harm to the plaintiff as an end in itself or the intention to cause economic harm to the plaintiff because it is a necessary means of achieving an end that serves some ulterior motive. It is the intentional targeting of the plaintiff by the defendant that justifies stretching the defendant’s liability so as to afford the plaintiff a cause of action. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant’s conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition.

The existence of a valid business relationship between the plaintiff and the third party and the defendant’s knowledge of that relationship are not elements of the unlawful means tort. The focus of this tort is unlawful conduct that intentionally harms the plaintiff’s economic interests. There need be no contract or even other formal dealings between the plaintiff and the third party so long as the defendant’s conduct is unlawful and it intentionally harms the plaintiff’s economic interests.

The tort of unlawful means is available even if there is another cause of action available to the plaintiff against the defendant in relation to the alleged misconduct. The gist of the tort is the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party. It is that conduct by the defendant which gives rise to liability quite apart from conduct that may be otherwise actionable by the plaintiff. General principles of tort liability accept concurrent liability and overlapping causes of action for distinct wrongs suffered by the plaintiff in respect of the same incident.

In this case, the Court of Appeal concluded that there was no wrong that would be actionable by the third party (the prospective purchasers) against A.I. and A. Accordingly, A.I. and A cannot be found liable to Bram

précisément les principes devant guider l’évolution du droit exposé au danger de jugements d’espèce rendus en fonction d’une certaine conception de l’éthique commerciale, précisément ce que le critère du « moyen illégal » vise à éviter.

La seule prévisibilité du préjudice économique ne suffit pas pour constituer l’intention que requiert le délit d’atteinte par un moyen illégal. Le défendeur doit avoir l’intention de causer un préjudice économique au demandeur comme fin en soi ou l’intention de causer un préjudice économique au demandeur comme moyen nécessaire pour parvenir à une fin qui sert un but inavoué. C’est le fait pour le défendeur de prendre intentionnellement pour cible le demandeur qui justifie l’élargissement du champ de la responsabilité du défendeur de manière à fournir au demandeur une cause d’action. Il ne suffit pas que la conduite du défendeur cause incidemment un préjudice au demandeur, même lorsque le premier est conscient de la probabilité extrêmement élevée qu’il en résulte un préjudice. Ce type de préjudice économique incident constitue une condition acceptée de la libre concurrence.

L’existence de rapports commerciaux valides entre le demandeur et le tiers, et la connaissance de ces rapports par le défendeur ne sont pas des éléments constitutifs du délit d’atteinte par un moyen illégal. L’élément fondamental de ce délit est la conduite illégale causant un préjudice intentionnel aux intérêts économiques du demandeur. L’existence d’un contrat n’est pas nécessaire, ni même l’existence d’autres relations d’affaires officielles entre le demandeur et le tiers; il suffit que la conduite du défendeur soit illégale et qu’elle cause un préjudice intentionnel aux intérêts économiques du demandeur.

Le demandeur peut invoquer le délit d’atteinte par un moyen illégal même si l’inconduite reprochée lui ouvre une autre cause d’action contre le défendeur. L’essence de ce délit est le fait pour le défendeur de prendre pour cible le demandeur par l’intermédiaire d’actes illégaux commis contre un tiers. C’est cette conduite qui emporte la responsabilité du défendeur, indépendamment des actes qui pourraient par ailleurs donner au demandeur matière à procès. La responsabilité concurrente et le chevauchement de causes d’action pour des préjudices distincts subis par le demandeur lors d’un même incident sont des notions reçues en droit de la responsabilité délictuelle.

En l’espèce, la Cour d’appel a conclu à l’absence d’une faute donnant au tiers (les acheteurs potentiels) matière à procès contre A.I. et A. En conséquence, on ne saurait conclure à la responsabilité de A.I. et A à

and Jamb on the basis of the unlawful means tort; however, the trial judge made strong findings that A breached his fiduciary obligations as a director of the family companies and the trial judge's award should be upheld on that basis. While A.I. was not a fiduciary, A was its sole director and shareholder and it is therefore liable for knowing assistance in the breach of fiduciary duty and knowing receipt of proceeds of the breach.

Cases Cited

Referred to: *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1; *Tarleton v. M'Gawley* (1793), Peake 270, 170 E.R. 153; *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia*, 2000 BCCA 463, 80 B.C.L.R. (3d) 62, leave to appeal refused, [2001] 1 S.C.R. xv; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *Mogul Steamship Company v. McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598, aff'd [1892] A.C. 25; *Allen v. Flood*, [1898] A.C. 1; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452; *Quinn v. Leathem*, [1901] A.C. 495; *Revenue and Customs Commissioners v. Total Network SL*, [2008] UKHL 19, [2008] 1 A.C. 1174; *Sanders v. Snell*, [1998] HCA 64, 196 C.L.R. 329; *Canberra Data Centres Pty Ltd. v. Vibe Constructions (ACT) Pty Ltd.*, [2010] ACTSC 20, 173 A.C.T.R. 33; *Hardie Finance Corporation Pty Ltd. v. Ahern (No. 3)*, [2010] WASC 403 (AustLII); *Van Camp Chocolates Ltd. v. Aulsebrooks Ltd.*, [1984] 1 N.Z.L.R. 354; *Diver v. Loktronic Industries Ltd.*, [2012] NZCA 131 (NZLII); *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265; *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Roman Corporation Ltd. v. Hudson's Bay Oil and Gas Co. Ltd.*, [1973] S.C.R. 820; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427; *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976), 69 D.L.R. (3d) 114; *Conway v. Zinkhofer*, 2008 ABCA 392

l'endroit de Bram et Jamb sur le fondement du délit d'atteinte par un moyen illégal; cependant, le juge de première instance a tiré de solides conclusions selon lesquelles A avait manqué à son obligation fiduciaire à titre d'administrateur des sociétés familiales, et il convient de maintenir le montant des dommages-intérêts qu'il a accordés sur ce fondement. Parce qu'A en était le seul administrateur et actionnaire, A.I. a engagé sa responsabilité, bien qu'elle ne fût pas elle-même fiduciaire, pour avoir aidé en connaissance de cause à commettre un manquement à l'obligation fiduciaire et pour avoir reçu en connaissance de cause le produit de ce manquement.

Jurisprudence

Arrêts mentionnés : *OBG Ltd. c. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1; *Tarleton c. M'Gawley* (1793), Peake 270, 170 E.R. 153; *No. 1 Collision Repair & Painting (1982) Ltd. c. Insurance Corp. of British Columbia*, 2000 BCCA 463, 80 B.C.L.R. (3d) 62, autorisation d'appel refusée, [2001] 1 R.C.S. xv; *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 CSC 8, [2002] 1 R.C.S. 156; *Mogul Steamship Company c. McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598, conf. par [1892] A.C. 25; *Allen c. Flood*, [1898] A.C. 1; *Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 R.C.S. 452; *Quinn c. Leathem*, [1901] A.C. 495; *Revenue and Customs Commissioners c. Total Network SL*, [2008] UKHL 19, [2008] 1 A.C. 1174; *Sanders c. Snell*, [1998] HCA 64, 196 C.L.R. 329; *Canberra Data Centres Pty Ltd. c. Vibe Constructions (ACT) Pty Ltd.*, [2010] ACTSC 20, 173 A.C.T.R. 33; *Hardie Finance Corporation Pty Ltd. c. Ahern (No. 3)*, [2010] WASC 403 (AustLII); *Van Camp Chocolates Ltd. c. Aulsebrooks Ltd.*, [1984] 1 N.Z.L.R. 354; *Diver c. Loktronic Industries Ltd.*, [2012] NZCA 131 (NZLII); *International Brotherhood of Teamsters c. Therien*, [1960] R.C.S. 265; *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205; *Edwards c. Barreau du Haut-Canada*, 2001 CSC 80, [2001] 3 R.C.S. 562; *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263; *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41, [2007] 3 R.C.S. 129; *Gagnon c. Foundation Maritime Ltd.*, [1961] R.C.S. 435; *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959; *Roman Corporation Ltd. c. Hudson's Bay Oil and Gas Co. Ltd.*, [1973] R.C.S. 820; *Central Canada Potash Co. c. Gouvernement de la Saskatchewan*, [1979] 1 R.C.S. 42; *Agribrands Purina Canada Inc. c. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427; *Gershman c. Manitoba Vegetable Producers' Marketing Board* (1976), 69

(CanLII); *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2009 ABCA 20, 446 A.R. 295; *R.L.T.V. Investments Inc. v. Saskatchewan Telecommunications*, 2009 SKCA 83, 331 Sask. R. 78, leave to appeal refused, [2010] 1 S.C.R. xiv; *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30; *Torquay Hotel Co., Ltd. v. Cousins*, [1969] 1 All E.R. 522; *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322, 86 O.R. (3d) 431; *Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.*, 2006 MBCA 69, 205 Man. R. (2d) 131, leave to appeal refused, [2007] 1 S.C.R. viii; *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353; *O'Dwyer v. Ontario Racing Commission*, 2008 ONCA 446, 293 D.L.R. (4th) 559; *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193, leave to appeal refused, [2011] 1 S.C.R. xi; *Barber v. Vrozos*, 2010 ONCA 570, 322 D.L.R. (4th) 577; *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392; *Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)*, 2009 BCSC 53, 55 M.P.L.R. (4th) 208; *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, 2012 BCSC 597, 89 C.B.R. (5th) 235; *Canuck Security Services Ltd. v. Gill*, 2013 BCSC 893 (CanLII); *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Douglas v. Hello! Ltd.*, [2005] EWCA Civ 595, [2005] 4 All E.R. 128.

Statutes and Regulations Cited

Civil Code of Québec, S.Q. 1991, c. 64, arts. 6, 7.
Trade Disputes Act, 1906 (U.K.), 6 Edw. 7, c. 47.

Authors Cited

Adams, George W. *Canadian Labour Law*, 2nd ed. Toronto: Canada Law Book, 1993 (loose-leaf updated September 2013, release 47).
 Adell, Bernard. “Secondary Picketing after *Pepsi-Cola*: What’s Clear, and What Isn’t?” (2003), 10 *C.L.E.L.J.* 135.
 American Law Institute. *Restatement of the Law, Second: Torts* 2d. St. Paul, Minn.: American Law Institute Publishers, 1989.
 Barker, Kit, et al. *The Law of Torts in Australia*, 5th ed. South Melbourne: Oxford University Press, 2012.
 Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 7^e éd. par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville, Qué.: Yvon Blais, 2013.
 Burns, Peter. “Tort Injury to Economic Interests: Some Facets of Legal Response” (1980), 58 *Can. Bar Rev.* 103.

D.L.R. (3d) 114; *Conway c. Zinkhofer*, 2008 ABCA 392 (CanLII); *Polar Ice Express Inc. c. Arctic Glacier Inc.*, 2009 ABCA 20, 446 A.R. 295; *R.L.T.V. Investments Inc. c. Saskatchewan Telecommunications*, 2009 SKCA 83, 331 Sask. R. 78, autorisation d’appel refusée, [2010] 1 R.C.S. xiv; *Reach M.D. Inc. c. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30; *Torquay Hotel Co., Ltd. c. Cousins*, [1969] 1 All E.R. 522; *Drouillard c. Cogeco Cable Inc.*, 2007 ONCA 322, 86 O.R. (3d) 431; *Conversions by Vantasy Ltd. c. General Motors of Canada Ltd.*, 2006 MBCA 69, 205 Man. R. (2d) 131, autorisation d’appel refusée, [2007] 1 R.C.S. viii; *Correia c. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353; *O'Dwyer c. Ontario Racing Commission*, 2008 ONCA 446, 293 D.L.R. (4th) 559; *Alleslev-Krofchak c. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193, autorisation d’appel refusée, [2011] 1 R.C.S. xi; *Barber c. Vrozos*, 2010 ONCA 570, 322 D.L.R. (4th) 577; *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392; *Westcoast Landfill Diversion Corp. c. Cowichan Valley (Regional District)*, 2009 BCSC 53, 55 M.P.L.R. (4th) 208; *0856464 B.C. Ltd. c. TimberWest Forest Corp.*, 2012 BCSC 597, 89 C.B.R. (5th) 235; *Canuck Security Services Ltd. c. Gill*, 2013 BCSC 893 (CanLII); *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147; *Douglas c. Hello! Ltd.*, [2005] EWCA Civ 595, [2005] 4 All E.R. 128.

Lois et règlements cités

Code civil du Québec, L.Q. 1991, ch. 64, art. 6, 7.
Trade Disputes Act, 1906 (R.-U.), 6 Edw. 7, ch. 47.

Doctrine et autres documents cités

Adams, George W. *Canadian Labour Law*, 2nd ed. Toronto : Canada Law Book, 1993 (loose-leaf updated September 2013, release 47).
 Adell, Bernard. « Secondary Picketing after *Pepsi-Cola* : What’s Clear, and What Isn’t? » (2003), 10 *C.L.E.L.J.* 135.
 American Law Institute. *Restatement of the Law, Second : Torts* 2d. St. Paul, Minn. : American Law Institute Publishers, 1989.
 Barker, Kit, et al. *The Law of Torts in Australia*, 5th ed. South Melbourne : Oxford University Press, 2012.
 Baudouin, Jean-Louis, et Pierre-Gabriel Jobin. *Les obligations*, 7^e éd. par Pierre-Gabriel Jobin et Nathalie Vézina. Cowansville, Qué. : Yvon Blais, 2013.
 Burns, Peter. « Tort Injury to Economic Interests : Some Facets of Legal Response » (1980), 58 *R. du B. can.* 103.

- Burns, Peter T., and Joost Blom. *Economic Interests in Canadian Tort Law*. Markham, Ont.: LexisNexis, 2009.
- Carty, Hazel. *An Analysis of the Economic Torts*. Oxford: Oxford University Press, 2001.
- Carty, Hazel. *An Analysis of the Economic Torts*, 2nd ed. Oxford: Oxford University Press, 2010.
- Carty, Hazel. "Intentional Violation of Economic Interests: The Limits of Common Law Liability" (1988), 104 *Law Q. Rev.* 250.
- Carty, Hazel. "The Economic Torts and English Law: An Uncertain Future" (2006-2007), 95 *Ky. L.J.* 845.
- Carty, Hazel. "The Economic Torts in the 21st Century" (2008), 124 *Law Q. Rev.* 641.
- Deakin, Simon, and John Randall. "Rethinking the Economic Torts" (2009), 72 *Mod. L. Rev.* 519.
- Eekelaar, John. "The Conspiracy Tangle" (1990), 106 *Law Q. Rev.* 223.
- Elias, Patrick, and Keith Ewing. "Economic Torts and Labour Law: Old Principles and New Liabilities" (1982), 41 *Cambridge L.J.* 321.
- Estes, Jerry C. "Expanding Horizons in the Law of Torts — Tortious Interference" (1974), 23 *Drake L. Rev.* 341.
- Fleming's The Law of Torts*, 10th ed. by Carolyn Sappideen and Prue Vines, eds. Pyrmont, N.S.W.: Lawbook Co., 2011.
- Fridman, G. H. L. *The Law of Torts in Canada*, 3rd ed. by G. H. L. Fridman et al. Toronto: Carswell, 2010.
- Kain, Brandon, and Anthony Alexander. "The 'Unlawful Means' Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2010*. Toronto: Carswell, 2010, 33.
- Lee, Pey Woan. "Causing Loss by Unlawful Means", [2011] *S.J.L.S.* 330.
- Linden, Allen M., and Bruce Feldthusen. *Canadian Tort Law*, 9th ed. Markham, Ont.: LexisNexis, 2011.
- Markesinis and Deakin's *Tort Law*, 7th ed. by Simon Deakin, Angus Johnston and Basil Markesinis. Oxford: Clarendon Press, 2013.
- Neyers, J. W. "Rights-based justifications for the tort of unlawful interference with economic relations" (2008), 28 *L.S.* 215.
- Osborne, Philip H. *The Law of Torts*, 4th ed. Toronto: Irwin Law, 2011.
- Perlman, Harvey S. "Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine" (1982), 49 *U. Chicago L. Rev.* 61.
- Burns, Peter T., and Joost Blom. *Economic Interests in Canadian Tort Law*. Markham, Ont. : LexisNexis, 2009.
- Carty, Hazel. *An Analysis of the Economic Torts*. Oxford : Oxford University Press, 2001.
- Carty, Hazel. *An Analysis of the Economic Torts*, 2nd ed. Oxford : Oxford University Press, 2010.
- Carty, Hazel. « Intentional Violation of Economic Interests : The Limits of Common Law Liability » (1988), 104 *Law Q. Rev.* 250.
- Carty, Hazel. « The Economic Torts and English Law : An Uncertain Future » (2006-2007), 95 *Ky. L.J.* 845.
- Carty, Hazel. « The Economic Torts in the 21st Century » (2008), 124 *Law Q. Rev.* 641.
- Deakin, Simon, and John Randall. « Rethinking the Economic Torts » (2009), 72 *Mod. L. Rev.* 519.
- Eekelaar, John. « The Conspiracy Tangle » (1990), 106 *Law Q. Rev.* 223.
- Elias, Patrick, and Keith Ewing. « Economic Torts and Labour Law : Old Principles and New Liabilities » (1982), 41 *Cambridge L.J.* 321.
- Estes, Jerry C. « Expanding Horizons in the Law of Torts — Tortious Interference » (1974), 23 *Drake L. Rev.* 341.
- Fleming's The Law of Torts*, 10th ed. by Carolyn Sappideen and Prue Vines, eds. Pyrmont, N.S.W. : Lawbook Co., 2011.
- Fridman, G. H. L. *The Law of Torts in Canada*, 3rd ed. by G. H. L. Fridman et al. Toronto : Carswell, 2010.
- Kain, Brandon, and Anthony Alexander. « The "Unlawful Means" Element of the Economic Torts : Does a Coherent Approach Lie Beyond Reach? », in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2010*. Toronto : Carswell, 2010, 33.
- Lee, Pey Woan. « Causing Loss by Unlawful Means », [2011] *S.J.L.S.* 330.
- Linden, Allen M., and Bruce Feldthusen. *Canadian Tort Law*, 9th ed. Markham, Ont. : LexisNexis, 2011.
- Markesinis and Deakin's *Tort Law*, 7th ed. by Simon Deakin, Angus Johnston and Basil Markesinis. Oxford : Clarendon Press, 2013.
- Neyers, J. W. « Rights-based justifications for the tort of unlawful interference with economic relations » (2008), 28 *L.S.* 215.
- Osborne, Philip H. *The Law of Torts*, 4th ed. Toronto : Irwin Law, 2011.
- Perlman, Harvey S. « Interference with Contract and Other Economic Expectancies : A Clash of Tort and Contract Doctrine » (1982), 49 *U. Chicago L. Rev.* 61.

- Podolny, Ronald. "The Tort of Intentional Interference with Economic Relations: Is Clarity Out of Reach?" (2012), 52 *Can. Bus. L.J.* 63.
- Sales, Philip, and Daniel Stiltz. "Intentional Infliction of Harm by Unlawful Means" (1999), 115 *Law Q. Rev.* 411.
- Stevens, Lyn L. "Interference With Economic Relations — Some Aspects of the Turmoil in the Intentional Torts" (1974), 12 *Osgoode Hall L.J.* 595.
- Stevens, Robert. *Torts and Rights*. Oxford: Oxford University Press, 2007.
- Waters' Law of Trusts in Canada*, 4th ed. by Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith, eds. Toronto: Carswell, 2012.
- Watkins, Larry. "Tort Law — Tortious Interference with Business Expectancy — A Trap for the Wary and Unwary Alike" (2012), 34 *U. Ark. Little Rock L. Rev.* 619.
- Weir, Tony. *Economic Torts*. Oxford: Clarendon Press, 1997.
- Winfield and Jolowicz on Tort*, 18th ed. by W. V. H. Rogers. London: Sweet & Maxwell, 2010.

APPEAL from a judgment of the New Brunswick Court of Appeal (Robertson, Bell and Green JJ.A.), 2012 NBCA 33, 387 N.B.R. (2d) 215, 350 D.L.R. (4th) 601, 96 C.C.L.T. (3d) 1, 2 B.L.R. (5th) 171, [2012] N.B.J. No. 116 (QL), 2012 CarswellNB 194, affirming a decision of Dionne J., 2010 NBQB 245, July 22, 2010. Appeal dismissed.

Richard J. Scott, Q.C., for the appellants.

Charles A. LeBlond, Q.C., and *Marie-France Major*, for the respondents.

J. Gareth Morley and *Christina Drake*, for the intervenor.

The judgment of the Court was delivered by

CROMWELL J. —

I. Overview

[1] A group of family members, through their companies, owned an apartment building. The majority of them wanted to sell it, but one of them

- Podolny, Ronald. « The Tort of Intentional Interference with Economic Relations : Is Clarity Out of Reach? » (2012), 52 *Rev. can. dr. comm.* 63.
- Sales, Philip, and Daniel Stiltz. « Intentional Infliction of Harm by Unlawful Means » (1999), 115 *Law Q. Rev.* 411.
- Stevens, Lyn L. « Interference With Economic Relations — Some Aspects of the Turmoil in the Intentional Torts » (1974), 12 *Osgoode Hall L.J.* 595.
- Stevens, Robert. *Torts and Rights*. Oxford : Oxford University Press, 2007.
- Waters' Law of Trusts in Canada*, 4th ed. by Donovan W. M. Waters, Mark R. Gillen and Lionel D. Smith, eds. Toronto : Carswell, 2012.
- Watkins, Larry. « Tort Law — Tortious Interference with Business Expectancy — A Trap for the Wary and Unwary Alike » (2012), 34 *U. Ark. Little Rock L. Rev.* 619.
- Weir, Tony. *Economic Torts*. Oxford : Clarendon Press, 1997.
- Winfield and Jolowicz on Tort*, 18th ed. by W. V. H. Rogers. London : Sweet & Maxwell, 2010.

POURVOI contre un arrêt de la Cour d'appel du Nouveau-Brunswick (les juges Robertson, Bell et Green), 2012 NBCA 33, 387 R.N.-B. (2^e) 215, 350 D.L.R. (4th) 601, 96 C.C.L.T. (3d) 1, 2 B.L.R. (5th) 171, [2012] A.N.-B. n° 116 (QL), 2012 CarswellNB 195, qui a confirmé une décision du juge Dionne, 2010 NBBR 245, 22 juillet 2010. Pourvoi rejeté.

Richard J. Scott, c.r., pour les appellants.

Charles A. LeBlond, c.r., et *Marie-France Major*, pour les intimées.

J. Gareth Morley et *Christina Drake*, pour l'intervenant.

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Aperçu

[1] Des personnes apparentées étaient, par sociétés interposées, propriétaires d'un immeuble d'habitation. La majorité d'entre elles voulait

did not. He took a series of actions to thwart the sale. The result was that the ultimate sale price was nearly \$400,000 less than it otherwise might have been. When the majority sued to recover this loss, the main question was whether the dissenting family member and his company were liable for what the trial judge referred to as the tort of unlawful interference with economic relations.

[2] While this tort is far from new, its scope is unsettled and needs clarification. There is not even any generally accepted nomenclature for the tort. It is variously referred to as “unlawful interference with economic relations”, “interference with a trade or business by unlawful means”, “intentional interference with economic relations”, or simply “causing loss by unlawful means”. I will refer to it by either the latter name or simply as the “unlawful means” tort.

[3] The uncertainty surrounding the unlawful means tort is reflected in the different approaches taken by the trial judge and the Court of Appeal in this case. The trial judge found the dissenting family member and his company liable. They had, he concluded, unlawfully and intentionally interfered with the economic relations between the majority owners and the prospective purchasers. Their conduct qualified as unlawful because it lacked any legal justification. The New Brunswick Court of Appeal upheld this result, although for significantly different reasons. The acts of the dissenting family member and his company did not meet the general requirement that they be unlawful because they did not provide any basis for a civil suit by the prospective purchasers. However, liability could be imposed on the basis of a “principled exception” to this requirement.

vendre l'immeuble, mais une s'y opposait. Par diverses mesures, le parent dissident a fait obstacle à la vente, de sorte que le prix de vente final était inférieur de près de 400 000 \$ à ce qu'il aurait pu être. L'action intentée par la majorité des membres de la famille pour recouvrer cette perte a principalement posé la question de savoir si le parent dissident et sa société avaient engagé leur responsabilité pour avoir commis ce que le juge de première instance a appelé le délit d'atteinte illégale aux rapports économiques.

[2] Ce délit n'est pas nouveau, loin de là, mais sa teneur demeure incertaine et doit être clarifiée. Il n'existe même pas pour le désigner d'appellation généralement acceptée. On l'a diversement dénommé « atteinte ou entrave illicite aux rapports économiques », « atteinte aux rapports commerciaux par un moyen illicite », « atteinte aux intérêts économiques par un geste illégal », « ingérence par recours à un moyen illicite » ou simplement délit consistant à « causer une perte par un moyen illicite ». J'utiliserai l'expression « causer une perte par un moyen illégal » ou je parlerai simplement du délit d'« atteinte par un moyen illégal ».

[3] Les raisonnements différents qu'ont tenus le juge de première instance et la Cour d'appel en l'espèce témoignent de l'incertitude entourant le délit d'atteinte par un moyen illégal. Le juge de première instance a conclu à la responsabilité du parent dissident et de sa société. Selon lui, ils avaient illégalement et intentionnellement porté atteinte aux rapports économiques entre les propriétaires majoritaires et les acheteurs potentiels. Leur conduite pouvait être qualifiée d'illégale parce qu'elle ne se justifiait pas sur le plan juridique. La Cour d'appel du Nouveau-Brunswick a confirmé le résultat, mais pour des motifs très différents. Elle a jugé que le critère général du caractère illégal n'était pas respecté parce que les actes du parent dissident et de son entreprise ne pouvaient fonder une poursuite civile de la part des acheteurs potentiels, mais qu'on pouvait néanmoins reconnaître leur responsabilité en application d'une « exception de principe » à ce critère.

[4] Before us, the main issue concerns the scope of liability for this tort and, in particular, what the unlawfulness requirement means. If the tort does not apply to these facts, we must also decide whether liability may be imposed on the basis of the breach of fiduciary duty of the dissenting family member as a director of the majority corporations.

[5] In summary, the issues and my conclusions are these:

A. What is the scope of liability for the tort of causing loss by unlawful means?

In light of the history and rationale of the tort and taking into account where it fits in the broader scheme of modern tort liability, the tort should be kept within narrow bounds. It will be available in three-party situations in which the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. (Other torts remain relevant in two-party situations, such as, for example, the tort of intimidation.)

(1) What sorts of conduct are considered “unlawful” for the purposes of this tort?

Conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it. The alleged misconduct of the defendants in this case was not unlawful in this sense and therefore they cannot be held liable on the basis of the unlawful means tort.

(2) Is the tort available only if there is no other cause of action available to the plaintiff against the defendant in relation to the alleged misconduct?

In my view the answer to this question is no.

(3) Should the “unlawfulness” requirement be subject to principled exceptions?

The answer to this question is also no in my view.

[4] La principale question à trancher en l’espèce est celle de la portée de la responsabilité qu’emporte ce délit et, plus particulièrement, de la teneur du critère du caractère illégal. Si les faits en cause ne permettent pas de conclure au délit, nous devons en outre déterminer si le parent dissident a manqué à son obligation fiduciaire en tant qu’administrateur des sociétés majoritaires et ainsi engagé sa responsabilité.

[5] Voici, en résumé, les questions en cause et mes conclusions :

A. Quel est le champ de la responsabilité afférente à l’infraction d’une perte par un moyen illégal?

L’histoire et le fondement de ce délit ainsi que la place qu’il occupe dans la sphère globale de la responsabilité délictuelle moderne imposent de le circonscrire étroitement. On ne pourra l’invoquer qu’en des situations mettant en cause trois parties où le défendeur accomplit contre un tiers un acte illégal dans l’intention de causer un préjudice économique au demandeur. (D’autres délits s’appliquent aux situations mettant en présence deux parties, par exemple, l’intimidation.)

(1) Quels sont les types de conduite « illégale » propres à constituer le délit?

Est illégale la conduite qui donne au tiers un droit d’action ou lui en donnerait un si elle lui avait causé une perte. La conduite reprochée aux défendeurs n’était pas illégale en ce sens, et ces derniers ne peuvent donc être tenus responsables sur le fondement du délit d’atteinte par un moyen illégal.

(2) Le demandeur peut-il invoquer le délit uniquement si l’inconduite reprochée ne fonde aucune autre cause d’action contre le défendeur?

J’estime qu’il faut répondre par la négative.

(3) Le critère du caractère « illégal » admet-il des exceptions de principe?

J’estime qu’il faut répondre par la négative à cette question également.

(4) Application to this case

The appellants cannot be found liable to the respondents on the basis of the unlawful means tort.

(5) Did the Court of Appeal err in finding that the defendants had the required knowledge for the unlawful means tort?

My answer to this question is also no.

B. If the unlawful means tort is not available, are the appellants otherwise liable?

The trial judge made strong findings that the dissenting family member breached his fiduciary obligations as a director of the family companies and the trial judge's award should be upheld on that basis.

[6] I would therefore dismiss the appeal with costs.

[7] In order to sort out the scope of liability for causing loss by unlawful means, we must delve deeply into the rationale of the tort and its place in the larger scheme of tort liability for causing economic harm. But first, I will briefly summarize the facts and judicial history giving rise to the appeal.

II. Facts and Judicial History**A. Facts**

[8] Joyce Avenue Apartments Ltd. owned an apartment building in Moncton, New Brunswick. Joyce was owned by Lillian Schelew and her four sons, Jeffrey, Michael, Bernard and Alan, through corporate entities. The respondents, Bram Enterprises Ltd. and Jamb Enterprises Ltd., each owned 40 percent of Joyce. The four Schelew

(4) Application à l'espèce

Les appellants ne peuvent être tenus responsables à l'égard des intimées sur le fondement du délit d'atteinte par un moyen illégal.

(5) La Cour d'appel a-t-elle conclu à tort que les défendeurs avaient la connaissance que requiert le délit d'atteinte par un moyen illégal?

Je réponds également à cette question par la négative.

B. Si le délit d'atteinte par un moyen illégal ne peut être invoqué, les appellants peuvent-ils être tenus responsables sur un autre fondement?

Le juge de première instance a tiré de solides conclusions selon lesquelles le parent dissident avait manqué à ses obligations fiduciaires à titre d'administrateur des sociétés familiales, et il convient de maintenir le montant des dommages-intérêts qu'il a accordés sur ce fondement.

[6] Je suis donc d'avis de rejeter le pourvoi avec dépens.

[7] Clarifier la portée de la responsabilité qu'emporte le fait de causer une perte par un moyen illégal suppose une analyse en profondeur du fondement de ce délit et de la place qu'il occupe dans la sphère globale de la responsabilité délictuelle en matière de préjudice financier. Je commencerai toutefois par un résumé succinct des faits et de l'historique judiciaire ayant mené au présent pourvoi.

II. Faits et historique judiciaire**A. Les faits**

[8] Joyce Avenue Apartments Ltd. possède un immeuble d'habitation à Moncton au Nouveau-Brunswick. Joyce appartient à Lillian Schelew et à ses quatre fils, Jeffrey, Michael, Bernard et Alan, par sociétés interposées. Les intimées, Bram Enterprises Ltd. et Jamb Enterprises Ltd., détiennent chacune une participation de 40 p. 100

brothers owned equal numbers of common shares and were directors of both corporations while Lillian held voting preferred shares in Bram. The remaining 20 percent interest in Joyce was held by the appellant A.I. Enterprises Ltd., whose owner and sole director was the appellant Alan Schelew. A.I. (effectively Alan) managed the building for a fee.

[9] Joyce, as owner of the building, and Bram, Jamb and A.I., as the investors, entered into a syndication agreement. The agreement contained a sale mechanism which gave a majority of the investors the right to sell the building subject to a right of first refusal of any dissenting investor to purchase it at a professionally appraised value. Once the appraisal was obtained, the investors wishing to sell were deemed to have made an irrevocable offer of sale in that amount to the dissenting investor. The offer would remain open for 15 days: Syndication Agreement, s. 9.02.

[10] The trouble started in the year 2000. The respondents, Bram and Jamb (in effect all of the family members except Alan Schelew), wanted to sell the property but the appellants, A.I. and Alan Schelew, did not. The respondents gave notice to A.I. under s. 9.02 of the Syndication Agreement and the building was appraised at \$2.2 million. A.I. did not accept the deemed offer within the prescribed time and the property was listed for sale. Over the next 16 months, the respondents dealt with four potential purchasers but no sale was completed. The respondents allege that the sale was thwarted by a series of intentional actions by the appellants, which form the basis of the claim against them for causing loss by unlawful means. Ultimately, about two years after the first attempts to sell, A.I. bought the building for the appraised value of \$2.2 million.

[11] The respondents then sued the appellants. They claimed that, as a result of the appellants' wrongful conduct, the sale had been substantially

dans Joyce. Les quatre frères Schelew possèdent le même nombre d'actions ordinaires des deux sociétés et en sont les administrateurs, tandis que Lillian possède des actions privilégiées avec droit de vote dans Bram. L'appelante A.I. Enterprises Ltd., dont le propriétaire et seul administrateur est Alan Schelew, détient la participation restante dans Joyce, soit 20 p. 100. A.I. (en fait, Alan) gère l'immeuble moyennant une rémunération.

[9] Joyce, à titre de propriétaire de l'immeuble, et Bram, Jamb et A.I., à titre d'investisseurs, ont conclu une entente de syndication, laquelle prévoit un mécanisme de vente donnant à une majorité des investisseurs le droit de vendre l'immeuble sous réserve de l'exercice par tout investisseur dissident d'un droit de premier refus permettant l'achat de l'immeuble à sa valeur d'expertise. Les investisseurs souhaitant vendre sont réputés avoir fait une offre irrévocable correspondant au montant de l'évaluation à l'investisseur dissident. L'offre est valable pour 15 jours (entente de syndication, art. 9.02).

[10] Les problèmes ont commencé en 2000. Les intimées, Bram et Jamb (dans les faits, tous les membres de la famille sauf Alan Schelew), voulaient vendre l'immeuble, ce à quoi s'opposaient les appellants, A.I. et Alan Schelew. Les intimées ont donné à A.I. l'avis prévu à l'art. 9.02 de l'entente de syndication, et une expertise a établi la valeur de l'immeuble à 2,2 millions de dollars. A.I. n'a pas accepté l'offre réputée dans le délai imparti, et l'immeuble a été mis en vente. Au cours des 16 mois qui ont suivi, les intimées ont négocié avec quatre acheteurs potentiels, mais aucune vente n'a été conclue. Les intimées font valoir que les appellants ont fait obstacle à la vente par une série d'actes intentionnels sur lesquels elles fondent leur réclamation pour perte causée par un moyen illégal. Environ deux ans après les premières tentatives de vente, A.I. a finalement acheté l'immeuble à sa valeur d'expertise de 2,2 millions de dollars.

[11] Les intimées ont alors poursuivi les appellants, soutenant que la conduite fautive de ces derniers avait considérablement retardé la vente et

delayed and was for less money than they could have obtained from a third party purchaser. While the respondents' statement of claim did not spell out the legal bases for the claim, the pre- and post-trial briefs alleged that the appellants breached their obligations arising under the Syndication Agreement, that Alan Schelew had breached his fiduciary duty as a director of Bram and Jamb by putting his interests ahead of those of the companies and that the appellants had unlawfully interfered with economic relations.

B. *Judicial History and the Parties' Positions on Appeal*

- (1) Court of Queen's Bench of New Brunswick, 2010 NBQB 245, July 22, 2010 (Dionne J.)

[12] Dionne J. at trial found that the appellants' conduct amounted to interference by unlawful means and awarded damages reflecting the difference between what A.I. paid and what could have been obtained but for the appellants' obstruction.

[13] The trial judge focused on four of the appellants' acts: they misused the arbitration provisions of the Syndication Agreement as a means of stalling the sale of the Joyce property; they advanced legally groundless defences for a "Notice of its first right of refusal" which they had filed against the Joyce property; they subsequently filed an equally baseless certificate of pending litigation against the property; finally, they denied entry to the Joyce property to prospective buyers. These acts had the effect of "complicating, delaying, impeding and ultimately and for all intents and purposes completely obstructing and preventing" the respondents' efforts to sell the property to third parties: para. 282.

[14] All of this conduct was unlawful in the trial judge's view because it lacked any legal basis or justification. He found that Alan Schelew's conduct in obstructing the sale also breached his fiduciary

avait résulté en un produit inférieur à celui qu'elles auraient obtenu d'un tiers. La déclaration des intimés n'énonçait pas explicitement le fondement juridique de leur action, mais leurs mémoires préalable et postérieur au procès faisaient valoir que les appelants avaient manqué aux obligations découlant de l'entente de syndication, qu'Alan Schelew avait manqué à son obligation fiduciaire en tant qu'administrateur de Bram et de Jamb en faisant passer ses propres intérêts avant ceux des sociétés et que les appelants avaient illégalement porté atteinte à des rapports économiques.

B. *Historique judiciaire et position des parties au pourvoi*

- (1) Cour du Banc de la Reine du Nouveau-Brunswick, 2010 NBBR 245, 22 juillet 2010 (le juge Dionne)

[12] En première instance, le juge Dionne a conclu que la conduite des appelants constituait une atteinte par un moyen illégal et a accordé des dommages-intérêts équivalant à la différence entre le prix payé par A.I. et celui qui aurait pu être obtenu n'eût été des manœuvres obstructives des appelants.

[13] Le juge a principalement analysé quatre de ces manœuvres : les appelants avaient exploité les dispositions d'arbitrage de l'entente de syndication afin d'entraver la vente de l'immeuble, opposé des moyens de défense sans fondement juridique pour justifier l'exercice d'un « droit de premier refus » dont ils avaient grevé l'immeuble, déposé un certificat d'affaire en instance tout aussi dépourvu de fondement à l'égard de l'immeuble et refusé l'accès à l'immeuble à des acheteurs potentiels. Ces actes ont eu pour effet de [TRADUCTION] « compliquer, retarder, gêner et finalement, entraver et enrayer complètement dans les faits » les efforts des intimés en vue de vendre l'immeuble à un tiers (par. 282).

[14] Le juge de première instance a estimé que tous ces actes étaient illégaux parce qu'ils étaient dépourvus de fondement ou justification juridiques. Il a conclu qu'en faisant obstacle à la vente,

obligations as director of Bram and Jamb and that A.I. had breached its obligations towards Bram and Jamb under the Syndication Agreement.

[15] The trial judge rejected the appellants' submission that the harm to Bram and Jamb was merely an incidental effect of the pursuit of their legitimate business interests. Rather, he found that the appellants "possessed actual intent to do whatever they could to pursue the interest of A I Enterprises and that they were well aware that their actions would cause harm to Jam[b] & Bram": para. 287. He concluded that but for the actions of the appellants, the respondents would have sold the Joyce property in 2001 for \$2.58 million, an amount which was \$380,000 more than the respondents received on the sale to A.I. in 2002. Factoring in the real estate commission and pre-judgment interest, he fixed total damages at \$183,061 for each plaintiff, plus costs.

(2) New Brunswick Court of Appeal, 2012 NBCA 33, 387 N.B.R. (2d) 215 (Robertson J.A., Bell and Green JJ.A. Concurring)

[16] At trial, neither party drew the attention of the court to the decision of the House of Lords in *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1, a decision which extensively examined the proper scope of the economic torts in general and of the unlawful means tort in particular. The decision was, however, placed before the Court of Appeal and, speaking through Robertson J.A., the court carefully and fully examined the law in light of it and subsequent developments. While the court took a considerably different view of the unlawful means tort than had the trial judge, it nonetheless dismissed the appeal.

[17] The Court of Appeal noted that the unlawful means tort has been "in a state of flux" (para. 18) and that two opposing views on the proper scope of the unlawful means component have stemmed from the *OBG* decision. Lord Hoffmann, who was in the

Alan Schelew avait également manqué à son obligation fiduciaire en tant qu'administrateur de Bram et de Jamb et qu'A.I. ne s'était pas acquittée des obligations que l'entente de syndication lui imposait à l'égard de Bram et de Jamb.

[15] Le juge Dionne n'a pas retenu l'argument des appels selon lequel le préjudice subi par Bram et Jamb découlait simplement de la poursuite d'intérêts commerciaux légitimes, estimant plutôt que les appels [TRADUCTION] « avaient effectivement l'intention de faire tout ce qu'ils pouvaient pour servir les intérêts d'A I Enterprises et qu'ils savaient très bien que cela causerait préjudice à Jam[b] et Bram » (par. 287). Il a conclu que, n'eût été la conduite des appels, les intimés auraient vendu l'immeuble en 2001 pour 2,58 millions de dollars, soit 380 000 \$ de plus que le produit de la vente à A.I. en 2002. Compte tenu de la commission de l'agent immobilier et des intérêts avant jugement, il a accordé des dommages-intérêts de 183 061 \$ à chaque demanderesse, plus les dépens.

(2) Cour d'appel du Nouveau-Brunswick, 2012 NBBR 33, 387 R.N.-B. (2^e) 215 (le juge Robertson, avec l'accord des juges Bell et Green)

[16] Au procès, aucune partie n'a invoqué la décision de la Chambre des lords dans *OBG Ltd. c. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1, qui présente une analyse fouillée sur la portée à donner aux délits économiques en général et à l'atteinte par un moyen illégal en particulier. Cette décision a toutefois été soulevée devant la Cour d'appel, et le juge Robertson a procédé à un examen minutieux et exhaustif du droit à la lumière de cette décision et de la jurisprudence qui a suivi. Bien que la Cour d'appel ait abordé le délit d'atteinte par un moyen illégal sous un angle passablement différent de celui du juge de première instance, elle n'en a pas moins rejeté l'appel.

[17] La Cour d'appel a indiqué que le délit d'atteinte par un moyen illégal « est fluide » (par. 18) et que *OBG* a donné naissance à deux courants de pensée opposés quant à ce qu'il faut entendre par moyen illégal. Lord Hoffmann, qui

majority on this point, adopted a narrow definition of “unlawful means” whereby only breaches of the civil law such as a tort or breach of contract would suffice. The unlawful conduct would need to be actionable by the party against which it was directed in order to give rise to liability: see *OBG*, at para. 49. Lord Nicholls of Birkenhead advocated a broader view, according to which “unlawful means” included “common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on”: *OBG*, at paras. 150 and 155.

[18] The Court of Appeal preferred Lord Hoffmann’s narrow definition. The conduct of the appellants, while lacking any legal justification, did not amount to a wrong actionable by the prospective purchasers. However, the Court of Appeal allowed for principled exceptions to mitigate the rigidity of the narrow rule. The court crafted an exception, which covered this case, in the following terms:

In my view, the intentional erection of self-help legal barriers, some of which are enforceable through statutory processes not subject to prior judicial authorization, in circumstances where those barriers rest on rights fabricated with arguments of sand, warrants redress under the tort of unlawful means (akin to the tort of abuse of legal process). [para. 9]

[19] A.I. and Alan Schelew appeal from that decision.

(3) Parties’ Positions

[20] Before this Court, the parties take diametrically opposed views of the scope of the unlawful means tort.

[21] The appellants urge us to adopt the position taken by a majority of the House of Lords, speaking through Lord Hoffmann in *OBG*, at para. 49: “unlawful” means actionable by the third party

compte parmi les juges majoritaires sur ce point, définit étroitement cette notion, la limitant à une contravention au droit civil, comme un délit civil ou une rupture de contrat. Pour qu’il y ait responsabilité, il faut que la conduite illégale puisse donner matière à procès à la partie contre qui elle est dirigée (voir *OBG*, par. 49). Lord Nicholls of Birkenhead propose une définition plus large, selon laquelle le « moyen illégal » s’entend [TRADUCTION] « de délits civils de common law, de délits civils d’origine législative, de crimes, de ruptures de contrat, de la violation de fiducie et d’obligations en equity, de l’abus de confiance et ainsi de suite » (*OBG*, par. 150 et 155).

[18] La Cour d’appel a retenu la définition étroite proposée par lord Hoffmann. Selon elle, bien que la conduite des appellants fût dépourvue de tout fondement juridique, elle ne constituait pas une faute donnant aux acheteurs potentiels matière à procès. Toutefois, la cour a jugé que des exceptions de principe pouvaient atténuer la rigueur de cette règle d’application étroite, et elle a formulé une telle exception applicable à la situation en cause :

À mon avis, le fait qu’une personne mette en place, de façon intentionnelle et dans un but d’autoprotection, des barrières juridiques dont certaines sont exécutoires du fait de mécanismes prévus par la loi ne nécessitant aucune autorisation judiciaire préalable, dans des circonstances où ces barrières reposent sur des droits fabriqués au moyen d’arguments faits de sable, justifie des mesures réparatoires ressortissant au délit d’atteinte par un moyen illicite (semblables à celles auxquelles donne lieu le délit d’abus de procédure). [par. 9]

[19] A.I. et Alan Schelew interjettent appel de cette décision.

(3) Position des parties

[20] Les parties défendent devant nous des conceptions diamétralement opposées du délit d’atteinte par un moyen illégal.

[21] Les appellants nous exhorent à faire notre l’opinion majoritaire de la Chambre des lords dans *OBG* exposée par lord Hoffmann au par. 49 selon laquelle est « illégal » l’acte qui donne au tiers

(or that the act would be actionable but for the fact that it did not cause the third party any loss). This approach may be described as the narrow view: it is premised on the tort having a limited sphere of operation so that only actionable civil wrongs against the third party provide a basis for allowing the intended victim to sue. The appellants also urge us to hold that the tort is only available to the plaintiff if the defendant's conduct causing the injury does not give rise to another cause of action by the plaintiff against the defendant.

[22] The respondents, on the other hand, urge us to adopt one of two alternative positions, both of which stake out a broader role for the tort. The primary submission is that “unlawful means” is defined by a “broad bright-line rule” that an act is unlawful if there exists a legal proceeding through which its legitimacy can be successfully challenged. Alternatively, the respondents submit that we should adopt Lord Hoffmann’s narrow formulation but hold, as did the Court of Appeal, that it is subject to principled exceptions.

III. Analysis

A. *What Is the Scope of Liability for the Tort of Causing Loss by Unlawful Means?*

(1) What Sorts of Conduct Are Considered “Unlawful” for the Purposes of This Tort?

[23] The unlawful means tort creates a type of “parasitic” liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant’s unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant’s unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)’s use of unlawful means against B (the third party): see H. Carty, *An Analysis of the Economic Torts*

matière à procès (ou qui lui aurait donné matière à procès, n’eût été l’absence de perte). On peut considérer cette conception comme étroite : elle part de la prémissse que le délit a un champ d’application restreint, de sorte que seule une faute civile contre le tiers ouvrant droit à une action permet à la victime véritablement visée de poursuivre. Les appellants nous invitent également à conclure que ce délit ne peut être invoqué par le demandeur que si la conduite préjudiciable du défendeur n’est source pour le demandeur d’aucune autre cause d’action contre lui.

[22] Pour leur part, les intimées veulent nous voir adopter l’une ou l’autre de deux positions accordant au délit une plus grande portée. Elles soutiennent principalement que le caractère « illégal » d’un moyen est déterminé par l’application de la [TRADUCTION] « règle générale traçant une ligne de démarcation très nette » selon laquelle un acte est illégal s’il existe une voie de droit permettant d’en contester la légitimité. À titre subsidiaire, elles nous invitent à adopter l’énoncé restrictif formulé par lord Hoffmann, mais à préciser, à l’instar de la Cour d’appel, que des exceptions de principe peuvent s’appliquer.

III. Analyse

A. *Quel est le champ de la responsabilité afférente à l’infliction d’une perte par un moyen illégal?*

(1) Quels sont les types de conduite « illégale » propres à constituer le délit?

[23] Le délit d’atteinte par un moyen illégal emporte une responsabilité que l’on pourrait qualifier de « parasitaire » dans une situation mettant en cause trois parties : il permet au demandeur de poursuivre le défendeur pour la perte économique que lui a causé la conduite illégale de ce dernier envers un tiers. La responsabilité envers le demandeur découle de l’acte illégal du défendeur contre le tiers (ou en dépend, à la manière d’un parasite). Bien que ses éléments constitutifs aient été décrits de maintes façons, ce délit réside essentiellement dans l’infliction intentionnelle par A

(2001), at p. 103; J. W. Neyers, “Rights-based justifications for the tort of unlawful interference with economic relations” (2008), 28 *L.S.* 215; G. H. L. Friedman, *The Law of Torts in Canada* (3rd ed. 2010), at pp. 773-75; P. H. Osborne, *The Law of Torts* (4th ed. 2011), at pp. 336-38; P. T. Burns and J. Blom, *Economic Interests in Canadian Tort Law* (2009), at p. 186. There is no dispute here that this is an intentional tort; the focus of the dispute in this case is on the unlawful means element.

[24] An old case will serve as an example. The defendant, the master of a trading ship, fired its cannons at a canoe that was attempting to trade with its competitor, the plaintiffs’ trading ship, in order to prevent it from doing so. The defendant was held liable, Lord Kenyon being of the opinion that these facts supported an action: *Tarleton v. M'Gawley* (1793), Peake 270, 170 E.R. 153. The plaintiffs were able to recover damages for the economic injury resulting from the defendant’s wrongful conduct toward third parties (the occupants of the canoe) which had been committed with the intention of inflicting economic injury on the plaintiffs.

[25] The question of what sort of conduct constitutes the necessary unlawful means is important. It has been described as the most important question concerning this tort: *OBG*, at para. 45, *per* Lord Hoffmann; H. Carty, *An Analysis of the Economic Torts* (2nd ed. 2010), at p. 84. Giving the concept of “unlawful means” a “sound, economically relevant and judicially supported interpretation” is “[t]he key to keeping the economic torts in harmony with contemporary legal values”: *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corp. of British Columbia*, 2000 BCCA 463, 80 B.C.L.R. (3d) 62, at para. 19, *per* Lambert J.A., dissenting, leave to appeal refused, [2001] 1 S.C.R. xv.

[26] The scope of the unlawful means tort depends on the answers to three questions. First,

(le défendeur) d’un préjudice économique à C (le demandeur) par des moyens illégaux contre B (le tiers) (voir H. Carty, *An Analysis of the Economic Torts* (2001), p. 103; J. W. Neyers, « Rights-based justifications for the tort of unlawful interference with economic relations » (2008), 28 *L.S.* 215; G. H. L. Friedman, *The Law of Torts in Canada* (3^e éd. 2010), p. 773-775; P. H. Osborne, *The Law of Torts* (4^e éd. 2011), p. 336-338; P. T. Burns et J. Blom, *Economic Interests in Canadian Tort Law* (2009), p. 186). Aucune partie ne conteste en l’espèce qu’il s’agit d’un délit d’intention. Le litige porte sur un élément constitutif, soit le moyen illégal.

[24] Prenons à titre d’exemple une affaire ancienne. Le défendeur, capitaine d’un navire de commerce, fait tirer du canon sur un canot pour empêcher les passagers de ce dernier de commercer avec le navire des demandeurs, son concurrent. Lord Kenyon a reconnu la responsabilité du défendeur, jugeant que les faits donnaient ouverture à action (*Tarleton c. M'Gawley* (1793), Peake 270, 170 E.R. 153). Les demandeurs ont pu être indemnisés du préjudice économique que leur avait causé la conduite fautive du défendeur envers les tiers (les passagers du canot), qui était motivée par l’intention d’infliger un préjudice économique aux demandeurs.

[25] La question de savoir quel type de conduite constitue un moyen illégal est une question importante, voire la plus importante en ce qui concerne ce délit (*OBG*, par. 45, le lord Hoffmann; H. Carty, *An Analysis of the Economic Torts* (2^e éd. 2010), p. 84). Donner à la notion de « moyen illégal » [TRADUCTION] « une interprétation étayée par la jurisprudence, qui soit juste et pertinente sur le plan économique » est « essentiel pour que les délits économiques demeurent conformes aux valeurs juridiques contemporaines » (*No. 1 Collision Repair & Painting (1982) Ltd. c. Insurance Corp. of British Columbia*, 2000 BCCA 463, 80 B.C.L.R. (3d) 62, par. 19, le juge Lambert, dissident; autorisation d’appel refusée, [2001] 1 R.C.S. xv).

[26] La portée du délit d’atteinte par un moyen illégal est fonction des réponses à trois questions.

does the unlawful conduct have to be actionable by the person at whom it is immediately directed? In my view, the conduct must be an actionable civil wrong or conduct that would be actionable if it had caused loss to the person at whom it was directed. Second, is there a requirement that the unlawful means not be otherwise actionable by the plaintiff? I propose to answer this question “no”. Third, should the definition of “unlawful means” be subject to principled exceptions? I would also answer this question in the negative. While the approach outlined by these answers leaves only a narrow scope for liability, my view is that it is most consistent with the history and rationale of the tort as well as with its place in the modern scheme of liability for causing economic harm.

[27] I will turn first to my understanding of these broader concerns and a review of the relevant law before returning to the reasons for my conclusions.

(a) *The Economic Torts and the Common Law*

[28] I will not dwell on the unfortunate state of the common law in relation to the unlawful means tort. As I noted earlier, there is not even consensus about what it ought to be called. One leading scholar simply observed that “[t]he economic torts [of which the unlawful means tort is one] are in a mess”: H. Carty, “Intentional Violation of Economic Interests: The Limits of Common Law Liability” (1988), 104 *Law Q. Rev.* 250, at p. 278. Careful review of the development of the unlawful means tort reveals confusion, overlap and inconsistency: see, e.g., Carty, *An Analysis of the Economic Torts* (2nd ed.), at pp. 73-78; P. Burns, “Tort Injury to Economic Interests: Some Facets of Legal Response” (1980), 58 *Can. Bar Rev.* 103, at pp. 145-48; T. Weir, *Economic Torts* (1997), at pp. 36-43; L. L. Stevens, “Interference With Economic Relations — Some Aspects of the Turmoil in the Intentional Torts” (1974), 12 *Osgoode Hall L.J.* 595, at pp. 617-19. At its core, however, the tort has two key ingredients: intention and unlawfulness. The gist of the tort is the intentional infliction of economic harm by unlawful means.

Premièrement, faut-il que la conduite illégale donne matière à procès à la personne contre qui elle était dirigée? À mon avis, il faut une faute civile ou une conduite qui ouvrirait droit à une action si elle avait causé une perte à la personne contre qui elle est dirigée. Deuxièmement, une règle exige-t-elle que le demandeur ne dispose d'aucune autre cause d'action? Cette question appelle selon moi une réponse négative. Troisièmement, des exceptions de principe s'appliquent-elles à la définition de « moyen illégal »? Je répondrais pareillement par la négative. Bien que de ces réponses se dégage un champ de responsabilité étroit, j'estime que ce résultat respecte tout à fait l'histoire et le fondement du délit ainsi que la place qu'il occupe au sein du régime moderne de responsabilité découlant d'un préjudice économique.

[27] Avant de revenir aux motifs fondant mes conclusions, j'expose d'abord ma conception de considérations générales et j'examine le droit applicable.

a) *Les délits économiques et la common law*

[28] Je ne m'attarde pas sur le triste état de la common law en ce qui concerne le délit d'atteinte par un moyen illégal. Comme je le mentionne précédemment, on ne s'entend même pas sur le nom à lui donner. Un éminent spécialiste fait simplement observer que [TRADUCTION] « [I]es délits économiques [dont l'atteinte par un moyen illégal fait partie] sont un fouillis » (H. Carty, « Intentional Violation of Economic Interests : The Limits of Common Law Liability » (1988), 104 *Law Q. Rev.* 250, p. 278). Un examen attentif de l'évolution du délit qui nous occupe en l'espèce révèle confusion, chevauchements et incohérences (voir, p. ex., Carty, *An Analysis of the Economic Torts* (2^e éd.), p. 73-78; P. Burns, « Tort Injury to Economic Interests : Some Facets of Legal Response » (1980), 58 *R. du B. can.* 103, p. 145-148; T. Weir, *Economic Torts* (1997), p. 36-43; L. L. Stevens, « Interference With Economic Relations — Some Aspects of the Turmoil in the Intentional Torts » (1974), 12 *Osgoode Hall L.J.* 595, p. 617-619). Essentiellement, toutefois, le délit compte deux composantes : l'intention et le caractère illégal. Il s'agit en gros de l'infraction intentionnelle d'un préjudice économique par un moyen illégal.

[29] The scope of the unlawful means tort should be understood in the context of the broad outlines of tort law's approach to regulating economic and competitive activity. Several aspects of that approach support adopting a narrow scope for the unlawful means tort: the common law accords less protection to purely economic interests; it is reluctant to develop rules to enforce fair competition; it is concerned not to undermine certainty in commercial affairs; and the history of the common law shows that tort liability, if unduly expanded, may undermine fundamental rights.

[30] Potential liability for the unlawful means tort often arises when there are contingent economic interests at stake, such as legitimate business expectations. Such interests, however, are at the margins of the traditional concerns of tort law. The first point, therefore, is that tort law has traditionally accorded less protection to purely economic interests than to physical integrity and property rights. As this Court stated in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, “[t]he law has never recognized a sweeping right to protection from economic harm”: para. 72. The unlawful means tort should not be viewed as providing that sort of “sweeping protection”: see, e.g., S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law* (7th ed. 2013), at p. 471; H. Carty, “The Economic Torts and English Law: An Uncertain Future” (2006-2007), 95 *Ky. L.J.* 845, at p. 845; A. M. Linden and B. Feldthusen, *Canadian Tort Law* (9th ed. 2011), at pp. 447-50; W. V. H. Rogers, *Winfield and Jolowicz on Tort* (18th ed. 2010), at pp. 859-60.

[31] Second, the common law has traditionally been reluctant to develop rules about fair competition: *OBG*, at para. 56, *per* Lord Hoffmann. The common law in general, and tort law in particular, have been astute to assure “some elbow-room [many would say much elbow-room] for the aggressive pursuit of self-interest”: C. Sappideen

[29] Il faut examiner la portée du délit d'atteinte par un moyen illégal à la lumière de la philosophie générale du droit de la responsabilité délictuelle quant à la régulation de l'activité économique et concurrentielle. Plusieurs aspects de cette philosophie justifient une définition étroite de ce délit : la common law ne protège pas autant les intérêts purement économiques que d'autres types d'intérêts, elle hésite à établir des règles pour forcer la concurrence loyale, elle veille à ne pas compromettre la certitude en matière commerciale et son histoire démontre que l'expansion indue de la responsabilité délictuelle peut fragiliser des droits fondamentaux.

[30] La possibilité qu'il y ait responsabilité en cas d'atteinte par un moyen illégal intervient souvent lorsque sont en jeu des intérêts économiques potentiels, telles des attentes commerciales légitimes. Ces intérêts, toutefois, se situent à la marge des préoccupations classiques du droit de la responsabilité délictuelle. Premièrement, le droit de la responsabilité délictuelle a traditionnellement accordé aux intérêts purement économiques une protection moindre qu'à l'intégrité physique et aux droits de propriété. Comme notre Cour l'indique dans *S.D.G.M.R., section locale 558 c. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 CSC 8, [2002] 1 R.C.S. 156, « la common law n'a jamais reconnu l'existence d'un droit général à la protection contre le préjudice économique » (par. 72). On ne saurait donc penser que le délit d'atteinte par un moyen illégal confère ce genre de « protection générale » (voir, p. ex., S. Deakin, A. Johnston et B. Markesinis, *Markesinis and Deakin's Tort Law* (7^e éd. 2013), p. 471; H. Carty, « The Economic Torts and English Law : An Uncertain Future » (2006-2007), 95 *Ky. L.J.* 845, p. 845; A. M. Linden et B. Feldthusen, *Canadian Tort Law* (9^e éd. 2011), p. 447-450; W. V. H. Rogers, *Winfield and Jolowicz on Tort* (18^e éd. 2010), p. 859-860).

[31] Deuxièmement, on a traditionnellement hésité en common law à formuler des règles en matière de concurrence loyale (*OBG*, par. 56, le lord Hoffmann). La common law en général et le droit de la responsabilité délictuelle en particulier ont astucieusement ménagé [TRADUCTION] « une certaine [d'aucuns diraient une considérable]

and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at para. 30.120. As Bowen L.J. put it in *Mogul Steamship Company v. McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598 (C.A.), at p. 614, aff'd [1892] A.C. 25 (H.L.), there can be no liability for a person who has "done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade". The same sentiment comes through in Lord Davey's speech in *Allen v. Flood*, [1898] A.C. 1, at p. 173: "The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same and compete with him, though to his damage." More recently, Lord Nicholls acknowledged the common law's respect for competition in *OBG* where he wrote:

Competition between businesses regularly involves each business taking steps to promote itself at the expense of the other. . . . Far from prohibiting such conduct, the common law seeks to encourage and protect it. The common law recognises the economic advantages of competition. [para. 142]

[32] This reluctance is directly relevant in this case. The trial judge found that the appellants intended to do "whatever they could to pursue the interest of A I Enterprises and . . . were well aware that their actions would cause harm to Jam[b] & Bram": trial reasons, at para. 287. Although he went on to find that the harm caused was not incidental to the pursuit by the defendants of their legitimate self-interest, this same conclusion could apply to a great deal of legitimate competitive activity in the marketplace. That, it seems to me, suggests the need for a limited role for the unlawful means tort.

[33] A third point also favours a limited role for this tort. The common law in the Anglo-Canadian tradition has generally promoted legal certainty for commercial affairs. That certainty is easily put in jeopardy by adopting vague legal standards

liberté d'action en vue de la poursuite énergique d'intérêts personnels » (C. Sappideen et P. Vines, dir., *Fleming's The Law of Torts* (10^e éd. 2011), par. 30.120). Le lord juge Bowen a ainsi considéré, dans *Mogul Steamship Company c. McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598 (C.A.), p. 614, conf. par [1892] A.C. 25 (H.L.), qu'une personne qui [TRADUCTION] « n'a fait que poursuivre jusqu'au bout l'âpre guerre concurrentielle menée contre les demanderesses dans son propre intérêt commercial » n'engage pas sa responsabilité. Cette opinion se dégage également des propos tenus par lord Davey dans *Allen c. Flood*, [1898] A.C. 1, p. 173 : [TRADUCTION] « Le droit qu'a une personne de poursuivre une activité commerciale ou professionnelle est limité par le droit d'autrui d'en faire autant et de la concurrencer, au risque de lui nuire ». Plus récemment, lord Nicholls reconnaît le respect que porte la common law à la concurrence lorsqu'il écrit, au par. 142 de l'arrêt *OBG* :

[TRADUCTION] Des entreprises en concurrence vont régulièrement faire en sorte de se faire valoir au détriment de leurs concurrentes. [. . .] Loin d'interdire ce comportement, la common law cherche à l'encourager et à le protéger. La common law reconnaît les bienfaits économiques de la concurrence.

[32] Cette hésitation est directement en jeu en l'espèce. Selon le juge de première instance, les appellants avaient l'intention de faire [TRADUCTION] « tout ce qu'ils pouvaient pour servir les intérêts d'A I Enterprises et [. . .] savaient bien que leur conduite causerait préjudice à Jam[b] et Bram » (motifs de première instance, par. 287). Même s'il a fini par conclure que le préjudice causé ne découlait pas simplement de la poursuite, par les défendeurs, de leur propre intérêt légitime, pareille conclusion pourrait s'appliquer à plus d'une activité concurrentielle commerciale légitime, ce qui à mon avis semble révéler la nécessité d'accorder un rôle limité au délit d'atteinte par un moyen illégal.

[33] Une troisième considération milite également en faveur d'un rôle limité pour ce délit. La common law anglo-canadienne a généralement cherché à favoriser la certitude juridique en matière commerciale. Or, en adoptant des normes

based on “commercial morality” or by imposing liability for malicious conduct alone: see Deakin, Johnston and Markesinis, at pp. 472-73. The majority in *Allen*, for example, rejected the view that “malice” was a sufficient basis for liability on the basis that it was too vague a notion to be applied by the courts: pp. 118-19, *per* Lord Herschell, and pp. 152-53, *per* Lord Macnaghten; see also Deakin, Johnston and Markesinis, at p. 472; *OBG*, at para. 14, *per* Lord Hoffmann. Regulating commercial activity should not, it has been said, depend on the “idiosyncrasies of individual judges”: *Mogul Steamship* (H.L.), at p. 51, *per* Lord Morris.

[34] A final consideration supports a limited scope for this tort: the risk inherent in the economic torts generally that they will undermine legislated schemes favouring collective action in, for example, labour relations and interfere with fundamental rights of association and expression. At one time, the common law of tort was ready — and many would say overready — to intervene to prevent economic coercion in the context of industrial disputes. The common law’s approach in this area led to legislative intervention to grant greater freedom to labour unions by enacting immunities to specific economic torts, in legislation modelled on the U.K. *Trade Disputes Act, 1906*, 6 Edw. 7, c. 47, and successor legislation: Deakin, Johnston and Markesinis, at p. 474; G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at para. 11.340. Writing about the experience in England, Deakin, Johnston and Markesinis observe that despite the intention underlying the creation of these immunities, the courts at times expanded economic tort liability which had the effect of “‘outflanking’ the immunities provided by statute At times it has seemed that the courts . . . were engaged in a battle of wits with the parliamentary draftsman, to see which side could develop the optimal formula for widening or for narrowing liability respectively”: p. 474. This history draws attention to the risk that expanded liability for the economic torts may be used to undermine legislative choices

juridiques imprécises fondées sur « l’éthique commerciale » ou en concluant à la responsabilité sur le seul fondement de la conduite malveillante, on compromettait facilement cette certitude (voir Deakin, Johnston et Markesinis, p. 472-473). Dans *Allen*, par exemple, les juges majoritaires ont rejeté l’opinion selon laquelle la [TRADUCTION] « malveillance » suffisait pour qu’il y ait responsabilité, jugeant que l’imprécision de cette notion s’opposait à son application judiciaire (p. 118-119, le lord Herschell et p. 152-153, le lord Macnaghten; voir aussi Deakin, Johnston et Markesinis, p. 472; *OBG*, par. 14, le lord Hoffmann). La régulation de l’activité commerciale ne devrait pas dépendre, a-t-on dit, des [TRADUCTION] « dispositions personnelles des juges » (*Mogul Steamship* (H.L.), p. 51, le lord Morris).

[34] Une dernière considération milite en faveur d’une définition étroite de ce délit : le risque inhérent aux délits économiques en général que leur existence mine les initiatives législatives favorisant l’action collective, par exemple dans les relations syndicales, et porte atteinte à la liberté fondamentale d’expression et d’association. En matière de responsabilité délictuelle, la common law a déjà été enclée — et beaucoup diraient excessivement enclée — à intervenir pour empêcher la coercition économique en contexte de conflits de travail. La position de la common law en la matière a amené le législateur à intervenir pour accorder une liberté accrue aux syndicats, en adoptant des lois inspirées de la *Trade Disputes Act, 1906*, 6 Edw. 7, ch. 47, du Royaume-Uni et de lois subséquentes prévoyant des immunités à l’égard de certains délits économiques (Deakin, Johnston et Markesinis, p. 474; G. W. Adams, *Canadian Labour Law* (2^e éd. (feuilles mobiles)), par. 11.340). À propos de l’expérience anglaise, Deakin, Johnston et Markesinis font observer qu’en dépit de l’intention ayant motivé la création de ces immunités, les tribunaux ont parfois interprété largement les délits économiques, ce qui a eu pour effet d’[TRADUCTION] « ‘annuler’ les immunités légales [. . .] À certains moments, il semblait que les tribunaux [. . .] jouaient au plus fin avec le législateur pour voir qui des deux trouverait la formule optimale pour élargir ou limiter la responsabilité, selon leur point de vue respectif »

and perhaps even constitutionally protected rights of expression and association: see, e.g., P. Elias and K. Ewing, “Economic Torts and Labour Law: Old Principles and New Liabilities” (1982), 41 *Cambridge L.J.* 321; B. Adell, “Secondary Picketing after *Pepsi-Cola*: What’s Clear, and What Isn’t?” (2003), 10 *C.L.E.L.J.* 135. A narrow and clear definition of the scope of liability reduces this risk.

[35] All of these factors, in my view, point to the wisdom of viewing the unlawful means tort as one of narrow scope.

(b) *Rationale of the Unlawful Means Tort*

[36] As Hazel Carty wisely said, “the scope of this tort can only be established by clarifying its rationale so that there is a principled definition of unlawful means”: *An Analysis of the Economic Torts* (2nd ed.), at p. 102. Unfortunately, there is no consensus about what that rationale is or should be. Scholars have remarked that there is no single unifying principle underlying the economic torts generally and that the unlawful means tort in particular is “radically under-theorized”: see, e.g., Deakin, Johnston and Markesinis, at p. 473; Neyers, at p. 233; B. Kain and A. Alexander, “The ‘Unlawful Means’ Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?”, in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation*, 2010 (2010), 33, at p. 162. Identifying the tort’s rationale is therefore far from a straightforward task. But, although there may be no clear rationale as a matter of historical fact, we can consider what rationale best reflects the modern role that the tort should play in the broader scheme of civil liability.

[37] There are several possible rationales for the tort but they are mostly variations on two themes: see, e.g., Neyers, at pp. 220-33, and Kain and Alexander, at pp. 162-74. The first — what I will

(p. 474). Ainsi, l’histoire nous rappelle le risque qu’une interprétation large des délits économiques serve à miner les choix du législateur, voire la liberté d’expression et d’association garantie par la Constitution (voir, p. ex., P. Elias et K. Ewing, « Economic Torts and Labour Law : Old Principles and New Liabilities » (1982), 41 *Cambridge L.J.* 321; B. Adell, « Secondary Picketing after *Pepsi-Cola* : What’s Clear, and What Isn’t? » (2003), 10 *C.L.E.L.J.* 135). Une définition étroite et claire de la portée de la responsabilité permet de réduire ce risque.

[35] Tous ces facteurs suggèrent, à mon avis, qu’il est sage de considérer l’atteinte par un moyen illégal comme étant un délit de portée étroite.

b) *Fondement de l’atteinte par un moyen illégal*

[36] Comme Hazel Carty l’indique judicieusement, [TRADUCTION] « pour circonscrire la portée de ce délit, il faut en préciser le fondement, de sorte que ce qu’il faut entendre par moyen illégal soit défini suivant des principes » (*An Analysis of the Economic Torts* (2^e éd.), p. 102). Malheureusement, ce fondement ne fait pas l’unanimité. Les auteurs signalent qu’aucun principe unificateur ne soutient les délits économiques de façon générale et que l’atteinte par un moyen illégal, en particulier, souffre d’une [TRADUCTION] « grave pauvreté théorique » (voir, p. ex., Deakin, Johnston et Markesinis, p. 473; Neyers, p. 233; B. Kain et A. Alexander, « The “Unlawful Means” Element of the Economic Torts : Does a Coherent Approach Lie Beyond Reach? », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation*, 2010 (2010), 33, p. 162). Circonscrire le fondement de ce délit est donc loin d’être une tâche aisée. Or, si les faits historiques ne nous éclairent pas à ce sujet, nous pouvons nous demander lequel rend le mieux compte du rôle moderne qu’il faudrait attribuer à ce délit dans la sphère globale de la responsabilité civile.

[37] Plusieurs possibilités ont été avancées, qui se réduisent en gros à des variations sur deux thèmes (voir, p. ex., Neyers, p. 220-233, et Kain et Alexander, p. 162-174). Suivant le premier,

call the “intentional harm” rationale — focuses on the fact that harm has been intentionally inflicted. This rationale supports the creation of new tort liabilities in order to reach clearly excessive and unacceptable intentional conduct: see, e.g., Carty, *An Analysis of the Economic Torts* (2nd ed.), at p. 104. The second, and in my view the preferred rationale, focuses on extending an existing right to sue from the immediate victim of the unlawful act to another party whom the defendant intended to target with the unlawful conduct. I will call this the “liability stretching” rationale. The focus of the tort on this understanding is not on enlarging the basis of civil liability, but on allowing those intentionally targeted by already actionable wrongs to sue for the resulting harm. On either rationale, the tort is, at its core, a tort of intention. The main difference is that on the “intentional harm” rationale, the intention requirement is seen as the main limitation on the potential scope of liability, whereas in the “liability stretching” rationale, the potential scope of liability is limited by both the intention requirement and the more restrictive definition of the conduct which will support liability.

[38] I will explain why I would not accept the first rationale and then turn to my reasons for preferring the second.

[39] There are two versions of the “intentional harm” rationale, one bolder and the other more modest. The bolder version sees the unlawful means tort as part of a broader pattern of liability for all intentionally inflicted harm: see, e.g., *OBG*, at para. 153, *per* Lord Nicholls; P. Sales and D. Stilitz, “Intentional Infliction of Harm by Unlawful Means” (1999), 115 *Law Q. Rev.* 411. By contrast, the modest version envisions a more limited role for the tort: it is not meant to sanction all intentional infliction of economic harm but only conduct

que j’appelle fondement intéressant le « préjudice intentionnel », l’élément important est le caractère intentionnel du préjudice. Ce fondement favorise la création de nouvelles causes de responsabilité délictuelle visant à réprimer des comportements intentionnels manifestement abusifs et inacceptables (voir, p. ex., Carty, *An Analysis of the Economic Torts* (2^e éd.), p. 104). Suivant le second — et celui qu’il faut privilégier à mon avis — le droit d’action que peut exercer la victime directe de la conduite illégale du défendeur est également reconnu à une autre personne que le défendeur entendait viser par cette conduite. Je le nomme fondement intéressant l’« extension du champ de la responsabilité ». Suivant cette conception du délit, l’important consiste non pas à élargir le fondement de la responsabilité civile, mais à permettre à ceux qui sont intentionnellement visés par des actes fautifs donnant à autrui matière à procès d’exercer eux aussi un droit d’action pour le préjudice qui leur a été causé. Peu importe le fondement que l’on retient, ce délit est essentiellement un délit d’intention. La principale différence entre les deux fondements tient à ce que, suivant le fondement intéressant le « préjudice intentionnel », la condition relative à l’intention joue pour limiter le champ potentiel de la responsabilité, tandis que, suivant le fondement intéressant l’« extension du champ de la responsabilité », tant la condition relative à l’intention que celle relative au comportement, défini de manière restrictive, jouent pour limiter le champ potentiel de la responsabilité.

[38] Avant d’exposer ce qui me fait privilégier le second, j’explique pourquoi je rejette le premier.

[39] Le fondement intéressant le « préjudice intentionnel » se décline en deux versions, l’une, audacieuse, et l’autre, plus modeste. Selon la première, l’atteinte par un moyen illégal s’inscrit dans une catégorie générale de responsabilité afférente à toute infliction intentionnelle d’un préjudice (voir, p. ex., *OBG*, par. 153, *le lord Nicholls*; P. Sales et D. Stilitz, « Intentional Infliction of Harm by Unlawful Means » (1999), 115 *Law Q. Rev.* 411). Selon la seconde, plus modeste, ce délit joue un rôle plus limité : il ne s’agit pas de sanctionner toute

that is a flagrant abuse of the competitive process. On this view, the tort seeks to maintain the integrity of the competitive process by curbing conduct that deserves to be called “cheating”: Kain and Alexander, at p. 171; S. Deakin and J. Randall, “Rethinking the Economic Torts” (2009), 72 *Mod. L. Rev.* 519, at p. 520.

[40] The intentional harm rationale supports a broader understanding of the unlawful means requirement. Under this rationale, the tortfeasor’s conduct must rise to a level of wrongfulness that amounts to cheating or upsetting the fundamental rules of market competition. Such conduct clearly encompasses torts and crimes but not conduct that is simply *ultra vires* or morally objectionable. So, for example, Kain and Alexander, who would adopt a version of the fair competition rationale, propose that “unlawful means” should extend to all conduct (both acts and omissions) that is forbidden by law whatever its source, regardless of whether it is actionable: p. 178. The unlawfulness requirement exists mainly to provide some broad outer limit for the judicial discretion to impose liability: see Carty, *An Analysis of the Economic Torts* (2nd ed.), at p. 104.

[41] This understanding of the tort is attractive because it provides a principled explanation for why liability should be imposed and one that accords with widely held views of commercial morality. While no person has a common law right to trade *per se*, a person does have a general freedom to participate in the commercial and labour market and a legitimate expectation that the basic rules of the game will be respected. To the extent that the defendant intentionally inflicts economic loss on the plaintiff through unlawful means which are clearly off-side those basic rules, the defendant gains an illegitimate advantage and causes the plaintiff to suffer an unfair disadvantage.

[42] However, for several reasons, I do not accept either the more modest or the bolder version of the

infraction intentionnelle de préjudice économique, mais uniquement la conduite constituant une entorse flagrante au principe de la concurrence. Dans cette optique, le délit vise à préserver l’intégrité de la concurrence en réprimant les comportements que l’on peut qualifier à bon droit de [TRADUCTION] « tricherie » (Kain et Alexander, p. 171; S. Deakin et J. Randall, « Rethinking the Economic Torts » (2009), 72 *Mod. L. Rev.* 519, p. 520).

[40] Le fondement intéressant le préjudice intentionnel favorise une interprétation large du critère du moyen illégal. Ainsi, suivant pareil fondement, pour être illégale, la conduite fautive de l’auteur du délit doit constituer de la tricherie ou perturber les règles fondamentales de la concurrence. Une telle conduite englobe indéniablement les délits et les crimes, mais non les simples comportements hors compétence ou moralement répréhensibles. Ainsi, Kain et Alexander, tenants d’une version axée sur la concurrence loyale, proposent que le « moyen illégal » comprenne toute conduite (action ou omission), donnant ouverture ou non à action, qui est visée par une interdiction juridique, quelle qu’en soit la source (p. 178). Le critère du caractère illégal sert principalement à circonscrire largement l’exercice du pouvoir judiciaire discrétionnaire qui permet d’imposer la responsabilité (voir Carty, *An Analysis of the Economic Torts* (2^e éd.), p. 104).

[41] Cette conception du délit est attrayante parce qu’elle fournit une explication raisonnée des motifs justifiant la responsabilité et concorde avec une perception généralement admise de l’éthique commerciale. Bien que la common law ne reconnaissasse pas de droit individuel de commercer comme tel, chacun jouit de la liberté générale de participer au marché du commerce et du travail et peut légitimement s’attendre à ce que les règles fondamentales les régissant soient respectées. Le défendeur qui cause intentionnellement une perte financière au demandeur en recourant à un moyen illégal qui s’écarte clairement de ces règles fondamentales obtient un avantage illégitime et fait subir un désavantage injuste au demandeur.

[42] Toutefois, pour diverses raisons, je ne puis accepter ni la version audacieuse ni la version plus

intentional harm rationale. Accepting either version would lead to an unwieldy concept of “unlawful means” and thus to undue uncertainty in commercial affairs. Furthermore, the modest version of this rationale fails to account for a central feature of the unlawful means tort, namely that it is a tort of intention. If the primary purpose of the tort were to uphold the institution of market competition, it would be irrelevant whether the interference was intentional or negligent: see Neyers, at pp. 229-30. The more ambitious rationale for the tort is inconsistent with two broad policies of the common law. As I outlined earlier, the common law generally prefers a limited role for the economic torts in the modern marketplace. The more ambitious rationale is also inconsistent with the unfailing refusal over many years of the courts in England and in common law Canada to adopt a *prima facie* tort which makes actionable intentional and unjustifiable interference with economic interests even in the absence of unlawful means: see, e.g., *Allen*, at p. 121, *per* Lord Herschell; *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at p. 469; *OOG*, at para. 145, *per* Lord Nicholls.

[43] This brings me to the rationale I prefer. The liability stretching rationale sees the tort as extending civil liability without creating new actionable wrongs. It thereby closes a perceived liability gap where the wrongdoer’s acts in relation to a third party, which are in breach of established legal obligations to that third party, intentionally target the injured plaintiff: *Quinn v. Leathem*, [1901] A.C. 495, at pp. 534-35, *per* Lord Lindley; J. Eekelaar, “The Conspiracy Tangle” (1990), 106 *Law Q. Rev.* 223, at pp. 225-26; Carty, *An Analysis of the Economic Torts* (2nd ed.), at pp. 103-4. The liability stretching rationale underlies Lord Hoffmann’s speech on behalf of the majority in *OOG*: see paras. 46-48. It also commands considerable (although far from unanimous) support among commentators: see, e.g., R. Podolny, “The Tort of Intentional Interference with Economic Relations: Is Clarity Out of Reach?” (2012), 52 *Can. Bus. L.J.* 63, at pp. 77-78; H. Carty, “The

modeste du fondement intéressant le préjudice intentionnel avancé à l’égard de ce délit. L’une et l’autre version mènent à une notion alambiquée de ce qui constitue un « moyen illégal » propre à susciter une incertitude indue en matière commerciale. En outre, la version plus modeste fait abstraction d’un élément primordial du délit d’atteinte par un moyen illégal, à savoir qu’il s’agit d’un délit d’intention. Si le délit avait pour objet premier de préserver l’institution qu’est la concurrence commerciale, il importerait peu que l’atteinte soit intentionnelle ou non ou qu’elle procède de la négligence (voir Neyers, p. 229-230). La version audacieuse, quant à elle, est incompatible avec deux grands principes de common law. Je le répète, la common law tend à limiter le rôle des délits économiques dans le marché moderne. La version audacieuse ne cadre pas non plus avec le fait que les tribunaux anglais et les tribunaux canadiens statuant en common law ont toujours refusé de reconnaître l’existence d’un délit d’atteinte intentionnelle et injustifiable à des intérêts économiques qui donnerait un droit d’action même en l’absence de moyen illégal (voir, p. ex., *Allen*, p. 121, le lord Herschell; *Ciments Canada LaFarge Ltée c. British Columbia Lightweight Aggregate Ltée*, [1983] 1 R.C.S. 452, p. 469; *OOG*, par. 145, le lord Nicholls).

[43] Cela m’amène au fondement du délit que je préfère. Suivant le fondement intéressant l’extension du champ de la responsabilité, le champ de la responsabilité civile est étendu sans que de nouvelles fautes ouvrant droit à action soient créées. Il permet ainsi de combler ce qui est perçu comme une lacune en matière de responsabilité, dans les cas où l’auteur d’un acte fautif commis à l’endroit d’un tiers en contravention aux obligations juridiques établies qu’il a à l’égard de ce dernier vise intentionnellement le demandeur lésé (*Quinn c. Leathem*, [1901] A.C. 495, p. 534-535, le lord Lindley; J. Eekelaar, « The Conspiracy Tangle » (1990), 106 *Law Q. Rev.* 223, p. 225-226; Carty, *An Analysis of the Economic Torts* (2^e éd.), p. 103-104). Le fondement intéressant l’extension du champ de la responsabilité sous-tend le raisonnement exposé au nom des juges majoritaires par lord Hoffmann dans *OOG* (voir par. 46-48). Il recueille en outre un appui considérable (quoique loin d’être unanime)

Economic Torts in the 21st Century” (2008), 124 *Law Q. Rev.* 641, at p. 672; Neyers, at pp. 231-33.

[44] Why do I favour the liability stretching rationale? It provides a rational explanation for the expansion of tort liability which rests on pre-existing causes of action. This type of expansion provides certainty because it establishes a clear “control mechanism” on liability in this area of the law, consistent with tort law’s reticence to intrude too far into the realm of competitive economic activity: *OBG*, at para. 266, *per* Lord Walker of Gestingthorpe. In the words of Baroness Hale of Richmond in *OBG*, it is “consistent with legal policy to limit rather than to encourage the expansion of liability in this area”: para. 306. I agree in general terms with Hazel Carty that “a narrow remit . . . based on existing civil liability is the best policy”: *An Analysis of the Economic Torts* (2nd ed.), at p. 301.

[45] This rationale of the tort supports a narrow definition of “unlawful means”: the tort does not seek to create new actionable wrongs but simply to expand the range of persons who may sue for harm intentionally caused by existing actionable wrongs to a third party. Thus, criminal offences and breaches of statute would not be *per se* actionable under the unlawful means tort, but the tort would be available if, under common law principles, those acts also give rise to a civil action by the third party and interfered with the plaintiff’s economic activity. For example, crimes such as assault and theft would be actionable by a third party in the torts of trespass to the person and conversion. But other breaches of criminal or regulatory law will not give rise to a civil action and there will be therefore no potential liability under the unlawful means tort. This approach avoids “tortifying” the criminal and regulatory law by imposing civil liability where

parmi les auteurs (voir, p. ex., R. Podolny, « The Tort of Intentional Interference with Economic Relations : Is Clarity Out of Reach? » (2012), 52 *Rev. can. dr. comm.* 63, p. 77-78; H. Carty, « The Economic Torts in the 21st Century » (2008), 124 *Law Q. Rev.* 641, p. 672; Neyers, p. 231-233).

[44] Pourquoi ce fondement me paraît-il préférable? Parce qu’il fait reposer sur des assises rationnelles l’extension du champ de la responsabilité délictuelle, qui est limitée aux causes d’action préexistantes. Ce type d’extension favorise la certitude parce qu’il établit un « mécanisme de contrôle » clair pour déterminer la responsabilité qui respecte la réticence exprimée dans le domaine de la responsabilité délictuelle à trop intervenir dans le champ de l’activité économique concurrentielle (*OBG*, par. 266, le lord Walker of Gestingthorpe). Pour reprendre les termes employés par la baronne Hale of Richmond dans *OBG*, il est [TRADUCTION] « conforme aux principes juridiques de contenir l’extension du champ de la responsabilité dans ce domaine plutôt que de l’encourager » (par. 306). Je partage de façon générale l’avis de Hazel Carty selon lequel [TRADUCTION] « un critère étroit [...] reposant sur les causes de responsabilité civile existantes constitue la meilleure voie » (*An Analysis of the Economic Torts* (2^e éd.), p. 301).

[45] Ce fondement du délit milite en faveur d’une définition étroite du « moyen illégal » : le délit a pour effet non pas de créer de nouvelles fautes ouvrant droit à action, mais simplement de reconnaître à d’autres personnes la possibilité de poursuivre pour un préjudice qui leur a été causé intentionnellement par une faute donnant déjà matière à procès à un tiers. Les infractions criminelles et contraventions aux lois ne permettraient donc pas a priori d’interdire une action pour atteinte par un moyen illégal, mais une telle action serait possible si les actes en cause, suivant les principes de la common law, fondent également l’action civile du tiers et ont porté atteinte à l’activité économique du demandeur. Par exemple, des crimes comme les voies de fait et le vol pourraient donner au tiers ouverture à action pour atteinte directe à la personne et détournement, respectivement. Or, ce ne sera pas le cas d’autres infractions à des lois en matière criminelle ou

there would not otherwise be any: see *OBG*, at paras. 57 and 266. The two core components of the unlawful means tort are thus that the defendant must use unlawful means, in the narrow sense, and that the defendant must intend to harm the plaintiff through the use of the unlawful means.

[46] There are at least two objections to the liability stretching rationale, but I do not find either persuasive.

[47] One objection is that this rationale cannot explain imposing liability in situations where the third party also suffers a loss: see Neyers, at p. 232. This objection sees a gap in liability as arising only if A commits a wrong against B but the harm is suffered only by C; the “gap” arises because neither B nor C has a claim. If filling that gap is the purpose of the unlawful means tort, then it would be difficult to justify imposing liability in classic cases of the unlawful means tort, such as *Tarleton*, where the third party also suffers harm and has a valid claim. My view, however, is that this objection is predicated on an unduly narrow understanding of the “gap” in liability. It is desirable to stretch liability even if other forms of action may be available. Take *Tarleton* as an example. Both the occupants of the canoe and the competitor trading ship suffered harm, but they suffered different and distinct harms. The occupants of the canoe suffered physical harm while the ship owners suffered economic harm distinct from those physical injuries. Allowing recovery for only one type of loss would leave the other loss uncompensated for no obvious reason. The liability stretching rationale, as I see it, justifies imposing liability in these circumstances.

réglementaire, et il n'en découlera pas de risque de responsabilité pour atteinte par un moyen illégal. Cette démarche évite de « délictualiser » le régime légal en matière criminelle ou réglementaire en imposant une responsabilité civile là où il n'y en aurait pas (voir *OBG*, par. 57 et 266). Les deux éléments essentiels du délit d'atteinte par un moyen illégal sont donc les suivants : le défendeur a recours à un moyen illégal, au sens étroit du terme, et le défendeur cause intentionnellement un préjudice au demandeur.

[46] Au moins deux objections ont été formulées à l'égard du fondement intéressant l'extension du champ de la responsabilité, mais aucune ne me paraît convaincante.

[47] Suivant la première objection, ce fondement ne permet pas d'expliquer pourquoi il devrait y avoir responsabilité à l'égard du demandeur dans les situations où le tiers a également subi un préjudice (voir Neyers, p. 232). Pour ceux qui élèvent cette objection, la « lacune » en matière de responsabilité n'intervient que si A commet une faute à l'endroit de B, mais que seul C en subit un préjudice, et elle provient du fait que ni B ni C n'ont de recours. À leur avis, si le délit d'atteinte par un moyen illégal vise à combler cette lacune, on pourrait difficilement justifier l'imposition d'une responsabilité dans les cas classiques, tel celui de *Tarleton*, où le tiers avait également subi un préjudice et pouvait valablement exercer un droit d'action. J'estime toutefois que l'objection repose sur une conception trop étroite de la « lacune ». Il est souhaitable d'étendre le champ de la responsabilité même si d'autres formes d'action peuvent être exercées. Prenons l'exemple de *Tarleton* : les passagers du canot et le navire marchand concurrent ont subi un préjudice, quoique distinct. Dans le cas des passagers du canot, le préjudice était d'ordre physique tandis que, dans le cas des propriétaires du navire, il était d'ordre économique. En permettant le recouvrement d'un seul type de perte, on négligerait l'autre perte sans raison évidente. Le fondement intéressant l'extension du champ de la responsabilité, de mon point de vue, justifie l'imposition d'une responsabilité dans cette situation.

[48] The second potential objection to the liability stretching rationale is that it provides a cause of action even though no right of the plaintiff has been engaged by the defendant's conduct: see Neyers, at p. 232. But the question is whether there ought to be a right of recovery. The affirmative answer rests on the notion that a modest expansion of the range of persons who can sue is justified where the breach of an existing duty to one party is intended to, and does, economically harm another.

[49] I conclude that the best rationale for the unlawful means tort is "liability stretching", a rationale that favours a narrow approach to the unlawful means requirement.

(c) *Review of the Jurisprudence*

[50] The case law does not form a tidy package of consistent approaches. But on balance it favours a narrow approach to the unlawful means requirement.

(i) England and Wales

[51] The leading case on the unlawful means tort in England is the decision of the House of Lords in *OBG*. Lord Hoffmann, for the majority, adopted a narrow definition of "unlawful means". The plaintiff will have a claim only where the wrong to the third party would have been actionable at the instance of that third party: *OBG*, at para. 49. The only exception identified by Lord Hoffmann to this narrow view was that the defendant would still be liable if the third party would have had an action but for the fact that he or she had suffered no loss. This exception is tailored to capture facts where the loss is suffered by the plaintiff rather than the third party, as where, for example, the defendant intimidates the third party into acting to the detriment of the plaintiff. Lord Hoffmann added a further requirement to his definition of "unlawful means": the unlawful means must interfere with the third party's "freedom to deal with the claimant": para. 51. The plaintiff must therefore have an economic interest at stake in the interference by the defendant with the third party.

[48] La seconde objection possible est que ce fondement reconnaît une cause d'action au demandeur même si la conduite du défendeur n'a porté atteinte à aucun de ses droits (voir Neyers, p. 232). Or, il faut plutôt se demander s'il devrait y avoir un droit d'indemnisation. La réponse affirmative à cette question s'explique ainsi : la modeste extension d'un droit de recours se justifie dans les cas où un manquement à une obligation existante envers une partie vise à causer un préjudice économique à une autre, et y parvient.

[49] Je conclus donc que le fondement intéressant l'« extension du champ de la responsabilité » est préférable, fondement du délit d'atteinte par un moyen illégal qui favorise une définition étroite du critère du moyen illégal.

c) *Examen de la jurisprudence*

[50] Les décisions en cette matière ne forment pas un ensemble ordonné de raisonnements semblables, mais elles préconisent, de façon générale, une définition étroite du critère du moyen illégal.

(i) Angleterre et Pays de Galles

[51] En Angleterre, larrêt de principe sur le délit d'atteinte par moyen illégal est celui rendu par la Chambre des lords dans l'affaire *OBG*. Lord Hoffmann, auteur de l'opinion majoritaire, a adopté une définition étroite de « moyen illégal », selon laquelle l'action du demandeur n'est possible que lorsque la faute commise à l'endroit du tiers donnerait à ce dernier matière à procès (*OBG*, par. 49). La seule exception à cette définition étroite formulée par lord Hoffmann veut que le défendeur puisse quand même être tenu responsable si le tiers aurait pu exercer un recours n'eut été l'absence de perte. Cette exception vise les situations où le demandeur, et non le tiers, subit la perte, comme lorsque le défendeur intimide le tiers pour que celui-ci agisse au détriment du demandeur. Lord Hoffmann a ajouté une exigence à la définition de « moyen illégal » : le moyen doit entraver la [TRADUCTION] « liberté [du tiers] de traiter avec le demandeur » (par. 51). L'ingérence du défendeur dans les affaires du tiers doit donc nuire à un intérêt économique du demandeur.

[52] The majority in *OBG* rejected the much broader view of unlawful means adopted by Lord Nicholls. On that wider view, “unlawful means” comprise “all acts which a person is not permitted to do. The distinction is between ‘doing what you have a legal right to do and doing what you have no legal right to do’”: para. 150, citing Lord Reid in *Rookes v. Barnard*, [1964] A.C. 1129, at pp. 1168-69. “Unlawful means” include common law torts, statutory torts, crimes, breaches of contract, breaches of trust and equitable obligations, breaches of confidence, and so on: para. 150. To this broad definition of “unlawful means”, Lord Nicholls added the requirement that the plaintiff must be harmed through the “instrumentality” of the third party: paras. 159-60.

[53] Less than a year after *OBG*, the House of Lords reconsidered the scope of “unlawful means”, but this time in the context of unlawful means conspiracy: *Revenue and Customs Commissioners v. Total Network SL*, [2008] UKHL 19, [2008] 1 A.C. 1174. The House of Lords distinguished the conspiracy tort from the unlawful means tort and held that a more flexible definition of “unlawful means” was needed in the conspiracy context: paras. 44, 76-77 and 94. Their Lordships echoed the views of Lord Nicholls in *OBG* in noting that criminal conduct is “at the top end” of “the scale of blameworthy conduct”: see para. 91, *per* Lord Walker of Gestingthorpe.

(ii) Australia

[54] While the position in Australia is not entirely settled, it is clear that the unlawful means tort will have at most a modest role to play in that country. In its most recent case on the unlawful means tort, the High Court left open the question of whether or not the independent tort of causing loss by unlawful means was even part of Australian law: *Sanders v. Snell*, [1998] HCA 64, 196 C.L.R. 329. Lower court decisions suggest that if the tort does exist, it exists in a narrow form similar to that articulated in *OBG*: *Canberra Data Centres Pty Ltd. v. Vibe*

[52] Dans *OBG*, les juges majoritaires ont rejeté la notion beaucoup plus large de moyen illégal retenue par lord Nicholls, pour qui constitue un « moyen illégal » [TRADUCTION] « tout acte qu'une personne n'est pas autorisée à accomplir. La distinction s'opère entre “ce qu'on a juridiquement le droit de faire et ce qu'on n'a pas juridiquement le droit de faire” » (par. 150, citant lord Reid dans *Rookes c. Barnard*, [1964] A.C. 1129, p. 1168-1169). Les « moyens illégaux » comprennent les délits civils de common law, les délits civils d'origine législative, les crimes, les ruptures de contrat, la violation de fiducie et d'obligations en equity, l'abus de confiance et ainsi de suite (par. 150). Lord Nicholls complète cette définition large en y ajoutant l'exigence que le préjudice ait été causé au demandeur par [TRADUCTION] « l'intermédiaire » d'un tiers (par. 159-160).

[53] Moins d'un an après *OBG*, la Chambre des lords a réexaminé la portée du « moyen illégal », cette fois dans le contexte du complot exécuté par des moyens illégaux (*Revenue and Customs Commissioners c. Total Network SL*, [2008] UKHL 19, [2008] 1 A.C. 1174). Elle a établi une distinction entre ce délit et le délit d'atteinte par un moyen illégal, et elle a jugé qu'une définition plus souple du « moyen illégal » s'appliquait dans le contexte du complot (par. 44, 76-77 et 94). Les lords juges ont fait écho à l'opinion de lord Nicholls dans *OBG*, faisant remarquer qu'une conduite criminelle se situe [TRADUCTION] « dans le haut » de « la fourchette des comportements condamnables » (voir par. 91, le lord Walker of Gestingthorpe).

(ii) Australie

[54] Bien que la position australienne n'a pas entièrement cristallisé, il ne fait aucun doute que le délit d'atteinte par un moyen illégal jouera tout au plus un rôle modeste dans ce pays. Dans sa plus récente décision en cette matière, la Haute Cour a laissé en suspens la question de savoir si le délit distinct qui consiste à causer une perte par un moyen illégal existait même en droit australien (*Sanders c. Snell*, [1998] HCA 64, 196 C.L.R. 329). Des décisions d'instances inférieures laissent entendre que si ce délit existe effectivement, il revêt une

Constructions (ACT) Pty Ltd., [2010] ACTSC 20, 173 A.C.T.R. 33, at para. 141; *Hardie Finance Corporation Pty Ltd. v. Ahern (No. 3)*, [2010] WASC 403 (AustLII); see also K. Barker et al., *The Law of Torts in Australia* (5th ed. 2012), at pp. 291 ff.

(iii) New Zealand

[55] The unlawful means tort is more firmly established in New Zealand and a narrow approach is taken to the unlawful means requirement: *Van Camp Chocolates Ltd. v. Aulsebrooks Ltd.*, [1984] 1 N.Z.L.R. 354 (C.A.). More recently, in *Diver v. Loktronic Industries Ltd.*, [2012] NZCA 131 (NZLII), the New Zealand Court of Appeal adopted Lord Hoffmann's analysis of the unlawful means tort in *OBG*, although this may not be the final word on the subject, as the analysis is brief and it is not clear that the point was argued: see para. 100.

(iv) United States

[56] The approach in several states of the United States departs markedly from the Commonwealth jurisprudence. In many states, liability is imposed where the defendant's conduct is "improper". In the several states that follow the *Restatement of the Law, Second: Torts 2d* (1989), this is determined by reference to a combination of factors including the defendant's motive, the nature of the plaintiff's interest, and the social value of the defendant's conduct: see § 767. The lack of an "unlawful means" requirement in most U.S. states has been criticized as creating commercial uncertainty, although this approach also has its defenders: H. S. Perlman, "Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine" (1982), 49 *U. Chicago L. Rev.* 61; compare J. C. Estes, "Expanding Horizons in the Law of Torts — Tortious Interference" (1974), 23 *Drake L. Rev.* 341; see also L. Watkins, "Tort Law — Tortious Interference with Business Expectancy — A Trap for the Wary and Unwary Alike" (2012), 34 *U. Ark. Little Rock L. Rev.* 619. Given the fundamentally different paths which Anglo-Canadian

forme étroite semblable à celle qui est expliquée dans *OBG (Canberra Data Centres Pty Ltd. c. Vibe Constructions (ACT) Pty Ltd.)*, [2010] ACTSC 20, 173 A.C.T.R. 33, par. 141; *Hardie Finance Corporation Pty Ltd. c. Ahern (No. 3)*, [2010] WASC 403 (AustLII); voir aussi K. Barker et autres, *The Law of Torts in Australia* (5^e éd. 2012), p. 291 et suiv.).

(iii) Nouvelle-Zélande

[55] Le délit d'atteinte par un moyen illégal est mieux établi en Nouvelle-Zélande, et le critère du moyen illégal y reçoit une interprétation étroite (*Van Camp Chocolates Ltd. c. Aulsebrooks Ltd.*, [1984] 1 N.Z.L.R. 354 (C.A.)). Dans l'arrêt plus récent *Diver c. Loktronic Industries Ltd.*, [2012] NZCA 131 (NZLII), la Cour d'appel de la Nouvelle-Zélande a adopté l'analyse du délit d'atteinte par un moyen illégal exposée par lord Hoffmann dans *OBG*. Or, il se peut que ce ne soit pas le dernier mot sur la question, car l'analyse est brève, et il n'est pas certain que ce point ait été plaidé (voir le par. 100).

(iv) États-Unis

[56] La jurisprudence dans plusieurs États américains diffère sensiblement de celle du Commonwealth. Dans plusieurs États, la responsabilité découle de la conduite [TRADUCTION] « répréhensible » du défendeur, ce qui, dans les États qui appliquent le *Restatement of the Law, Second : Torts 2d* (1989), appelle l'examen d'un ensemble de facteurs, notamment le motif du défendeur, la nature de l'intérêt du demandeur et la valeur sociale de la conduite du défendeur (voir l'art. 767). Certains auteurs déplorent l'incertitude en matière commerciale qui découle de l'absence, dans la plupart des États américains, du critère du « moyen illégal », mais cette approche a ses partisans (H. S. Perlman, « Interference with Contract and Other Economic Expectancies : A Clash of Tort and Contract Doctrine » (1982), 49 *U. Chicago L. Rev.* 61; comparer avec J. C. Estes, « Expanding Horizons in the Law of Torts — Tortious Interference » (1974), 23 *Drake L. Rev.* 341; voir aussi L. Watkins, « Tort Law — Tortious Interference with Business Expectancy — A Trap for the Wary and Unwary Alike » (2012), 34 *U. Ark. Little Rock*

and American tort law have taken on this subject, there is no need to examine the American jurisprudence in greater detail here. It is sufficient to note that the feared dangers associated with a broad approach to this tort appear to have materialized.

(v) Canada

[57] The position in the common law jurisdictions, as I read it, favours a narrow understanding of the unlawful means requirement. I will examine first the previous decisions of this Court and then turn to the jurisprudence from Canadian appellate courts.

[58] There is only one decision of this Court dealing with the unlawful means tort, although the Court has also addressed the unlawful means requirement in the context of unlawful means conspiracy and intimidation. I read this jurisprudence as being consistent with a narrow approach to unlawful means in the unlawful means tort context.

[59] The case addressing the unlawful means tort is *International Brotherhood of Teamsters v. Therien*, [1960] S.C.R. 265. Mr. Therien owned a small trucking business which loaned trucks and drivers to a construction company in British Columbia. After the employees of the construction company unionized, Mr. Therien was told that he needed to join the union, which he did not do. The union threatened to picket the construction company, which then decided to cease doing business with Mr. Therien. Mr. Therien brought an action against the union for interference with business by illegal means. Locke J. held that the union's threat to picket the employer was a breach of its obligation under the collective agreement to submit disputes relating to the agreement to arbitration and of s. 21 of the *Labour Relations Act*, S.B.C. 1954, c. 17, which made it an offence for any person to violate an obligation arising under a collective agreement. Locke J. held that "to ascertain whether the means employed were illegal inquiry may be made both at

L. Rev. 619). Puisque le droit de la responsabilité délictuelle américain diffère fondamentalement du droit anglo-canadien sur ce point, il est inutile de pousser plus avant l'examen de la jurisprudence américaine. Il suffit de signaler que les craintes relatives à l'adoption d'une définition large de ce délit semblent s'être matérialisées.

(v) Canada

[57] La position des ressorts de common law, telle que je l'interprète, favorise une interprétation étroite du critère du moyen illégal. Mon examen portera d'abord sur les arrêts antérieurs de la Cour puis abordera la jurisprudence des cours d'appel canadiennes.

[58] Un seul arrêt de la Cour concerne le délit d'atteinte par un moyen illégal; la Cour a toutefois analysé le critère du moyen illégal en rapport avec le complot exécuté par des moyens illégaux et l'intimidation. Selon moi, cette jurisprudence va dans le sens d'une définition étroite du moyen illégal dans le contexte du délit d'atteinte par un moyen illégal.

[59] L'arrêt intéressant le délit d'atteinte par un moyen illégal est *International Brotherhood of Teamsters c. Therien*, [1960] R.C.S. 265. M. Therien exploitait une petite entreprise de camionnage qui louait des véhicules et les services de chauffeurs à une entreprise de construction en Colombie-Britannique. Les employés de l'entreprise de construction se sont syndiqués, et M. Therien a été informé qu'il devait adhérer au syndicat, ce qu'il n'a pas fait. Le syndicat a menacé de piquetage l'entreprise de construction, et celle-ci a mis fin à ses rapports commerciaux avec M. Therien, lequel a poursuivi le syndicat pour atteinte à des relations commerciales par un moyen illégal. Le juge Locke a statué qu'en menaçant l'employeur de piquetage le syndicat avait contrevenu à l'obligation prévue à la convention collective de soumettre à l'arbitrage les différends relatifs à cette convention et avait enfreint l'art. 21 de la *Labour Relations Act*, S.B.C. 1954, ch. 17, aux termes duquel constituait une infraction la violation de toute obligation découlant

common law and of the statute law" and concluded that both the union's breach of contract and breach of statute constituted unlawful means: p. 280.

[60] The intervener, the Attorney General of British Columbia, argues that the inclusion of statutory offences within the scope of the unlawful means tort in *Therien* precludes the adoption of the narrow view of the tort. I do not think this is the case for two reasons.

[61] First, it was not necessary to rely on the breach of statute in *Therien*: the conduct giving rise to the claim was also a breach of the collective agreement between the union and the company employing Mr. Therien's firm: see pp. 283-84, *per* Cartwright J. In any case, there was no analysis of the question whether unlawful means may include all breaches of statute.

[62] Second, the comments in *Therien* about civil liability for breach of statute must be read in light of this Court's subsequent jurisprudence about the interplay between statutory duties and civil causes of action: see, e.g., *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129. The law in this regard has evolved significantly since *Therien* and the brief reference to breach of statute must be read in light of those developments. The position that I propose in relation to the scope of unlawful means is consistent with this approach. A breach of statute will constitute unlawful means if it would be otherwise actionable under the principles developed in these later cases. While this Court has held that the unlawful means

d'une convention collective. Le juge Locke a indiqué que [TRADUCTION] « l'illégalité du moyen peut s'évaluer au regard tant de la common law que des textes législatifs », et conclu que la rupture de contrat et le manquement à une disposition législative par le syndicat constituaient tous deux un moyen illégal (p. 280).

[60] Selon le procureur général de la Colombie-Britannique, intervenant en l'espèce, comme la Cour dans *Therien* indique qu'une infraction à une disposition législative peut constituer le délit d'atteinte par un moyen illégal, la définition étroite du délit est impossible. Je ne suis pas de cet avis, pour deux raisons.

[61] Premièrement, il n'était pas nécessaire, dans *Therien*, de fonder le raisonnement sur l'infraction à la disposition législative : la conduite donnant lieu à la poursuite contrevainait également à la convention collective intervenue entre le syndicat et l'entreprise qui faisait affaire avec le commerce de M. Therien (voir p. 283-284, le juge Cartwright). De toute manière, la Cour n'a pas examiné la question de savoir si toute infraction à une disposition législative peut constituer un moyen illégal.

[62] Deuxièmement, la jurisprudence subséquente de la Cour au sujet de l'interaction entre les obligations légales et les causes d'action civiles doit éclairer notre lecture des commentaires formulés dans *Therien* au sujet de la responsabilité civile découlant d'une infraction à une disposition législative (voir, p. ex., *La Reine du chef du Canada c. Saskatchewan Wheat Pool*, [1983] 1 R.C.S. 205; *Edwards c. Barreau du Haut-Canada*, 2001 CSC 80, [2001] 3 R.C.S. 562; *Succession Odhavji c. Woodhouse*, 2003 CSC 69, [2003] 3 R.C.S. 263; *Hill c. Commission des services policiers de la municipalité régionale de Hamilton-Wentworth*, 2007 CSC 41, [2007] 3 R.C.S. 129). Le droit à cet égard a beaucoup évolué depuis l'arrêt *Therien*, et c'est à la lumière de cette évolution qu'il faut interpréter la brève mention qui y est faite à propos de l'inobservation de dispositions législatives. La position que je propose relativement à la portée du moyen illégal va dans ce sens. L'infraction à une

conspiracy tort continues to impose liability for breaches of statute, as I explain below, there is no need for consistency in the unlawful means component of unlawful means conspiracy and of the tort of causing loss by unlawful means.

[63] The Court has also considered the unlawful means requirement in the context of unlawful means conspiracy. In *Gagnon v. Foundation Maritime Ltd.*, [1961] S.C.R. 435, a shipbuilder refused to negotiate with an uncertified union. The union responded by picketing which resulted in a work stoppage which was found to have been an unlawful strike. The shipbuilder sued the union members responsible. A majority of the Court found them liable on the basis of unlawful means conspiracy, reasoning that the means employed by the union were prohibited by statute: “. . . this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy, the carrying out of which exposes the conspirators to an action for damages if any ensue therefrom”: *Gagnon*, at p. 446, *per* Ritchie J.

[64] This approach was also adopted in *LaFarge*. The case involved a conspiracy to prevent or unduly lessen competition in the production of cement contrary to s. 32(1)(c) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. The plaintiff successfully brought an action against the conspirators claiming damages for conspiracy to injure. The Court allowed the appeal of the conspirators on the basis that they did not intend to injure the plaintiff but rather to advance their business interests. However, Estey J. stated for the Court that “the conduct of the appellants, although not directed towards the plaintiff, was unlawful. They have been convicted of offences in contravention of a federal statute and have been fined in company with their fellow accused in the total sum of \$432,000”: *LaFarge*, at

loi constitue un moyen illégal si elle donne ouverture à action conformément aux principes élaborés dans ces arrêts ultérieurs. Bien que la Cour ait jugé que l'inobservation d'une disposition législative emporte la responsabilité dans le cas du délit de complot exécuté par des moyens illégaux, il n'est pas nécessaire, comme on le verra, que la notion de moyen illégal soit la même pour le délit de complot exécuté par des moyens illégaux et pour celui qui consiste à causer une perte par un moyen illégal.

[63] La Cour a aussi examiné le critère du moyen illégal dans le contexte du délit de complot exécuté par des moyens illégaux. Dans l'affaire *Gagnon c. Foundation Maritime Ltd.*, [1961] R.C.S. 435, un syndicat non accrédité s'étant fait opposer un refus de négocier par un constructeur de navire a érigé un piquet de grève qui a entraîné un arrêt de travail, lequel a été jugé constituer une grève illégale. Le constructeur a poursuivi les instigateurs au sein du syndicat. Par jugement majoritaire, la Cour a conclu qu'ils avaient engagé leur responsabilité pour complot exécuté par des moyens illégaux, parce que des dispositions législatives interdisaient les moyens employés : [TRADUCTION] « . . . ce qui suffit en soi à transformer un accord licite qui n'engendrerait aucune cause d'action en complot délictuel dont l'exécution expose les complices à des poursuites en dommages-intérêts s'il en résulte un préjudice quelconque » (*Gagnon*, p. 446, le juge Ritchie).

[64] Ce raisonnement a aussi été suivi dans *LaFarge*, qui portait sur un complot visant à empêcher ou à diminuer indûment la concurrence dans la production de béton en contravention à l'al. 32(1)c) de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23. La demanderesse avait poursuivi en dommages-intérêts les auteurs d'un complot en vue de nuire et avait eu gain de cause. La Cour a accueilli l'appel des auteurs du complot parce qu'ils avaient l'intention, non pas de nuire à la demanderesse, mais de servir leurs propres intérêts commerciaux. Le juge Estey, au nom de la Cour, a cependant indiqué que « si elle n'était pas dirigée contre la demanderesse, la conduite des appelantes n'en était pas moins illégale. Elles ont été reconnues coupables d'avoir commis des

p. 472. The Court confirmed the *LaFarge* understanding of unlawful means conspiracy in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at pp. 984-90.

[65] The scope of unlawful means has also arisen in the context of the tort of intimidation. Intimidation is committed when the defendant threatens to commit an unlawful act and in so doing causes loss to the person threatened (two-party intimidation) or to a third party (three-party intimidation). The tort of intimidation was recognized before the unlawful means tort fully in its present form was well established: Fridman, at p. 765.

[66] In *Roman Corporation Ltd. v. Hudson's Bay Oil and Gas Co. Ltd.*, [1973] S.C.R. 820, the Court recognized the tort of intimidation, though held that it was not available in that case as there had been no threat to use unlawful means: pp. 829-30. The tort of intimidation reached this Court again in the case of *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42. The Minister of Mineral Resources threatened to cancel the plaintiff's mineral leases if it did not lower its potash production under regulations which on separate grounds were held to be *ultra vires*. Martland J. rejected the plaintiff's claim in intimidation on the grounds that the Minister lacked the necessary intention for the tort. The Minister had not acted unreasonably, let alone intentionally. Martland J. also distinguished between two-party and three-party intimidation. He held that, unlike the three-party scenario, in a two-party intimidation case a mere threat to breach a contract could not ground liability because the plaintiff should be left to the remedies available under the contract: *Central Canada Potash*, at p. 87. This Court reiterated the application of the intimidation tort to both two-party and three-party situations in *Pepsi-Cola*, at para. 113.

infractions à une loi fédérale et elles se sont vu avec leurs coaccusées imposer des amendes totalisant 432 000 \$ » (*LaFarge*, p. 472). Cette conception du complot exécuté par des moyens illégaux a été confirmée dans *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959, p. 984-990.

[65] La question de la portée du moyen illégal s'est également posée dans le contexte du délit d'intimidation. Il y a intimidation lorsque le défendeur menace de commettre un acte illégal et occasionne ainsi des pertes à la personne menacée (intimidation dans une situation mettant en cause deux parties) ou à un tiers (intimidation dans une situation mettant en cause trois parties). Le délit d'intimidation a été reconnu avant que le délit d'atteinte par un moyen illégal dans sa forme actuelle ne soit bien établi (Fridman, p. 765).

[66] Dans *Roman Corporation Ltd. c. Hudson's Bay Oil and Gas Co. Ltd.*, [1973] R.C.S. 820, la Cour a reconnu le délit d'intimidation tout en concluant qu'il ne pouvait être invoqué dans ce cas parce qu'il n'y avait pas eu menace de recours à des moyens illégaux (p. 829-830). La Cour a eu à se prononcer une fois de plus sur ce délit dans l'affaire *Central Canada Potash Co. c. Gouvernement de la Saskatchewan*, [1979] 1 R.C.S. 42. Le ministre des Ressources minérales avait menacé d'annuler le bail de droit minier de la demanderesse si elle ne réduisait pas sa production de potasse en application d'un règlement qui a été jugé *ultra vires* pour d'autres motifs. Le juge Martland a rejeté la demande fondée sur l'intimidation parce que le ministre n'avait pas eu l'intention nécessaire pour qu'il y ait délit. Il n'avait pas agi de façon déraisonnable, et encore moins de façon intentionnelle. Le juge Martland établit également une distinction entre la situation mettant en cause deux parties et celle mettant en cause trois parties, estimant que, dans le premier cas, la simple menace de rupture de contrat n'emporte pas responsabilité, parce que le demandeur peut se prévaloir des recours contractuels, ce qui n'est pas vrai dans le deuxième cas (*Central Canada Potash*, p. 87). Au par. 113 de l'arrêt *Pepsi-Cola*, la Cour revient sur l'application du délit d'intimidation dans l'un et l'autre cas.

[67] The Court has clearly taken a different approach to “unlawful means” in the context of unlawful means conspiracy and intimidation than I propose to adopt in the context of the unlawful means tort. For example, liability based on all breaches of statute is more clearly established in the context of the unlawful means conspiracy tort. Not only *Gagnon* but also *LaFarge* involved liability in the unlawful means conspiracy tort for breaches of statute. Does this suggest that a broader approach should also be followed in the unlawful means tort? In my view, it does not.

[68] While the economic torts may sometimes develop along parallel lines, they have distinct historical roots and roles to play in the regulation of the modern marketplace. So, for example, this Court in *Central Canada Potash* accepted the proposition that a narrower definition of “unlawful means” applies in the two-party intimidation tort than in the three-party intimidation tort. This suggests that there is no general requirement of consistency in the elements of the economic torts. Similarly, the House of Lords accepted the need for different definitions of “unlawful means” for the unlawful means and conspiracy torts in *Total Network*. As Lord Mance put it, “[t]he two torts are different in their nature, and the interests of justice may require their development on somewhat different bases”: para. 123. This same point was made recently by Goudge J.A. on behalf of the Ontario Court of Appeal, who stated that “these two economic torts [i.e. the unlawful means and conspiracy torts] have evolved separately, and thus each ha[s] developed [its] own concept of unlawful conduct”: *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 34; see also R. Stevens, *Torts and Rights* (2007), at p. 297. Moreover, it may well be that the presence of an agreement in the tort of conspiracy justifies a different and broader definition of “unlawful means” for the tort of “unlawful means” conspiracy than is appropriate for the unlawful means tort. This is illustrated by the Court’s retention, although as an anomaly, of the so-called predominant purpose conspiracy tort on the basis that the fact of agreement between

[67] En matière de complot et d’intimidation, la Cour aborde clairement le « moyen illégal » d’une manière différente de celle que je propose pour le délit d’atteinte par un moyen illégal. Par exemple, il est établi plus clairement dans le contexte du délit de complot exécuté par des moyens illégaux que dans le contexte de l’atteinte par un moyen illégal que la responsabilité peut découler de toute infraction à une loi. Les affaires *Gagnon* et *LaFarge* portaient sur la responsabilité pour complot exécuté par des moyens illégaux en cas d’infraction à une disposition législative. Faut-il en conclure que le délit d’atteinte par un moyen illégal doit être défini largement? J’estime que non.

[68] Bien que les délits économiques puissent parfois évoluer parallèlement, ils ont des origines distinctes et jouent des rôles différents dans la régulation du marché moderne. Par exemple, dans l’arrêt *Central Canada Potash*, la Cour accepte la proposition selon laquelle une définition de « moyen illégal » plus étroite s’applique aux situations d’intimidation mettant en cause deux parties qu’à celles mettant en cause trois parties. On peut conclure qu’il n’existe pas de grand principe d’uniformité des éléments de ce type de délits. De même, la Chambre des lords a reconnu, dans *Total Network*, que le « moyen illégal » devait être défini différemment selon qu’il s’agit du délit d’atteinte ou du délit de complot. Comme lord Mance l’a expliqué, [TRADUCTION] « [l]es deux délits sont de nature distincte, et il se peut que l’intérêt de la justice commande qu’ils évoluent en fonction de fondements quelque peu différents » (par. 123). S’exprimant au nom de la Cour d’appel de l’Ontario, le juge Goudge a repris le même raisonnement, affirmant que [TRADUCTION] « ces deux délits économiques [à savoir le délit d’atteinte par un moyen illégal et le délit de complot] ont évolué séparément, de sorte qu’ils présentent chacun leur propre notion de ce qu’il faut entendre par conduite illégale » (*Agribrands Purina Canada Inc. c. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, par. 34; voir aussi R. Stevens, *Torts and Rights* (2007), p. 297). En outre, il se peut que l’existence d’une entente comme élément constitutif du délit de complot justifie une définition différente et plus large de « moyen illégal » dans le contexte de ce

conspirators (or “combination”) could itself justify imposing liability: see, e.g., *LaFarge*, at pp. 471-72, *per* Estey J.

[69] I conclude that it is not necessary to seek identical treatment of the unlawful means component for all of the torts of which it is a requirement. The Court has not insisted on this uniformity in the past and there are reasons of principle that support different approaches in different contexts. Of course, my reasons in this case are confined to the unlawful means tort and nothing I have said should be taken as opining on the elements of other torts which are not before us for decision in this case.

[70] To conclude the review of this Court’s jurisprudence, it does not settle the point before us for decision and the Court has not addressed the unlawful means requirement in this context since *Therien*.

[71] The unlawful means tort has been addressed by many appellate courts across the country: see, e.g., *Gershman v. Manitoba Vegetable Producers’ Marketing Board* (1976), 69 D.L.R. (3d) 114 (Man. C.A.); *Conway v. Zinkhofer*, 2008 ABCA 392 (CanLII); *Polar Ice Express Inc. v. Arctic Glacier Inc.*, 2009 ABCA 20, 446 A.R. 295; *R.L.T.V. Investments Inc. v. Saskatchewan Telecommunications*, 2009 SKCA 83, 331 Sask. R. 78, leave to appeal refused, [2010] 1 S.C.R. xiv. In decisions that address the unlawful means component, there has been a general trend towards a narrower understanding of it. Earlier cases such as *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.), had advanced a broad definition of “unlawful means” that included any act the

délit que celle qui conviendrait dans celui du délit d’atteinte. Une telle interprétation est illustrée par le fait que la Cour reconnaît la réalité de ce qu’on a appelé le délit de complot visant principalement à causer un préjudice, même si elle admet qu’il s’agit d’une anomalie, et estime que l’existence même d’une entente entre les auteurs du complot (ou d’un acte commis « de concert ») suffit à engendrer la responsabilité (voir, p. ex., *LaFarge*, p. 471-472, le juge Estey).

[69] Je suis d’avis qu’il n’est pas nécessaire de chercher à traiter de manière identique la notion de moyen illégal à l’égard de chaque délit dont elle représente un élément constitutif. La Cour n’a pas insisté sur une telle uniformité par le passé, et des raisons de principe militent en faveur de l’adoption d’une définition différente dans des contextes différents. Bien entendu, mes motifs dans la présente affaire n’intéressent que le délit d’atteinte par un moyen illégal et ne devraient pas être interprétés comme une opinion sur les éléments constitutifs d’autres délits qui n’ont pas été invoqués en l’espèce.

[70] En somme, l’examen de la jurisprudence de la Cour ne nous permet pas de trancher la présente espèce et révèle que la Cour n’a pas statué sur le critère du moyen illégal dans ce contexte depuis l’arrêt *Therien*.

[71] De nombreuses cours d’appel canadiennes ont examiné le délit d’atteinte par un moyen illégal (voir, p. ex., *Gershman c. Manitoba Vegetable Producers’ Marketing Board* (1976), 69 D.L.R. (3d) 114 (C.A. Man.); *Conway c. Zinkhofer*, 2008 ABCA 392 (CanLII); *Polar Ice Express Inc. c. Arctic Glacier Inc.*, 2009 ABCA 20, 446 A.R. 295; *R.L.T.V. Investments Inc. c. Saskatchewan Telecommunications*, 2009 SKCA 83, 331 Sask. R. 78, autorisation d’appel refusée, [2010] 1 R.C.S. xiv). La tendance générale qui se dégage de leur analyse du moyen illégal à titre d’élément constitutif du délit favorise une définition plus étroite. Dans des affaires plus anciennes, comme *Reach M.D. Inc. c. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.), une définition large de ce qui constitue un « moyen

defendant “is not at liberty to commit”: paras. 50-52, citing Lord Denning M.R. in *Torquay Hotel Co., Ltd. v. Cousins*, [1969] 1 All E.R. 522, at p. 530. However, *Reach* has been narrowed by subsequent decisions: *Drouillard v. Cogeco Cable Inc.*, 2007 ONCA 322, 86 O.R. (3d) 431, at paras. 22-24; *Conversions by Vantasy Ltd. v. General Motors of Canada Ltd.*, 2006 MBCA 69, 205 Man. R. (2d) 131, at paras. 31-33, leave to appeal refused, [2007] 1 S.C.R. viii; *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, at para. 107; *O'Dwyer v. Ontario Racing Commission*, 2008 ONCA 446, 293 D.L.R. (4th) 559, at paras. 57-59. The Ontario Court of Appeal has confirmed that it “has now opted for the Lord Hoffmann side of the debate” in *OBG* and adopted the narrow definition of “unlawful means”: see *Alleslev-Krofchak v. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193, at paras. 57 and 63, leave to appeal refused, [2011] 1 S.C.R. xi; *Agribrands Purina*, at para. 33; although compare *Barber v. Vrozos*, 2010 ONCA 570, 322 D.L.R. (4th) 577, at para. 58. *Therien* does not appear to have been addressed in any of these decisions.

[72] I conclude my review by noting the fundamentally different approach which the civil law of Quebec takes to this problem. It offers what is perhaps a more straightforward analysis under the doctrine of “abuse of rights”: see *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 24. This doctrine is rooted in the *Civil Code of Québec*, S.Q. 1991, c. 64, which provides in art. 6 that “[e]very person is bound to exercise his civil rights in good faith” and in art. 7 that “[n]o right may be exercised with the intent of injuring another”.

[73] The civil law of Quebec thus goes farther than the Anglo-Canadian unlawful means tort: under the civil law, liability may be imposed on the defendant for conduct which is otherwise lawful but which is done with the intent to injure the plaintiff or in a manner inconsistent with the social ends of that right: J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and

illégal » avait été formulée et elle incluait tout acte que le défendeur [TRADUCTION] « n'a pas le droit de faire » (par. 50-52, citant le maître des rôles lord Denning dans *Torquay Hotel Co., Ltd. c. Cousins*, [1969] 1 All E.R. 522, p. 530). Toutefois, des décisions subséquentes ont réduit la portée de la définition formulée dans *Reach* (*Drouillard c. Cogeco Cable Inc.*, 2007 ONCA 322, 86 O.R. (3d) 431, par. 22-24; *Conversions by Vantasy Ltd. c. General Motors of Canada Ltd.*, 2006 MBCA 69, 205 Man. R. (2d) 131, par. 31-33, autorisation d'appel refusée, [2007] 1 R.C.S. viii; *Correia c. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, par. 107; *O'Dwyer c. Ontario Racing Commission*, 2008 ONCA 446, 293 D.L.R. (4th) 559, par. 57-59). La Cour d'appel de l'Ontario a confirmé qu'elle [TRADUCTION] « opte à présent pour la position soutenue par lord Hoffmann » dans *OBG* et retient la définition étroite de « moyen illégal » (voir *Alleslev-Krofchak c. Valcom Ltd.*, 2010 ONCA 557, 322 D.L.R. (4th) 193, par. 57 et 63, autorisation d'appel refusée, [2011] 1 R.C.S. xi; *Agribrands Purina*, par. 33; mais comparer avec *Barber c. Vrozos*, 2010 ONCA 570, 322 D.L.R. (4th) 577, par. 58). Aucune de ces décisions ne semble avoir examiné l'arrêt *Therien*.

[72] Je clos mon examen en signalant la manière fondamentalement différente dont le droit civil du Québec aborde ce problème. Sa doctrine de l’« abus de droit » traduit une démarche possiblement plus simple que celle que propose la common law (voir *Ciment du Saint-Laurent inc. c. Barrette*, 2008 CSC 64, [2008] 3 R.C.S. 392, par. 24). Cette doctrine est issue du *Code civil du Québec*, L.Q. 1991, ch. 64, lequel énonce à l'art. 6 que « [t]oute personne est tenue d'exercer ses droits civils selon les exigences de la bonne foi » et, à l'art. 7, qu’« [a]ucun droit ne peut être exercé en vue de nuire à autrui ».

[73] Le droit civil du Québec va donc plus loin que le droit anglo-canadien et son délit d’atteinte par un moyen illégal : il reconnaît la responsabilité du défendeur ayant commis un acte légal par ailleurs, mais accompli dans l'intention de nuire au demandeur ou d'une manière qui n'est pas conforme avec la finalité sociale du droit d'exercer cet acte (J.-L. Baudouin et P.-G. Jobin,

N. Vézina, at paras. 156-58. It may well be that the conduct of the appellants in this case would have constituted an abuse of their rights as property manager and the case could thus have been resolved on these grounds under civil law. However, the common law has taken a very different path.

(d) *Conclusion Regarding the Unlawfulness Requirement*

[74] In light of the examination of the jurisprudence in this country and comparable common law jurisdictions, the trend of authority is towards a narrow definition of “unlawful means”. In addition to being consistent with precedent, this approach is also in my view desirable in principle. Restricting unlawful means to acts that would give rise to civil liability to the third party (or would do so if the third party suffered loss from them) provides a coherent and rational basis for the development of the unlawful means tort. The limitation of unlawful means to actionable civil wrongs provides certainty and predictability in this area of the law, since it does not expand the types of conduct for which a defendant may be held liable but merely adds another plaintiff who may recover if intentionally harmed as a result of that conduct. While details relating to the scope of what is “actionable” may need to be worked out in the future, the basic contours of liability would be clear: see *Alleslev-Krofchak*, at para. 63. This approach does not risk “tortifying” conduct rendered illegal by statute for reasons remote from civil liability: see *OBG*, at paras. 57 and 152. The narrow definition of “unlawful means”, in short, keeps tort law within its proper bounds.

[75] There are of course arguments to the contrary. I concede that it may in some cases be artificial to limit the plaintiff’s recovery by reference exclusively to factors that relate to the defendant’s liability to the third party. For example, a statutory immunity might be intended to shield the defendant from liability to the third party for reasons which have nothing to do with the plaintiff: see Deakin

Les obligations (7^e éd. 2013), par P.-G. Jobin et N. Vézina, par. 156-158). En droit civil, l’on aurait pu conclure à l’abus du droit que les appellants en l’espèce exerçaient en tant que gestionnaires de l’immeuble et régler l’affaire sur ce fondement. Or, la common law emprunte une voie très différente.

d) *Conclusion au sujet du critère du caractère illégal*

[74] L’examen de la jurisprudence du Canada et de ressorts semblables de common law révèle une tendance à définir restrictivement le « moyen illégal ». Non seulement cette conception est-elle conforme à la jurisprudence antérieure, mais elle est souhaitable en principe, à mon avis. En limitant les moyens illégaux aux actes qui engageraient la responsabilité civile de leur auteur envers un tiers (ou qui le feraient si le tiers en avait subi une perte), on permet l’évolution du délit d’atteinte par un moyen illégal selon une assise cohérente et rationnelle. En outre, les restreindre aux délits civils ouvrant droit à action assure la certitude et la prévisibilité dans ce domaine de droit, du fait qu’on ne grossit pas la liste des actes pouvant engager la responsabilité du défendeur, on ne fait qu’ajouter un demandeur, qui peut être indemnisé si la conduite lui a causé préjudice intentionnel. Peut-être faudra-t-il à l’avenir préciser la portée de ce qui « ouvre droit à action », cependant les limites générales de la responsabilité seraient claires (voir *Alleslev-Krofchak*, par. 63). Cette approche ne risque pas de « délictualiser » une conduite que le législateur a rendue illégale pour des raisons sans rapport avec la responsabilité civile (voir *OBG*, par. 57 et 152). Une définition étroite de « moyen illégal », en bref, permet de confiner le droit de la responsabilité délictuelle dans la sphère qui doit être la sienne.

[75] Il existe naturellement des arguments contraires. Je concède qu’il puisse parfois y avoir quelque artificialité à refuser l’indemnisation du demandeur exclusivement en fonction de facteurs touchant la responsabilité du défendeur envers un tiers. Par exemple, une immunité d’origine législative peut protéger le défendeur contre toute responsabilité à l’endroit du tiers pour des motifs

and Randall, at p. 545. Looked at from another perspective, however, it is unjust to impose liability on the defendant in such a scenario, since he or she would have not committed a legal wrong. The narrow definition of “unlawful means” may also be criticized as unduly narrow for excluding crimes: see *OBG*, at para. 152, *per* Lord Nicholls; *Total Network*, at paras. 90-94, *per* Lord Walker. This exclusion, however, is much less sweeping than it may at first appear, given that many crimes, such as assault or theft, are also tortious. Other crimes, such as bribery, may still be actionable under the tort of unlawful means conspiracy: see P. W. Lee, “Causing Loss by Unlawful Means”, [2011] *S.J.L.S.* 330, at p. 349 (fn. 115). The possibility that immoral or malicious conduct may not be remediable through the economic torts in some cases is simply a consequence of the Anglo-Canadian conception of the limited role of the common law and is a price worth paying for certainty in this area.

[76] I conclude that in order for conduct to constitute “unlawful means” for this tort, the conduct must give rise to a civil cause of action by the third party or would do so if the third party had suffered loss as a result of that conduct.

(2) Is the Tort Available Only if There Is No Other Cause of Action Available to the Plaintiff Against the Defendant in Relation to the Alleged Misconduct?

[77] The appellants urge us to hold that the unlawful means tort, because it has a gap-filling function, should only be available where the defendant’s conduct does not provide the plaintiff with any other cause of action against the defendant. This was the view of the Court of Appeal in this case and this view has also been adopted by the Ontario Court of Appeal and followed by other Canadian courts. For example, in *Correia*, the unlawful means alleged by the plaintiff were directly actionable in negligence against one of the defendants and in *Alleslev-Krofchak*, the unlawful means were directly actionable in defamation and for this reason,

n’ayant rien à voir avec le demandeur (voir Deakin et Randall, p. 545). Vu autrement, toutefois, il serait injuste d’imposer au défendeur la responsabilité dans un tel cas, puisqu’il n’a commis aucune transgression du droit positif. On peut également reprocher à la définition étroite de « moyen illégal » d’être indûment restrictive du fait qu’elle exclut les crimes (voir *OBG*, par. 152, le lord Nicholls; *Total Network*, par. 90-94, le lord Walker). Toutefois, cette exclusion est beaucoup moins générale qu’elle puisse d’abord le paraître, puisque de nombreux crimes, comme les voies de fait et le vol, constituent également des délits. D’autres crimes, comme la corruption, pourraient aussi ouvrir droit à action sur le fondement du délit de complot exercé par des moyens illégaux (voir P. W. Lee, « Causing Loss by Unlawful Means », [2011] *S.J.L.S.* 330, p. 349 (note de bas de page 115)). La possibilité qu’une conduite immorale ou malveillante ne donne lieu à aucun recours pour délit économique découle simplement de la conception anglo-canadienne du rôle limité de la common law. Il s’agit du prix à payer pour assurer la certitude dans ce domaine.

[76] Je conclus que par « moyen illégal » à l’égard de ce délit on entend la conduite qui donne au tiers une cause d’action civile ou lui en donnerait une si elle lui avait causé une perte.

(2) Le demandeur peut-il invoquer le délit uniquement si l’inconduite reprochée ne fonde aucune autre cause d’action contre le défendeur?

[77] Les appellants exhortent la Cour à statuer que le délit d’atteinte par un moyen illégal, parce que sa fonction consiste à combler une lacune, ne devrait fonder une action que lorsque la conduite du défendeur ne fournit aucune autre cause d’action au demandeur. C’est la conclusion à laquelle est arrivée la Cour d’appel en l’espèce et c’est également la position qui a été adoptée par la Cour d’appel de l’Ontario et d’autres tribunaux canadiens. Dans *Correia*, par exemple, le moyen illégal invoqué par le demandeur ouvrirait droit à une action directe pour négligence contre l’une des parties défenderesses et, dans *Alleslev-Krofchak*, il permettait une

the plaintiffs' claims for causing loss by unlawful means failed: see also *Westcoast Landfill Diversion Corp. v. Cowichan Valley (Regional District)*, 2009 BCSC 53, 55 M.P.L.R. (4th) 208, at paras. 379-87; *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, 2012 BCSC 597, 89 C.B.R. (5th) 235, at para. 47; *Canuck Security Services Ltd. v. Gill*, 2013 BCSC 893 (CanLII), at paras. 188-89. On this view, the tort exists "to fill a gap where no action could otherwise be brought for intentional conduct that caused harm through the instrumentality of a third party": *Correia*, at para. 107. The question is whether we should accept this limitation on the scope of the unlawful means tort. My view is that, for several reasons, we should not.

[78] This limitation seems to me to be wrong in principle. The gist of the tort is the targeting of the plaintiff by the defendant through the instrumentality of unlawful acts against a third party. It is that conduct by the defendant which gives rise to liability quite apart from conduct that may be otherwise actionable by the plaintiff. Moreover, general principles of tort liability accept concurrent liability and overlapping causes of action for distinct wrongs suffered by the plaintiff in respect of the same incident: see, e.g., *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147. Finally, and as I explained earlier, this limitation is premised on an unduly narrow understanding of the "gap-filling" function of the tort. A gap need not be a void.

[79] I do not read *Central Canada Potash* as being contrary to this conclusion. That was a two-party intimidation case and the Court held that the plaintiff could not succeed on the intimidation claim because it was "a party to the contract which it says was threatened to be breached . . . and would have been entitled to pursue its contractual remedies had that contract been illegally breached": p. 87, *per* Martland J. for the Court. However, the Court distinguished two-party intimidation from three-party intimidation and made it clear that the rationale for its holding was limited to two-party cases

poursuite directe pour diffamation; c'est pourquoi les prétentions des demandeurs fondées sur la perte causée par un moyen illégal n'ont pas été accueillies (voir aussi *Westcoast Landfill Diversion Corp. c. Cowichan Valley (Regional District)*, 2009 BCSC 53, 55 M.P.L.R. (4th) 208, par. 379-387; *0856464 B.C. Ltd. c. TimberWest Forest Corp.*, 2012 BCSC 597, 89 C.B.R. (5th) 235, par. 47; *Canuck Security Services Ltd. c. Gill*, 2013 BCSC 893 (CanLII), par. 188-189). Selon cette conception, le délit vise à [TRADUCTION] « combler une lacune lorsqu'aucune autre action ne pourrait être intentée à l'égard d'une conduite intentionnelle qui a causé un préjudice par l'intermédiaire d'un tiers » (*Correia*, par. 107). Convient-il que la Cour accepte de limiter ainsi la portée du délit d'atteinte par un moyen illégal? J'estime que non, pour les raisons que voici.

[78] Cette limitation me semble fondamentalement erronée. L'essence de ce délit est le fait pour le défendeur de prendre pour cible le demandeur par l'intermédiaire d'actes illégaux commis contre un tiers. C'est cette conduite qui emporte la responsabilité du défendeur, indépendamment des actes qui pourraient par ailleurs donner au demandeur matière à procès. Qui plus est, la responsabilité concurrente et le chevauchement de causes d'action pour des préjudices distincts subis par le demandeur lors d'un même incident sont des notions reçues en droit de la responsabilité délictuelle (voir, p. ex., *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147). Enfin, comme je l'explique précédemment, cette limitation procède d'une conception trop étroite de la fonction du délit consistant à combler une lacune. Une lacune n'est pas nécessairement un vide.

[79] Tel que je l'interprète, l'arrêt *Central Canada Potash* ne s'oppose pas à cette conclusion. Dans cette affaire d'intimidation mettant en cause deux parties, la Cour a débouté la demanderesse, qui invoquait l'intimidation par le défendeur parce qu'elle était « partie au contrat que, selon elle, on menaçait de violer [. . .] et elle aurait disposé de recours en vertu du contrat en cas de rupture illégale » (p. 87, le juge Martland, au nom de la Cour). Toutefois, la Cour établit une distinction entre l'intimidation mettant en cause deux parties et celle qui en met en cause trois. Elle précise que

arising from threats to breach a contract between those two parties: pp. 87-88. The underpinning for the Court's holding does not apply to a three-party unlawful means action.

[80] The “not otherwise actionable” requirement is not consistent with the majority view in *OBG* and can be awkward to apply in practice. In *OBG*, Lord Hoffmann accepted that it would be possible for there to be concurrent liability for inducing breach of contract and causing loss by unlawful means, as where the defendant threatens to break his or her contract with the third party in order to convince the third party to breach a separate contract with the plaintiff. Such a scenario might trigger liability both for the tort of inducing a breach of contract and the unlawful means tort, a result which is inconsistent with the “not otherwise actionable” requirement: see *OBG*, at para. 21. In addition, the “not otherwise actionable” requirement could give rise to some nice questions about whether some other cause of action that might be available to the plaintiff provides an adequate remedy for the loss.

[81] Finally, this limitation is not necessary to ensure that the unlawful means tort is kept within its proper bounds. The restrictions on the “unlawful means” and intention components of the unlawful means tort that I propose mean that it will rarely, if ever, be more advantageous to a plaintiff to plead the unlawful means tort rather than another available cause of action.

[82] I would therefore not limit liability for the unlawful means tort to situations in which the defendant's conduct is not otherwise actionable by the plaintiff.

(3) Should the “Unlawfulness” Requirement Be Subject to Principled Exceptions?

[83] The Court of Appeal, while adopting a narrow view of the unlawful means requirement, held that it must be subject to principled exceptions.

sa conclusion ne concerne que les situations où il y a menace de rupture du contrat liant deux parties (p. 87-88). Le raisonnement qui sous-tend la décision de la Cour ne s'applique pas à une action pour atteinte par un moyen illégal mettant en cause trois parties.

[80] L'exigence relative à l'absence d'une autre cause d'action ne cadre pas avec l'opinion majoritaire dans *OBG* et peut être difficile à appliquer en pratique. Dans *OBG*, lord Hoffmann a accepté la possibilité qu'inciter à rompre un contrat et causer une perte par un moyen illégal emportent une responsabilité concurrente, par exemple lorsque le défendeur menace un tiers de rupture de contrat pour amener ce dernier à briser ses liens contractuels avec le demandeur. Dans un tel scénario, le défendeur peut avoir engagé sa responsabilité à l'égard tant du délit d'incitation à rupture de contrat que du délit d'atteinte par un moyen illégal, un résultat incompatible avec l'exigence relative à l'absence d'une autre cause d'action (voir *OBG*, par. 21). En outre, cette exigence pourrait donner lieu à des questions délicates sur la possibilité qu'une autre cause d'action procure une réparation adéquate au demandeur.

[81] Enfin, cette limitation n'est pas nécessaire pour confiner le délit d'atteinte par un moyen illégal dans la sphère qui est la sienne. Les restrictions que je propose aux éléments du délit que sont le « moyen illégal » et l'intention feront en sorte qu'un demandeur aura rarement, voire jamais, avantage à invoquer le délit d'atteinte par un moyen illégal plutôt qu'une autre cause d'action possible.

[82] Je suis donc d'avis de ne pas restreindre l'application du délit d'atteinte par un moyen illégal aux situations où le demandeur ne dispose d'aucune autre cause d'action contre le défendeur.

(3) Le critère du caractère « illégal » admet-il des exceptions de principe?

[83] La Cour d'appel a adopté une conception étroite du critère du moyen illégal, mais a jugé qu'il était assujetti à des exceptions de principe. Elle

The court found that this case falls within such an exception because the appellants' conduct was akin to the tort of abuse of process. As Robertson J.A. put it for the court, "the intentional erection of legal barriers, some of which are enforceable through statutory processes not subject to prior judicial authorization, in circumstances where those barriers rest on rights fabricated with arguments of sand" falls within the ambit of the unlawful means tort: para. 82. This approach was intended to provide judges with some "wiggle room" to respond "adequately" to unanticipated factual scenarios or changing circumstances: para. 81.

[84] I respectfully disagree with this approach and would hold that there are no exceptions to the scope of liability which I propose for the unlawful means tort.

[85] My difficulty with the "principled exception" approach is that I cannot, with respect, find any principle on which it is based. Providing trial judges with "wiggle room" to deal "adequately" with cases that do not fall within the scope of the tort's liability simply confers an unstructured judicial discretion to do what appears to the particular judge to be just in the particular circumstances. This to me is the antithesis of a principled approach and, if adopted, it would largely undercut the efforts to give a certain and narrow ambit to the tort. Allowing for exceptions without clearly outlining the principles to guide the development of the law invites the danger of *ad hoc* decisions tailored to achieve a vision of commercial morality — precisely the danger which the unlawful means requirement is meant to avoid.

[86] I conclude that for the purposes of the unlawful means tort, the defendant's means are "unlawful" if they support a civil action for damages or compensation by the third party, or would do so except for the fact that the third party did not suffer

a conclu que la présente affaire appelait l'application d'une telle exception parce que la conduite des appellants était assimilable au délit d'abus de procédure. Ainsi que l'explique le juge Robertson, au nom de la cour : « . . . la mise en place intentionnelle de barrières juridiques, dont certaines sont exécutoires du fait de mécanismes prévus par la loi ne nécessitant aucune autorisation judiciaire préalable, dans des circonstances où ces barrières reposent sur des droits fabriqués au moyen d'arguments faits de sable » relève du délit d'atteinte par un moyen illégal (par. 82). Ce raisonnement visait à donner aux juges une « marge de manœuvre » leur permettant de répondre « convenablement » à des situations factuelles imprévues ou à ce qu'exigent les circonstances (par. 81).

[84] Je ne puis souscrire à ce raisonnement, et j'estime qu'il n'existe pas d'exception au cadre de responsabilité que je propose d'appliquer au délit d'atteinte par un moyen illégal.

[85] Le raisonnement permettant l'application d'« exceptions de principe » pose problème parce qu'il ne repose, à mon avis, sur aucun principe. Donner aux juges de première instance une « marge de manœuvre » permettant de régler « convenablement » les affaires débordant le cadre de la responsabilité qu'emporte ce délit ne fait que conférer aux juges un pouvoir discrétionnaire non structuré les autorisant à ordonner les mesures leur paraissant justes dans les circonstances particulières. Selon moi, il s'agit de l'antithèse d'une approche fondée sur des principes. Si elle était retenue, elle contrecarrerait dans une large mesure les efforts déployés pour donner au délit une portée étroite et certaine. Autoriser des exceptions sans définir précisément les principes devant guider l'évolution du droit expose au danger de jugements d'espèce rendus en fonction d'une certaine conception de l'éthique commerciale, précisément ce que le critère du moyen illégal vise à éviter.

[86] Je conclus que, s'agissant du délit d'atteinte par un moyen illégal, est « illégal » le moyen utilisé par le défendeur si le tiers peut l'invoquer au soutien d'un recours civil en compensation financière ou le pourrait s'il avait subi une perte. Il n'est

any loss as a result of the defendant's acts. There is no requirement that these acts not be otherwise actionable by the plaintiff against the defendant and there are no exceptions to the scope of the liability imposed by this approach.

[87] In Lord Hoffmann's reasons in *OBG*, he added a further requirement to the unlawful means tort, namely that the unlawful means employed must interfere with the third party's freedom to deal with the plaintiff: paras. 51-54. Lord Hoffmann held that without such a limitation, "there is a danger that it will provide a cause of action based on acts which are wrongful only in the irrelevant sense that a third party has a right to complain if he chooses to do so": para. 56. This additional requirement has not been included in the formulation of the tort adopted by Canadian appellate decisions that otherwise approve of Lord Hoffmann's approach to the unlawful means tort, although the point was not specifically at issue in those cases: see *Correia, O'Dwyer, and Alleslev-Krofchak*. It has also been roundly criticized by commentators: see Carty, *An Analysis of the Economic Torts* (2nd ed.), at pp. 97-98; Kain and Alexander, at pp. 181-82; Deakin and Randall, at pp. 548-49. Respectfully, I do not find this additional requirement helpful in outlining the proper bounds of the unlawful means tort. This requirement is not supported either by the authorities or by the rationale for imposing liability. Whether the unlawful means interfere with the plaintiff's right to deal with the injured third party or with some other party, the fact that the defendant aims at the plaintiff provides a sufficient nexus between the unlawful means and the interests of the plaintiff to justify imposing liability. Rather than resort to this additional "freedom to deal" qualification, I prefer to limit the scope of the unlawful means tort through a narrow approach to both the unlawful means component, as discussed above, and the intention component, as discussed below.

pas nécessaire que les actes commis ne fournissent pas au demandeur d'autre cause d'action contre le défendeur, et aucune exception ne s'applique au cadre de responsabilité défini suivant ce raisonnement.

[87] Dans ses motifs dans *OBG*, lord Hoffmann assortit le délit d'atteinte par un moyen illégal d'un critère supplémentaire, à savoir que le moyen illégal utilisé porte atteinte à la liberté du tiers de faire des affaires avec le demandeur (par. 51-54). Lord Hoffmann est d'avis que sans une telle limite, [TRADUCTION] « il existe un danger de créer un droit d'action fondé sur des actes qui ne sont fautifs que dans la mesure, non pertinente, où ils donnent à un tiers le droit de s'en plaindre s'il le veut » (par. 56). Ce critère supplémentaire n'est pas entré dans la définition du délit formulée par les cours d'appel canadiennes dans les décisions où elles approuvent par ailleurs l'analyse du délit d'atteinte par un moyen illégal proposée par lord Hoffmann, même si ce point précis n'était pas en litige dans ces affaires (voir *Correia, O'Dwyer et Alleslev-Krofchak*). Ce critère a également fait l'objet de vives critiques de la part d'auteurs (voir Carty, *An Analysis of the Economic Torts* (2^e éd.), p. 97-98; Kain et Alexander, p. 181-182; Deakin et Randall, p. 548-549). J'estime que ce critère n'est d'aucune utilité lorsqu'il s'agit de circonscrire le délit d'atteinte par un moyen illégal. Il ne repose sur aucune source et n'intéresse pas les raisons pour lesquelles la responsabilité s'impose. Qu'importe si le moyen illégal a eu pour effet de porter atteinte au droit du demandeur de faire des affaires avec la partie lésée ou avec une autre partie, le fait que le défendeur ait pris le demandeur pour cible constitue un lien suffisant entre le moyen illégal et les intérêts du demandeur, de sorte que conclure à la responsabilité dans ce cas serait justifié. Plutôt que d'invoquer ce critère supplémentaire de la « liberté de faire des affaires », je préconise de limiter la portée du délit d'atteinte par un moyen illégal par le truchement d'une définition étroite des éléments du délit que sont le moyen illégal, comme je l'explique précédemment, et l'intention, que j'explique plus loin.

(4) Application to This Case

[88] The Court of Appeal concluded that there was no wrong that would be actionable by the third party (the prospective purchasers) against the appellants, and the respondents do not point to one: paras. 79 and 83.

[89] Accordingly, I conclude that the appellants cannot be found liable to the respondents on the basis of the unlawful means tort.

(5) Did the Court of Appeal Err in Finding That the Defendants Had the Required Knowledge for the Unlawful Means Tort?

[90] The trial judge found that the appellants had unlawfully interfered with the sale of the property in various ways. The appellants contend, however, that none of this activity can sustain liability because there was no proof that they had appropriate knowledge of the existence of any business relationship between the respondents and prospective purchasers. The appellants submit that they must be shown to have had actual knowledge of the relationship between prospective purchasers, such as Greenarm Developments Ltd., and the respondents and that the record does not support such a finding.

[91] Given my conclusion that the unlawful means tort was not available to the respondents in this case, it is not strictly speaking necessary to address this issue. However, it will be helpful to do so.

[92] In my opinion, the appellants' submission is premised on a faulty view of the elements of the unlawful means tort.

[93] I do not agree with the Court of Appeal that the existence of a valid business relationship between the plaintiff and the third party and the defendant's knowledge of that relationship are essential elements of the unlawful means tort.

(4) Application à l'espèce

[88] La Cour d'appel a conclu à l'absence d'une faute donnant au tiers (les acheteurs potentiels) matière à procès contre les appellants, et les intimées n'en invoquent aucune (par. 79 et 83).

[89] J'estime par conséquent qu'on ne saurait conclure à la responsabilité des appellants à l'endroit des intimées sur le fondement du délit d'atteinte par un moyen illégal.

(5) La Cour d'appel a-t-elle conclu à tort que les défendeurs avaient la connaissance nécessaire que requiert le délit d'atteinte par un moyen illégal?

[90] Le juge de première instance a conclu que les appellants avaient illégalement entravé de diverses façons la vente de l'immeuble. Ces derniers font valoir qu'ils ne peuvent être tenus responsables à l'égard de ces actes, car rien ne prouve qu'ils avaient la connaissance voulue de l'existence de rapports commerciaux entre les intimées et les acheteurs potentiels. Ils soutiennent qu'il faut démontrer qu'ils étaient effectivement au courant des relations entre des acheteurs potentiels, comme Greenarm Developments Ltd., et les intimées, et que le dossier ne permet pas de tirer une telle conclusion.

[91] Puisque j'ai conclu que les intimées ne pouvaient invoquer le délit d'atteinte par un moyen illégal en l'espèce, il n'est pas nécessaire, à proprement parler, d'examiner cette question. J'estime toutefois cet examen utile.

[92] L'argument des appellants repose selon moi sur une conception erronée des éléments du délit d'atteinte par un moyen illégal.

[93] Je ne souscris pas à l'opinion de la Cour d'appel selon laquelle l'existence de rapports commerciaux valides entre le demandeur et le tiers et la connaissance de ces rapports par le défendeur sont des éléments essentiels du délit d'atteinte par

The inclusion of these elements in my view flows from confusion between the unlawful means tort and the tort of inducing breach of contract. It is now commonly accepted that for the latter, the plaintiff must prove that the defendant actually understood that he or she was procuring a breach of contract: see, e.g., *OBG*, at para. 39, *per* Lord Hoffmann. The position is different, however, in the unlawful means tort, the focus of which is unlawful conduct that intentionally harms the plaintiff's economic interests. There need be no contract or even other formal dealings between the plaintiff and the third party so long as the defendant's conduct is unlawful and it intentionally harms the plaintiff's economic interests. In this case, it was more than sufficient that the appellants were shown to know that "various persons were negotiating with the majority of investors" (C.A. reasons, at para. 75) for the purchase of the premises and that the allegedly unlawful acts were committed with the intention to cause economic harm to the respondents.

[94] It may be helpful to add a few words about the intention requirement for the unlawful means tort, given that there is some confusion about it: see Carty, "The Economic Torts in the 21st Century", at pp. 658-59; Podolny, at pp. 79-80; Kain and Alexander, at p. 135; Osborne, at pp. 336-37.

[95] The Court of Appeal of England in *Douglas v. Hello! Ltd.*, [2005] EWCA Civ 595, [2005] 4 All. E.R. 128, one of the appeals heard with *OBG*, identified five types of intention which might be relevant in this context: (a) an intention to cause economic harm to the claimant as an end in itself; (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive; (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm; (d) knowledge that the course of conduct will probably

un moyen illégal. Cette opinion découle à mon avis d'une confusion entre le délit d'atteinte par un moyen illégal et celui d'incitation à rupture de contrat. Il est à présent généralement reconnu que, dans ce dernier cas, le demandeur doit prouver que le défendeur était conscient de provoquer une rupture de contrat (voir, p. ex., *OBG*, par. 39, le lord Hoffmann). Il n'en va pas de même, toutefois, pour le délit d'atteinte par un moyen illégal, dont l'élément fondamental est la conduite illégale causant un préjudice intentionnel aux intérêts économiques du demandeur. L'existence d'un contrat n'est pas nécessaire, ni même l'existence d'autres relations d'affaires officielles entre le demandeur et le tiers; il suffit que la conduite du défendeur soit illégale et qu'elle cause un préjudice intentionnel aux intérêts économiques du demandeur. En l'espèce, il a été démontré que les appellants savaient que « différentes personnes étaient en train de négocier avec les investisseuses majoritaires » (motifs de la C.A., par. 75) en vue de l'achat de l'immeuble et qu'ils avaient l'intention de nuire aux intérêts économiques des intimés par le truchement des actes prétendument illégaux commis, ce qui suffisait amplement.

[94] Il pourrait s'avérer utile d'ajouter quelques précisions au sujet de l'intention exigée à l'égard du délit d'atteinte par un moyen illégal, étant donné qu'une certaine confusion semble régner sur ce point (voir Carty, « The Economic Torts in the 21st Century », p. 658-659; Podolny, p. 79-80; Kain et Alexander, p. 135; Osborne, p. 336-337).

[95] Dans *Douglas c. Hello! Ltd.*, [2005] EWCA Civ 595, [2005] 4 All. E.R. 128, l'un des appels entendus en même temps qu'*OBG*, la Cour d'appel d'Angleterre a énuméré cinq types d'intention pouvant s'appliquer dans ce contexte : a) l'intention de causer un préjudice économique au demandeur comme fin en soi; b) l'intention de causer un préjudice économique au demandeur comme moyen nécessaire pour parvenir à une fin qui sert un but inavoué; c) la connaissance que la conduite aura inévitablement pour conséquence de causer un préjudice économique au demandeur; d) la connaissance que la conduite causera probablement

cause the claimant economic harm; (e) knowledge that the course of conduct undertaken may cause the claimant economic harm coupled with reckless indifference as to whether it does or not: para. 159. In my opinion, the first two of these species of intention represent the core intention required for the unlawful means tort. They describe cases in which the tortfeasor is “aiming at” or “targeting” the plaintiff: see Carty, “The Economic Torts in the 21st Century”, at p. 654. This is the approach favoured by the majority of commentators as well as by the cases: see, e.g., Carty, *An Analysis of the Economic Torts*, at pp. 80-82; Podolny, at p. 70; Kain and Alexander, at pp. 181-82; *Correia*, at para. 101. It is the intentional targeting of the plaintiff by the defendant that justifies stretching the defendant’s liability so as to afford the plaintiff a cause of action. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant’s conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result. Such incidental economic harm is an accepted part of market competition.

[96] Goudge J.A. put this point aptly in *Alleslev-Krofchak*, where he summarized the House of Lords’ discussion in *OBG*:

... intentional interference with economic relations requires that the defendant intend to cause loss to the plaintiff, either as an end in itself or as a means of, for example, enriching himself. If the loss suffered by the plaintiff is merely a foreseeable consequence of the defendant’s actions, that is not enough. [para. 50]

[97] In my view, this narrow approach to intention is consistent both with the policy concerns relevant to this area of law as well as the underlying “liability stretching” rationale for the tort. It is an important safeguard against attaching liability to vigorous but lawful competitive behaviour. Economic harm to a competitor is often a foreseeable consequence of such behaviour. Mere foreseeability of such harm

un préjudice économique au demandeur; e) la connaissance que la conduite causera peut-être un préjudice économique au demandeur, assortie d’une insouciance téméraire à l’égard de cette possibilité (par. 159). Les deux premiers types constituent à mon sens l’intention fondamentale propre à constituer le délit d’atteinte par un moyen illégal. Ils renvoient à des situations où l’auteur du délit « vise » ou « prend pour cible » le demandeur (voir Carty, « The Economic Torts in the 21st Century », p. 654). C’est la définition retenue par la majorité des auteurs et dans la jurisprudence (voir, p. ex., Carty, *An Analysis of the Economic Torts*, p. 80-82; Podolny, p. 70; Kain et Alexander, p. 181-182; *Correia*, par. 101). C’est le fait pour le défendeur de prendre intentionnellement pour cible le demandeur qui justifie l’élargissement du champ de la responsabilité du premier de manière à fournir au demandeur une cause d’action. Il ne suffit pas que la conduite du défendeur cause incidemment un préjudice au demandeur, même lorsque le premier est conscient de la probabilité extrêmement élevée qu’il en résulte un préjudice. Ce type de préjudice économique incident constitue une condition acceptée de la libre concurrence.

[96] Comme le juge Goudge l’a exprimé avec justesse au par. 50 de l’arrêt *Alleslev-Krofchak* dans lequel il résume l’analyse effectuée par la Chambre des lords dans *OBG* :

[TRADUCTION] ... l’atteinte intentionnelle aux rapports économiques commande que le défendeur ait l’intention de causer une perte au demandeur, comme une fin en soi ou comme un moyen pour parvenir à une autre fin, s’enrichir par exemple. Si la perte subie par le demandeur n’est qu’une conséquence prévisible des actions du défendeur, la condition n’est pas remplie.

[97] Selon moi, cette conception étroite de l’intention s’harmonise à la fois avec les considérations d’intérêt public qui jouent dans ce domaine du droit et avec le fondement intéressant l’« extension du champ de la responsabilité » qui sous-tend ce délit. Elle offre une importante garantie contre le risque que des actes concurrentiels énergiques, mais légaux, entraînent la responsabilité délictuelle.

does not meet the requirement for intention in the unlawful means tort.

L'infliction d'un préjudice économique à un concurrent constitue souvent une conséquence prévisible de tels actes. La seule prévisibilité du préjudice ne suffit pas pour constituer l'intention que requiert le délit d'atteinte par un moyen illégal.

B. *If the Unlawful Means Tort Is Not Available, Are the Appellants Otherwise Liable?*

[98] Given the conclusion I have reached on the question of liability for the unlawful means tort, I have to confront the final issue: Did the respondents establish liability for breach of fiduciary duty and is that issue properly before us?

[99] In my view, they did and it is. Alan Schelew was a director of both of the respondent corporations. The record is clear that he breached his fiduciary duty to the respondent corporations to act in good faith in the interests of the corporations and the point was argued before us.

[100] As the Court of Appeal noted, the respondents did not plead breach of fiduciary duty in their statement of claim: para. 10. However, the same may be said about all other causes of action. The pleading was purely factual and did not set out any legal basis for the claim for relief. However, the alleged breaches of fiduciary duty were clearly live issues at the trial as is apparent from the respondents' pre- and post-trial briefs.

[101] Contrary to the conclusion of the Court of Appeal, the trial judge made numerous clear and specific findings with respect to Alan Schelew's breach of his fiduciary obligations to the respondent companies of which he was a director. Examples include:

B. Si le délit d'atteinte par un moyen illégal ne peut être invoqué, les appellants peuvent-ils être tenus responsables sur un autre fondement?

[98] Comme j'ai tranché la question de la responsabilité quant au délit d'atteinte par un moyen illégal, je dois aborder la dernière question : les intimées ont-elles établi que les appellants avaient engagé leur responsabilité pour avoir manqué à une obligation fiduciaire, et la Cour est-elle saisie régulièrement de cette question?

[99] À mon avis, il faut répondre par l'affirmative aux deux membres de la question. Alan Schelew était administrateur des deux sociétés intimées. La preuve indique clairement qu'il a manqué à l'égard des deux sociétés à l'obligation fiduciaire lui imposant d'agir de bonne foi dans leur intérêt, et la question a été débattue devant notre Cour.

[100] Comme la Cour d'appel l'a signalé, les intimées n'ont pas invoqué le manquement à l'obligation fiduciaire dans leur déclaration (par. 10). On peut toutefois dire la même chose de toutes les autres causes d'action. Leur déclaration était purement factuelle et n'exposait pas le fondement juridique de la réparation demandée. Cependant, les manquements reprochés à l'obligation fiduciaire étaient clairement en litige lors de l'instruction, comme en font foi les mémoires des intimées préalable et postérieur au procès.

[101] Contrairement à la Cour d'appel, le juge de première instance a formulé de nombreuses conclusions claires et précises concernant les manquements d'Alan Schelew à l'obligation fiduciaire à laquelle il était astreint à l'égard des sociétés intimées en tant qu'administrateur de celles-ci, notamment :

- At paras. 233-34, the trial judge found that by attempting to invoke the arbitration process, Alan Schelew had acted in a way that violated his obligations as a director of Bram and Jamb;
- At paras. 243 and 247-48, the trial judge found that the appellants' defence, long after there was any legal basis to do so, of a "Notice of its first right of refusal" which they had registered against the property was a tactic that had no lawful basis and which was a "blatant breach of [Alan Schelew's] fiduciary obligations as director in Jamb and Bram";
- At para. 254, the trial judge concluded that the appellants' filing of a "second encumbrance" against the property, this time a certificate of pending litigation, based on the "bogus" arbitration process was another "illegitimate and unjustified measure" that constituted a further breach of Alan Schelew's fiduciary duty to Bram and Jamb;
- At paras. 262-65, the trial judge found that Alan Schelew's role in impeding access to the building by a potential purchaser was in breach of fiduciary duties to Bram and Jamb;
- At paras. 270-71, the trial judge found that "Alan [Schelew] . . . would in fact take whatever steps were necessary to prevent the sale of 99 Joyce to anyone other than himself" and that he "was resolved in not letting his director's fiduciary duties in Bram and Jamb interfere in his plan".
- en tentant de recourir à l'arbitrage, il avait agi à l'encontre de ses obligations d'administrateur de Bram et de Jamb (par. 233-234);
- la défense invoquée par les appellants, longtemps après l'expiration du délai juridique, reposant sur l'enregistrement contre l'immeuble d'un [TRADUCTION] « avis d'un droit de premier refus », était une tactique dépourvue de fondement en droit et « manifestement contraire [aux] obligations fiduciaires [d'Alan Schelew] en tant qu'administrateur de Jamb et de Bram » (par. 243 et 247-248);
- le dépôt d'un [TRADUCTION] « deuxième grèvement » contre l'immeuble, à savoir un certificat d'affaire en instance, se rapportant au processus d'arbitrage « bidon » était une autre « mesure illégitime et injustifiée » constituant un manquement supplémentaire à l'obligation fiduciaire d'Alan Schelew envers Bram et Jamb (par. 254);
- le fait qu'Alan Schelew ait empêché l'accès d'un acheteur potentiel à l'immeuble contrevainait à son obligation fiduciaire envers Bram et Jamb (par. 262-265);
- [TRADUCTION] « Alan [Schelew] [. . .] était prêt à faire tout ce qu'il fallait pour empêcher l'acquisition du 99 Joyce par quelqu'un d'autre que lui » et il « était résolu à ne pas laisser son obligation fiduciaire à titre d'administrateur de Bram et de Jamb contrecarrer son plan » (par. 270-271).

[102] The fiduciary duty point was argued in this Court. The appellants submitted, in my view correctly, that the trial judge made numerous specific findings with respect to Alan Schelew's breach of his fiduciary obligations to the respondents. These submissions were in support of their position that this excluded their liability for the unlawful means tort because the wrong was otherwise actionable by the respondents: A.F., at para. 87. The respondents submitted that if Alan Schelew breached his

[102] La question de l'obligation fiduciaire a été débattue devant nous. Les appellants font valoir, à bon droit selon moi, que le juge du procès a tiré de nombreuses conclusions précises au sujet des manquements d'Alan Schelew à son obligation fiduciaire envers les intimées. Cet argument soutenait à leur avis leur thèse selon laquelle ils n'avaient pas engagé leur responsabilité pour atteinte par un moyen illégal, parce que l'acte fautif fournissait une autre cause d'action aux intimées

fiduciary duty and these breaches were sufficient for the trial judge to have issued judgment on that basis, then it is open to this Court to affirm the judgment against Alan Schelew on that basis. As the respondents put it, “[t]he Appellants cannot assert the findings of the trial judge were sufficient to ground liability for breach of fiduciary duty, while at the same time trying to escape liability from same”: R.F., at para. 125.

[103] I agree with the respondents on this point.

[104] No one disputes that Alan Schelew had a fiduciary duty as a director of Bram and Jamb. Although there was a certain conflict of interest inherent between that role and his role, through his company A.I., as building manager, it cannot be suggested that this permitted him to take groundless legal steps to obstruct the sale in order to further his personal interests.

[105] The trial judge’s assessment of damages is not challenged on appeal. The breaches of fiduciary duty are precisely the same acts which the trial judge found to constitute the unlawful means for the purposes of the unlawful means tort. The breaches of fiduciary duty resulted in Alan Schelew’s company, A.I., acquiring Bram and Jamb’s units under the Syndication Agreement as well their shares in Joyce. The trial judge found as a fact that but for Alan Schelew’s conduct, the building would have been sold to a third party for \$2.58 million: para. 327. Whether the compensation is viewed as being aimed at restoring the respondents’ loss or requiring the appellants to disgorge the gain obtained by Alan Schelew’s breach of fiduciary duty, the assessment of compensation remains the same. While the appellant, A.I., was not a fiduciary, Alan Schelew was its sole director and shareholder and it is therefore liable for knowing assistance in the breach of fiduciary duty and knowing receipt of

(m.a., par. 87). Les intimées soutiennent que si Alan Schelew avait manqué à son obligation fiduciaire et que les manquements étaient suffisants pour que le juge de première instance rende jugement sur ce fondement, il est loisible à la Cour de confirmer ce jugement contre Alan Schelew. Comme elles l’ont exposé, [TRADUCTION] « [l]es appelants ne peuvent d’une part affirmer que les conclusions du juge de première instance suffisaient pour fonder une conclusion de responsabilité pour manquement à l’obligation fiduciaire et d’autre part tenter de se soustraire à cette même responsabilité » (m.i., par. 125).

[103] Je donne raison aux intimées sur ce point.

[104] Personne ne conteste que sa fonction d’administrateur de Bram et de Jamb imposait à Alan Schelew une obligation fiduciaire. Bien qu’un certain conflit d’intérêts découle du cumul de cette fonction et de celle de gestionnaire de l’immeuble qu’il exerçait par l’intermédiaire de sa société, A.I., on ne saurait laisser entendre que cela l’autorisait à prendre des mesures juridiques sans fondement pour faire obstacle à la vente afin de servir ses propres intérêts.

[105] Le montant des dommages-intérêts établi par le juge de première instance n’a pas été contesté en appel. Les manquements à l’obligation fiduciaire sont les actes mêmes qui constituaient, selon le juge de première instance, le moyen illégal au sens où il faut l’entendre pour l’application du délit d’atteinte par un moyen illégal. En raison de ces manquements, la société d’Alan Schelew, A.I., a acquis les parts de Bram et de Jamb aux termes de l’entente de syndication ainsi que les actions de celles-ci dans Joyce. Le juge de première instance a tiré la conclusion de fait selon laquelle, n’eût été la conduite d’Alan Schelew, l’immeuble aurait été vendu à un tiers pour 2,58 millions de dollars (par. 327). Qu’on conçoive les dommages-intérêts comme une indemnisation pour la perte subie par les intimées ou comme la restitution par les appellants des gains découlant des manquements d’Alan Schelew à son obligation fiduciaire, leur montant ne change pas. Parce qu’Alan Schelew

the proceeds of the breach: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at pp. 516-23.

en était le seul administrateur et actionnaire, l'appelante A.I. a engagé sa responsabilité, bien qu'elle ne fût pas elle-même fiduciaire, pour avoir aidé en connaissance de cause à commettre des manquements à l'obligation fiduciaire et pour avoir reçu en connaissance de cause le produit de ces manquements (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (4^e éd. 2012), p. 516-523).

IV. Disposition

[106] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: McInnes Cooper, Fredericton.

Solicitors for the respondents: Stewart McKelvey, Moncton; Supreme Advocacy, Ottawa.

Solicitor for the intervener: Attorney General of British Columbia, Victoria.

IV. Dispositif

[106] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appellants : McInnes Cooper, Fredericton.

Procureurs des intimées : Stewart McKelvey, Moncton; Supreme Advocacy, Ottawa.

Procureur de l'intervenant : Procureur général de la Colombie-Britannique, Victoria.

TAB 5

Agribrands Purina Canada Inc. v. Kasamekas et al.

Kasamekas et al. v. Agribrands Purina Canada Inc. et al.

[Indexed as: Agribrands Purina Canada Inc. v. Kasamekas]

106 O.R. (3d) 427

2011 ONCA 460

Court of Appeal for Ontario,
Goudge, Gillese and Juriansz JJ.A.
June 20, 2011

Civil procedure -- Prejudgment interest -- Action commenced in last quarter of 1992 -- Trial judge erring in awarding prejudgment interest based on average rate applicable for entire 1992 calendar year rather than applying rate specified by Rules of Civil Procedure for proceedings commenced in last quarter of 1992.

Contracts -- Damages -- Where contract sets out several modes of performance, damages for breach of contract generally assessed on basis of mode that is least profitable to plaintiff and least burdensome to defendant -- Trial judge erring in finding that that principle applies only where parties acted honestly and in good faith -- Agreement giving either party unconditional right to cancel contract at any time on 60 days' notice -- Trial judge erring in not calculating damages on that basis -- Trial judge erring in finding that defendant could not rely on 60-day notice clause as it had breached implied duty of good faith and in basing quantification on finding that contract would have continued indefinitely had defendant not breached its contractual obligation.

Damages -- Punitive damages -- Defendant entering into feed dealership agreement with plaintiffs and then undermining plaintiffs' business by surreptitiously supplying another dealer in plaintiffs' territory -- Plaintiffs' business failing -- Trial judge finding that defendant breached dealership agreement and breached implied duty of good faith toward plaintiffs -- Trial judge not erring in awarding punitive damages -- Breach of implied duty of good faith constituting separate actionable wrong -- Defendant's conduct constituting marked departure from ordinary standards of decency.

Torts -- Conspiracy -- Unlawful conduct conspiracy -- "Unlawful conduct" element of unlawful conduct conspiracy not encompassing conduct that defendant is "not at liberty" or "not authorized" to engage in as result of convention or understanding -- Conduct "unlawful" only if it is wrong in law.

The appellant Purina terminated the appellant Ren's feed dealership in July 1990 and entered into a dealership agreement for Ren's former territory with the respondent Raywalt in February 1991. Ren's arranged to have the appellant M, the Purina dealer in a neighbouring territory, supply it with Purina feed at dealer prices, which enabled Ren's to continue to sell Purina feed in Raywalt's territory. Purina approved of that arrangement and provided M with feed for resale to Ren's. As a result, Raywalt's business was not as profitable as projected and it ceased business at the end of January 1992. The trial judge found the appellants liable to the respondents for the tort of unlawful conduct conspiracy and found Purina liable for breach of its contract with Raywalt. The dealership agreement was for two years, with automatic renewal if neither party gave notice of cancellation. Either party had the right to cancel the contract at any time by giving [page428] 60 days' notice. The trial judge found that, had it not been for Purina's breach, the contract would have continued indefinitely and based his quantification of damages for breach of contract on that finding. He awarded general damages and prejudgment interest in the amount of \$2,096,406 and punitive damages against Purina in the amount of \$30,000. The appellants appealed the finding of unlawful conduct conspiracy. Purina

appealed the method used to calculate damages for breach of contract and the award of punitive damages.

Held, the appeal should be allowed in part.

The trial judge erred in finding that "unlawful conduct" includes conduct that the defendants were "not at liberty" or "not authorized" to engage in, not only as a result of law or a contract, but also as a result of a convention or an understanding. What is required is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort. While Purina's breach of its contract with Raywalt was sufficient to qualify as "unlawful conduct", neither Ren's nor M did anything that would do so. The finding of unlawful conduct conspiracy and the damages flowing from it should be set aside.

Where there are several ways in which a contract might be performed, for the purposes of assessing damages, the mode that is the least profitable to the plaintiff and the least burdensome to the defendant should be adopted. The trial judge erred in finding that that principle applies only where the parties acted honestly and in good faith and that Purina had not done so. The contract provided that Purina had the unconditional right to cancel the contract at any time on 60 days' notice. That was the least burdensome mode of performance for Purina and should have been used as the basis for calculating the damages for breach of contract. Moreover, by finding an implied duty of good faith on Purina not to act in a way that defeated the very purpose of the contract and then finding that Purina could not rely on the 60-day notice clause because it breached that implied duty, the trial judge erred by using the implied duty of good faith to alter the express terms of the contract, including the right to terminate on notice. Finally, the trial judge erred in suggesting that it would be unconscionable to allow Purina to rely on the 60-day notice clause in calculating damages for breach of contract. The doctrine of unconscionability is applicable to determine

whether the contract itself is unconscionable, and is not applicable to determine how damages should be assessed in light of the circumstances of a particular breach.

The action was commenced in the last quarter of 1992. The trial judge erred in applying a prejudgment interest rate of 6.65 per cent, the average rate applicable for the entire 1992 calendar year, to his assessment of damages for breach of contract and unlawful conduct conspiracy. The prejudgment rate specified in the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 for proceedings commenced in the last quarter of 1992 was 5.1 per cent. The trial judge offered no special circumstances for exercising his discretion to deviate from that rate.

Purina's breach of the implied duty of good faith amounted to an independent actionable wrong, one of the requirements for an award of punitive damages for breach of contract. The trial judge erred in awarding punitive damages solely on that basis without considering the other requirement, that the impugned conduct must depart markedly from ordinary standards of decency. However, in the circumstances of this case, that requirement was also met. Purina's conduct was reprehensible and deserving of sanction. The punitive damages award was affirmed. [page429]

Cases referred to

Fidler v. Sun Life Assurance Co. of Canada, [2006] 2 S.C.R. 3, [2006] S.C.J. No. 30, 2006 SCC 30, 271 D.L.R. (4th) 1, 350 N.R. 40, [2006] 8 W.W.R. 1, J.E. 2006-1316, 227 B.C.A.C. 39, 57 B.C.L.R. (4th) 1, [2006] R.R.A. 525, 53 C.C.E.L. (3d) 1, 39 C.C.L.I. (4th) 1, [2007] CLLC 210-015, [2006] I.L.R. 4521, 148 A.C.W.S. (3d) 902, EYB 2006-107056; Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC 210-025, 128 A.C.W.S. (3d) 1111; Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, 209 D.L.R. (4th) 257, 283 N.R. 1, J.E. 2002-405, 156 O.A.C. 201, 20 B.L.R. (3d) 165, 35 C.C.L.I. (3d) 1, [2002] I.L.R. I-4048, REJB 2002-28036, 111 A.C.W.S. (3d) 935, apld Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, [1983] S.C.J. No. 33,

145 D.L.R. (3d) 385, 47 N.R. 191, [1983] 6 W.W.R. 385, 21 B.L.R. 254, 24 C.C.L.T. 111, 72 C.P.R. (2d) 1, 19 A.C.W.S. (2d) 352; Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062, 227 D.L.R. (4th) 458, 172 O.A.C. 202, 17 C.C.L.T. (3d) 149, 25 C.P.R. (4th) 417, 123 A.C.W.S. (3d) 411 (C.A.), consd

Other cases referred to

Agribrands Purina Canada v. Kasamekas, [2010] O.J. No. 1796, 2010 ONSC 2597; Alleslev-Krofchak v. Valcom Ltd., [2010] O.J. No. 3548, 2010 ONCA 557, 266 O.A.C. 356, 322 D.L.R. (4th) 193, 76 C.C.L.T. (3d) 163; Bank of Montreal v. Tortora, [2010] B.C.J. No. 466, 2010 BCCA 139, 287 B.C.A.C. 14, 3 B.C.L.R. (5th) 39, 80 C.C.E.L. (3d) 161; Cockburn v. Alexander (1848), 6 C.B. 791; Correia v. Canac Kitchens, a division of Kohler Ltd. (2008), 91 O.R. (3d) 353, [2008] O.J. No. 2497, 2008 ONCA 506, 294 D.L.R. (4th) 525, 58 C.C.L.T. (3d) 29, 167 A.C.W.S. (3d) 422, 67 C.C.E.L. (3d) 1, 240 O.A.C. 153, [2009] CLLC 210-001; Drouillard v.Cogeco Cable Inc. (2007), 86 O.R. (3d) 431, [2007] O.J. No. 1664, 2007 ONCA 322, 282 D.L.R. (4th) 644, 223 O.A.C. 350, 57 C.C.E.L. (3d) 14, 48 C.C.L.T. (3d) 119, [2007] CLLC 210-034, 157 A.C.W.S. (3d) 213; OBG Ltd. v. Allen; Douglas v. Hello! Ltd.; Mainstream Properties Ltd. v. Young, [2008] A.C. 1, [2007] UKHL 21 (H.L.); Revenue and Customs Commissioners v. Total Network S.L., [2008] 2 W.L.R. 711, [2008] UKHL 19 (H.L.); Torquay Hotel Co. Ltd. v. Cousins, [1969] 2 Ch. 106, [1969] 1 All E.R. 522, [1969] 2 W.L.R. 289, 6 K.I.R. 15 (C.A.); Transamerica Life Canada Inc. v. ING Canada Inc. (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656, 234 D.L.R. (4th) 367, 41 B.L.R. (3d) 1, [2004] I.L.R. I-4258, 127 A.C.W.S. (3d) 235 (C.A.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 130(2)

Criminal Code, R.S.C. 1985, c. C-46 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Authorities referred to

Burns, Peter T., and Joost Blom, Economic Interests in Canadian Tort Law (Markham, Ont.: LexisNexis, 2009)

APPEAL from the judgment of M.G. Quigley J., [2010] O.J. No. 84, 2010 ONSC 166 for the plaintiffs. [page430]

Kirk F. Stevens and Gerard V. Thompson, for appellants.

W. Graydon Sheppard and Marc Munro, for respondents.

The judgment of the court was delivered by

GOUDGE J.A.: --

Introduction

[1] After an 11-day trial, the respondents, Walter Kasamekas ("Kasamekas"), Raymond Jackson ("Jackson") and Raywalt Feed Sales Ltd. ("Raywalt"), recovered judgment for general damages and prejudgment interest in the amount of \$2,096,406 against the appellants Agribrands Purina Canada Inc. ("Purina"), Ren's Feed and Supplies Ltd. ("Ren's"), Walter Rendell Job ("Job") and the estate of Edwards James McGrath ("McGrath"). The respondents also recovered punitive damages of \$30,000 against Purina. Finally, they were awarded costs of \$175,000.

[2] The trial judge found the appellants liable to the respondents for the tort of unlawful conduct conspiracy. He also found Purina in breach of its contract with Raywalt. He assessed damages on the same basis for both causes of action.

[3] The appellants appeal the finding of unlawful conduct conspiracy. They also say that the trial judge made errors in calculating damages for that tort and in the rate he applied for prejudgment interest. While Purina does not contest the breach of contract finding against it, it does contest the method the trial judge used to calculate the damages for that breach. Finally, Purina appeals the finding of punitive damages against it.

[4] For the reasons that follow, I would allow the appeal on each of these issues except punitive damages and the alleged

errors in calculating the tort damages. I would therefore amend the trial judgment to provide that Raywalt recover damages for breach of contract by Purina on the basis described below, with prejudgment interest calculated on the basis described below. The respondents' claims for conspiracy must be dismissed.

The Trial Judgment

[5] The basic facts are not in dispute. Ren's was a well-established dealer of Purina livestock feed and pet food. However, in 1990 Purina discovered that Ren's was also purchasing feed from one of its competitors and selling it as feed for laboratory animals in breach of its dealership agreement with Purina. As a consequence, Purina terminated Ren's dealership in July 1990.

[6] Walter Kasamekas, who was a Purina employee, and his brother Raymond Jackson saw an opportunity to set up Raywalt [page431] as a Purina dealership to take over Ren's territory. Raywalt and Purina concluded a dealership agreement in February 1991, pursuant to which Purina agreed not to appoint any other dealer in Raywalt's territory, previously Ren's territory.

[7] Raywalt opened for business in mid-March 1991. However, despite giving Raywalt territorial exclusivity, Purina continued to supply feed to Ren's until the end of April 1991. This enabled Ren's to sell to its former customers in what was now Raywalt's territory. When Purina finally ended this practice, Ren's got McGrath, who was a friend and the Purina dealer in a neighbouring territory, to supply Ren's with Purina feed at dealer prices. This allowed Ren's to continue to sell Purina feed in Raywalt's territory. Purina knew of, condoned and indeed approved of this arrangement. Purina provided McGrath with feed for resale to Ren's. As a result, Raywalt's business was not nearly as profitable as projected and its cash flow problems caused it to cease business at the end of January 1992.

[8] After setting this factual scene, the trial judge turned first to Purina's liability for breach of its contract with Raywalt. He concluded that, by supplying McGrath with feed

knowing that McGrath would sell it to Ren's at dealer prices for sale in Raywalt's territory and by approving this arrangement, Purina breached its contract with Raywalt. Purina does not appeal this finding.

[9] He then addressed the method of calculating damages for that breach, in particular whether the damages were time limited by the terms of the contract. Two of its provisions were relevant. The first provided that the dealership agreement was for two years but would automatically renew unless either party gave notice of cancellation. The second allowed either party to cancel the contract at any time by giving 60 days' notice.

[10] The trial judge concluded that there was an implied duty of good faith on Purina in its contract with Raywalt, that Purina had acted in bad faith and that it could therefore not rely on the provision allowing it to terminate the contract on 60 days' notice. On this basis, the trial judge distinguished *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72. In considering *Hamilton*, he said, at para. 100, "[T]he trial judge specifically found that the defendant had acted in good faith at all material times" (emphasis in original). At para. 108, he concluded, "The case has no application here because the foundation of good faith that was present in that case is evidently absent in this case."

[11] Instead of applying *Hamilton*, the trial judge engaged in an inquiry into what would have happened if Purina had not [page432] breached its contractual obligation. He found that the only reasonable conclusion available on the evidence was that the contract would have continued indefinitely. He found that Purina dealerships were typically of long duration. In this case, it would have been because no steps would have been taken to terminate it. By its terms, the dealership agreement would therefore have continued automatically.

[12] In addition, he concluded that, because of Purina's conduct, the doctrine of unconscionability applied to prevent Purina from relying on the time limiting provisions in the

dealership agreement.

[13] For these reasons, the trial judge based his quantification of damages for breach of contract on the premise that Purina's contract with Raywalt would have continued indefinitely.

[14] He then moved to the civil conspiracy issue. The respondents did not advance the branch of this tort that requires the plaintiff to demonstrate that the defendants' primary purpose was to cause injury to the plaintiff, whether by lawful or unlawful means. Rather, the respondents' argument was that the appellants engaged in the tort of unlawful conduct conspiracy, that is, their conduct, done in concert, was unlawful and they knew or should have known that injury to the respondents was likely to result.

[15] The trial judge found that the appellants acted in concert, and while their predominant purpose was not to injure the respondents, their conduct was directed at the respondents, and it was reasonably foreseeable that serious economic injury to the respondents would and did result.

[16] The central issue was whether their conduct was "unlawful". The trial judge found that the appellants did not appear to have committed a crime, or any other tort than unlawful conduct conspiracy. Nor had they infringed a guaranteed constitutional right. Relying primarily on *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30, [2003] O.J. No. 2062 (C.A.), he found that the ambit of unlawful conduct required by this tort extends beyond strict illegality. He put it this way, at para. 127:

The newer decisions confirm that the ambit of "illegal conduct" extends beyond strict illegality for the purposes of proving the existence of tortious conduct. It includes conduct that the defendant "is not at liberty" or "not authorized" to engage in, whether as a result of law, a contract, a convention or an understanding.

[17] His assessment of the appellants' conduct against this standard was as follows, at paras. 132-34: [page433]

It was unlawful and unauthorized conduct from Purina's perspective because Purina had a commercial obligation of good faith and was contractually bound to support Raywalt as its dealer. More importantly, Purina had no authority or entitlement to permit Purina feed products to continue to be sold by Ren's at dealer pricing just to ensure that its decision to terminate the Ren's dealership would not result in a reduction of its market share. It effectively licensed Ren's through McGrath to sell products in a geographic area that was reserved to another dealer, both as de facto dealers of Purina horse feeds.

It was unlawful and unauthorized conduct from McGrath's perspective because he had no authority under his Dealership Agreement with Purina to establish a sub-dealership and to receive dealer rebates that reduced the product cost to dealer level "white list" pricing where his sub-dealer was selling Purina feed products in territory that had been assigned to another dealer.

It was unlawful and unauthorized conduct from Walter Rendell Job's and Ren's Feeds perspective because Ren's was not entitled to be able to obtain Purina feed products for resale at the advantageous pricing available only to authorized Purina dealers. The illegality lies in Purina and McGrath effectively licensing Ren's to deal in the Raywalt territory.

[18] The next issue was the assessment of damages. The trial judge concluded that there was no material difference in the damages to which the respondents were entitled, whether assessed for Purina's breach of contract or for the tort of unlawful conduct conspiracy. He said this, at para. 158:

To my mind, as will be evident from the foregoing, in the absence of effective contractual language limiting liability, the assessment of damages in both tort and contract in this case should be and is essentially the same. Any loss suffered

by the plaintiffs that was reasonably foreseeable at the time of the breach is properly compensable.

[19] The trial judge found that the appellants' actions caused the respondents to lose their business. He determined that damages should reflect the going concern value of Raywalt at the time, which he calculated by assessing what the net profit of the business would have been in its second year of operation had it continued beyond January 1992. He then applied a three times earnings multiple. The result was a damage award of \$954,213 for Purina's breach of contract and the appellants' conspiracy.

[20] The trial judge applied a prejudgment interest rate of 6.65 per cent to this amount. Because 18 years had passed since the cause of action arose in 1992, this added an additional \$1,142,193. In supplementary reasons released on May 3, 2010 [[2010] O.J. No. 1796, 2010 ONSC 2597], the trial judge noted [at para. 8] that he selected that rate because it was "the average rate applicable for the entire 1992 calendar year". He declined to use the rate of 5.1 per cent, which was the bank rate [page434] at the start of the third quarter of 1992, the quarter in which the respondents filed their claim.

[21] Finally, the trial judge dealt with punitive damages. He reiterated that Purina's breach of its exclusivity contract with Raywalt was also answerable in the tort of conspiracy. He found that, if Purina's participation in that tort was not enough to justify the imposition of punitive damages, the breach of its implied duty of good faith to Raywalt was the second respect in which its conduct constituted an actionable wrong. Having found this precondition to be met, the trial judge based his justification for punitive damages on Purina's conduct. He found [at para. 237] it was "the very antithesis of acting in good faith".

[22] In the result, the trial judge ordered that the respondents recover \$2,096,406 jointly and severally from the appellants, inclusive of prejudgment interest, that Purina pay punitive damages of \$30,000 and that the respondents receive trial costs fixed at \$175,000.

Analysis

[23] The appellants raise five issues. I will deal with each in turn.

First issue -- The unlawful conduct conspiracy

[24] The seminal case in Canada on the tort of civil conspiracy is Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, [1983] S.C.J. No. 33. Speaking for the court, Estey J. described, at pp. 471-72 S.C.R., two categories of conspiracy recognized by Canadian law:

Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [page435]

[25] This case deals with the second category, namely, unlawful conduct conspiracy. The first does not apply because

there was no finding that the predominant purpose of the appellants' conduct was to cause injury to the respondents. The respondents did not advance that proposition at trial.

[26] For the appellants to be liable for the tort of unlawful conduct conspiracy, the following elements must therefore be present:

- (a) they act in combination, that is, in concert, by agreement or with a common design;
- (b) their conduct is unlawful;
- (c) their conduct is directed towards the respondents;
- (d) the appellants should know that, in the circumstances, injury to the respondents is likely to result; and
- (e) their conduct causes injury to the respondents.

[27] In this court, the appellants challenge only the finding that their conduct was unlawful. In particular, while they acknowledge that Purina's breach of its contract with Raywalt was unlawful, they say that the conduct of Ren's and McGrath was in no sense unlawful, and that therefore this element of the tort was not made out. Civil conspiracy cannot be established if only one conspirator acts unlawfully.

[28] What, then, are the requirements for unlawful conduct for the purposes of this tort? Most obviously, it must be unlawful conduct by each conspirator: see *Bank of Montreal v. Tortora*, [2010] B.C.J. No. 466, 3 B.C.L.R. (5th) 39 (C.A.). There is no basis for finding an individual liable for unlawful conduct conspiracy if his or her conduct is lawful or, alternatively, if he or she is the only one of those acting in concert to act unlawfully. The tort is designed to catch unlawful conduct done in concert, not to turn lawful conduct into tortious conduct. The trial judge applied this requirement and found that each of the appellants had committed an unlawful act.

[29] To determine what sort of conduct qualifies as "unlawful" the trial judge looked to the jurisprudence dealing with the tort of intentional interference with economic relations.

[30] The trial judge concluded from the intentional interference cases that "unlawful conduct" includes conduct that the defendant "is not at liberty" or "not authorized" to engage in, whether as a result of law, a contract, a convention or an understanding. [page436]

[31] With respect, I do not think the jurisprudence goes that far. In Reach, this court found the tort of intentional interference with economic relations to be made out because actions by the defendant, a voluntary association, that caused its members to stop advertising with the plaintiff, constituted unlawful means directed at third parties, which then caused them to injure the plaintiff. The court was clear that these actions were beyond the lawful authority that the defendant had under its constitution, and were therefore actions beyond the defendants powers and done without jurisdiction. They could be set aside by the court at the behest of the third parties, its members. While the court made reference to the judgment of Lord Denning in *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 2 Ch. 106, [1969] 1 All E.R. 522 (C.A.), it explicitly declined to decide how far Lord Denning's concept of "unlawful conduct" as "an act which [the defendant] is not at liberty to commit" might extend. Reach was a case of conduct that was wrong in law. I do not think that it provides a basis for the expansive interpretation used by the trial judge [at para. 127] as any "conduct that the defendant 'is not at liberty' or 'not authorized' to engage in, whether as a result of law, a contract, a convention or an understanding".

[32] Since Reach, this court's jurisprudence on the tort of intentional interference with economic relations has, if anything, tightened the scope of conduct considered unlawful. In *Drouillard v. Cogeco Cable Inc.* (2007), 86 O.R. (3d) 431, [2007] O.J. No. 1664 (C.A.), the defendant's conduct in not following its internal corporate policy but instead acting in bad faith did not amount to unlawful means. In *Correia v. Canac Kitchens*, a division of Kohler Ltd. (2008), 91 O.R. (3d) 353, [2008] O.J. No. 2497 (C.A.), this court approved of Lord Hoffman's majority reasons in *OBG Ltd. v. Allen; Douglas v. Hello! Ltd.; Mainstream Properties Ltd. v. Young*, [2008] A.C. 1, [2007] UKHL 21 (H.L.), in which he required unlawful conduct

against a third party to be conduct that is actionable by the third party for the purposes of the tort of intentional interference with economic relations. This court reiterated this principle in *Alleslev-Krofchak v. Valcom Ltd.*, [2010] O.J. No. 3548, 2010 ONCA 557, while recognizing that the delineation of actionability remained to be fully defined. It was unnecessary to do so in that case because the unlawful conduct relied on was clearly actionable as a matter of private law.

[33] What is clear from this jurisprudence is that, to constitute unlawful conduct for the purposes of the tort of intentional interference, the conduct must be actionable. It must be wrong in law. Conduct that is merely not authorized by a convention or an [page437] understanding is not enough. On this standard, the approach used by the trial judge was simply too broad.

[34] Moreover, reliance on the tort of intentional interference to supply the definition of "unlawful conduct" for the tort of civil conspiracy does not recognize that these two economic torts have evolved separately, and thus each have developed their own concept of unlawful conduct.

[35] The court should therefore be cautious of turning away from the history of this separate evolution simply to achieve a unified theory for the economic torts. Indeed, in *Revenue and Customs Commissioners v. Total Network S.L.*, [2008] 2 W.L.R. 711, [2008] UKHL 19 (H.L.), the House of Lords went further, and said explicitly that, as the torts of intentional interference with economic relations and unlawful conduct conspiracy have developed over time, the concept of unlawful conduct has a different meaning in one tort than in the other: see, for example, the speech of Lord Walker of Gestingthorpe, at para. 100.

[36] It is not necessary that we go that far in this case. However, rather than automatically adopting the meaning of unlawful conduct given in the intentional interference tort cases, I think the better course is to use those cases as a guide, but also consider the kind of conduct that the jurisprudence has found to be unlawful conduct for the purposes

of the conspiracy tort.

[37] It is clear from that jurisprudence that quasi-criminal conduct, when undertaken in concert, is sufficient to constitute unlawful conduct for the purposes of the conspiracy tort, even though that conduct is not actionable in a private law sense by a third party. The seminal case of Canada Cement LaFarge is an example. So too is conduct that is in breach of the Criminal Code, R.S.C. 1985, c. C-46. These examples of "unlawful conduct" are not actionable in themselves, but they have been held to constitute conduct that is wrongful in law and therefore sufficient to be considered "unlawful conduct" within the meaning of civil conspiracy. There are also many examples of conduct found to be unlawful for the purposes of this tort simply because the conduct is actionable as a matter of private law. In Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham, Ont.: LexisNexis, 2009), the authors say this, at pp. 167-68:

There are two distinct categories of conduct that can be described as comprising "unlawful means": conduct amounting to an independent tort or other actionable wrong, and conduct not actionable in itself.

.

Examples of conspiracies involving tortious conduct include inducing breach of contract, wrongful interference with contractual rights, nuisance, intimidation, [page438] and defamation. Of course, a breach of contract itself will support an action in civil conspiracy and, as one Australian court has held, the categories of "unlawful means" are not closed.

The second category of unlawful means is conduct comprising unlawful means not actionable in itself.

.

The first class of unlawful means not actionable in themselves, but which nevertheless supports a conspiracy action, is breach of a statute which does not grant a private right of action, the very instance rejected in *Lonrho* (1981)

by the House of Lords. A common case is a breach of labour relations legislation, and another is the breach of a criminal statute such as the Canadian Criminal Code.

[38] What is required, therefore, to meet the "unlawful conduct" element of the conspiracy tort is that the defendants engage, in concert, in acts that are wrong in law, whether actionable at private law or not. In the commercial world, even highly competitive activity, provided it is otherwise lawful, does not qualify as "unlawful conduct" for the purposes of this tort.

[39] The appellants submit that while Purina's breach of its contract with Raywalt was sufficient to qualify as "unlawful conduct", neither Ren's nor McGrath did anything that would do so. I agree. In my view, the trial judge used an approach that is too broad. Assessed against the correct test, their conduct was not unlawful.

[40] Dealing with Ren's conduct, at the time it purchased feed from McGrath, it had no contract with either Purina or Raywalt. Ren's was free to purchase Purina feed from McGrath at the best price it could obtain and sell it wherever it could. I disagree with the trial judge's conclusion that Ren's was not entitled to be able to obtain Purina feed for resale at advantageous pricing available only to Purina dealers. Ren's conduct in doing so breached no contract. Nor was this conduct tortious or in breach of any statute. Indeed, the trial judge explicitly found that Ren's committed no crime or tort apart from the conspiracy. Ren's required no authorization from Purina to act as it did.

[41] On appeal, the respondent advanced for the first time the proposition that Ren's induced Purina to breach its contract with Raywalt and induced McGrath to breach its contract with Purina. Neither of these allegations was advanced at trial. They are belied by the trial judge's finding that, other than conspiracy, Ren's committed no tort. Moreover, the trial judge's finding that Purina knew of, and approved of the arrangement between Ren's and McGrath, leaves little room for the conclusion required by the inducing breach of contract

tort, namely, that Ren's caused Purina to breach its contract with Raywalt or induced McGrath [page439] to breach its contract with Purina, assuming such a breach could be found. There was nothing in Ren's conduct that was wrong in law. It was not "unlawful conduct" for the purposes of the tort of conspiracy.

[42] Turning to McGrath's conduct, the trial judge found it to be "unlawful" because McGrath had no authority to effectively establish a sub-dealership for Ren's to obtain Purina feed at advantageous prices and then sell it into Raywalt's territory. The trial judge characterized McGrath's conduct as a violation of Purina's standard operating procedures. He therefore did not find McGrath's conduct to constitute a breach of his contract with Purina. Indeed, the standard dealership agreement that Raywalt and Ren's had with Purina did not prohibit such an arrangement. Moreover, the trial judge could not have found McGrath to be in breach of his dealership contract with Purina. His finding that Purina knew and approved of what McGrath was doing precluded that possibility, even if such a prohibition had been a term of McGrath's contract. There is no suggestion that McGrath's actions were tortious or in violation of any statute or in other way wrong in law. In my opinion, McGrath's actions cannot be said to be "unlawful conduct" for the purposes of the tort of conspiracy.

[43] In summary, I conclude that only Purina engaged in any unlawful conduct. The other two appellants did not. As a consequence, the finding of unlawful conduct conspiracy and the damages flowing from it must be set aside. The respondents' claim based on civil conspiracy must be dismissed.

Second issue -- The method of calculating breach of contract damages

[44] In Hamilton, Ms. Hamilton entered into a contract with Open Window Bakery Ltd. ("Open Window") for a term of 36 months to serve as its exclusive agent in Japan. The contract gave Open Window the unconditional right to terminate the contract on three months' notice, effective after the commencement of

the 19th month of the contract. In the 16th month, Open Window wrongfully terminated the contract. The trial judge determined Ms. Hamilton's damages by inquiring into how Open Window would likely have performed its obligations under the contract hypothetically, but for its repudiation. This resulted in an award reflecting the payments that would have been made over the full 36-month term less a 25 per cent reduction for contingencies.

[45] The Supreme Court held that this was the wrong approach and substituted a damage award based on early termination at [page440] the 19th month mark together with three months' notice, reflecting Open Window's maximum exposure to damages. The court based this on the principle articulated in *Cockburn v. Alexander* (1848), 6 C.B. 791 that, generally speaking, where there are several ways in which the contract might be performed, the mode that is adopted is the least profitable to the plaintiff and the least burdensome to the defendant, for the purposes of assessing damages. The court described the rationale for this principle and the error in the approach used by the trial judge in the following language [at paras. 15-18]:

This tort-like analysis proposed by Hamilton is not an established part of Canadian law. There are compelling reasons for this. Contractual obligations are voluntarily assumed by parties and given effect to by the courts. The failure to perform certain promised positive contractual obligations in contract law is conceptually distinct from the breach of unpromised negative obligations to not harm another's interests in tort law: see G. H. L. Fridman, *The Law of Torts in Canada* (2nd ed. 2002), at p. 11.

In a successful tort claim for damages, unliquidated damages are awarded to a plaintiff on the basis that the plaintiff has suffered a loss through some wrongful interference by the defendant. The plaintiff in such cases has legally protected interests that have been found by a court to be unduly compromised. In tort cases, it is widely recognized that the inquiry into what would have been but for the tort is appropriate, since the plaintiff's interest is in being restored to (or at least awarded compensation in

respect of) the position the plaintiff would otherwise be in. See Fridman, *supra*, at p. 2; A. M. Linden, *Canadian Tort Law* (7th ed. 2001), at p. 4, ("[f]irst and foremost, tort law is a compensator"); J. G. Fleming, *The Law of Torts* (9th ed. 1998), at p. 5; and R. F. V. Heuston and R. A. Buckley, *Salmond and Heuston on the Law of Torts* (21st ed. 1996), at pp. 8-9.

However, under the general principle applicable in breach of contracts with alternative performances enunciated above, it is not necessary that the non-breaching party be restored to the position they would likely, as a matter of fact, have been in but for the repudiation. Rather, the non-breaching party is entitled to be restored to the position they would have been in had the contract been performed.

In this case, the relevant contractual duties have been expressly set out by the parties in the agreement. Hamilton is entitled to OWB's performance of these voluntarily assumed duties. Hamilton has no compensable interest in the advantages she might have expected under any particular performance of the contract, since the contract itself provided for alternative methods of performance at the election of the defendant. If Hamilton wanted to secure herself the benefits associated with a given particular method of performance, she should have contracted for only that method of performance.

(Emphasis in original)

[46] The trial judge distinguished Hamilton [at para. 106], finding that it applied only where the parties acted honestly and in good faith, and that Purina had not done so, having [page441] "conducted itself in a manner that 'defeated or eviscerated the very purpose and objective' of its agreement with Raywalt".

[47] With respect, I do not agree. The trial judge erred in finding Hamilton to be premised on good faith conduct by the breaching party. Contrary to his view, there was no finding by the trial judge in Hamilton that Open Window had acted in good faith at all material times. Nor is there any suggestion in the

Supreme Court's decision that good faith conduct is a pre-requisite for the least burdensome principle to apply.

Indeed, Open Window had wrongfully terminated Ms. Hamilton by repudiating the entire contract, thereby defeating its very purpose, yet the least burdensome principle of calculating damages was applicable.

[48] In my view, Hamilton cannot be distinguished as the trial judge did, and should have been followed in assessing the breach of contract damages in this case, even if Purina did not act in good faith in breaching the contract.

[49] Had that been done, the trial judge would not have embarked on a hypothetical inquiry into how Purina would likely have performed its obligations under the contract if it had not breached the contract. That is the very sort of inquiry that Hamilton says should not be done in approaching breach of contract damages where there are alternate modes of performing the contract.

[50] The contract provided that Purina had the unconditional right to cancel the contract at any time on 60 days' notice. Article V(B) of the contract reads, "Notwithstanding anything to the contrary in this article, either of the parties may cancel this Agreement at any time by giving sixty (60) days advance notice to the other party." There is no doubt that this is the least burdensome mode of performance for Purina. It should have been used as the basis for calculating the damages for breach of contract.

[51] Moreover, by finding an implied duty of good faith on Purina not to act in a way that defeats the very purpose of the contract and then finding that Purina could not rely on Article V(B) because it breached that implied duty, the trial judge erred by using the implied duty of good faith to alter the express terms of the contract, including the right to terminate on notice. In *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656 (C.A.), at para. 53, this court made clear that Canadian courts have not accorded this power to an implied duty of good faith.

[52] The trial judge also suggested that it would be unconscionable in these circumstances to allow Purina to rely on a [page442] clause like V(B) in the calculation of breach of contract damages. I do not agree that unconscionability can be used in this way. In my view, that doctrine is applicable to determine whether the contract itself is unconscionable, given, for example, the circumstances in which it was made. The doctrine is not applicable to determine how damages should be assessed in light of the circumstances of a particular breach.

[53] In summary, I conclude that the trial judge erred in failing to apply the approach in Hamilton to calculate the damages owed by Purina for its breach of contract. His task should have been to calculate the breach of contract damages needed to restore Raywalt to the position it would have been in had the contract been performed, adopting the mode of performance provided by the contract that is least burdensome to Purina.

[54] The trial judge found that had Purina performed the contract, there is no doubt that Raywalt would still have been in business at the end of January 1992, when it in fact closed its doors. At that point, the contract gave Purina the unconditional right of cancelling the agreement on 60 days' notice. This was the mode of performance least burdensome to Purina and therefore constituted its maximum exposure for damages for breach of the contract with Raywalt.

[55] Using this approach, the quantification of the damages owed by Purina for breach of contract requires the determination of the amount Raywalt lost because of Purina's breach from the time Raywalt opened for business in March 1991 until the end of March 1992, two months after it actually closed its doors.

[56] In my view, the trial judge made findings of fact sufficient for this court to do that calculation, recognizing that this exercise is more of an art than a science. He calculated that, had Purina performed its contractual obligations, Raywalt would have had a profit of \$145,654 at the end of January 1992, instead of being insolvent.

[57] He arrived at this amount after considering the expert evidence, together with evidence of additional pet food sales that Raywalt would have been able to make in the last two months of that first year of operation. The appellants attack this figure on two bases.

[58] First, they say that the expert opinion relied on already included the additional pet food sales and that it was an error to count them a second time. I do not agree. The expert's evidence makes only cryptic reference to the pet food sales and it was entirely open to the trial judge to find that they were not included in the expert's opinion of Raywalt's first-year profits [page443] and could therefore properly be added to the expert's calculation of loss in the first year.

[59] Second, they say that the trial judge did not add to Raywalt's costs the additional costs that would have been required in achieving these additional sales. Again, I disagree. There was an ample evidentiary basis for the trial judge to reach the conclusion he did for both Raywalt's gross sales and its expenses had Purina honoured its contract.

[60] I see no basis for interfering with the trial judge's valuation of first-year profits lost to Raywalt.

[61] The trial judge also calculated the net profits that Raywalt would have achieved in its second year of operation had the appellants acted lawfully, as part of his calculation of tort damages. He quantified that loss at \$318,071. The appellants raise a number of challenges to this calculation, all of which I reject, as explained in the next section of these reasons. I am therefore prepared to accept that figure as the profits Raywalt would have made in its second year of operation had Purina not breached its contract. This provides a good basis for determining the profits lost to Raywalt through February and March 1992, representing the 60 days' notice Purina was required to give, which I would assess at one-sixth of this number, namely, \$53,011.83.

[62] Thus calculated, I would fix the damages to which

Raywalt is entitled for Purina's breach of contract at \$145,654 plus \$53,011.83, for a total of \$198,665.83.

Third issue -- The calculation of damages

[63] As I have indicated, the trial judge concluded that damages for the unlawful conduct conspiracy should reflect the ongoing concern value of Raywalt at the time it was harmed. He calculated this by assessing what the net profit of the business would have been in its second year of operation and then applying a three times earnings multiple to that figure.

[64] The appellants raise a number of challenges to his assessment of Raywalt's net profit for that second year. Although I have found that the finding of unlawful conduct conspiracy cannot stand, it is necessary to address these challenges since I have used the calculation of Raywalt's net profits for the second year to calculate Raywalt's contract damages for February and March 1992.

[65] First, the appellants say that the trial judge made several errors, resulting in an overvaluation of the contribution that additional pet food sales would have made. They say that the trial judge double counted that contribution by adding it to the expert evidence he relied on. I disagree with this, as I have [page444] explained above. They also say that the trial judge impermissibly relied on hearsay evidence in making his finding. I disagree. In my view, it was open to him to rely on the evidence he did hear, which was completely unobjectionable at trial by the appellants. Lastly, they say that the trial judge insufficiently discounted for the possibility that these additional sales might not take place. However, the discount to be applied was an assessment that the trial judge was entitled to make on the evidence before him. That is what he did. There is no basis for this court to interfere with it.

[66] Second, the appellants argue that the trial judge erred in the discount he applied in using Ren's earnings for the same period as input to calculate what Raywalt would have earned but for the harm inflicted on it. However, the trial judge was fully aware that some discount was appropriate because Ren's

sold some products that Raywalt did not. He based the discount he selected on evidence of the percentage of Ren's business that these additional products represented, measured by tonnage. That was a conclusion he was entitled to draw. There is no basis for this court to second guess it and apply a higher discount rate.

[67] Third, the appellants quarrel with the trial judge's calculation of the value of Ren's feed sales that Raywalt would have taken over but for the conspiracy. They say that there was evidence of this value that the trial judge should have preferred to the evidence he accepted. In my opinion, that too was up to him. His calculation was based on evidence that he was entitled to act upon. There is no basis for this court to interfere.

[68] Fourth, the appellants say that the trial judge committed a palpable and overriding error in assessing the administrative expenses that Raywalt would have incurred in its second year of operation. Again, I disagree. His assessment was well founded on evidence of what those expenses would have been. The trial judge accepted this evidence and made no reversible error in doing so.

[69] In summary, I conclude that all of the appellant's challenges to the trial judge's calculation of the profit that Raywalt would have made in its second year of operation must fail.

Fourth issue -- Prejudgment interest

[70] In his original reasons for judgment, the trial judge applied a prejudgment interest rate of 6.65 per cent to his assessment of damages for breach of contract and unlawful conduct conspiracy. He did so without the parties having an opportunity to make submissions on the issue. He set out his basis for selecting this rate, at para. 219 of his original reasons: [page445]

The average rate of interest established for pre-judgment interest by section 128 of the Courts of Justice Act, R.S.O.

1990, c. C.43, for 1992, the year in which I find that the cause of action of the plaintiffs arose, is 6.65%.

[71] Following the release of these reasons, the trial judge agreed to receive written submissions on the issue. In subsequent reasons, he declined to change the rate he had selected. He gave this explanation, at para. 8 of his supplementary reasons [[2010] O.J. No. 1796, 2010 ONSC 2597]:

More importantly, section 128(1) of the Courts of Justice Act shows that the appropriate starting point for the calculation is not the date on which the claim was actually filed, but rather the date on which the cause of action arose: see also *Sedigh v. Lange*, [2000] O.J. No. 3606 (S.C.J.) at para. 11. I focused on when the cause of action arose as the relevant time and found as a fact that the plaintiffs' cause of action arose at some point in 1992 at or about the time that the business failed owing to the actions of the defendants, rather than focusing on the date upon which the plaintiffs filed their claim. As such, I continue to regard it as appropriate to average the quarterly rates for 1992 in the manner that I did at paragraph 219 of my Reasons for Judgment.

[72] The appellants also argued at trial that the trial judge ought to have adjusted the rate down to reflect the factors listed on s. 130(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43. The trial judge concluded his supplementary reasons by rejecting that submission, at para. 11:

Here, the defendants have advanced a range of reasons for their claim that a lower rate should be applicable, but I find that they have done nothing to discharge the onus that rests upon them of persuading me that it is appropriate that I should exercise discretion in this case to deviate from what would otherwise be the applicable interest rate specified by the Courts of Justice Act.

[73] In this court, the appellants argue that the trial judge erred in this approach.

[74] I agree. The prejudgment rate specified in the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 pursuant to the Courts of Justice Act for proceedings commenced in the last quarter of 1992, that is, when the respondents' claim was commenced, was 5.1 per cent. That is the applicable rate unless the court finds special circumstances to justify departing from it. In my view, the trial judge erred by taking as his starting point the average prejudgment interest rate for 1992, the year in which the respondents' cause of action arose, rather than the starting point as specified under the Courts of Justice Act. Moreover, he offered no special circumstances for exercising his discretion to deviate from the applicable rate specified by the Courts of Justice Act. His error was in using 6.65 per cent as the applicable rate. The proper applicable rate to be used is 5.1 per cent. [page446]

Fifth issue -- Punitive damages

[75] Finally, the appellant Purina attacks the award of punitive damages made against it. It argues that the trial judge's basis for doing so did not reach the threshold required by the jurisprudence.

[76] In *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, [2006] S.C.J. No. 30 ("Sun Life"), the Supreme Court of Canada made clear that, in breach of contract cases, conduct warranting punitive damages must be an independently actionable wrong in addition to a breach of contract. As well, it must also reach the threshold warranting punitive damages. The court described that threshold, at para. 62:

By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency -- the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; *Whiten*, at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, "punitive damages straddle the

frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

[77] In coming to his conclusion, the trial judge was clearly influenced by his finding that Purina's conduct was both a breach of contract and part of the unlawful conduct conspiracy. Alternatively, he found that Purina's conduct constituted a second actionable wrong in that it was also a breach of its implied duty of good faith towards Raywalt. Beyond that, he justified the punitive damages award this way, at para. 238:

Here, I find that an award of punitive damages ought to be made against Purina to serve the rational purpose of delivering the simple message that good faith, promises of good faith, and an underlying foundation of business efficacy continue to be what our law relies upon as the cornerstone of upholding and enforcing contractual promises.

[78] In my view, this sets too low a bar. It would make every breach of contract that is also a breach of an implied duty of good faith a sufficient basis for the award of punitive damages. I think that would pay insufficient regard to the caution in Sun Life that punitive damages are confined to exceptional cases in which the misconduct is of a nature that takes it beyond the usual opprobrium surrounding breaking a contract. It seems to me that breaches of an implied duty of good faith can come in so many possible different shapes and sizes that it cannot be said [page447] that generically, the breach of such a duty is *per se* enough to justify punitive damages. It falls, therefore, to this court to determine whether, on the facts as found below, such an award is warranted.

[79] In Sun Life, the Supreme Court of Canada affirmed that the principles set out in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, at para. 63, continue to govern the award of punitive damages. It reiterated that in breach of contract cases, in addition to the requirement that

the conduct constitute a marked departure from ordinary standards of decency, there is the requirement that the acts be "independently actionable". Breach of an implied duty of good faith can satisfy the requirement of an independent actionable wrong: see Whiten, at para. 79. The trial judge found that Purina had breached its implied duty of good faith. That was not contested before us and since we received no argument on it we must proceed on that basis. Coupled with breach of the exclusivity contract, the requirement of an independently actionable wrong is therefore met in this case.

[80] Thus, the question becomes: did Purina's conduct constitute such a marked departure from the ordinary standards of decency that it warrants censure through the imposition of an award of punitive damages? In answering this question, a careful analysis of Purina's conduct is warranted. In doing so, it is useful to call to mind the factors for consideration set out by the Supreme Court in Whiten, at para. 94:

(1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to

accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that [page448] moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[81] From the outset, Purina knew that in order for Raywalt to succeed, it had to take over Ren's sales of Purina products. As the trial judge found, the volume of Purina sales to Raywalt taken from the Ren's dealership was "critically important" to the success of the new dealership. While the exclusive right to market and sell Purina feed products within defined geographical territories is an important feature of all distributorships, to Purina's knowledge, it was crucial to Raywalt. Further, Purina was aware of the financial risks and vulnerability of Kasamekas and Jackson. As part of the start-up financing, Kasamekas gave Purina a mortgage against his home and the company's credit line was secured by personal guarantees by Kasamekas, Jackson and their spouses. The personal guarantees were secured against their homes.

[82] It is within this context that Purina's actions must be considered. Within weeks of Raywalt starting up, it learned that Purina was permitting Ren's to continue to supply Ren with feed. When challenged, Purina assured Raywalt that it would stop supplying Ren with feed. While Purina did in fact stop supplying Ren directly, it then embarked on the arrangements with McGrath to ensure that Ren continued to receive feed and sell within the Raywalt territory. That is, in essence, Purina did precisely what it told Raywalt it would not do. It did so repeatedly, over a lengthy period of time and with a complete disregard for the consequences to Raywalt. At para. 49 of the reasons for decision, the trial judge quotes from correspondence authored by Tom Robinson, a manager at Purina, which shows that he had a "clear financial and business interest in McGrath succeeding over Raywalt" and at the relevant times, took an "aggressive stance" against Raywalt.

Because of the surreptitious way in which Purina supplied Ren, Raywalk had no knowledge of what was going on and therefore had no ability to take steps to address the problem or mitigate the financial harm that ensued.

[83] Purina's actions in supplying McGrath so that he, in turn, could supply Ren are deceitful. As such, they are reprehensible and deserving of sanction.

[84] As the preceding reasons explain, the damages award does not otherwise punish this behaviour. There is no "double recovery" aspect to making an award of punitive damages in this case. Moreover, the damages award is insufficient to accomplish the objectives of denunciation and deterrence of others from acting similarly. The amount of \$30,000, set by the [page449] trial judge, is sufficient to do so. Accordingly, I would affirm the punitive damages award, albeit for different reasons than those of the trial judge.

Conclusion

[85] In summary, except for punitive damages, I would allow the appeal. I would dismiss the claim of unlawful conduct conspiracy. I would substitute for the damage award for breach of contract an award of \$198,665.83, to which I would apply a prejudgment interest rate of 5.1 per cent. The trial judgment must be amended accordingly, in light of these reasons.

[86] This result may be of relevance to the costs awarded at trial and is as well the context for an award of costs of the appeal. The parties may file written submissions of no more than ten pages on both of these questions within 30 days of the release of these reasons.

Appeal allowed in part.

TAB 6

Barrick Gold Corporation v. Lopehandia et al.

[Indexed as: Barrick Gold Corp. v. Lopehandia]

71 O.R. (3d) 416
[2004] O.J. No. 2329
Docket No. C39837

Court of Appeal for Ontario,
Doherty, Laskin and Blair JJ.A.
June 4, 2004

Injunctions -- Jurisdiction -- British Columbia defendant conducting lengthy campaign of posting defamatory and malicious statements about Ontario-incorporated gold producer on Internet -- Plaintiff's claim for injunctive relief against defendant falling within rule 17.02(i) of Rules of Civil Procedure -- In personam nature of remedy and defendant's marginal presence in Ontario not constituting grounds for denying relief in Ontario in circumstances of this case -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 17.02(i). [page417]

Torts -- Defamation -- Damages -- Appellate review -- Appellate court having more flexibility in reviewing award of damages for defamation made by judge alone than in case of jury award -- Court will nevertheless not readily interfere with award unless satisfied that trial judge applied wrong principle of law or misapprehended facts or that amount awarded was so extremely high or low as to make it erroneous estimate of damages.

Torts -- Defamation -- Damages -- General damages -- Defendant conducting lengthy campaign of posting defamatory and malicious statements about plaintiff gold producer on Internet -- Trial judge erring in awarding general damages in amount of \$15,000 -- Trial judge failing to take special nature

of Internet into account in assessing general damages and in concluding that defendant's statements were unlikely to be taken seriously -- Trial judge erring in treating defamatory statements made against directors, officers and employees of plaintiff as irrelevant to damage to plaintiff's reputation -- Trial judge failing to take into account defendant's refusal to retract or apologize -- Trial judge erring in reducing damages she might otherwise have ordered on basis that her decision would play significant role in vindicating plaintiff's reputation -- Award set aside and replaced by award of \$75,000.

Torts -- Defamation -- Damages -- Punitive damages -- Defendant conducting lengthy campaign of posting defamatory and malicious statements about plaintiff gold producer on Internet -- Trial judge erring in dismissing claim for punitive damages on grounds that no reasonable business person or investor would take defendant's statements seriously and that there was no evidence of vulnerability on part of plaintiff -- Defendant being unknown to persons reading

his messages and holding himself out as knowledgeable -- Plaintiff being vulnerable in context of Internet -- Punitive damages in amount of \$50,000 awarded on appeal.

The plaintiff, an Ontario corporation with its head office in Toronto, was one of the largest producers of gold in the world. The defendant was a businessman who resided in British Columbia. He was the directing mind of a British Columbia company which purported to deal in precious-base metals and strategic minerals. The defendant claimed that the plaintiff had fraudulently acquired certain mining claims of which the defendant and others were the beneficial owners. He embarked upon an Internet campaign by posting messages on bulletin boards or message boards on various Internet web sites dedicated to providing information to those interested in the gold mining industry. In addition to attacking and undermining the plaintiff's claim to ownership of one of its most important holdings, the defendant accused the plaintiff of a long list of criminal misconduct.

The plaintiff brought an action for damages for defamation

and a permanent injunction restraining the defendant from disseminating, posting on the Internet or publishing further defamatory statements concerning the plaintiff or its officers, directors or employees. The defendant continued his campaign, even more defiantly, after the libel notice was served. He did not defend the action, and was noted in default. On a motion for default judgment, the trial judge found that the impugned statements were defamatory. She awarded general damages for injury to the plaintiff's reputation in the amount of \$15,000. She dismissed the claim for punitive damages. She also dismissed the claim for injunctive relief on the basis that the court did not have jurisdiction to make the order requested [page418] because (a) service was not properly made with respect to the claim for injunctive relief pursuant to rule 17.02(i) of the Ontario Rules of Civil Procedure; (b) there was no evidence the defendant had any assets or presence in Ontario; and (c) the claim for injunctive relief, being a claim in personam, should have been pursued against the defendant in British Columbia, where the courts had the ability to supervise any injunctive relief granted. The plaintiff appealed the award of damages and the dismissal of the claim for an injunction.

Held, the appeal should be allowed.

Per Blair J.A. (Laskin J.A. concurring): Defamation on the Internet has features which distinguish it, for purposes of damages, from defamation in other media. Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed. The Internet has greater potential to damage the reputation of individuals and corporations as a result of these features than does its less pervasive cousins.

An appellate court has more flexibility in reviewing an award of damages for defamation made by a judge alone than in the case of one made by a jury. However, the court will not readily interfere with the award unless it is satisfied that the trial judge arrived at the figure either by applying a wrong principle of law or through a misapprehension of the facts or

that the amount awarded was so extremely high or so low as to make it an entirely erroneous estimate of the damages.

The trial judge misapprehended the evidence, and erred in principle, in arriving at her award of \$15,000 for general and compensatory damages. She did so in five ways. First, her conclusion that a reasonable reader was unlikely to take what the defendant said seriously was contrary to the evidence. While the defendant's style of writing might not be taken seriously in a traditional medium such as a newspaper, the Internet is not a traditional medium of communication, and there was nothing in the record to indicate that people did not take the defendant's postings seriously. On the contrary, several people took the messages seriously enough to contact the plaintiff personally; the plaintiff received a number of communications from a concerned shareholder; and the Toronto Stock Exchange contacted the plaintiff to enquire about the defamatory statements. Moreover, many users of the message boards and bulletin boards responded to and replied to the defendant's messages. Second, the trial judge's conclusion that a reasonable reader was unlikely to take what the defendant said seriously misjudged the target audience and the nature of the potential impact in the context of the Internet. She failed to take into account the distinctive capacity of the Internet to cause instantaneous, irreparable damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications referred to above. Thirdly, she erred in treating the defamatory statements made against the directors, officers and employees of the plaintiff as irrelevant to the damages to the plaintiff's reputation. Fourthly, she failed to take into account the refusal of the defendant to retract or to apologize. Finally, she erred in reducing the damages she might otherwise have ordered on the basis that her decision would play a significant role in vindicating the plaintiff's reputation. Such a consideration should not form the basis for decreasing the amount of damages that are reasonably required to vindicate the reputation of a person or corporation. It was impossible to say that the judgment would receive the same degree of publication and diffusion on the Internet as the defendant's postings had

received. [page419]

In dismissing the claim for punitive damages, the trial judge held that the emotional and unreasoned tenor of the defendant's messages was such that no reasonable business person or investor would take him seriously, thus mitigating the claim for punitive damages. She also held that there was no evidence of real vulnerability on the part of the plaintiff, which she viewed as "the powerful party here", and that this was not a case of the defendant abusing power. Finally, she concluded that her compensatory award, including costs, would be a sufficient deterrent to prevent the repetition of his conduct. She failed to take into account the fact that the defendant was unknown to the unlimited numbers of persons who may have viewed his avalanche of defamatory postings on the Internet and held himself out to be a person of substance, knowledgeable in matters relating to the mining industry in Chile. Secondly, while vulnerability is a factor to be considered by the court in assessing punitive damages, the plaintiff was not "the powerful party" in the context of the Internet. The impact of the Internet was to neutralize whatever "power" the plaintiff might have had, in terms of a communication battle with the defendant. In reality, it was the plaintiff that was vulnerable to publications of this nature, and the defendant who was abusing his power. Thirdly, an award of general damages in the amount of \$15,000 was insufficient to fulfill the dual role of compensation plus punishment and deterrence in the circumstances of this case. Finally, punitive damages were simply required in this case. The defendant's conduct was malicious and high handed. It was unremitting and tenacious, and it involved defamatory publications that were vicious, spiteful, wide-ranging in substance and worldwide in scope. Punitive damages were called for as a means by which the court expressed its outrage at the egregious conduct of the defendant. The appropriate award of punitive damages in this case was \$50,000.

The trial judge erred in concluding that the claim for injunctive relief did not fall within rule 17.02(i) because the injunctive relief was not claimed with respect to acts by a party in Ontario. Even if it was unclear on the evidence that

the defendant was doing or refraining from doing anything in Ontario, he was, in his campaign of libel, doing something affecting personal property in Ontario. The plaintiff's goodwill constituted "personal property". The result of the defendant's conduct was to affect that goodwill or personal property negatively. Secondly, there was evidence that the defendant was doing something in Ontario in connection with the publication of the libel. At least one of the bulletin boards that he utilized was located in Ontario. Users of the Internet in Ontario and elsewhere could access that message board through seamless connections maintained by an Internet service provider, the offices of which were located in Toronto.

The more troubling point respecting the claim for injunctive relief was the *in personam* nature of the remedy, the marginal presence of the defendant in the jurisdiction and concerns about enforceability of such an order. However, courts do in some circumstances permit service of claims outside the jurisdiction seeking to prevent publication in the jurisdiction of libellous material originating outside the jurisdiction, and this was an appropriate case in which to do so. Not only was there a real and substantial connection between the plaintiff and Ontario, but there was a real and substantial connection between the publication of the libel by the defendant and Ontario as well. At least one of the bulletin boards utilized by the defendant was operated in Toronto. The posting of messages on that board constituted at least an act done by the defendant that affected the plaintiff's reputation, goodwill and personal property in Ontario, and arguably constituted an act done by him in Ontario. The courts in Ontario must have jurisdiction to restrict such conduct. Even if an injunction might only be enforced against the defendant if he entered Ontario personally, the injunction [page420] might nonetheless be effective as it would operate to prevent the Internet service provider from continuing to post the defamatory messages on the bulletin board operated in Toronto. Moreover, if the plaintiff were to take an injunction granted in Ontario to British Columbia, he might be successful in having the order enforced against the defendant by the British Columbia courts. A permanent injunction should be granted.

Per Doherty J.A. (dissenting): The trial judge did not misapprehend the evidence or err in principle in awarding the plaintiff \$15,000 for general and compensatory damages. Her finding that a reasonable reader was unlikely to take the defendant's statements seriously was a finding of fact with which the court could not interfere absent clear and palpable error. If that finding stood, there was no basis upon which to interfere with the quantum awarded. It could not be assumed that the trial judge was unaware of the stylistic difference between Internet dialogue and statements in more traditional media and failed to consider it in arriving at her conclusion that the manner in which the allegations were made tended to undermine their credibility. There was very little evidence of people actually taking the defendant's statements seriously, and the plaintiff failed to provide any details concerning the nature of the inquiry made by the Toronto Stock Exchange. It was open to the trial judge to interpret the evidence as showing that the statements were unlikely to be taken seriously. The fact that other interpretations, more favourable to the plaintiff, were also available on the evidence, did not justify appellate intervention. The trial judge did not fail to consider the Internet's capacity to cause instantaneous, irreparable damage to the business reputation of an individual or corporation. Her findings that the statements would not be taken seriously rendered the Internet's capacity to cause harm to a company's business reputation irrelevant.

Farrell v. St. John's Publishing Co., [1986] N.J. No. 19, 58 Nfld. & P.E.I.R. 66, 174 A.P.R. 66 (C.A.), revg in part (1982), 35 Nfld. & P.E.I.R. 181, 99 A.P.R. 181 (Nfld. S.C.), apld

McElroy v. Cowper-Smith, [1967] S.C.R. 425, 62 D.L.R. (2d) 65, 60 W.W.R. 85, consd

Other cases referred to

Associated Newspapers Ltd. v. Dingle, [1964] A.C. 371, [1964] 2 All E.R. 737 (H.L.); Attorney-General v. Times Newspapers Ltd., [1991] 1 A.C. 191 (H.L.); 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, [1995] S.C.J. No. 69, revg, [1993] O.J. No. 239 (C.A.); Braintech, Inc. v. Kostiuk, [1999] B.C.J. No. 622, 63 B.C.L.R. (3d) 156, 171 D.L.R. (4th) 46, [1999] 9 W.W.R. 133 (C.A.) [Leave to appeal to S.C.C. refused (2000), 253 N.R. 395n]; Brown v. Cole, [1998] B.C.J. No. 2464, [1999] 7 W.W.R. 703, 61 B.C.L.R. (3d) 1, [1999] 7 W.W.R. 703 (C.A.) [Leave to appeal to S.C.C. dismissed (1999), 243 N.R. 400n]; Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C., [1997] B.C.J. No. 428, 31 B.C.L.R. (3d) 24, 143 D.L.R. (4th) 213, [1997] 5 W.W.R. 299 (C.A.) [Leave to appeal to S.C.C. refused (1997), 223 N.R. 79n], affg (1996), 136 D.L.R. (4th) 414, 5 C.P.C. (4th) 3

01 (B.C.S.C.); Dow Jones & Company Inc. v. Gutnick, [2002] HCA 56 (10 December 2002); Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, 24 O.R. (3d) 865n, 184 N.R. 1, 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89, affg (1994), 18 O.R. (3d) 385, [1994] O.J. No. 961, 114 D.L.R. (4th) 1, 20 C.C.L.T. (2d) 129 (C.A.), revg in part (1992), 7 O.R. (3d) 489 (Gen. Div.); Hodgson v. Canadian Newspapers Co. (2000), 49 O.R. (3d) 161, 189 D.L.R. (4th) 241, [2000] O.J. No. 2293 (C.A.) [Leave to appeal to S.C.C. refused (2001), 271 N.R. 394n], supp. reasons (2003), 65 O.R. (3d) 626, 228 D.L.R. (4th) 732, 37 C.P.C. (5th) 165, [2003] O.J. No. 2760 (S.C.J.), affg in part (1998), 39 O.R. (3d) 235 (Gen. Div.); [page421] Langille v. McGrath, [2001] N.B.J. No. 414, 243 N.B.R. (2d) 360, 631 A.P.R. 360, 2001 NBCA 106 (C.A.); MacMillan Bloedel Ltd. v. Simpson, [1996] 2 S.C.R. 1048, 22 B.C.L.R. (3d) 201, 137 D.L.R. (4th) 633, 199 N.R. 279, [1996] 8 W.W.R. 305, 109 C.C.C. (3d) 259, 2 C.P.C. (4th) 161, [1996] S.C.J. No. 83, affg (1994), 96 B.C.L.R. (2d) 201, 118 D.L.R. (4th) 1, [1994] 10 W.W.R. 705, 93 C.C.C. (3d) 289, 32 C.P.C. (3d) 11 (C.A.), affg (1993), 106 D.L.R. (4th) 556 (B.C.S.C.); Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135, 52 B.C.L.R. (2d) 160, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1; Muscutt v. Courcelles (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128, 213 D.L.R. (4th) 577, 13 C.C.L.T. (3d) 161, 26 C.P.C. (5th) 206 (C.A.), supp. reasons (2002), 213 D.L.R. (4th) 661, 13 C.C.L.T. (3d) 238, 26 C.P.C. (5th) 203 (Ont. C.A.), affg (2001), 5 C.P.C. (5th) 353

(Ont. S.C.J.); Pacific International Securities Inc. v. Drake Capital Securities Inc., [2000] B.C.J. No. 2328, 2000 BCCA 632, 82 B.C.L.R. (3d) 329, 194 D.L.R. (4th) 716, 49 C.P.C. (4th) 193 (C.A.); Royal Bank of Canada (c.o.b. Chargex) v. Battistella, [19294] O.J. No. 1717 (C.A.); Safeway Stores Ltd. v. Harris, [1948] 2 W.W.R. 211, [1948] 4 D.L.R. 187, 56 Man. R. 146 (C.A.); Tozier v. Hawkins (1885), 15 Q.B. 680, 55 L.J.Q.B. 152 (C.A.); Vaquero Energy Ltd. v. Weir, [2004] A.J. No. 84, 2004 ABQB 68; Walker v. CFTO Ltd. (1987), 59 O.R. (2d) 104, [1987] O.J. No. 236, 37 D.L.R. (4th) 224, 39 C.C.L.T. 121 (C.A.); Waxman v. Waxman, [2004] O.J. No. 1765, 186 O.A.C. 201, 44 B.L.R. (3d) 165 (C.A.), affg (2002), 25 B.L.R. (3d) 1, [2003] O.J. No. 2528 (S.C.J.), supp. reasons [2003] O.J. No. 3533 (S.C.J.); Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 283 N.R. 1, [2002] I.L.R. I-4048, 2002 SCC 18, 20 B.L.R. (3d) 165, [2002] S.C.J. No. 19

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 128

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 17.02

Authorities referred to

Carter-Ruck, P.F., and H. Starte, Carter-Ruck on Libel and Slander, 5th ed. (London: Butterworths, 1997)

Castel, J.-G., and J. Walker, Canadian Conflict of Laws, 5th ed., looseleaf (Toronto: Butterworths, 2004)

Collins, M., The Law of Defamation and the Internet (Oxford University Press, 2001)

Gibson, W., Neuromancer (New York: Ace Books, 1984)

Harasim, L.M. (ed.), Global Networks: Computers and International Communication (Cambridge, MA: MIT Press, 1993)

Hogg, P.W., *Constitutional Law of Canada*, looseleaf ed., Vol. 1 (Toronto: Carswell, 1998)

Lidsky, L.B., "Silencing John Doe: Defamation and Discourse in Cyberspace" (2000), 49 Duke L.J. 855

Mazey, E., "The Enforcement of Labour Orders outside the Jurisdiction of Origin" (2002), 59 U.T. Fac. L. Rev. 25

Rheingold, H., *A Slice of Life in My Virtual Community// Global Networks: Computers and International Communication*, L.M. Harasim, ed. (Cambridge, Mass.: MIT Press, 1993)

Sharpe, R.J., *Injunctions and Specific Performance*, looseleaf ed. (Toronto: Canada Law Book, 2002) [page422]

APPEAL by the plaintiff from an award of damages and dismissal of a claim for permanent injunction by Swinton J., dated March 12, 2003.

Kent E. Thomson, for appellant.

No one appearing for respondents.

BLAIR J.A. (LASKIN J.A. concurring): --

The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation

(Emphasis added) [See Note 1 at the end of the document.]

[1] The issues on this appeal concern the damages that may be awarded in Internet defamation cases, and whether the remedy of injunctive relief should be granted in such circumstances.

Introduction

[2] Jorge Lopehandia has a grievance against Barrick Gold Corporation. The grievance emerges from a claim he asserts regarding one of Barrick's mining properties in Chile, known as the Pascua Lama project. Barrick insists that the grievance is unfounded.

[3] Following Barrick's refusal to settle the complaint in 2001, Mr. Lopehandia embarked upon what counsel for the appellant has accurately described as "a systematic, extensive and vicious campaign of libel . . . over an extraordinarily lengthy period" with the express purpose and intent of embarrassing Barrick and injuring its reputation. This campaign was conducted over the Internet, and involved the posting of hundreds of false and defamatory statements concerning Barrick on various websites.

[4] Barrick served a libel notice on October 8, 2002, after learning about the extent of the Internet campaign earlier that year. The campaign continued. Barrick served its statement of claim on October 31, 2002. Unrepentant, Mr. Lopehandia continued his campaign even more defiantly. Neither he nor his company defended the action, however, and the defendants [page423] were noted in default. On March 12, 2003, after a motion for default judgment, Swinton J. granted judgment, finding that the impugned statements were defamatory and awarding general damages for injury to Barrick's reputation in the amount of \$15,000. She dismissed the claim for punitive damages and for injunctive relief.

[5] Barrick appeals the quantum of general damages awarded and the refusal to award any punitive damages or grant injunctive relief. I would allow the appeal for the reasons that follow.

Facts

[6] Barrick is one of the largest producers of gold in the world. It has operating mines and development projects in Canada, the United States, Peru, Argentina, Tanzania, Australia and Chile. It is incorporated pursuant to the laws of Ontario and has its head office in Toronto, Ontario.

[7] Barrick's shares are widely held. They trade under the ticker symbol "ABX" on the Toronto, New York, London and Swiss Stock Exchanges and the Paris Bourse.

[8] Mr. Lopehandia is a businessman who resides in North Vancouver, British Columbia. He is an officer and director, and the directing mind of the defendant Chile Mineral Fields Canada Ltd. ("CMFCL"), a British Columbia corporation with head offices in Vancouver and purporting to deal in precious-base metals and strategic minerals. It is a deemed fact in this case that the actions of Mr. Lopehandia at issue in the proceeding were undertaken by him in his personal capacity and in his capacity as an officer, director and representative of CMFCL.

[9] Barrick obtained its interest in the Pascua Lama Project in 1994. Through a Chilean subsidiary it also acquired mining claims near the Project, known as the "Amarillo Claims", from two individuals named Rodolfo Villar Garcia ("Villar") and Alejandro Moreno ("Moreno"). The Pascua Lama Project is an important Barrick holding as its estimated gold reserves represent approximately 25 per cent of Barrick's worldwide gold reserves.

[10] In January 2001, Barrick received a letter from Mr. Lopehandia claiming that he and three other individuals (including Villar) were the beneficial owners of the Amarillo Claims and that the Pascua Lama Project had been fraudulently obtained by Barrick. He threatened to sue and to commence "an all out war" against Barrick if his demands for the payment of US\$3 million were not met within ten days. The campaign was to include complaints to various governmental, financial and regulatory authorities about the Company. In a

letter dated January 11, 2002, he stated: [page424]

Since my time left is short; should we not Agree to Agree in 10 days; my actions will be very swift and unfortunately because of your profile; and Action will result to be extremely serious to the stance and Public Image of Barrick's Gold in Chile. Perhaps even in the world.

[11] Barrick investigated the allegations. It then notified Mr. Lopehandia that they were unfounded in its view, and that Barrick would not accede to his demands.

[12] True to his word, Mr. Lopehandia embarked upon an Internet campaign by posting a blizzard of messages on "bulletin boards" or "message boards" on various Internet web sites. The web sites in question are dedicated to providing information to those interested in the gold mining industry, including those interested in investing in the stocks of gold or gold-industry companies. Some of the web sites are dedicated to discussions concerning Barrick specifically. The web sites include www.lycos.com (in the financial markets message board sections dedicated to Barrick and another company, Durban Roodeport Deep Limited ("Durban Deep")); www.yahoo.com and www.yahoo.ca (in the financial markets message board section dedicated to Barrick); www.siliconinvestor.com; www.theminingweb.com; and www.miningindia.com.

[13] The messages and e-mails complained of filled nine thick volumes of exhibits before the motions judge. They fall into three categories, chronologically, namely:

- (a) statements published between July 31, 2001 and October 8, 2002 (the date of service of the libel notice) -- 7 volumes;
- (b) statements published after service of the libel notice but before the issuance of the statement of claim on October 30, 2002 -- 1 volume; and
- (c) statements published after service of the statement of claim and before the hearing on February 14, 2003 -- 1

volume.

[14] Barrick attempted to file an additional volume of messages published after the hearing but before judgment. The motions judge declined to accept this evidence. It is unnecessary to resolve the debate over whether she was correct in doing so, as the additional evidence would simply have confirmed her finding that Mr. Lopehandia will continue to make defamatory statements against Barrick.

[15] The motions judge correctly found that the voluminous statements published by Mr. Lopehandia were defamatory of Barrick and, on the deemed facts, published with malice. Indeed, the libel was of a most serious nature. The libellous campaign [page425] was conducted over a prolonged period of time and in the face of -- and in defiance of -- Barrick's protests and attempts to obtain redress. As well as attacking and undermining Barrick's claim to ownership of the Pascua Lama Project -- a serious allegation in itself, given the proportionate significance of the Project to the company's overall gold reserves -- the many postings accused Barrick of a long list of criminal misconduct. The list is extensive, comprising allegations of fraud, tax evasion, money laundering, manipulation of world gold prices for Barrick's own benefit, misrepresentation to government officials, improperly influencing government officials, obstruction of justice, pursuing organized crime, attempted murder, arson and genocide and crimes against humanity.

[16] It is true, as the motions judge found, that the messages are "emotional, often incoherent, rambling and highly critical of Barrick, its officers, directors and employees". Nevertheless, the postings clearly conveyed the meaning in the allegations listed above. Some examples will suffice:

www.theminingweb.com

May 26, 2002

Comments posted to two Articles:

(i) "Barrick dusts off \$1.6bn projects";

(ii) "Barrick's Australian headache"

Barrick Gold never owned Pascua Lama and has assumed a posture of Financial Fraud just like ENRON on its audited financials re: Chile.

Acting in contempt, Barrick "got Pascua" in March 1997 for US\$25, frauded the rest and "created US\$ billions with the largest orebody in the planet".

However, Barrick forgot Chile and its Judicial system re: Civil Law of simulation of Contracts and Imaginary transactions.

Barrick engaged in documented fraud and theft of mining property rights and intellectual mining discoveries in Chile.

Homestake is guilty of the same sin with a parallel embargo in Maricunga Gold, III Region, Chile.

Barrick, tied to ENRON via Trizechann it's third largest real state provider. (Peter Munk), engaged itself in a POLICY of terror manipulation of Gold price and Gold markets, financial suffocation to Chilean miners and fraud at Exchanges worldwide, to try to corner the world GOLD Markets.

End result? [page426]

Over hedging and falsely reporting to IRS and SEC regarding Chile, losses, Audited Financials, cost of Pascua Lama, the US\$25 fraud, the string of coverup frauds thereof related is incredibly long and detailed . . .

Barrick and Associates, are today, short 20 million ounces of Gold and 592 million ounces of Silver, plus damages and punitive damages re Pascua Lama.

We, the real owners of Pascua Lama, will not give up and will pursue JUSTICE and satisfaction for the immoral crimes

committed against us since 1996 in Chile and worldwide.

Forensic Audit for Barrick Gold re: Minera Nevada S.A.
activities and financial dealings (its Chilean clone-aside of
Barrick Chile S.A.)

Barrick GUILTY of the largest Gold fraud since Bre-X. Jorge
Lopehandia Legitimate owner, co-owner of Pascua Lama, 111
Region, Chile.

www.lycos.com:

July 12, 2002

Message Board: Drooy (Durban Deep)

Chileans, killed most Junior mining companies with the
hedging programs, 'WHEREBY BARRICK MAKES MONEY WITH THE
BANKS, ONLY IF GOLD PRICES ARE LOW AND EVERYONE ELSE LOSSES
MONEY & GOLD".

.

Mining is a highly scientific endeavour and DOES NOT RESPOND
WELL to Market Prices Manipulation! However, 1,000's of
little & medium miners are dead or close to it in Chile.

Similarly in Africa, Barrick's genocidal policy and theft
policy of "MEASURING LESS OUNCES TO PAY LESS in Tanzania
(Theft of 3+ million ounces in one pass)",

Barrick burned the country of Tanzania. Barrick is a DEVIL
Killer.

So the reality?

A bunch of majors are today, more worried about he overall
reserves and firing as many as possible to "HAVE THE ANALYSTS
PUMP UP THEIR STOCK"!

What is the POLICY THEN? BRUTALITY or Business?

More like -- GENOCIDE and control through force, financial suffocation, bank fraud, contract fraud & MONOPOLY?

Get a mental and ethics UPGRADE Gold fellaws!

.

When it comes to GOLD, Barrick uses crime to GET IT!

Barrick will be brought to justice WORLDWIDE! [page427]

Write off Barrick's worldwide reserves obtained since 1996 (after the Pacua Fraud) as "product of crime" or "fruits belonging to a Chilean Law Suit".

Barrick is running on:

"Stolen Gold, Stolen Silver, Stolen cash, influence peddling, geological fraud, Stock Exchange Fraud, Accounting Fraud, Auditing Fraud, Internet Fraud, Material Facts suppression, False Public releases and false propaganda and media releases.

www.lycos.com

August 9, 2002

Message Board: ABX (Barrick Gold)

.

But neither Barrick nor Minerva S.A . . . own "Pascua Lama" in Chile. . . . NEVER DID since 1996.

All the "TAXABLE EXPENSES" of ABX in Chile since 1997 to date are a FICTIONAL FABRICATION to MONEY LAUNDER and to PAUNDER shareholders MONEY!

We just feel SORRY for the Pension Funds, Pension Plans, Banks, Institutional Investors and shareholders at large,

that believed this CRIMINAL GANG, when they purported to be

. . .

BUILD TO LAST . . .

More like BUILT on CRIME, THEFT, GENOCIDE and cheating on taxes worldwide

This Stock -- Barrick et al. . . . are a FRAUD!!!!!!!!!

Jorge Lopehandia

www.yahoo.com

October 31, 2002

Re: Pascua mine & project

EMBARGOED

By : peterisatheif

Barrick is under Civil and Criminal Investigation in Chile since June 2001.

Barrick "closed -- Pascua 200" after I adverted Patrick Garver Tory's law Firm et al, of my Legal situation with Barrick's John Lill President of Barrick 2 Ltd -- Barrick Chile and President of Minera Nevada S.A.

Barrick was the MAGNET used by John Lil to attract me 1996, Minera Nevada S.A. is the vehicle of FRAUD to steal Pascua in March 04, 1997 for US\$25 equivalent. [page428]

June 2001 Injunction (Embargo) in the form of medida Prejudicial precautoria, was decreed.

Barrick has sued me at lycos and is reading these Boards.

I am being sued for SLANDER for speaking the Documented TRUTH of Record, as per Chilean Mining Code.

Not the cooked and rigged "financials of Barrick"

even if it was for decency, check at goldsextant's website
the Gold peak and bull 1996, KILLED by ABX et al, at the
inefficiency of their Legal Mining Department.

With CASH to shoot from the HIP and deceit to USA and
Canadian leaders, Barrick has rigged and stolen the wealth of
the world.

They do NOT own and IOTA of our Gold.

In Chile, they are one away from JAIL, all of them.

In Canada, I am being sued and the plot has thickened.

Barrick's books are WORSE Than ENRON.

I can PROVE IT in a Court of LAW.

[17] There is evidence that Mr. Lopehandia's numerous postings were read by users of the Internet, including people in Ontario, and that they have prompted enquiries from Barrick's shareholders, from financial analysts and from regulatory agencies, including the Toronto Stock Exchange. These enquiries continue. Moreover, Mr. Lopehandia's messages have elicited their own constituency of support and encouragement, thus amplifying the spread of the defamation throughout the Internet.

[18] The motions judge discounted Barrick's evidence about the harm to its reputation as lacking in detail and, in some respects, unsupported. She concluded that Mr. Lopehandia's statements "come across as a diatribe or a rant" and were unlikely to be taken seriously by a reasonable reader, "especially those who are said to have read the material, such as stock analysts or individuals working for the TSE". She held that the defamatory words, notwithstanding their repetition, had not caused any serious damage to Barrick's business reputation. At para. 44 of her decision, she

concluded:

Given that the main concern in the litigation was to vindicate the corporation's reputation and the lack of any evidence of adverse economic impact, but recognizing that general damages for libel are at large, and that there have been hundreds of repetitions of the libelous statements, I award general damages of \$15,000.00 for damage to reputation.

[19] The motions judge then went on to consider and reject Barrick's claims for punitive damages and injunctive relief.

[page429]

The Standard of Review

[20] Appellate courts should not lightly interfere with damage awards, particularly the award of a jury or judge alone in a defamation case where damages are "at large": see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, at pp. 1194-96 S.C.R.; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, [1995] S.C.J. No. 69, at pp. 37-38 S.C.R.; and *Hodgson v. Canadian Newspapers Co.* (2000), 49 O.R. (3d) 161, [2000] O.J. No. 2293 (C.A.), at para. 60. In *Botiuk*, at p. 38 S.C.R., Cory J. said:

Perhaps the cautionary note expressed in *Hill* bears repeating. Namely, that appellate courts should, for the reasons expressed in *Hill*, proceed with restraint and caution before making any variation in assessments of damages in libel cases.

[21] In *Hill*, Cory J. relied heavily upon the decision of this court in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, [1987] O.J. No. 236 (C.A.). There, Robins J.A. observed (at p. 110 O.R.):

An appellate court is not entitled to substitute its own judgment on the proper amount of damages for the judgment of the jury. The question is not whether the court would have awarded a smaller sum than was awarded by the jury; nor is the question whether the size of the verdict was merely too

great. The question is whether the verdict is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate or, put another way, whether the verdict is so exorbitant or so grossly out of proportion to the libel as to shock the court's conscience and sense of justice.

[22] Walker and Hill involved jury awards. There appears to be little jurisprudence in Ontario as to the standard that applies to appellate review of judge-alone damage awards in defamation cases. In my view -- even though the bywords remain "caution" and "restraint" -- an appellate court has more flexibility in reviewing an award of damages for defamation made by a judge alone than in the case of one made by a jury. When Hill was before this court, the court acknowledged the general rule in England "that an appellate court might more readily overturn an award by a judge sitting alone than an award by a jury: see Blackshaw v. Lord, [1984] Q.B. 1 at p. 27, [1983] 2 All E.R. 311". [See Note 2 at the end of the document.]

[23] It makes sense that the standard of review should be somewhat different in such a case. When examining a jury award, in the absence of errors in the charge to the jury, the [page430] court is limited to a consideration of the amount in question. No reasons are provided for the damage calculation, and there is a purpose therefore in focusing on whether the award is inordinately high or low. In the case of a judge alone, however, the court has the benefit of the judge's reasons for arriving at the quantum of damages, and, as well as considering quantum, can determine whether there have been any errors in law or in principle, or whether the judge has misapprehended or misapplied the facts. As the British Columbia Court of Appeal noted in Brown v. Cole, [1998] B.C.J. No. 2464, [1999] 7 W.W.R. 703 (C.A.), at para. 50, "[e]rror of law and serious misapprehension of the evidence go, almost without saying, as grounds for interference by a provincial appellate court".

[24] Courts in other provinces have considered this question. They have generally concluded that appellate courts should only reluctantly interfere with judge-alone defamation awards but

that they may do so where the judge has made an error in law, applied a wrong principle, seriously misapprehended the evidence, or made an award that is inordinately high or low. See *Brown v. Cole*, *supra*; *Safeway Stores Ltd. v. Harris*, [1948] 2 W.W.R. 211, [1948] 4 D.L.R. 187 (Man. C.A.); *Langille v. McGrath*, [2001] N.B.J. No. 414, 243 N.B.R. (2d) 360 (C.A.), at paras. 22-24; and *Farrell v. St. John's Publishing Co.*, [1986] N.J. No. 19, 58 Nfld. & P.E.I.R. 66 (C.A.).

[25] I accept the following statement from the decision of the Newfoundland Court of Appeal in *Farrell*, at [p. 79 Nfld. & P.E.I.R.], as an accurate outline of the law:

In assessing damages in a libel action a judge, sitting without a jury, has a great deal of latitude and the Court of Appeal will not readily interfere with his award unless it is satisfied that he arrived at his figure either by applying a wrong principle of law or through a misapprehension of the facts or that the amount awarded was so extremely high or so low as to make it an entirely erroneous estimate of the damages. (See *Flint v. Lovell*, [1935] 1 K.B. 354 at 360; *Associated Newspapers v. Dingle*, [1964] A.C. 371 at 393 applying *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 and *Nance v. British Electric Railway Co. Ltd.*, [1951] A.C. 601).

[26] This court has effectively applied that standard in the past, even if not acknowledging it specifically. In *Royal Bank of Canada (c.o.b. Chargex) v. Battistella*, [1994] O.J. No. 1717 (C.A.), it increased the plaintiff's award on the basis that the trial judge had erred by assessing general damages based only on the plaintiff's economic loss without incorporating an element for injured feelings. *Botiuk*, *supra*, was the reverse (see, [1993] O.J. No. 239 (C.A.)). The court interfered with the trial judge's award of general damages not only because it thought the damages [page431] inordinately high but also because he had failed to include an element of lost professional business in the damages. [See Note 3 at the end of the document] Finally, in *Hodgson*, at para. 60, the court relied on the fact "there was no error in principle in taking [the] aggravating factors into account when assessing general damages" in deciding not to

interfere with the trial judge's award of general damages.

[27] With the foregoing principles in mind, then, I turn to an examination of the damages awarded in this case.

Analysis

General considerations concerning Internet defamation

[28] Is there something about defamation on the Internet -- "cyber libel", as it is sometimes called -- that distinguishes it, for purposes of damages, from defamation in another medium? My response to that question is "Yes".

[29] The standard factors to consider in determining damages for defamation are summarized by Cory J. in Hill, at p. 1203 S.C.R. They include the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances.

[30] In the Internet context, these factors must be examined in the light of what one judge has characterized as the "ubiquity, universality and utility" of that medium. In Dow Jones & Company Inc. v. Gutnick, [2002] HCA 56 (10 December 2002), that same judge -- Kirby J., of the High Court of Australia -- portrayed the Internet in these terms, at para. 80:

The Internet is essentially a decentralized, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. It is ubiquitous, borderless, global and ambient in its nature. Hence the term "cyberspace". [See Note 4 at the end of the document] This is a word that recognizes that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge. The Internet is [page432] accessible in virtually all places on

Earth where access can be obtained either by wire connection or by wireless (including satellite) links. Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware.

(Emphasis added).

[31] Thus, of the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed: see *Vaquero Energy Ltd. v. Weir*, [2004] A.J. No. 84, 2004 ABQB 68, at para. 17.

[32] These characteristics create challenges in the libel context. Traditional approaches attuned to "the real world" may not respond adequately to the realities of the Internet world. How does the law protect reputation without unduly overriding such free wheeling public discourse? Lyrissa Barnett Lidsky discusses this conundrum in her article, "Silencing John Doe: Defamation and Discourse in Cyberspace" (2000), 49 Duke L.J. 855, at pp. 862-65:

Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and "venting" is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that "anything goes," and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. While this view is undoubtedly overstated, certainly the immediacy and informality of Internet communications may be central to its

widespread appeal.

Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie". The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse.

(Emphasis added) [page433]

[33] These characteristics differentiate the publication of defamatory material on the Internet from publication in the more traditional forms of media, in my opinion.

[34] It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

General or compensatory damages

[35] In my respectful opinion, the motions judge misapprehended the evidence, and erred in principle, in arriving at her award of \$15,000 for general and compensatory damages. She did so in five ways. First, her conclusion that a reasonable reader was unlikely to take what Mr. Lopehandia said seriously was contrary to the evidence. Secondly, that conclusion misjudged the target audience and the nature of the potential impact of the libel in the context of the Internet. Given the centrality of these two aspects of her findings to her reasons, they constitute both palpable and overriding error: see Waxman v. Waxman, [2004] O.J. No. 1765, 186 O.A.C. 201 (C.A.), at paras. 289-307. Thirdly, she erred in treating the defamatory statements made against the directors, officers, and employees of Barrick as irrelevant to the damages to Barrick's reputation. Fourthly, she failed to take into account the refusal of Mr. Lopehandia to retract or to apologize. Finally, she erred in reducing the damages she might otherwise have ordered on the basis that her decision would play a significant role in vindicating Barrick's reputation.

[36] These flaws sufficiently undermine the award that it must be set aside and reconsidered, in my view.

Not taking the libel seriously

[37] The motions judge's conclusion that a reasonable reader was unlikely to take what Mr. Lopehandia said seriously, because of its emotional and intemperate nature and because of [page434] his use of capitals and pronunciation, lies at the heart of her finding that the defamatory messages did not cause any serious damage to Barrick's business reputation. In my view, it is a finding of fact, or an inference drawn from the facts, that is not supported by the evidence.

[38] The notion that Mr. Lopehandia's Internet dialogue style -- a style that may not be taken seriously in a traditional medium such as a newspaper -- may undermine the credibility of his message has some appeal to those of us who are accustomed to the traditional media. However, as I have noted, the Internet is not a traditional medium of communication. Its

nature and manner of presentation are evolving, and there is nothing in the record to indicate that people did not take Mr. Lopehandia's postings seriously. In fact, the uncontradicted evidence is to the contrary.

[39] For instance, several individuals took the messages seriously enough to contact Barrick by e-mail themselves. On October 25, 2001, Monique Lafleche of The Mining Association of Canada forwarded a Lopehandia message to alert Barrick to the situation. On February 18, 2002, an individual named Jim Versa referred Barrick to two websites where postings could be found. One of these websites, www.goldhaven.com, contained a defamatory posting by Mr. Lopehandia and a response posting from another individual referring Mr. Lopehandia to a different website where he could "relate his experience with the crooks at Medinah [Minerals]". Barrick received a number of communications from John Hartley, one of its shareholders, stating that as a shareholder he was extremely upset that Barrick had not taken action against Mr. Lopehandia. In an e-mail dated September 5, 2002, Mr. Hartley said:

Since I wrote you on Friday August 29th, I have read a lot more of the outrageous slander against BARRICK and its Top Management, written by "Gadfly" Lopehandia on the Message Boards of ABX and MDMN at Finance.lycos.com website.

In my opinion this is going much too far and must come to an end very soon now, because it is affecting the credibility, the image and the prestige of your Great Mining Company and its Top Management.

It is really becoming a torture for me and many fellow ABX shareholders, to see that nobody is reacting nor sueing [sic] this chilean-canadian reckless pimp, who dares to challenge an exemplary leading international gold company called BARRICK, to whom we trusted our savings investment.

We definitely don't like to see BARRICK treated openly as a "COWARD CORPORATION", "CESSPOOL OF CRIME AND THEFT", "MONEY LAUNDERER THEIVES", etc, etc; and to see statements like "BARRICK OWES AN APOLOGY TO MR. GEORGE BUSH SENIOR AND

TO HIS [page435] SONE, THE PRESIDENT OF THE UNITED STATES", "BARRICK GOLD'S REIGN OF FRAUD MUST STOP NOW", "BARRICK IS THE NEXT ENRON" AND THE LIKE.

When we read this slander we suffer indignation and our blood starts to boil. Please find a way to stop this crap.

BARRICK WAS BUILT TO LAST AND IN BARRICK WE TRUSTED OUR SAVINGS.

(*Italics and underlining added; block capitals in original*)

[40] There is evidence as well that the Toronto Stock Exchange contacted Barrick during 2002 to enquire about Mr. Lopehandia's defamatory statements. An inquiry of that nature from a regulatory agency governing a public company is not to be taken lightly.

[41] In addition to the specific communications referred to, the evidence of Mr. Garver, the Executive Vice-President and General Counsel of the appellant, is that "Barrick continues to receive complaints and inquiries from concerned shareholders, analysts and other members of the public as a direct result of the Lopehandia defamatory postings".

[42] Finally, the record shows that many users of the message boards and bulletin boards have responded to and replied to Mr. Lopehandia's messages. Some invited and encouraged him to go to other websites with his message, thus expanding the scope of the campaign of libel against Barrick, and wishing him well: "may you find your mark", said one of them.

[43] These various communications demonstrate that individuals with a variety of interests in Barrick, and one major regulatory agency, were genuinely concerned about what Mr. Lopehandia had to say. There was no evidence to the contrary. In those circumstances, I find the motions judge's conclusion that people were unlikely to take Mr. Lopehandia's messages seriously to be contrary to the evidence.

The Internet context

[44] Secondly, the motions judge failed to appreciate, and in my opinion misjudged, the true extent of Mr. Lopehandia's target audience and the nature of the potential impact of the libel in the context of the Internet. She was alive to the fact that Mr. Lopehandia "[had] the ability, through the Internet, to spread his message around the world to those who take the time to search out and read what he posts" and indeed that he had "posted messages on many, many occasions". However, her decision not to take the defamation seriously led her to cease her analysis of the Internet factor at that point. She failed to take into account the [page436] distinctive capacity of the Internet to cause instantaneous and irreparable damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature and the characteristics of Internet communications outlined in paras. 28-33 above.

[45] Had the motions judge taken these characteristics of the Internet more fully into account, she might well have recognized Barrick's exposure to substantial damages to its reputation by reason of the medium through which the Lopehandia message was conveyed.

The defamatory remarks against officers, directors and employees

[46] Thirdly, the motions judge erred in dismissing the defamatory statements against the officers, directors and employees of Barrick as irrelevant to her determination of damages respecting Barrick. At para. 32 of her reasons she stated:

In assessing the plaintiff's damages, I have only considered the damage to the corporation's reputation. While the affidavit of Mr. Garver and the factum speak of the libel to Barrick and its officers, directors and employees, the only party to this action is Barrick. Therefore, any defamatory statements regarding any of the officers, directors or employees which have caused damage to their reputations are irrelevant to the calculation of damages in this case. If

their reputations have been damaged, it is for them to pursue their own actions.

(Emphasis added)

[47] However, a significant element in Mr. Lopehandia's defamatory campaign against Barrick consisted of lengthy attacks on the integrity and bona fides of its various officers, directors and employees. A corporation can only act through such individuals. False and defamatory statements concerning the people who are responsible for supervising and conducting the affairs of the corporation -- particularly a public corporation such as Barrick -- must inevitably affect the business reputation of the corporation, as well as that of the individuals. The authors of P.F. Carter-Ruck and H.N.A. Starte, *Carter-Ruck on Libel and Slander*, 5th ed. (London: Butterworths, 1997), at pp. 197-98, state:

It is probable that a statement which reflects upon the honesty of the directors of a company, which is calculated by the imputations to which it gives rise to lead third parties no longer to deal with the company, would also entitle the company to seek substantial damages.

[48] I agree. Here, Mr. Lopehandia's campaign was admittedly designed to embarrass Barrick and to influence people to stop [page437] dealing with the company. A substantial part of the campaign consisted of the defamatory comments directed at the officers, directors and employees of Barrick for that purpose. While it is true that these individuals would have had to commence their own actions if they wished to recover damages for injury to their own personal reputations, these statements were relevant to the injury to Barrick's reputation. Had the motions judge thought about them in that context, she might well have been persuaded to award substantially higher general damages.

No retraction or apology

[49] Fourthly, when considering the question of general or compensatory damages, the motions judge did not take into

account Mr. Lopehandia's refusal to retract or apologize. She correctly recognized that, while corporations are entitled, without proof of damage, to compensatory damages representing the amount necessary to vindicate the company's business reputation, they cannot receive compensation for injured feelings -- and therefore are not entitled to aggravated damages. She also held, properly, that a corporation is entitled to recover more than nominal damages but that compensatory damages may be lower for a corporation than damages received by an individual (who is entitled to receive compensation both for injury to reputation and for injury to feelings): *Walker v. CFTO*, *supra*, at pp. 113-14 O.R. However, there is a caveat to the latter principle. It is to be found in the following passage from *Carter-Ruck on Libel and Slander*, *supra*, at p. 197 (quoted with approval from the 3rd ed. by Robins J.A. in *Walker*, *supra*, at pp. 113-14 O.R.):

Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special damage, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages. As was made clear by Lord Reid in *Lewes v. Daily Telegraph Ltd.*, 'A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.' . . . That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, unless the defendant's refusal to retract or apologise makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages.

(Emphasis added)

[50] The motions judge acknowledged the repetition of the defamatory statements by Mr. Lopehandia and that "normally, repetition of the libelous statements would increase the

damages." [page438] However, she discounted the impact of the repetitious statements on the basis of her conclusion that they were unlikely to be taken seriously. She held that a large award of damages was not necessary to vindicate the plaintiff's reputation.

[51] Repetition, however, is only one factor to be considered in determining what award of damages is required to vindicate a plaintiff's reputation. Mr. Lopehandia's clear refusal to retract his statements, or to apologize for them -- and, indeed, his dogged pursuit of the libelous campaign even after commencement of the proceedings -- is an aggravating factor in this case, and a different factor than the repetition of the libel. The motions judge found that Mr. Lopehandia would likely continue his defamatory statements. Had she considered the lack of retraction and apology, along with repetition, in the context of determining whether "a really substantial award of damages" was required to vindicate Barrick's reputation in the circumstances, she might well have come to a different conclusion than she did.

The judgment as vindication

[52] Finally, the appellant submits the motions judge erred in reducing the damages Barrick would otherwise have been entitled to in the circumstances on the basis that her decision would play a significant role in vindicating Barrick's reputation. To the extent the motions judge may have done so, I agree. While Robins J.A. acknowledged in Walker, at p. 115 O.R., that a "judgment enables the plaintiff publicly to brand the defamatory publication as false or groundless, and, when there is no actual damage, can perform the vindictory function of this cause of action", he was not directing his mind to a reduction in damages that might otherwise be appropriate, as I read his reasons. It is readily apparent that a successful judgment in a defamation case will be of assistance to the plaintiff in vindicating the plaintiff's reputation. However, there is authority for the proposition that such a consideration should not form the basis for decreasing the amount of damages that are reasonably required to vindicate the reputation of a person or corporation: see Safeway Stores Ltd.

v. Harris, *supra*, at pp. 202-20 D.L.R.; Associated Newspapers Ltd. v. Dingle, [1964] A.C. 371, [1964] 2 All E.R. 737 (H.L.). I have difficulty accepting the concept that an otherwise appropriate damage award should be reduced on the principle that the judgment itself will operate as some form of vindication for the plaintiff. As Lord Morton of Henryton noted in Associated Newspapers, at p. 404 A.C., "a judge cannot tell how widely his judgment will be reported and read, nor can he tell how far the plaintiff's general [page439] reputation will be improved by his complimentary remarks." Here, it is impossible to say, for instance, that Barrick's judgment will receive the same degree of publication and diffusion on the Internet as Mr. Lopehandia's postings have received.

[53] Respectfully, then, I believe the motions judge's award of general damages in the amount of \$15,000 is seriously undermined by errors in law and principle and by a misapprehension of the evidence regarding the impact of the libel and its Internet context. The award should be set aside and the amount reconsidered in light of the foregoing principles. Had the motions judge taken the abovementioned factors into account, I am far from satisfied that her award would have been as low as it was.

Punitive damages

[54] The motions judge dismissed Barrick's claim for punitive damages on several grounds. Relying on the decision of the Supreme Court of Canada in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425, 62 D.L.R. (2d) 65, she decided that "the emotional and unreasoned tenor of [Mr. Lopehandia's] messages" was such that "no reasonable business person or investor would take him seriously", thus mitigating the claim for punitive damages. In addition, she held that there was no evidence of real vulnerability on the part of Barrick, which she viewed as "the powerful party here", and that this was not a case of Mr. Lopehandia abusing power. Finally, the motions judge concluded that her compensatory award, including costs, would be a sufficient deterrent to prevent the repetition of his conduct.

[55] The key principles regarding punitive damages, of which

the motions judge was aware, are outlined below. For the reasons that follow, however, she erred in dismissing the claim, in my view.

[56] Appellate courts have greater scope and discretion in reviewing awards for punitive damages than is the case for awards of general or compensatory damages. Appellate review is based upon the court's estimation as to whether the punitive damages serve a rational purpose. See *Hill v. Church of Scientology of Toronto*, *supra*, at pp. 1208-09 S.C.R.; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, at pp. 635-37 S.C.R., pp. 288-89 D.L.R.

[57] Cory J. described punitive damages in the following fashion in *Hill*, at p. 1208 S.C.R.:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the [page440] plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

[58] In *Whiten*, at pp. 634-36 S.C.R., pp. 287-89 D.L.R., Binnie J. reviewed comparative principles regarding punitive damages in various common law jurisdictions, and outlined a number of factors that he found to be "consistent with Canadian practice and precedent". The following observation is particularly apt to the present circumstances:

. . . [T]here is a substantial consensus that coincides with Lord Pratt C.J.'s view in 1763 that the general objectives of

punitive damages are punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in Hill, *supra*, at para. 196, they are "the means by which the jury or judge expresses its outrage at the egregious conduct").

. . . [A]ll jurisdictions seek to promote rationality. In directing itself to the punitive damages, the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the lowest award that would serve the purpose, i.e., because any higher award would be irrational.

. . . [T]he governing rule for quantum is proportionality. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation). Thus, there is broad support for the "if, but only if" test formulated, as mentioned, in Rookes, *supra*, and affirmed here in Hill, *supra*.

(Emphasis in original)

[59] With these principles in mind, I am satisfied that the motions judge erred in failing [to] make an award of punitive damages for the reasons that follow.

[60] First, her reliance on the decision of the Supreme Court of Canada in *McElroy v. Cowper-Smith* was misplaced in the circumstances, and was influenced again by her flawed conclusion that the repeated libels of Mr. Lopehandia would not be taken seriously by readers. *McElroy* involved a single defamatory letter circulated to three clergymen and several religious organizations. The defendant was known to be temporarily unstable and given to making unreasoned and extravagant statements about the plaintiffs (who were a lawyer and an [page441] insurance executive). Although the majority of

the court recognized the serious damage that can be done to the reputation of a professional person from allegations of misconduct and dishonesty, and that punitive damages may be warranted in some such circumstances, they concluded that reasonable business people -- the plaintiffs' clientele -- would not likely be affected in their dealings with the plaintiffs "by statements coming from the source which they did in this case". Since the libel had not been published to business people, but only to the clergymen and religious organizations, who were very familiar with both the plaintiffs and defendants, punitive damages were not warranted in the circumstances.

[61] Such is not the case here. Mr. Lopehandia is not known to the unlimited numbers of persons who may have viewed his avalanche of defamatory postings on the Internet. He holds himself out to be a person of substance, knowledgeable in matters relating to the mining industry in Chile, where Barrick's Pascua Lama Project is located, and a representative of many Chilean mining families and other affected persons worldwide. On the evidence referred to earlier, it is apparent that various individuals and organizations, and at least one regulatory agency, were taking his libelous campaign seriously. In my view, McElroy does not assist on the question of punitive damages in this case.

[62] Secondly, while vulnerability is a factor to be considered by the court in assessing punitive damages -- see Whiten at pp. 651-53 S.C.R., pp. 300-01 D.L.R. -- the motions judge misread that factor in the context of this case, in my respectful opinion. Barrick is not "the powerful party" in the context of the Internet. The impact of the Internet is to neutralize whatever "power" Barrick may have had, in terms of a communication battle with Mr. Lopehandia. In reality it is Barrick that is vulnerable to publications of this nature, and Mr. Lopehandia who is abusing his power. The Internet is one of the most powerful tools of communications ever invented and, as the Collins text cited at the outset of these reasons indicates, it is "potentially a medium of virtually limitless international defamation".

[63] Thirdly, the motions judge's conclusion that her compensatory award would operate as a deterrent to Mr. Lopehandia's repeated publications is inconsistent with her own observation that "he has not done so." She found that, in spite of her judgment, "Mr. Lopehandia will continue to make defamatory statements." With respect, an award of general damages in the amount of \$15,000 is insufficient to fulfill the dual role of compensation plus punishment and deterrence in the circumstances of this case. [page442]

[64] Finally, punitive damages are simply required in a case such as this, in my view. Mr. Lopehandia's conduct is malicious and high-handed. It is unremitting and tenacious. It involves defamatory publications that are vicious, spiteful, wide-ranging in substance, and world-wide in scope. They involve the very type of misconduct that -- in the words of Cory J. in Hill, at p. 1208 S.C.R. -- is "so malicious, oppressive and high-handed that it offends the court's sense of decency", calling for an award of punitive damages as a "means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". While it is always important to balance freedom of expression and the interests of individuals and corporations in preserving their reputations, and while it is important not to inhibit the free exchange of information and ideas on the Internet by damage awards that are overly stifling, defendants such as Mr. Lopehandia must know that courts will not countenance the use of the Internet (or any other medium) for purposes of a defamatory campaign of the type engaged in here.

[65] I would therefore set aside the decision of the motions judge not to award punitive damages in favour of the appellant.

Quantum

[66] The appellant does not seek a new trial on damages. Both in its notice of appeal and in its factum, it asks for an order awarding Barrick substantial general and punitive damages. The action was not defended. In the circumstances, therefore, this court can proceed on the basis that there is consent to our determining the appropriate damages to be awarded.

[67] Having regard to all of the factors referred to above, and the principles to be assessed in determining damages, as outlined in Hill and set out earlier in these reasons, I would set aside the award of the motions judge and substitute for it the following award:

For general damages: \$75,000

For punitive damages: \$50,000

Injunctive relief

[68] The motions judge dismissed Barrick's claim for a permanent injunction restraining Mr. Lopehandia from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees. She did so on the basis that the court did not have jurisdiction to make such an order, because in her view, [page443] (a) service was not properly made with respect to the claim for injunctive relief pursuant to rule 17.02(i) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194; (b) there was no evidence Mr. Lopehandia had any assets or presence in Ontario; and (c) the claim for injunctive relief, being a claim in personam, should have been pursued against Mr. Lopehandia in British Columbia, where the courts have the ability to supervise any injunctive relief given.

[69] Rule 17.02 provides that:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

.

(g) in respect of a tort committed in Ontario;

(h) in respect of damage sustained in Ontario arising from a tort, . . . wherever committed; or

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario.

[70] The motions judge accepted jurisdiction over the action for damages for libel based upon the provisions of rule 17.02(g) and (h). However, she concluded that the claim for injunctive relief did not fall within rule 17.02(i) because the injunctive relief was not claimed with respect to acts by a party in Ontario.

[71] There are two problems with this approach. First, even if it is unclear on the evidence that Mr. Lopehandia is doing or refraining from doing anything in Ontario, he is, in his campaign of libel, doing something affecting personal property in Ontario. Barrick's goodwill -- which includes as an important component what on the record is its unblemished corporate reputation in Ontario -- constitutes "personal property". The result of Mr. Lopehandia's conduct is to affect that goodwill or personal property negatively. Barrick's claim therefore falls within the provisions of rule 17.02(i). Secondly, there is evidence that Mr. Lopehandia is doing something in Ontario in connection with the publication of the libel. Although the motions judge concluded there was no evidence he had an Internet service provider in Ontario, at least one of the bulletin boards that he utilizes -- the Yahoo! site -- is located in this province. The affidavit of Mr. Garver shows that users of the Internet in Ontario and elsewhere can access that message board through seamless connections maintained by Yahoo Canada Inc., the offices of which are located in downtown Toronto. [page444]

[72] Consequently, I am satisfied that Barrick's claim for injunctive relief does fall within the provisions of rule 17.02(i).

[73] The more troubling point respecting the claim for injunctive relief is the *in personam* nature of the remedy, the marginal presence of the defendant in the jurisdiction, and the concerns about enforceability of such an order. The motions

judge was correct to be worried about this. Courts have traditionally been reluctant to grant injunctive relief against defendants who are outside the jurisdiction. The reason for this is explained by Robert J. Sharpe in his text, *Injunctions and Specific Performance*, looseleaf edition (Toronto: Canada Law Book, November 2002), at 1-54 to 1-55:

Claims for injunctions against foreign parties present jurisdictional constraints which are not encountered in the case of claims for money judgments. In the case of a money claim, the courts need not limit assumed jurisdiction to cases where enforceability is ensured. Equity, however, acts *in personam* and the effectiveness of an equitable decree depends upon the control which may be exercised over the person of the defendant. If the defendant is physically present, it will be possible to require him or her to do, or permit, acts outside the jurisdiction. The courts have, however, conscientiously avoided making orders which cannot be enforced. The result is that the courts are reluctant to grant injunctions against parties not within the jurisdiction and the practical import of rules permitting service *ex juris* in respect of injunction claims is necessarily limited. Rules of court are typically limited to cases where it is sought to restrain the defendant from doing anything within the jurisdiction. As a practical matter the defendant "who is doing anything within the jurisdiction" will usually be physically present within the jurisdiction to allow ordinary service.

(Emphasis in original)

[74] As the motions judge noted, however, courts do in some circumstances permit service of claims outside the jurisdiction seeking to prevent publication in the jurisdiction of libelous material originating outside the jurisdiction: see Sharpe, *supra*, at p. 1-55; *Tozier v. Hawkins* (1885), 15 Q.B.D. 680, 55 L.J.Q.B. 152 (C.A.). This is one such case, in my view. Moreover, it is also a case where there is a sufficient connection, actual and potential, between the parties and Ontario to justify the granting of a permanent injunction as sought. Not only is there a real and substantial connection

between Barrick and Ontario, but there is a connection between the publication of the libel by Mr. Lopehandia and Ontario as well.

[75] Mr. Lopehandia is ordinarily resident in British Columbia, but there is no way to determine from where his postings originate. They could as easily be initiated in an Internet caf in downtown Toronto or anywhere else in the world, as in his offices in Vancouver. Given the manner in which the Internet works, it [page445] is not possible to know whether the posting of one of Mr. Lopehandia's messages on one of the bulletin boards in question, or the receipt of that message by someone accessing the bulletin board, travelled by way of a server in Ontario to or from the message board. [See Note 5 at the end of the document] It may have, however. The highly transmissible nature of the tortious misconduct at issue here is a factor to be addressed in considering whether a permanent injunction should be granted. The courts are faced with a dilemma. On the one hand, they can throw up their collective hands in despair, taking the view that enforcement against such ephemeral transmissions around the world is ineffective, and concluding therefore that only the jurisdiction where the originator of the communication may happen to be found can enjoin the offending conduct. On the other hand, they can at least protect against the impugned conduct re-occurring in their own jurisdiction. In this respect, I agree with the following observation of Kirby J. in Dow Jones, at para. 115:

Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable.

[76] Here, at least one of the bulletin boards utilized by Mr. Lopehandia for the dissemination of his campaign against Barrick is operated by Yahoo Canada Inc. in Toronto. The posting of messages on that board constitutes at least an act done by the defendant that affects Barrick's reputation, goodwill, and personal property in Ontario, and arguably constitutes an act done by him in Ontario. The courts in

Ontario must have jurisdiction to restrain such conduct. Even if an injunction may only be enforced in this province against Mr. Lopehandia if he enters the province personally, there are two reasons why the injunction may nonetheless be effective. The first is that it will operate to prevent Yahoo! from continuing to post the defamatory messages: MacMillan Bloedel Ltd. v. Simpson, [1996] 2 S.C.R. 1048, [1996] S.C.J. No. 83; Attorney-General v. Times Newspapers Ltd., [1991] 1 A.C. 191 (H.L.). Secondly, it may be enforceable in British Columbia, where Mr. Lopehandia resides: Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, [1990] S.C.J. No. 135; J.-G. Castel and Janet Walker, Canadian Conflict of Laws, 5th ed. (looseleaf) (Toronto: Butterworths, 2004), at p. 14-31.

[page446]

[77] Barrick's shares trade on the Toronto Stock Exchange. It is an Ontario corporation with its head offices and employees, and a business reputation, here. Indeed, the protection and vindication of that reputation in Ontario is what gives rise to the court's mandate in cases of this nature. These factors point to a real and substantial connection between Barrick and Ontario rather than to a jurisdictional link with the defendant. However, they suggest that if the appellant were to take an injunction granted by this court to British Columbia -- where Mr. Lopehandia does have a physical presence -- and seek to enforce it there, in this "post-Morguard era", the order might be enforced against him by the courts of that province. The argument for enforcement would be based upon the principles of order and fairness and upon what Professor Hogg has referred to as "an implicit full faith and credit rule in the Constitution of Canada" as a result of the Supreme Court of Canada's decision in *Morguard*: see P.W. Hogg, Constitutional Law of Canada, looseleaf ed., Vol. 1 (Toronto: Carswell, 1998), s. 13.5, at pp. 13-20 to 13-21; *Morguard*, *supra*; *Muscott v. Courcelles* (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128 (C.A.); Edward Mazey, "The Enforcement of Labour Orders outside the Jurisdiction of Origin" (2002), 59 U.T. Fac. L. Rev. 25, at pp. 37-38. It is not for this court to usurp the role of the courts in another province, of course. However, the British Columbia Court of Appeal has held in two relatively recent cases that jurisdiction based upon the "real and

"substantial connection" test may be satisfied where the province asserting jurisdiction has a real and substantial connection with the subject matter of the litigation or the cause of action asserted: *Pacific International Securities Inc. v. Drake Capital Securities Inc.*, [2000] B.C.J. No. 2328, 194 D.L.R. (4th) 716 (C.A.), at p. 722 D.L.R.; *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.*, [1997] B.C.J. No. 428, 143 D.L.R. (4th) 213 (C.A.), at p. 219 D.L.R.; see also *Braintech, Inc. v. Kostiuk*, [1999] B.C.J. No. 622, 171 D.L.R. (4th) 46 (C.A.). Such is the case here.

[78] I would set aside the decision of the motions judge in this regard and grant a permanent injunction as requested, restraining the defendants from disseminating, posting on the Internet or publishing further defamatory statements concerning Barrick or its officers, directors or employees.

Pre-judgment interest

[79] Finally, the appellant submits the motions judge erred in failing to address Barrick's entitlement to pre-judgment interest [page447] pursuant to s. 128 of the Courts of Justice Act, R.S.O. 1990, c. C.43, which it seeks to have awarded as of September 1, 2002 (the month after it became aware of the Lopehandia campaign). The judgment provides for post-judgment interest from the date of the judgment, March 12, 2003.

[80] The motions judge did not deal with the issue of pre-judgment interest, either in her main reasons for judgment or in the supplementary reasons respecting costs. It cannot be said, therefore, that she exercised her discretion with respect to pre-judgment interest.

[81] I would grant the appellant pre-judgment interest at the Courts of Justice Act rate from October 25, 2002, the date upon which the statement of claim was issued. Barrick took all reasonable steps to encourage Mr. Lopehandia to cease his libellous campaign. He not only ignored these demands, he became even more determined in his efforts to continue. In fact, he has persisted in the campaign, at ever higher levels of intensity, at least up to the time of trial, and, as noted,

the motions judge "[had] no doubt that Mr. Lopehandia will continue to make defamatory statements". In my view, it is appropriate that pre-judgment interest should run from the date the action was commenced.

Disposition

[82] I would accordingly allow the appeal, set aside the judgment of the motions judge and in its place order:

- (a) that the defendants pay to the plaintiff general damages in the amount of \$75,000;
- (b) that the defendants pay to the plaintiff punitive damages in the amount of \$50,000;
- (c) that the defendants are permanently restrained from disseminating, posting on the Internet or publishing in any manner whatsoever, either directly or indirectly, any defamatory statements concerning Barrick or its officers, directors or employees, all as claimed in para. 2 of the notice of motion for judgment before the motions judge.

[83] Barrick is entitled to its costs of the appeal on a partial indemnity basis. Brief written submissions may be made in that regard within 30 days of the release of this decision.

[84] DOHERTY J.A. (dissenting): -- I have had the benefit of reading the reasons of Blair J.A. I join in those reasons in all [page448] respects save one. I do not agree that the trial judge misapprehended the evidence or erred in principle in awarding the appellant \$15,000 for general and compensatory damages. I would not set aside that part of her judgment.

[85] As my colleague observes, the award made by the trial judge is entitled to deference in this court as are the findings of fact upon which it is based. It is also germane to observe that the amount awarded at trial, \$15,000, is well beyond the range of nominal damages and is within the range established by earlier cases of corporate libel where the libel does not cause actual economic loss to the corporation.

[86] In *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, [1987] O.J. No. 236 (C.A.) at p. 113 O.R., Robins J.A. said:

A company whose business character or reputation (as distinct from the character or reputation of the persons who compose it) is injuriously affected by a defamatory publication is entitled, without proof of damage, to a compensatory award representing the sum necessary to publicly vindicate the company's business reputation.

[87] To determine the quantum of the award necessary to publicly vindicate a corporation's business reputation, a trial judge must have regard both to the nature of the statements and their impact on those who have heard or read the statements.

[88] In the present case, the trial judge described the statements as diatribes or rants. She concluded at para. 38:

They [the libellous statements] do not leave a reader with the impression that the writer has a credible case against Barrick. Rather, they leave the impression of someone with a grievance, who is emotional and highly intemperate in expressing his views.

[89] After considering the nature of the statements, the trial judge turned to their impact on those who read them. She held at para. 39:

In my view, a reasonable reader is unlikely to take what is said seriously -- especially those who are said to have read the material, such as stock analysts or individuals working for the TSE. In assessing damages, one must consider the impact of the messages on the estimation of the plaintiff among right thinking members of society. While Mr. Lopehandia's words are defamatory, I do not believe that they have caused any serious damage to Barrick's business reputation.

[90] The trial judge's finding that a reasonable reader was unlikely to take the statements seriously was a finding of

fact. This court cannot interfere with that finding absent clear and palpable error. If the finding stands, I do not think there is any basis upon which to interfere with the quantum awarded. Put bluntly, where the libellous statements are not likely to be taken [page449] seriously by any reasonable person, \$15,000 is ample to vindicate a company's business reputation.

[91] My colleague, Blair J.A., finds clear and palpable error both in the trial judge's assessment of the nature of the statements and in her conclusion that they were not likely to be taken seriously. As to the nature of the statements, my colleague notes the stylistic difference between Internet dialogue and statements in more traditional media. I am happy to take his word for this. I cannot, however, assume that the trial judge was unaware of this distinction and failed to consider it in arriving at her conclusion that the manner in which the allegations were made tended to undermine their credibility. I take her conclusion to be arrived at with a full understanding of the nature of the medium in which the statements were made.

[92] Blair J.A. also finds that the trial judge's conclusion that the libellous statements were not likely to be taken seriously by reasonable people was contrary to the evidence. My colleague refers to the evidence at paras. 38 to 48 of his reasons. The trial judge was alive to this evidence (paras. 34-35). She drew a much different inference. In her assessment, the evidence offered in support of the damages was neither detailed nor convincing. The trial judge noted that there were only two named individuals identified who had complained about the statements and only one of the thousands of the appellant's shareholders who was identified as registering complaints with the appellant. The trial judge also observed that the appellant had failed to provide any details concerning the nature of the inquiry made by the Toronto Stock Exchange. Based on this record, it could well be that the Toronto Stock Exchange acknowledged the falsity of the allegations in the inquiry it made.

[93] The non-specific evidence concerning the impact of the

statements combined with the trial judge's finding as to the nature of the statements, led the trial judge to find that the statements were not likely to be taken seriously by any reasonable person. I think the evidence was open to the interpretation given to it by the trial judge. The fact that other interpretations, more favourable to the appellant, were also available on the evidence, does not justify appellate intervention.

[94] I am satisfied that the trial judge made no clear and palpable error in coming to the conclusion that reasonable persons were not likely to take the libellous statements seriously. I am further satisfied that considered in the light of that factual finding, it cannot be said that an award of \$15,000 for compensatory damages is inordinately low. [page450]

[95] I need not address the other specific errors identified by Blair J.A. I will, however, refer briefly to two. In holding that the trial judge erred in coming to the conclusion that reasonable persons would not take the statements seriously, Blair J.A. indicates that the trial judge failed to consider the Internet's capacity to cause "instantaneous irreparable damage to the business reputation of an individual or corporation". I do not agree that the trial judge failed to consider this possibility. The possibility identified by my colleague arises, however, only if the information being disseminated on the Internet is reasonably capable of belief. The trial judge's finding that the statements would not be taken seriously rendered the Internet's capacity to cause harm to a company's business reputation irrelevant.

[96] My colleague also concludes that the trial judge erred in holding that the defamatory statements made against officers and officials of the appellant were irrelevant to the calculation of the appellant's damages. I agree with Blair J.A. that the trial judge erred in so holding. However, I do not think that this error warrants any variation in the damage assessment given that I would uphold the trial judge's finding that the statements were not likely to be taken seriously by any reasonable person.

[97] I would dispose of the appeal as proposed by Blair J.A. except that I would affirm the trial judge's judgment awarding \$15,000 for general and compensatory damages.

Appeal allowed.

Notes

Note 1: Matthew Collins, *The Law of Defamation and the Internet* (Oxford University Press, 2001), at para 24.02.

Note 2: The Court of Appeal citation for *Hill v. Church of Scientology of Toronto* is (1994), 18 O.R. (3d) 385, [1994] O.J. No. 961 (C.A.), at p. 430 O.R.

Note 3: The Court of Appeal ruled that the trial judge had erroneously awarded special damages, which had not been pleaded. The Supreme Court of Canada subsequently restored the award of special damages: *supra*, at pp. 37-39 S.C.R.

Note 4: Dow Jones, at footnote 100. The term was coined by William Gibson, *Neuromancer* (New York: Ace Books, 1984), at p. 51; see also Harasim (ed.), *Global Networks: Computers and International Communication* (Cambridge, MA: MIT Press, 1993), at p. 9.

Note 5: For a brief discussion of the features of the Internet and how it works, see *Dow Jones & Company Inc. v. Gutnik*, *supra*, at pp. 16-17; and Collins, *The Law of Defamation and the Internet*, *supra*, ch. 2.

TAB 7

COURT OF APPEAL FOR ONTARIO

CITATION: Berry v. Pulley, 2015 ONCA 449

DATE: 20150619

DOCKET: C55933

Hoy A.C.J.O., Watt and Brown JJ.A.

BETWEEN

Patrick Berry, James Deluce, Jeffrey Karelson, Robert James Simerson and
Ernest Zurkan

Plaintiffs (Appellants)

and

Chris Pulley, Tom Fraser, James Griffith, Peter Wallace, George Cockburn,
Denis Belhumeur, Greg Mutchler, Gary Dean, Yves Filion, Howard Malone,
Kevin Vaillant and Gordon Grieg

Defendants (Respondents)

and

Kent Hardisty

Third Party (Respondent)

Benjamin Zarnett, Graham D. Smith and Peter R. Merchant, for the appellants

Steve Waller and Leanne Storms, for the respondents

Brian Shell and Steven Sagle, for the third party respondent

Heard: April 14, 2015

On appeal from the judgment of Justice Sarah E. Pepall of the Superior Court of Justice dated July 25, 2012, with reasons reported at 2012 ONSC 1790.

Hoy A.C.J.O.:

I OVERVIEW

[1] This appeal arises out of turf wars waged nearly twenty years ago between Air Canada pilots and pilots of Air Ontario and other regional carriers in which Air Canada held an interest.

[2] In the late 1980s, Air Canada's pilots became concerned that Air Canada would transfer domestic routes to the cheaper regional carriers, which had lower pilot costs. Some thought that merging the pilot seniority lists of Air Canada and the regional carriers would protect Air Canada pilots. They would get access to the routes that the regional pilots flew. Merger could also benefit the regional pilots. They would be able to bid on Air Canada planes, advance their careers, and make more money.

[3] On March 1, 1991, with the support of union executives from Air Canada, Air Ontario and four other regional airlines, the Canadian Airline Pilots Association ("CALPA") – a trade union that, at its peak, represented 4,000 pilots in Canada – initiated a process to merge pilot seniority lists at Air Canada and five regional airlines. However, the Air Canada pilots and the regional pilots had different perspectives on how a merged seniority list should look. The Air Canada pilots pushed for an end-tail merger, in which the most senior regional pilot would follow the most junior Air Canada pilot. The regional pilots argued for a dove-tail

merger, in which pilots would be assigned seniority numbers by start date, regardless of the airline for which they flew. Ultimately, an arbitrator – Michel Picher – crafted first a framework for a merged seniority list and then, a number of months later, drafted an actual merged seniority list.

[4] Neither the framework nor the list was binding on Air Canada and neither could be implemented without its agreement. CALPA contemplated that Air Canada's agreement would be secured through collective bargaining.

[5] A couple of days after the arbitrator finalized the merged seniority list, the Air Canada pilots voted to leave CALPA and join a new union known as the Air Canada Pilots Association ("ACPA"). The merged seniority list was not implemented.

[6] In a class proceeding, the representative plaintiffs of a class comprised of 171 pilots employed by Air Ontario on March 28, 1995 claimed, among other things, that the defendant Air Canada pilots had committed the tort of unlawful act conspiracy. In particular, they alleged that from March 28, 1995 until November 14, 1995, Air Canada First Officer Chris Pulley – who was the Chairman of Air Canada's Master Executive Council during that period – and defined sub-classes of Air Canada pilots conspired with each other by expressly or impliedly entering into an agreement or agreements to prevent implementation of the merged seniority list. The plaintiffs sued for expenses incurred in

connection with creating the merged list and for the loss of the chance to implement the merged seniority list.

[7] Following a lengthy common issues trial, the trial judge dismissed the plaintiffs' claims. She found that the plaintiffs' claim for unlawful act conspiracy failed against the defendants in sub-classes two, four and six because those defendants had committed no unlawful acts, the second of the five elements in unlawful act conspiracy.

[8] After finding that the plaintiffs had established the first four elements of unlawful act conspiracy with respect to the defendants in sub-classes one, three and five, the trial judge dismissed the claims against those defendants because she found their unlawful conduct did not cause damage to the plaintiffs. Due to a number of barriers to implementation of a merged seniority list, the plaintiffs did not lose more than a *de minimis* chance to have a merged seniority list implemented.

[9] The plaintiffs advance four principal arguments on this appeal, all relating to their claim of unlawful act conspiracy:

1. The trial judge erred in concluding that a union member's "right to dissent" permitted the defendants in sub-class six (Air Canada rank-and-file who somehow acted to prevent implementation of a merged seniority list) to resist implementation of the merged list. As a result,

- the trial judge wrongly concluded that the defendants in sub-class six acted lawfully in resisting implementation of the merged list.
2. The trial judge erred in concluding that sub-classes two and four (described below) did not commit unlawful acts related to the merged list.
 3. The trial judge erred in her causation analysis. She should have concluded that the defendants' unlawful conduct had caused the plaintiffs to lose more than a *de minimis* chance of having a merged seniority list implemented. She should then have gone on to value that lost chance.
 4. The trial judge erred by failing to award damages equal to the \$150,280 incurred by the plaintiffs in retaining lawyers and preparing for the arbitration with respect to the merged seniority list.

[10] As I explain below, I reject each of these arguments and would dismiss this appeal.

[11] Because I conclude that the trial judge did not err in her causation analysis, and that there is therefore no need to value the lost chance, I need not address the plaintiffs' further argument that this court should value the lost chance in the aggregate on the evidence of the plaintiffs' expert rather than refer the chance for individual assessment (as the trial judge would have ordered had she found causation).

[12] Before addressing the plaintiffs' four principal arguments, I will first set out some portions of the background in more detail and then outline the elements of the tort of unlawful act conspiracy.

II THE BACKGROUND

The CALPA Constitution, the Merger Policy and the declaration of merger

[13] While the Air Canada pilots and the pilots of the various regional airlines formed separate bargaining units, they were all members of CALPA. CALPA had a Constitution and an Administrative Policy to which all members were bound. Under a section of CALPA's Administrative Policy, the President of CALPA could declare a "merger" of pilot seniority lists, even if the pilots' airlines had not actually merged operations. This section – referred to by the trial judge as the Merger Policy – set out a process for integrating the seniority lists of affected airlines once the President declared a merger.

[14] The CALPA Constitution provided for Local Councils. Each Local Council decided local matters and consisted of members who were employed by the same airline or division of an airline and who were based at the same location. In the relevant period, Air Canada had Local Councils in Montreal, Toronto, Winnipeg and Vancouver. Each Local Council elected a Local Executive Council ("LEC").

[15] The CALPA Constitution also provided that each bargaining unit would have a Master Executive Council (“MEC”). The MEC was the highest governing body in all matters that only affected the active CALPA membership of a particular airline. The MEC was comprised of the Chairman and Vice-Chairman of each Local Executive Council. The members of the MEC elected a Chairman. First Officer Chris Pulley was the Chairman of Air Canada’s MEC from September 1994 until the Air Canada pilots decertified CALPA on November 14, 1995.

[16] At the request of the MEC Chairmen for Air Canada, Air Ontario and four other regional airlines, the President of CALPA declared a merger of pilot seniority lists in March 1991.

Unsuccessful negotiation of a merged seniority list

[17] As provided in the Merger Policy, the MEC of each merging bargaining unit appointed two Merger Representatives to negotiate a merged seniority list. One of Air Canada’s Merger Representatives is the defendant in sub-class two in this action.

[18] CALPA did not pay all expenses associated with the merger process. The MEC for each airline had to raise funds from its pilots. After an authorizing vote, the MECs deducted monies from pilots’ wages to pay merger-related expenses. Air Ontario’s merger-related expenses amounted to \$238,000 up to November

15, 1995. Of that amount, \$150,280 relates to their claim in this action and is the subject of the fourth issue that the plaintiffs raise on appeal.

[19] The various Merger Representatives were unable to agree on a merged seniority list. Mediations conducted in 1992 and 1993 failed. By late 1993, Air Canada's MEC Chairman was receiving weekly if not daily communications on merger from Air Canada pilots, about 90% of whom were against merger. In response to pilot dissatisfaction, the Air Canada MEC in March 1994 passed a resolution to try and postpone, delay or cancel the merger of the seniority lists. The Air Canada MEC also tried to convince CALPA's President to dissolve the merger.

[20] CALPA was not deterred. In accordance with the Merger Policy, Michel Picher had been appointed as arbitrator in January 1994 to put together the merged seniority list. Arbitration commenced in September 1994. Air Canada's MEC participated fully in the arbitration.

The March Picher Award and events triggered by it

[21] On March 28, 1995, Mr. Picher released his first award (the "March Picher Award"). He contemplated two lists: one for seniority and a second for bidding on home base, flying equipment and status as captain or first officer (the latter two of which influenced a pilot's income). He directed that an integrated seniority list be based on date of hire but left the dates of hire to be determined by the MECs.

He selected an Air Canada pilot – P.J. O’Hara – to act as “top blocker” for bidding on base, equipment and status. Regional pilots senior to him would be treated as immediately junior to him for bidding purposes. In his reasons, Mr. Picher indicated that only the 15% most junior Air Canada pilots would compete with regional pilots in bidding on base, equipment and status. Mr. Picher invited the parties to fashion the two actual lists, but reserved jurisdiction in the event of a dispute.

[22] The Air Canada rank-and-file overwhelmingly opposed the March Picher Award. In April 1995, Air Canada’s MEC Chairman, First Officer Pulley, issued a newsletter questioning the legitimacy of the merger process. Air Canada Local Councils in Toronto, Winnipeg and Montreal passed motions directing the Air Canada MEC to reject the March Picher Award. In addition, the Montreal Local Council unanimously resolved that, among other things, the Air Canada MEC refuse to negotiate any agreement with Air Canada that would place any Air Canada pilot on the current seniority list junior to any regional pilot. The Montreal Local Council also resolved that Seniority Protection Committees be appointed at the Montreal level and at the MEC level to explore means to nullify the arbitration award.

[23] A Montreal-based Seniority Protection Committee was established and circulated a petition, entitled the “Declaration of Solidarity”. The Declaration of

Solidarity was presented to Air Canada. It was also presented to CALPA's Board of Directors with the hope that it would prompt them to stop the merger process.

[24] Air Canada pilots also sent letters to Hollis Harris, the Chief Executive Officer of Air Canada, complaining about the March Picher Award.

[25] The Air Canada MEC sought legal advice. Their lawyer told them the CALPA Constitution did not require the Air Canada MEC to put the March Picher Award into the collective agreement. The MEC unanimously passed a motion that recognized Air Canada pilots' direction to cease any efforts to implement the March Picher Award. It also established the Special MEC Merger Advisory Committee (the "SMMAC") to, among other things, provide options on the merged seniority list.

[26] The SMMAC recommended that the Air Canada MEC withdraw its grievance with Air Canada over Letter of Understanding 17 ("LOU 17"). LOU 17, concluded in 1988, provided that Air Canada could not transfer flying to regional airlines and then lay off Air Canada pilots due to loss of that flying. CALPA argued that Air Canada laid off pilots in 1993 because it transferred flying to the regional airlines. The SMMAC thought that pursuing the grievance risked demonstrating that Air Canada was playing its bargaining units off against one another. And that demonstration could provide fodder for an application under s. 35 of the *Canada Labour Code*, R.S.C. 1985, c. L-2. Under a s. 35 single

employer application, the Canada Labour Relations Board (the "Board") could declare Air Canada and its regional airlines a single employer and consolidate the pilot bargaining units into a single bargaining unit.

[27] Several meetings were held between late April and early August 1995 to construct seniority and bidding lists, as required by the March Picher Award. The Air Canada MEC did not agree to the proposed lists.

[28] The Air Canada collective bargaining agreement expired on April 1, 1995. First Officer Pulley and the Air Canada MEC directed the committee appointed to negotiate the new collective agreement not to raise the March Picher Award or the topic of a merged seniority list. Sub-class four of the defendants in this action consists of members of that negotiating committee.

[29] In April or May 1995, some Air Canada pilots began discussing formation of a new union. The Air Canada Pilots Association was subsequently formed and, in May 1995, it began soliciting support from Air Canada pilots. Because ACPA was seeking the right to represent Air Canada pilots, CALPA and the Air Canada MEC's negotiating committee suspended collective bargaining with Air Canada on June 22, 1995. On July 7, ACPA applied for certification as bargaining agent for the Air Canada bargaining unit. In September, the Board ordered a representation vote to determine whether CALPA or ACPA would represent Air Canada pilots.

The Final Picher Award and de-certification of CALPA

[30] On October 9, Mr. Picher unsuccessfully attempted to mediate a resolution. He then proceeded to prepare finalized, merged seniority lists – the “Final Picher Award”. He released the Final Picher Award on November 7, 1995.

[31] On November 9, 1995, a substantial majority of Air Canada pilots voted to certify ACPA as the new bargaining agent for Air Canada pilots. On November 14, 1995, ACPA was certified and CALPA was subsequently decertified as the bargaining agent for Air Canada pilots. ACPA and Air Canada then negotiated a collective agreement.

[32] On March 20, 1996, CALPA filed an application before the Board, seeking a declaration that Air Canada and its five regional airlines constituted a single employer. On December 22, 1999, the Board declined to grant the relief requested. It had denied an Air Canada single employer application in 1989 and concluded that no change in the airline industry since warranted modifying its position.

[33] On February 1, 1997, CALPA merged with the Air Line Pilots Association (“ALPA”), a U.S.-based union. ALPA became the successor bargaining agent for the Air Ontario bargaining unit formerly represented by CALPA. ALPA, represented by Kent Hardisty, defended the main action as a Third Party and is the Third Party Respondent on this appeal. In a separate action, currently “on

hold", the Air Canada defendants seek indemnification from ALPA for any damages arising out of tort awarded to the plaintiffs. ALPA denies that the actions of the defendants were tortious.

III THE TORT OF UNLAWFUL ACT CONSPIRACY

[34] Before considering the issues raised on this appeal, it is useful to review the elements of unlawful act conspiracy.

[35] Canadian courts recognize two types of actionable conspiracy: *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 73. The first is predominant purpose conspiracy, also known as conspiracy to injure. This appeal involves the second type, which is known as unlawful means or unlawful act conspiracy.

[36] As outlined in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at para. 26, a plaintiff must establish the following five elements to succeed on a claim of unlawful act conspiracy:

- 1) The defendants acted in combination, that is, in concert, by agreement or with a common design;
- 2) The defendants' conduct was unlawful;
- 3) The defendants' conduct was directed towards the plaintiff;
- 4) The defendants should have known that, in the circumstances, injury to the plaintiff was likely to result; and

5) The defendants' conduct caused injury to the plaintiff.

[37] Only the trial judge's conclusions on the second and fifth elements are at issue on appeal.

[38] With this framework, I turn to the first issue the plaintiffs raise on the second element: whether the members of sub-class six acted unlawfully in resisting implementation of a merged seniority list.

IV ISSUE ONE: DID THE “RIGHT TO DISSENT” PERMIT THE DEFENDANTS IN SUB-CLASS SIX TO FRUSTRATE IMPLEMENTATION OF THE AWARD?

[39] To establish that the defendants in sub-class six (Air Canada rank-and-file who somehow acted to prevent implementation of a merged seniority list) were liable for unlawful act conspiracy, the plaintiffs had to establish that the defendants in sub-class six acted unlawfully in resisting implementation of the merged list. The trial judge acknowledged that the CALPA Constitution and Merger Policy constituted a contract between each union member and CALPA. The plaintiffs alleged that the members of sub-class six breached that contract and thereby acted unlawfully. At issue is how a union member's right to dissent from the manner in which union affairs are conducted fits into this breach-of-contract analysis.

[40] Below, I first outline the trial judge's reasons on this point, then summarize the plaintiffs' arguments, and finally explain my conclusion that the defendants in

sub-class six did not breach their contracts with CALPA. In interpreting the CALPA-member contract, I describe the relevance of sub-class six's right to dissent.

The trial judge's reasons

[41] Before considering whether the members of sub-class six breached their contract with CALPA, the trial judge considered the impact of a union member's right of dissent on the contract analysis. She quoted the following passage from *Tippett v. International Typographical Union, Local 226* (1975), 63 D.L.R. (3d) 522 (B.C. S.C.), at p. 546:

All members of trade unions have the unqualified right to speak out against the manner in which union affairs are conducted. There is a right of dissent. There is a right of decertification, subject to the condition that no member of a union shall conspire with his employer to injure the union... No person can be expelled or penalized by a trade union for insisting on his rights.

[42] She also cited *Berry v. Pulley*, 2002 SCC 40, [2002] 2 S.C.R. 493, the Supreme Court decision from an earlier point in this action. In 1998, the defendants brought a summary judgment motion that made its way to the Supreme Court. The court held that the plaintiffs' breach of contract claims against the defendants could not prevail. The CALPA Constitution and Merger Policy constituted a contract between each union member and CALPA, not a contract between union members. At para. 60, Iacobucci J., for the court,

endorsed the passage from *Tippett* and the unqualified right of union members to speak out against the agenda of their bargaining agent.

[43] The trial judge also cited the more recent decision of *Followka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, which, at para. 149, stated:

The relationship between a union member and his or her union is contractual in nature, with both the union and the member agreeing to be bound by the terms of the union constitution. However, the analogy to contract has its limits given that the relationship is greatly determined by the relevant statutory regime and the general principles of labour law which have been fashioned over the years. Significantly, the members have the “unqualified” right to speak out against the agenda of their bargaining agent.

[44] The trial judge then considered, at para. 417, whether a union member's right to dissent permitted him or her to depart from the terms of the CALPA Constitution and Merger Policy. She concluded that the right to dissent did not permit members of sub-classes one through five, who were either officers of the union or members acting on behalf of officers, to so depart. However, members of sub-class six could seek to avoid implementation of a merged seniority list.

[45] At para. 419, she explained that the CALPA Constitution and Merger Policy did not require the members of sub-class six to act to implement the merged seniority list:

A review of the Merger Policy places the primary responsibility for implementation on CALPA, not the MECs, much less the individual members. Furthermore, while the Constitution bound union members, the Merger Policy provides that the President shall notify the MECs that it is their responsibility, as representatives of the affected pilots, to activate the described procedure for the integration of the pilot lists. The remainder of the Merger Policy describes the role of the MEC, the Merger Representatives and CALPA. With the exception of a passing reference to "pilot groups" in section 5(a) of the Merger Policy, there is no reference to the individual union members.

[46] She concluded, at paras. 420 and 421:

It seems to me that the unqualified right to dissent should operate to permit members of Class 6 to speak out against the agenda of CALPA and its union officers in these circumstances.

Many members of Class 6 communicated with Air Canada, urged the MEC and LECs to oppose the implementation of an integrated seniority list, supported the formation of SMMAC or the Local Seniority Protection Committee, signed the Declaration of Solidarity, and took other steps and positions to advocate against the imposition of the Picher Award. I decline to find that any of these actions or the conduct advanced by the Plaintiffs constituted unlawful conduct for the purposes of liability for conspiracy. Rather, they were permissible given the Class members' right to dissent.

The plaintiffs' argument

[47] The plaintiffs' argument has two prongs. The second prong depends on the success of the first.

[48] First, the plaintiffs argue that the trial judge erred in concluding that the conduct of the rank-and-file members did not breach their contract with the union.

[49] The plaintiffs argue that the provisions of the Merger Policy bound all union members, including the rank-and-file members of sub-class six, to implement the merged seniority list. Section 1(c) of the Merger Policy provides that the Merger Representatives “will have authority to act for and on behalf of the pilots of their respective airlines for the purpose of compiling a single integrated seniority list”. The Merger Policy also mandates arbitration if the Merger Representatives cannot agree on an integrated pilot seniority list through negotiation or mediation. The Merger Representatives of each airline participate in the selection of the arbitrator. The arbitrator’s decision binds all parties to the arbitration.

[50] The plaintiffs submit that a party to a contract who renders it impossible to perform the contract breaches the contract: *Culina v. Giuliani*, [1972] S.C.R. 343, at pp. 357-58, citing *Southern Foundries (1926), Ltd. v. Shirlaw*, [1940] A.C. 701 (H.L. Eng.). Therefore, they say, because the Constitution and the Merger Policy bound the members of sub-class six, those members could not take any steps – including forming a new union and decertifying CALPA as their bargaining agent – to intentionally thwart implementation of the merged list.

[51] Second, if a union member harms another member by the breach of the union’s rules, the injured member may (if the requisite elements are present)

have an action in tort against that member: *Berry* (SCC), at para. 64. The plaintiffs submit that a union member's "right to dissent" does not insulate him or her from tort claims from other union members.

[52] The plaintiffs argue that Winkler J. (as he then was) "got it right" in his *obiter* comment in the summary judgment motion in this action: *Berry v. Pulley* (1999), 45 O.R. (3d) 449 (S.C.). There, Winkler J. wrote, at para. 78:

The assertion of a right of dissent in this case ignores the process that led to the Picher award. The defendants participated, through representatives, in the process with full opportunity to have their views heard by an independent arbiter. Consequently, I find that the defendants' submission that their actions were justifiable based on a right to dissent to be untenable.

[53] This paragraph, the plaintiffs say, supports their position that the right to dissent does not insulate the members of sub-class six from the plaintiffs' tort claims.

Analysis

[54] The plaintiffs argue on appeal that the members of sub-class six breached their contracts with CALPA. I agree with the trial judge that members of sub-class six did not breach their contracts with CALPA in their attempts to avoid the implementation of the March Picher Award and the Final Picher Award. The plaintiffs' argument accordingly fails.

[55] In considering the plaintiffs' argument that the members of sub-class six breached their contracts with CALPA, it is important to keep in mind the Supreme Court's comments in *Berry* about the nature of the contract between the member and the trade union. The union-member contract is a unique adhesion contract: *Berry* (SCC), at para. 49. While, by the act of membership, both the union and the member agree to be bound by the terms of the union constitution, "the terms of the contractual relationship... will be greatly determined by the statutory regime affecting unions generally as well as the labour law principles that courts have fashioned over the years": *Berry* (SCC), at para. 48. As the court pointed out, at para. 49, the statutory context plays a very important role:

For example, the statutory right of members to be represented by the union of their choice implies that the contract only exists as long as the members maintain that union as their bargaining agent, and no penalty could be imposed by the contract against members for exercising this statutory right.

[56] As the Supreme Court also noted at para. 49, "the unique character and context of [a member-union] contract, as well as the nature of the questions in issue, will necessarily inform its construction in any given situation."

[57] Accordingly, the terms of the contractual relationship between the rank-and-file members of sub-class six and CALPA must be interpreted in light of both

the statutory right of union members to choose their union¹ and the labour law principle affording a right to dissent to union members.

[58] The trial judge concluded, and I agree, that that the Constitution and Merger Policy did not expressly require the members of sub-class six to act to implement a merged seniority list. Nor did the Merger Policy expressly require the members of sub-class six to refrain from impeding or thwarting implementation of a merged list. Having regard to the statutory right of union members to choose their union and the labour law principle affording a right to dissent to union members, I would not imply such a term. Interpreting the terms of the contractual relationship between the rank-and-file members of sub-class six in light of the applicable principles, the members of sub-class six did not breach their contracts with CALPA in voting to form ACPA and in taking other steps to avoid implementation of a merged seniority list.

[59] This case does not involve a situation where a union member's right to dissent conflicts with an express provision of the union-member contract. While I am doubtful that a provision directly or indirectly prohibiting dissent would survive

¹ See s. 38(1) of the *Canada Labour Code*, which provides a statutory right to decertify a bargaining agent:

Where a trade union has been certified as the bargaining agent for a bargaining unit, any employee who claims to represent a majority of the employees in the bargaining unit may, subject to subsection (5), apply to the Board for an order revoking the certification of that trade union.

in what the Supreme Court has characterized as a unique adhesion contract, that issue is best left for another day.

[60] *Culina* does not help the plaintiffs. The contract between the members of sub-class six and CALPA did not require the members of sub-class six to act to implement, or to refrain from sabotaging, the merged seniority list.

[61] Nor does Winkler J.'s *obiter* comment assist the plaintiffs. First, as discussed above, the trial judge's conclusion was driven by her interpretation of the union-member contract. Second, the defendants were not yet divided into sub-classes when Winkler J. gave his reasons. The trial judge determined that the right to dissent did not apply to sub-classes one through five (the sub-classes made up of union officers or members who worked on behalf of those officers). Winkler J. might well have taken a more nuanced position had the defendants been divided into sub-classes when he wrote his reasons. In light of the subsequent, clear direction from the Supreme Court, I would interpret his statement in *obiter* as restricted to the members of sub-classes one through five.

[62] I turn next to whether the members of sub-classes two and four acted unlawfully.

**V ISSUE TWO: DID THE TRIAL JUDGE ERR IN FINDING THAT THE
MEMBERS OF SUB-CLASSES TWO AND FOUR COMMITTED NO
UNLAWFUL ACTS?**

[63] The plaintiffs' factum devoted a single paragraph to the argument that the trial judge erred in concluding that the defendants in sub-classes two and four committed no unlawful acts. The plaintiffs did not allude to the argument in their oral submissions. I will address the argument very briefly.

[64] The trial judge found that the members of the Air Canada MEC, who comprise sub-class one, engaged in unlawful conduct by breaching duties of loyalty to CALPA and breaching their contractual obligations under the Merger Policy. The trial judge found that the members of sub-classes two (one of the Air Canada pilots' Merger Representatives) and four (members of the committee appointed by the Air Canada MEC to negotiate the new Air Canada collective bargaining agreement) did not owe duties of loyalty to CALPA. The trial judge also concluded, at para. 429, that members of sub-class two and sub-class four did not commit unlawful acts on the basis of breach of the Merger Policy. She found that the members of sub-classes two and four "had a limited contractual role. In addition, they acted under the control and direction of the Air Canada MEC. Furthermore, it is not clear to me that their conduct did amount to a breach of contract."

[65] The plaintiffs argue that whether the members of sub-classes two and four acted under others' direction is irrelevant and does not change the fact that they were bound, as union members, to abide by the Merger Policy.

[66] However, this argument does not address the trial judge's key determination. The trial judge had to decide whether the members of the sub-classes, in their capacities as Merger Representatives or negotiating committee members, breached the Merger Policy. In addition to finding that the members of these two sub-classes acted under the control and direction of the Air Canada MEC, the trial judge found that their conduct did not breach the Merger Policy. The plaintiffs do not articulate how the trial judge erred in her interpretation of the Merger Policy, if they in fact argue that she did err. I am not persuaded that there is any basis to interfere with the trial judge's conclusion that sub-classes two and four did not breach the Merger Policy.

[67] I turn next to the two issues arising out the fifth element of unlawful act conspiracy: causation.

VI ISSUE THREE: DID THE TRIAL JUDGE ERR IN HER CAUSATION ANALYSIS?

[68] The fifth and final element of unlawful act conspiracy required the plaintiffs to prove that the defendants' wrongful conduct caused them injury. The plaintiffs put forward as their main injury the loss of the chance to implement the merged

seniority list. They say that the trial judge erred in concluding that, even without the defendants' unlawful acts, the chance of implementing the merged seniority list was not more than *de minimis*. As a result of that error, the trial judge failed to value the probability of implementing the merged seniority list.

[69] In my view, the trial judge made no error. First, I outline the legal framework applied when a plaintiff claims injury consisting of the loss of a chance to achieve a benefit or avoid a loss. Then I review the relevant portion of the trial judge's reasons, outline the plaintiffs' arguments on this issue, and finally explain my conclusion.

The loss of chance doctrine

[70] A two-step framework applies when a plaintiff alleges injury consisting of the loss of the chance to achieve a benefit or avoid a loss. *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (C.A.), at para. 73, outlines the four criteria the plaintiff must meet at the first step:

First, the plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself. Fourth, the plaintiff must show that the lost chance had some practical value. [Citations omitted.]

[71] As Doherty J.A. noted in *Folland*, at para. 74, the second criterion is “somewhat nebulous. There is no bright line between a real chance and a speculative chance. An empirical review of the case law suggests that chances assessed at less than 15 percent are seldom viewed as real chances.” This *de minimis* threshold has also been described as requiring the plaintiff to prove she had “some reasonable probability” of realizing “an advantage of some real substantial monetary value”: *Kinkel v. Hyman*, [1939] S.C.R. 364, at p. 383; see also *Eastwalsh Homes Ltd. v. Anatol Developments Ltd.* (1993), 12 O.R. (3d) 675 (C.A.), at pp. 689-90, leave to appeal refused, [1993] S.C.C.A. No. 225.

[72] If these four criteria are met, the court proceeds to the second step and will award damages equal to the probability of securing the lost benefit (or avoiding the loss) multiplied by the value of the lost benefit (or the loss sustained): see *Wong v. 407527 Ontario Ltd.* (1999), 179 D.L.R. (4th) 38 (Ont. C.A.), at para. 27.

The trial judge’s reasons

[73] After outlining the loss of chance doctrine, the trial judge concluded that the plaintiffs failed to establish that they had lost any chance above the *de minimis* range for any one of a number of reasons, which she detailed. I will enumerate only a few of them.

[74] First, the decertification of CALPA as the bargaining agent for the Air Canada pilots, which she found was lawful, terminated the prospect of

implementing the merged seniority list through collective bargaining. Mr. Picher issued the Final Picher Award only one week before CALPA ceased to represent the Air Canada pilots. The chance of implementing the Final Picher Award in that very short period was negligible.

[75] Second and critically, Air Canada needed to agree for the parties to implement the merged seniority list. As she explained, in the absence of consent by Air Canada, a merged list was no more than “a bargaining position”. She accepted the evidence of Hollis Harris, the CEO of Air Canada at the relevant time. He testified that only he had the authority to accept the Picher Award and would not have done so. According to Mr. Harris, “[i]t would have been a financial disaster” to agree to a merged list. Based on his evidence, which was “credible”, “forceful” and “unequivocal”, she found, at para. 457, that:

[E]ven if the Defendants had fully complied with the Merger Policy and taken all necessary steps to implement the integrated seniority list, there was no possibility that Air Canada would have agreed to a merged list.

[76] Third, Air Canada pilots could not legally strike to force Air Canada to agree to a merged seniority list.

The plaintiffs' arguments on appeal

[77] The plaintiffs do not take issue with the parameters of the loss of chance doctrine or the trial judge's articulation of the doctrine. In essence, they make three arguments.

[78] First, they argue that the trial judge should have assessed the second criterion in the first step – whether the plaintiffs lost a chance above the *de minimis* range – beginning with the March Picher Award, and not the Final Picher Award. They say that the chance to implement a merged seniority list arose with the March Picher Award. They argue that chance was clearly real and significant, as evidenced by the defendants' strenuous efforts to frustrate implementation of the Award. And, they continue, in March 1995, before the defendants engaged in wrongful conduct, there was clearly a reasonable probability of implementing a merged seniority list. The Air Canada MEC was about to begin collective bargaining with Air Canada and could have bargained to include the merged seniority list. In addition, CALPA was in a position to apply for a single employer declaration, relying on the LOU 17 grievance as evidence that Air Canada was undermining bargaining rights by playing bargaining units off against one another. They argue that either alternative could have resulted in implementation of a merged seniority list. Ignoring wrongdoing by the defendants, the contingencies that had to work out in the plaintiffs' favour to implement the March Picher Award did not discount the value of the chance to a *de minimis* level.

Accordingly, the trial judge should have valued the lost chance of implementing a merged seniority list.

[79] Second, the plaintiffs submit that figuring out what would have happened but for the defendants' wrongful conduct is particularly challenging in this case because the defendants committed so many unlawful acts. In interpreting the impact of the defendants' unlawful acts, the plaintiffs argue the trial judge simply got it wrong. They argue that Mr. Harris' evidence did not foreclose the chance to implement a merged list. They submit that if events had transpired differently, Mr. Harris might have offered a more equivocal position.

[80] Third, they argue that although the trial judge properly directed herself to consider not what did happen but what would have happened but for the defendants' wrongful conduct, she failed to follow that direction when she analyzed the potential success of a single employer application. They say the trial judge did not assess what would have happened had the Air Canada MEC not withdrawn its grievance with Air Canada over LOU 17 and had instead supported CALPA's single employer application. This, they submit, amounted to an error in principle. The plaintiffs argue that had the trial judge conducted this portion of her analysis correctly, she would (or should) have concluded that there was a reasonable probability that, absent the defendants' wrongful conduct, a single employer application would have been successful. They argue that if a

single employer application had been successful, the chance of implementing the merged seniority list would have been more than *de minimis*.

Analysis

[81] In my view, all of the plaintiffs' arguments fail in the face of the trial judge's acceptance of Mr. Harris' evidence, her detailed analysis of the circumstances leading to decertification, and her assessment of the lawfulness of the defendants' actions. I explain my reasoning below in relation to each of the three arguments advanced.

[82] The plaintiffs' first argument attempts to characterize what was inherently an exercise in meticulous fact-finding as an error in principle. Ultimately, nothing turns on whether the analysis focussed on the chance of implementing the March Picher Award or the Final Picher Award. Whether the Air Canada MEC had raised a merged seniority list in the collective bargaining process or CALPA had sought and won a single employer declaration before negotiating, Air Canada had to agree to a merged list. Air Canada's opposition to a merged seniority list pre-dated the March Picher Award. The trial judge was entitled to accept the evidence of Mr. Harris that he would not have accepted a merged seniority list. She found that Air Canada would have inevitably rejected a merged list and that, for this reason alone, the chance of implementing a merged seniority list did not arise above the *de minimis* threshold.

[83] In substantial part, the plaintiffs' second argument is rooted in sub-class six's efforts to form ACPA and decertify CALPA, efforts the plaintiffs argued were unlawful. For example, they say that if ACPA had not been formed and CALPA decertified, the chance of implementing the merged seniority list would have exceeded the *de minimis* threshold. By way of illustration, they argue that but for the unlawful conduct of the Air Canada MEC, the March Picher Award, which set out a framework for a merged seniority list, would have been mentioned in collective bargaining negotiations with Air Canada and, if ACPA had not been formed, the negotiations would not have been suspended and the Air Canada pilots might have been able to fulfill the statutory preconditions to a legal strike. Moreover, if CALPA had not been decertified, the window within which to implement the merged seniority list would not have prematurely shut.

[84] Whether the plaintiffs' chance was more than *de minimis* is essentially a determination of fact. I concluded, above, that the trial judge correctly found that the sub-class six defendants' conduct in forming ACPA and decertifying CALPA was lawful. That conclusion reduces the plaintiffs' second argument to one that the trial judge committed palpable and overriding errors in finding that the chance of implementing the merged seniority lists did not rise above a *de minimis* level even without the defendants' unlawful conduct.

[85] I am not persuaded that the trial judge made any palpable and overriding errors. Indeed, I agree with her conclusion. She heard months of evidence. She

reviewed the conduct of all the defendants in comprehensive and cogent reasons that reached 567 paragraphs in length. She clearly understood the implications and interplay of the conduct at issue, both lawful and unlawful. In the case of the Air Canada pilots' ability to strike that the plaintiffs allude to, the trial judge explained both that the Merger Policy did not require the Air Canada pilots to strike to obtain a merged seniority list and that the suspension of collective bargaining was not the only reason why the Air Canada pilots could not legally strike to obtain a merged seniority list. The plaintiffs do not challenge those other reasons the Air Canada pilots could not legally strike to force Air Canada acceptance of a merged list.

[86] Each of the trial judge's reasons for concluding that the plaintiffs' chance of implementing the merged seniority list did not exceed the *de minimis* threshold was fully supported by the evidence and is logically sound.

[87] To put the plaintiffs' third argument in context, it is necessary to consider what the trial judge said about the single employer application. She explained that it was CALPA and not the Air Canada MEC that had to bring a single employer application, that CALPA did not do so until March 1996, that six different unions representing various bargaining units opposed the application, and that the Board dismissed CALPA's application in December 1999, stating that it failed utterly.

[88] At para. 471, she wrote the passage with which the plaintiffs take issue: “It is not possible or indeed appropriate to second guess [the Board’s] decision based on speculation that it would have been different if supported by the Air Canada pilots and if the LOU 17 grievance had been pursued.” She noted that the Board had dismissed an Air Canada single employer application in 1989. She concluded that “there was no possibility or probability that a single employer application would have had a different result but for the Defendants’ conduct.”

[89] The plaintiffs argue that while the trial judge declined to speculate whether the outcome might have been different, the loss of chance doctrine required exactly that hypothetical assessment. They say that had she engaged in that assessment, she would (or should) have concluded that, absent the defendants’ wrongful conduct, there was a reasonable probability CALPA would have won a single employer declaration. They argue that the withdrawal of the LOU 17 grievance played a crucial role in the failure of the application.

[90] They also argue that the trial judge erred in excluding the opinion of their expert, Professor McLaren, on the basis that it pertained to domestic law. He opined that had the Air Canada pilots supported a single employer application, it was highly likely that the Board would have exercised its discretion to grant the application. The plaintiffs argue that this was an opinion on a matter of fact (what the Board might have decided under different circumstances) and not law.

[91] The plaintiffs' argument is flawed. It assumes that the defendants were required to support a single employer application. The trial judge found, at para. 426, that “[t]he Air Canada MEC was entitled to work to prevent a [single employer] application” and, at para. 467, that the Merger Policy did not call for a single employer application. Those findings are not challenged on appeal. While the trial judge was required to consider what would have happened but for the defendants' wrongful conduct, she was not required to speculate about what would have happened but for lawful conduct. She was correct that it was not “appropriate to second guess [the Board's] decision based on speculation that it would have been different if supported by the Air Canada pilots and if the LOU 17 grievance had been pursued.”

[92] Professor McLaren's opinion, which assumed the defendants supported a single employer application, was therefore of no assistance to the plaintiffs.

[93] I turn now to the final issue.

VII ISSUE FOUR: DID THE TRIAL JUDGE ERR BY NOT AWARDING MERGER EXPENSES DAMAGES OF \$150,280?

[94] The fourth element of unlawful act conspiracy required the plaintiffs to establish that the defendants should have known that injury to the plaintiffs was likely to result from their unlawful conduct. At para. 442, the trial judge found the plaintiffs had established the fourth element:

Clearly the Air Canada pilots knew or ought to have known that the [regional] pilots might have been harmed. They certainly knew or ought to have known that the Air Ontario pilots were subject to assessments for merger expenses just as the Air Canada pilots were themselves.

[95] Elsewhere in her reasons, the trial judge determined that those merger expenses totalled \$150,280.

[96] The plaintiffs argue that once the trial judge found that the merger expenses constituted an injury to the plaintiffs that the defendants knew or ought to have known would result from their unlawful conduct, she erred by not, at a minimum, awarding damages of \$150,280.

[97] I disagree. I conclude that the plaintiffs are not entitled to the merger expenses.

[98] The trial judge's conclusion on loss of chance disposes of the plaintiff's argument. The plaintiffs had to establish that, but for the defendants' wrongful conduct, the merger expenses they incurred would not have been for naught. The trial judge concluded that regardless of the defendants' wrongful conduct, the merged seniority list would not have been implemented. Therefore, the defendants by their wrongful conduct did not cause the merger expenses to come to no end. The plaintiffs' claim for merger expenses fails because they have not established that the defendants' wrongful conduct caused the loss of those expenses.

VIII DISPOSITION

[99] For the foregoing reasons, I would dismiss this appeal. The parties agreed that the successful party on this appeal would be entitled to costs in the amount of \$175,000, inclusive of disbursements and HST. I would accordingly order the plaintiffs to pay such amount to the defendants.

[100] The Third Party Respondent, ALPA, did not seek costs and shall not be entitled to them.

Released: "AH" "JUN 19 2015"

"Alexandra Hoy A.C.J.O."
"I agree David Watt J.A."
"I agree David Brown J.A."

TAB 8

CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2019 ONSC 128
COURT FILE NO.: CV-17-587463-00CL
DATE: 20190109

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Catalyst Capital Group Inc. and Callidus Capital Corporation

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 and John Does #1-10

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Linda Plumpton and Leora Jackson*, for the Applicants the Anson Defendants

Brian Radnoff, for the Applicants Nathan Anderson and ClaritySpring Inc.

Nancy Tourgis and Melvyn Solmon, for the Applicant Richard Molyneux

Darryl Levitt, Self-Represented, Applicant

David Moore, Ken Jones and Matthew Karabus, for the Respondents Catalyst Capital Group and Callidus Capital Corporation

HEARD: October 29, 2018

ENDORSEMENT

[1] On these motions, various defendants in this action (the “applicants”) seek an order striking the statement of claim dated November 7, 2017 (the “Statement of Claim”) and dismissing the action against them under Rules 21, 25.06(1) and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

The Parties

[2] The following sets out the parties in the action and the defined terms in the Statement of Claim that are relevant for the present motions.

- Page 2 -

The Plaintiffs

[3] The plaintiff The Catalyst Capital Group Inc. (“Catalyst”) is a corporation with its head office located in Toronto, Ontario. Catalyst describes itself as a firm in the field of investments in distressed and undervalued Canadian situations.

[4] The plaintiff Callidus Capital Corporation (“Callidus”) is a corporation with its head office located in Toronto, Ontario. Callidus is a publicly traded asset-based lender that provides capital on a bridge basis to meet the financing requirements of companies that cannot access traditional lending sources.

[5] The common shares of Callidus (the “Callidus Shares”) are listed on the Toronto Exchange. Catalyst owns approximately 40 percent of the outstanding shares of Callidus.

[6] Catalyst and Callidus are herein collectively referred to as the “plaintiffs”.

The Anson Defendants

[7] The defendant M5V Advisors Inc. is a hedge fund incorporated in Ontario that carries on business as Anson Group Canada.

[8] The defendant Frigate Ventures LP (“Frigate”) is a limited partnership organized pursuant to the laws of Texas. At all relevant times, Frigate was a registered investment fund manager with the Ontario Securities Commission (the “OSC”). The defendant Admiralty Advisors LLC (“Admiralty”) is a limited liability company organized pursuant to the laws of Texas that is the general partner of Frigate.

[9] The defendants Anson Investments LP and Anson Capital LP are limited partnerships organized under the laws of Texas.

[10] The defendant Anson Investments Master Fund LP is a limited partnership organized under the laws of Texas. The defendant AIMF GP is the general partner of Anson Investments Master Fund LP.

[11] The defendant Anson Catalyst Master Fund LP is a limited partnership organized under the laws of Texas. The defendant ACF GP is the general partner of Anson Catalyst Master Fund LP.

[12] The parties described in the preceding five paragraphs are a family of hedge funds that carry on business as the “Anson Group”. All of them engage in securities transactions on public markets. They are collectively referred to herein as the “Anson Corporate Defendants”.

[13] The defendants Moez Kassam (“Kassam”) and Adam Spears (“Spears”) are principals of the Anson Corporate Defendants. The defendant Sunny Puri (“Puri”) is an analyst employed by

- Page 3 -

the Anson Corporate Defendants. Kassam, Spears and Puri are collectively referred to herein as the “Anson Individual Defendants”.

[14] The Anson Corporate Defendants and the Anson Individual Defendants are herein collectively referred to as the “Anson Defendants”.

The Wolfpack Conspirators

[15] The defendant West Face Capital Inc. (“West Face”) is a Toronto-based private equity corporation with assets under management of approximately \$2.5 billion. West Face competes with Catalyst. One of the principals of West Face is the defendant Gregory Boland (“Boland”).

[16] The defendant ClaritySpring Inc. (“Clarity”) is a Delaware corporation that is based in New York. Clarity’s principal is the defendant Nathan Anderson (“Anderson”).

[17] In the Statement of Claim and herein, the Anson Defendants, West Face, Boland, Clarity and Anderson are collectively referred to as the “Wolfpack Conspirators”.

The Guarantor Conspirators

[18] The defendant Jeffrey McFarlane (“McFarlane”) is an individual residing in North Carolina, in the United States of America.

[19] The defendant Darryl Levitt (“Levitt”) is an individual residing in Toronto, Ontario.

[20] The defendant Richard Molyneux (“Molyneux”) is an individual residing in Toronto, Ontario.

[21] The defendant Kevin Baumann (“Baumann”) is an individual residing in Red Deer, Alberta.

[22] Baumann, McFarlane, Levitt and Molyneux are collectively referred to in the Statement of Claim and herein as the “Guarantor Conspirators”.

The Remaining Defendants

[23] The defendant Bruce Langstaff (“Langstaff”) is a former employee of Canaccord Genuity.

[24] The defendant Rob Copeland (“Copeland”) is a reporter with The Wall Street Journal (the “WSJ”) who resides in New York, New York.

[25] The Wolfpack Conspirators, the Guarantor Conspirators, Langstaff and Copeland are collectively referred to in the Statement of Claim and herein as the “Conspirators”.

- Page 4 -

[26] The Statement of Claim also uses the defined term “Defendants” to include both the Conspirators and John Doe defendants who are alleged to have participated in the Conspiracy (as defined below) and whose identities are presently unknown.

The Pleadings and the Plaintiffs' Responses to the Applicants' Demands for Particulars

[27] In the Statement of Claim, the plaintiffs plead that, in response to actions commenced to enforce personal guarantees of the Guarantor Conspirators and certain other parties (the “Guarantors”) in respect of loans made by Callidus to certain borrowers, the Guarantor Conspirators coordinated their actions. In particular, it is alleged that they decided to defend the actions against them by filing spurious counterclaims against Callidus and by alleging claims of “fraudulent inducement”. It is also alleged that certain of the Wolfpack Conspirators funded the Guarantor Conspirators in these actions through one or more of the Guarantor Conspirators.

[28] It is further alleged in paragraph 61 of the Statement of Claim that the Wolfpack Conspirators and the Guarantor Conspirators then entered into a conspiracy to harm Callidus and Catalyst (herein the “Conspiracy”). The Conspiracy took the form of an agreement to a plan of action described in paragraph 64 of the Statement of Claim having the following elements (the “Plan”):

- (1) The spreading of false information by rumours;
- (2) The filing of false “whistleblower” complaints against Callidus with the OSC by certain of the Guarantor Conspirators to “confirm” the rumours;
- (3) The leaking of the allegations contained in the complaints to the media to generate interest;
- (4) The Conspirators taking short positions, directly or indirectly, in the Callidus Shares;
- (5) The publication of a report in the Wall Street Journal, timed to be released near the end of the trading day, in order to cause a rapid decline in the price of the Callidus Shares; and
- (6) The closing out of their naked short positions by the Conspirators to their profit and at the expense of the market value of Callidus.

[29] Each of these alleged steps in the Conspiracy is the subject of specific pleadings in paragraphs 67-111. Paragraphs 67-74 set out allegations regarding the filing of “false and defamatory whistleblower complaints” with the OSC relating to Callidus and Catalyst by Bauman, McFarlane, Levitt (or Molyneux) and Clarity (or Anderson) (the latter being incorrectly referred to as one of the Guarantor Conspirators) (the “Complaints”). The plaintiffs allege that the Complaints were defamatory and that the sole motivation for filing the Complaints was the furtherance of the Conspiracy. Bauman, McFarlane, Levitt (or Molyneux) and Clarity (or Anderson) are collectively referred to as the “Complainants” in the Statement of Claim.

[30] In paragraph 69, the plaintiffs allege that the Complainants disclosed the Complaints, or the substance of the Complaints, to WSJ reporters. I note that this paragraph appears to do no

- Page 6 -

more than anticipate the allegations in paragraphs 84-93. However, insofar as the pleadings say that the Complainants disclosed the Complaints, rather than the existence and substance of the Complaints, the pleadings are in error given the definition of “Complaints”. The plaintiffs say that the error will be corrected.

[31] In paragraphs 75-82, the pleadings allege that the Conspirators contacted journalists in an effort to leak the existence of the Complaints and other false allegations about them. The pleadings refer first to the engagement of a journalist, Bruce Livesey (“Livesey”), and then to an approach to Reuters, both of which are addressed further below.

[32] The pleadings allege in paragraphs 84-93 that the Conspirators then approached Copeland who authored an article that was published in the WSJ (the “Article”) after meetings between Copeland and each of the Guarantor Conspirators, at the urging of Anderson, and a meeting between Copeland and representatives of Callidus and Catalyst.

[33] In paragraphs 94-100, the pleadings allege that the Wolfpack Conspirators and one or more of the John Doe Defendants took naked short positions, and other positions to simulate short positions, in Callidus Shares, either directly or indirectly, on or about August 9, 2017. The Article was released at 3:29 p.m. on August 9, 2017. The plaintiffs say the Conspirators encouraged Copeland to release the Article at that time in order that Callidus would not be able to make normal course issuers bid purchases of Callidus Shares in the last 30 minutes of trading on that day. They say the Wolfpack Conspirators thereby profited in the significant drop in the value of Callidus Shares between August 9 and August 14, 2017.

[34] The plaintiffs allege that the Article and the Complaints made false and defamatory statements about Callidus and Catalyst and caused them loss. They also say that the Defendants’ actions constituted breaches of the *Securities Act*, R.S.O. 1990, c. S.5, in particular ss. 126.1 and 126.2.

[35] The principal claim of the plaintiffs against the Defendants is a claim for damages based on the tort of conspiracy, both predominant purpose conspiracy and unlawful means conspiracy. The plaintiffs also assert claims for damages based on defamation and the tort of intentional interference with contractual relations, in each case based on the alleged defamatory statements in the Article and the Complaints, as well as unjust enrichment. They seek disgorgement of the profits made by the Conspirators.

[36] The Anson Defendants delivered a Demand for Particulars dated January 12, 2018. Molyneux delivered a Demand for Particulars dated May 15, 2018. Levitt delivered a Demand for Particulars dated May 16, 2018. Clarity and Anderson delivered a Demand for Particulars dated August 7, 2018.

[37] The plaintiffs delivered a Response to Demand for Particulars on October 22, 2018 which responded to each of the foregoing Demands for Particulars. The plaintiffs further supplemented their Response to Demand for Particulars with an addendum dated October 23, 2018 (the “Addendum”).

- Page 7 -

Applicable Legal Principles on a Motion to Strike

[38] The following provisions of the *Rules of Civil Procedure* are applicable in respect of these motions:

21.01 (1) A party may move before a judge, ...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

...

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. ...

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. ...

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

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

[39] The principles pertaining to a motion to strike a claim under r. 21.01(1)(b) are well established. In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980, the Supreme Court articulated the applicable test as follows:

[A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect

- Page 8 -

... should the relevant portions of a plaintiff's statement of claim be struck out under [the counterpart under the British Columbia rules of civil procedure to r. 21.01(1)(b)].

[40] More recently, in *Catalyst Capital Group Inc. et al v. Veritas Investment Research et al.*, 2017 ONCA 85, 136 O.R. (3d) 23, at para. 21, the Court of Appeal set out the following principles that apply on a motion under r. 21.01(1)(b):

No one contests that the bar for striking a pleading as disclosing no cause of action is very high – is it plain and obvious that the plaintiff cannot succeed? – or that the facts as alleged in the Statement of Claim are to be accepted as true for purposes of deciding the motion: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. No evidence is permissible on a rule 21.01(1)(b) motion: rule 21.01(2)(b). The statement of claim is to be read as generously as possible with a view to accommodating any inadequacies in the allegations due to drafting difficulties.

Preliminary Matter

[41] Before addressing the applicants' motions in respect of the specific claims asserted against them, it is necessary to address certain issues pertaining to the pleadings in respect of the plaintiffs' defamation claims that also have implications for a number of the plaintiffs' other claims.

[42] As currently drafted, the allegations in the Statement of Claim give rise to considerable confusion regarding the extent to which the plaintiffs are grounding a separate defamation claim in the Complaints, in addition to their defamation claim based on the Article. In this regard, the following provisions of the pleadings are relevant.

[43] First, at paragraph 68, "Complaints" is defined as "false and defamatory whistleblower complaints" filed by the Complainants with the OSC relating to Callidus and Catalyst. The term "Complaints" therefore does not include any statements made to parties other than the OSC regarding the existence, or content, of the Complaints.

[44] Second, at paragraph 112, the plaintiffs allege that the "Article, read as a whole and the Complaints make false and defamatory statements (the "Defamatory Words") ... about Callidus and Catalyst". This definition of "Defamatory Words" is effectively confirmed in the statement at paragraph 11 of the Addendum that "[c]urrently, the only specific defamation claim pleaded in the [Statement of Claim] relates to the 'Defamatory Words' as stated in the [Statement of Claim]." This suggests that the plaintiffs base their defamation claim on "false and defamatory statements" in the Complaints as well as in the Article.

[45] Third, there are a number of vague allegations made in the Statement of Claim to disclosure of the existence of the Complaints, or the substance of the Complaints, to various

- Page 9 -

parties other than the OSC. These allegations include the references in paragraphs 64 and 73 to spreading “false information through the Bay Street rumour mill” and spreading “rumours within the financial industry”. They also include the allegations in paragraphs 75-78 regarding the Conspirators’ contact with, and engagement of, Livesey to write a negative story targeting the plaintiffs, as well as the allegations in paragraphs 79 and 81-83 that the Conspirators approached Reuters and “other reputable news organizations” in 2017 and encouraged them to publish a negative story about the plaintiffs.

[46] As a result of these pleadings, a reasonable reader of the pleadings would be confused as to: (1) whether the plaintiffs are asserting defamation claims based on statements made regarding the existence of, or substance of, the Complaints in circumstances other than the preparation and publication of the Article; and (2) whether the plaintiffs are asserting defamation claims based on the content of the Complaints themselves as made to the OSC.

[47] The applicants proceeded on the basis that the answer to both these questions was in the affirmative and argued that such claims should be struck for various reasons, in particular that they fail to set out the necessary facts to establish a claim against them, individually. At the hearing, however, the plaintiffs confirmed that, in fact, with one qualification addressed below, they are not asserting either of the claims described in (1) and (2) above. I will address each in turn.

[48] First, the plaintiffs say that their defamation claims are based solely on the publication of the Article and, to the extent that it is relevant, the statements of the Complainants to Copeland regarding the existence, and the alleged content, of the Complaints. The plaintiffs do not allege defamation based on any of the other alleged communications to third parties regarding the existence or content of Complaints, including to Livesey or Reuters. Instead, they say they rely on these allegations as further improper means for the purposes of their conspiracy claims as well as their claims of intentional interference with economic relations and unjust enrichment.

[49] Second, the plaintiffs also do not assert that the statements allegedly made by the Complainants to the OSC pursuant to the OSC’s “whistleblower” programme are the subject of defamation claims, subject to the issue of the applicability of the tort of abuse of process discussed below. It is acknowledged that statements made to the OSC in such circumstances are entitled to absolute privilege: see *Fraleigh v. RBC Dominion Securities Inc.* (2009), 99 O.R. (3d) 290 (S.C.), at paras. 31-35; *Hung v. Gardiner*, 2003 BCCA 257, 13 B.C.L.R. (4th) 298, at paras. 30-37. This immunity applies not only to the making of statements to the OSC staff performing investigatory functions but also to all causes of action that may be based on those statements. In any event, in the present circumstances, the actual content of the Complaints remains unknown and is not pleaded.

[50] As mentioned, the plaintiffs have, however, suggested that the tort of abuse of process may apply to exclude the availability of absolute privilege in respect of the Complaints. The tort of abuse of process entails the following four elements as confirmed by the Court of Appeal in *Harris v. Glaxosmithkline Inc.*, 2010 ONCA 872, 106 O.R. (3d) 661, at para. 27:

(1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted. [Citations omitted.]

[51] The plaintiffs suggest that a “whistleblower” complaint to the OSC is analogous to the commencement of legal proceedings, and, therefore, the tort of abuse of process should be applicable in respect of the communication of knowingly false complaints to the OSC for an ulterior and predominant purpose to further an improper objective. They do not, however, provide any case law to support this proposition.

[52] In my view, the plaintiffs have failed to establish a reasonable cause of action for abuse of process on the facts of this case for the reason that they have failed to plead facts that establish the first element of the tort. The making of a complaint to the OSC under its “whistleblower” programme does not constitute the commencement of legal proceedings for the purposes of the tort of abuse of process.

[53] There is a significant distinction between the communication of a “whistleblower” complaint in confidence to OSC staff and the commencement of legal proceedings. Among other things, the communication of a complaint does not involve any publication to third parties of the allegedly false complaint. The complaint remains a matter of confidential disclosure to the OSC staff, who then determine whether or not to investigate the complaint. Further, if a decision is taken to commence legal proceedings after any such investigation, it is the OSC, rather than the “whistleblower” that takes that decision. Moreover, any public documents released in connection with such action will reflect the view of the OSC staff of the relevant events, which may not necessarily be the same as the view of the “whistleblower”. Accordingly, the making of a complaint does not entail the publication of any documents by the “whistleblower” whose publication could cause special loss or damage to a defendant.

[54] There is, therefore, a causation problem in respect of complaints to the OSC, unlike the commencement of legal proceedings. In the latter case, the defendant’s action in commencing litigation proceedings is a direct cause of any loss suffered by a plaintiff. In the former case, as mentioned, the independent action of the OSC in deciding to commence legal proceedings after conducting its own investigation is the cause of any loss suffered by a plaintiff.

[55] Lastly, it is inherent in any “whistleblower” programme that a party making a “whistleblower” statement to a regulatory authority may have a questionable purpose in mind in doing so. However, the fact that a “whistleblower” may have the furthering of an improper object as his or her predominant purpose does not mean that the subject matter of his or her communication would not be of legitimate concern from a regulatory perspective. There are

- Page 11 -

therefore compelling policy reasons why the tort of abuse of process should not apply in the case of “whistleblower” complaints to the OSC.

[56] The plaintiffs’ counsel advised the Court at the hearing of these motions that the plaintiffs would amend the pleadings to make the basis of their defamation claims clear if the Court found that, as currently drafted, the pleadings were confusing. Based on the foregoing, I find that the pleadings should be struck: (1) under r. 25.11, insofar as they suggest that the plaintiffs assert defamation claims in respect of statements made to third parties regarding the existence, or content of, the Complaints, other than statements made to WSJ reporters in respect of the Article; and (2) under r. 21.01(1)(b), insofar as they suggest that the plaintiffs assert a claim of defamation based on the assertion that the making of the Complaints was an abuse of process.

Analysis and Conclusions Regarding the Applicants’ Motions to Strike

[57] I propose to address the motions to strike of the various applicants by grouping them according to the plaintiffs’ claims in the Statement of Claim.

Defamation

[58] The plaintiffs allege that the Article was defamatory in respect of each of them. They assert a defamation claim against each of the applicants in these motions for loss arising from the publication of the Article. Based on the discussion above, it is my understanding that the plaintiffs’ defamation claims against the applicants are based on the allegations in paragraphs 84-93. These pleadings pertain to Copeland’s publication of the Article and to alleged conversations between McFarlane, Bauman, Molyneux, Levitt and Anderson with Copeland that formed the information upon which he based the Article.

[59] The requirements for a pleading of defamation were addressed in *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), at para. 91:

Both courts and leading authors on the law of defamation repeatedly state that pleadings in defamation cases are more important than in any other class of actions. The statement of claim must contain a concise statement of the material facts. A summary of the necessary material facts to allege a complete cause of action for defamation is found in Patrick Milmo and W.V.H. Rogers, ed., *Gatley on Libel and Slander*, 10th ed. (London: Sweet & Maxwell, 2003) at p. 806:

These facts are the publication by the defendant, the words published, that they were published of the claimant, (where necessary) the facts relied on as causing them to be understood as defamatory or as referring to the claimant and knowledge of these

- Page 12 -

facts by those to whom the words were published, and, where the words are slander not actionable per se, any additional facts making them actionable, such as that they were calculated to disparage the plaintiff in an office held by him or that they have caused special damage.

[60] In *Catalyst Capital Group Inc.* at para. 23, the Court of Appeal addressed the requirements for a pleading of libel as follows:

In libel actions (defamatory statements in writing, as in this case), the material facts to be pleaded are (i) particulars of the allegedly defamatory words; (ii) publication of the words by the defendant; (iii) to whom the words were published; and (iv) that the words were defamatory of the plaintiff in their plain and ordinary meaning or by innuendo. See, generally, Alastair Mullis and Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London: Sweet & Maxwell, 2013), at paras. 26-1 to 26-26; *Lysko v. Braley* (2006), 79 O.R. (3d) 721, [2006] O.J. No. 1137 (C.A.), at para. 91; *Metz v. Tremblay-Hall*, [2006] O.J. No. 4134, 53 C.C.E.L. (3d) 107 (S.C.J.), at para. 13.

[61] Each of the applicants seeks an order striking the plaintiffs' defamation claims against them, but on different grounds. I will address the position of each of the applicants in turn.

The Anson Defendants

[62] The Anson Defendants move to strike the claim of defamation against them on the basis that the plaintiffs have failed to plead any facts regarding the involvement of the Anson Defendants in the publication of the Article, including any particulars of any instances of publication of the Defamatory Words by the Anson Defendants.

[63] The plaintiffs make three principal arguments. First, they argue that the defamation claim is part of the conspiracy claim. They say that, to the extent that the Anson Defendants participated in the Conspiracy, they also participated in the publication of the Article, even if they took no specific actions in furtherance of the publication of the Article. I do not think that this is correct.

[64] I accept that a party who participates in the publication of a defamatory expression in furtherance of a common design will be liable to the plaintiff: see *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 75-76. However, for such purposes, the common design must pertain to the publication of the defamatory statement.

[65] In *Botiuk*, the issue concerned the liability of certain parties who participated in the publication of one of three documents that were treated collectively as a single libel. The

- Page 13 -

Supreme Court upheld the lower court decisions that found these parties liable for all damages flowing from the publication of the three documents as a single libel. At para. 75, the Supreme Court expressed its finding as follows:

The appellants' actions bring them within the third category of joint tortfeasors so well described by Fleming. In the context in which the text writer has utilized the word conspiracy, it refers to the design or agreement of persons to participate in acts which are tortious, even though they did not realize they were committing a tort.

[66] In *Botiuk*, the Supreme Court therefore held that these parties were joint tortfeasors with the author and publisher of the two other articles. Not only are the facts in *Botiuk* significantly different from the present situation but there is also nothing in the decision of the Supreme Court that would attract liability to persons who did not participate in some manner in furtherance of the actual tortious act of libel of or slander upon which a plaintiff bases its claim of defamation.

[67] In the present case, therefore, the plaintiff must plead facts that would support a finding that the Anson Defendants participated in the tortious act of publication of the Article in order to plead a viable cause of action in defamation against them. A pleading that the Anson Defendants participated in the Conspiracy, in furtherance of which certain of the other participants are alleged to have published the Article, is not sufficient to sustain a claim for defamation against the Anson Defendants.

[68] Second, the plaintiffs say that the pleading is sufficient to permit the Anson Defendants to plead a simple denial of any involvement in the preparation or publication of the Article. This argument proceeds on an inadequate view of the purpose of pleadings. Under r. 25.06(1), the plaintiff has the obligation to plead facts upon which it relies and which, if proven, would ground a viable cause of action. In addition, a plaintiff is not entitled to plead a bald allegation and rely on the possibility that new facts might turn up that would support the allegation: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22. Further, as mentioned in *Catalyst Capital Group Inc.* at para. 22, pleadings in defamation cases have traditionally been held to a higher standard, in terms of the precision with which the material facts must be pleaded, than is the case with other types of actions. More generally, in the absence of such particulars, a party should not be forced to bear the cost of an action for defamation in respect of a publication in which it took no part.

[69] Third, the plaintiffs rely on the more flexible approach to pleadings of defamation in recent case law. In particular, they rely on the statements of Blair J.A. in *Catalyst Capital Group Inc.* at paras. 23 and 25. This principle has been applied in situations in which the plaintiff was unable to plead the exact wording of allegedly defamatory statements or the names of all of the parties to whom an allegedly defamatory statement was published.

[70] In this case, however, apart from bald statements regarding the Conspirators collectively, the plaintiffs plead no details whatsoever regarding any involvement of the Anson Defendants in

- Page 14 -

the preparation or publication of the Article. Moreover, there is no logical basis on which one could infer that they might have had knowledge of, and therefore been in a position to, participate in the preparation or publication of the Article. The plaintiffs' pleadings are therefore more properly regarded as bald allegations against the Anson Defendants for the purpose of a fishing expedition to determine whether or not the Anson Defendants played any role in the preparation and publication of the Article.

[71] Accordingly, I agree with the Anson Defendants that the defamation claim against them does not disclose a reasonable cause of action for the purposes of r. 21.01(1)(b) in that it fails to plead that the Anson Defendants participated in the publication of the alleged defamatory expression. This claim should therefore be struck.

Clarity/Anderson

[72] Clarity and Anderson also move to strike the claim of defamation against them on the basis that the plaintiffs have failed to plead any facts regarding the involvement of either of them in the publication of the Article including any particulars of any instances of publication by either of them. In opposition to the motion of Clarity and Anderson, the plaintiffs make the same three principal arguments discussed in respect of the Anson Defendants.

[73] In the present circumstances, there is no basis in the pleadings for the defamation claim asserted against Clarity in its own right. The plaintiffs do not plead any actions by Clarity, in its own right, in respect of the preparation or publication of the Article. Clarity's position in respect of the plaintiffs' defamation claim against it is therefore substantially the same as that of the Anson Corporate Defendants with one qualification.

[74] To the extent that there is a basis for asserting a claim against Anderson acting on behalf of Clarity, the plaintiffs' claim against Anderson would also constitute a claim against Clarity. Accordingly, any claim against Clarity requires the assertion of facts that would establish a viable claim based on actions of Anderson in his capacity as a representative of Clarity.

[75] In paragraph 86 of the Statement of Claim, as mentioned, the plaintiffs plead that McFarlane told Copeland that "Callidus and Catalyst were engaged in allegedly nefarious accounting practices concerning a loan that Callidus had extended to XTG." The pleadings allege that Copeland had "similar conversations" with Anderson.

[76] As literally drafted, the paragraph suggests that Anderson had a conversation or conversations with Copeland regarding the matters raised by McFarlane pertaining to XTG. It is understood, however, that the plaintiffs intended to plead that Anderson told Copeland the substance of his own Complaint to the OSC. I have therefore proceeded on this basis in analyzing the defamation claim against Anderson.

[77] Neither Clarity nor Anderson was in litigation with Callidus, as were the Guarantor Conspirators. It is therefore unclear what Anderson is alleged to have said to Copeland in respect of his own position, or that of Clarity, that was defamatory of the plaintiffs. Moreover, the

- Page 15 -

pleadings do not allege that the Article refers to the substance of any Complaint of Clarity or Anderson. It is therefore not possible to infer any defamatory statements to Copeland based on the pleadings regarding the content of the Article. Accordingly, Anderson cannot know the case that he has to meet and cannot plead otherwise than by way of a blanket denial that he made any defamatory statement to Copeland.

[78] In my view, in the absence of a pleading regarding the substance, even if not the details, of a defamatory statement made by Anderson to Copeland, the pleadings fail to disclose a reasonable cause of action against Anderson and Clarity for the purposes of r. 21.01(1)(b). In addition, the plaintiffs have failed to plead the material facts upon which they base their claim that Anderson's alleged conversation with Copeland was actionable in view of the text of the Article. Accordingly, the plaintiffs' defamation plea against both Clarity and Anderson is also struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claim based on the Article.

Molyneux and Levitt

[79] Molyneux and Levitt also move to strike the defamation claims against them.

[80] Both Molyneux and Levitt are in litigation with Callidus and are attempting to enforce their personal guarantees in respect of a loan made by Callidus to an entity referred to as "Fortress Resources" in the Statement of Claim. However, there is no pleading that the Article refers to Fortress Resources nor is there a pleading regarding what either Molyneux or Levitt is alleged to have said to Copeland. There is therefore no pleading as to what either Molyneux or Levitt communicated to Copeland that was defamatory of the plaintiffs.

[81] Further, Molyneux and Levitt could possibly be liable in defamation if they pursued a "common design" with McFarlane to publish a defamatory article concerning the plaintiffs. However, the plaintiffs' pleading does not plead facts that would establish such a common design, as opposed to an agreement for a larger conspiracy, which is discussed below.

[82] In my view, therefore, the positions of Anderson, Molyneux and Levitt on this issue are substantially similar. On this basis, the defamation claims against each of Molyneux and Levitt should be struck under r. 21.01(1)(b) as failing to disclose a reasonable cause of action and, in addition, should be struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claims based the Article.

Intentional Interference with Economic Relations

[83] The plaintiffs assert claims of intentional interference with economic relations against all of the applicants.

[84] The elements of this tort were addressed by the Supreme Court in *A. I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177. In that decision, Cromwell J. concluded at para. 5 that the tort was available in three-party situations in which the defendant

- Page 16 -

commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. He also concluded that, for the purposes of the tort, conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it. At para. 45, Cromwell J. went on to state that “[t]he two core components of the unlawful means tort are … that the defendant must use unlawful means, in the narrow sense, and that the defendant must intend to harm the plaintiff through the use of the unlawful means.” For this purpose, breaches of criminal or regulatory law do not satisfy the criteria for “unlawful means”.

[85] The plaintiffs’ claims for damages for intentional interference with economic relations against all of the applicants in these motions should be struck for two reasons.

[86] First, given the determinations above that the plaintiffs’ defamation claims against the applicants should be struck, the plaintiffs’ claims against the applicants for intentional interference with economic relations cannot survive. These claims are based on “unlawful means” in the form of actionable defamation of the plaintiffs. As the plaintiffs’ defamation claims have been struck, the plaintiffs’ claims for interference with economic relations fail to plead an essential element of the tort.

[87] Second, with respect to the element of third-party involvement, the pleadings state simply that the Defendants “deceived third-party market participants into believing that Callidus and Catalyst were engaged in fraudulent activity and were subject to ‘investigation’ by the OSC and the Toronto police.” The plaintiffs further plead that the Defamatory Words were published to induce these market participants to sell their Callidus Shares, thereby lowering the Callidus share price for a prolonged period of time.

[88] The plaintiffs have therefore failed to identify the third party or third parties against whom the applicants are alleged to have committed an unlawful act. They have also failed to plead facts that establish the commission of an unlawful act that constitutes unlawful means, as understood for the purposes of this tort, directed against such third party or third parties. Specifically, they have failed to identify a claim of any third-party market participant against the applicants arising out of the publication of the Defamatory Words by the applicants.

[89] Counsel for the plaintiffs conceded that if a plaintiff asserting a claim of intentional interference with economic relations must plead facts that identify a third party against whom the defendant has committed an unlawful act, and the actionable claim of such third-party against the defendant that arose as a result of the applicants’ actions, the claim is deficient. As I find that such pleadings are required, the pleadings against the applicants fail to disclose a reasonable cause of action.

[90] Accordingly, this claim should be struck under r. 21.01(1)(b) as against all of the applicants.

Unjust Enrichment

[91] The plaintiffs assert a claim for unjust enrichment against all of the applicants.

[92] In order to succeed in a claim for unjust enrichment, a plaintiff must prove three matters: (1) an enrichment of or benefit to the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: see *Apotex Inc. v. Eli Lilly and Company*, 2015 ONCA 305, 125 O.R. (3d) 561, at para. 20, referring to *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at para. 32.

[93] The plaintiffs plead that the applicants have been unjustly enriched through their participation in an unlawful short selling attack. Read generously, this is understood to proceed on the basis that the publication of the Defamatory Words rendered unlawful the Conspirators' short sales of Callidus Shares that would otherwise have been lawful. The pleading alleges that the applicants received a benefit in the form of their profit made on the short sales, that "the benefit was at Callidus's expense, as it corresponded to a decline in Callidus's market capitalization, which constitutes an injury to Callidus", and that there was no juristic reason for the enrichment. The plaintiffs seek an order requiring the applicants to pay over their profits on the sale of Callidus Shares to the plaintiffs.

[94] There are two problems with this pleading.

[95] First, given the determination above that the defamation pleading must be struck, the pleading that there was no juristic reason for the applicants' profits from their short sales cannot stand. In the absence of a further act that vitiates the applicants' sales activity, there is nothing improper or illegal about the applicants' actions in taking short positions in the Callidus Shares that would support a claim for unjust enrichment.

[96] Second, as was observed in *Apotex Inc. v. Eli Lilly and Company* at para. 43, there must be a reciprocal relationship between the defendant's benefit and the plaintiff's deprivation for a claim of unjust enrichment to succeed, that is, the defendant's gain must correspond to the plaintiff's loss:

The Supreme Court of Canada recently discussed the elements of unjust enrichment in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, [2012] 3 S.C.R. 660, at paras. 148-158. With respect to the first and second elements, the enrichment and the corresponding deprivation, the court explained, at para. 151, that they are "the same thing from two different perspectives" or "two sides of the same coin." These elements are "properly understood to connote a transfer of wealth": at para. 152. Since "the purpose of the doctrine of unjust enrichment is to reverse unjust transfers of wealth", the first question the court asked in that case was whether the government was enriched at the plaintiffs' expense. The court affirmed that the

- Page 18 -

government's gain had to correspond to the plaintiffs' loss for the unjust enrichment claim to succeed.

[97] This requirement for a claim of unjust enrichment was confirmed in the recent decision of the Supreme Court in *Moore v. Sweet*, 2018 SCC 52. In that decision, Côte J. for the majority noted at para. 43 that "the plaintiff must demonstrate that the loss he or she incurred corresponds to the defendant's gain, in the sense that there is some causal connection between the two."

[98] In this case, there is no reciprocal relationship between the applicants' alleged gain, being profits from their short selling activity, and the plaintiffs' alleged deprivation, being the decline in Callidus' market capitalization. While the triggering event may have been the same – the publication of the Article – the alleged gains of the Conspirators and the losses suffered by the plaintiffs do not exhibit a reciprocal relationship, and are not causally related, as understood for the purposes of a claim of unjust enrichment.

[99] The losses that corresponded to the applicants' gains from their short selling activity were transferred from the holders of Callidus Shares who sold their shares in the market to the Conspirators who acquired such shares for the purpose of covering their naked short positions. Neither Callidus nor Catalyst was a seller of Callidus Shares. The loss suffered by Callidus was a reduction in its ability to raise additional capital as a result of a lowered market capitalization. The loss suffered by Catalyst was a reduction in the market value of its investment in Callidus. However, the decline in Callidus's market capitalization was not a loss that was transferred from Callidus to the applicants nor was the decline in the market value of Catalyst's investment in Callidus.

[100] In this regard, the pleadings in this case raise a similar issue to that which was presented in *Apotex Inc. v. Eli Lilly and Company*, although in a very different context. The following reasoning of the Court of Appeal at para. 55 of that case is equally applicable in the present case:

This is not a bilateral context where Apotex is the only party that has been wronged by Lilly. Effectively, Apotex is asking the court to designate it as the de facto beneficiary of the wrongfully-obtained monopolistic profits despite recognizing in its pleadings that it was the public that suffered actual deprivation as a result of the monopolistic pricing. Unlike the plaintiffs in the "profiting from wrong" cases discussed above, Apotex is not positioned as the sole party with a legitimate right to "enforce" or "deter" the underlying wrong. The pecuniary interests of consumers, and potentially other generic companies, are also implicated. Lilly did not owe Apotex an equitable duty, nor is this case akin to the "exceptional" breach of contract cases where courts award restitution damages to a plaintiff in order to prevent a defendant from exploiting a bilateral agreement to its advantage.

- Page 19 -

[101] Accordingly, the plaintiffs' claims for unjust enrichment should be struck under r. 21.01(1)(b) as against all of the applicants.

Conspiracy

[102] The plaintiffs' principal claim in the Statement of Claim is its claim of conspiracy against the Defendants. As discussed above, the pleadings allege that, in or about December 2016, the Wolfpack Conspirators and the Guarantor Conspirators entered into the Conspiracy with the intention of causing economic harm to the plaintiffs. The elements of the plan to be implemented in furtherance of the Conspiracy are set out in paragraph 64 of the Statement of Claim.

[103] In *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.), at paras. 21 and 22, the Court of Appeal approved the following statement of the pleading requirements for a civil conspiracy claim which is quoted from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975) at pp. 646-47:

The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

[104] In this action, the essence of the conspiracy claim is that the Conspirators agreed to a plan whereby a defamatory article would be published and the Conspirators would profit from the decline in the value of the Callidus Shares by covering short positions put in place shortly prior to publication of the article. For clarity, while the plaintiffs also alleged that the Guarantors co-ordinated their responses to the litigation commenced by Callidus against them and, in that connection, asserted allegedly spurious defences and counterclaims, these allegations do not form part of the conspiracy claim. They are instead alleged to be events that prompted the Guarantor Conspirators to enter into the Conspiracy with the Wolfpack Conspirators. Similarly, as mentioned, while the Conspirators are alleged to have communicated with certain parties, in addition to Copeland, with a view to publication of an article negative to Callidus and Catalyst, these efforts were not successful and were not directly part of the implementation of the Conspiracy as described in paragraph 64.

[105] In the Addendum, the plaintiffs say that each of the Conspirators were aware of and agreed to participate in the Conspiracy and that each benefitted from and intended to unlawfully harm the plaintiffs through the Conspiracy. Significantly for present purposes, they also say that, because all of the Defendants were party to the common design shared by the Conspirators, each Defendant is liable for the damages caused, irrespective of whether such Defendants participated in each specific act constituting the Conspiracy.

- Page 20 -

Anson Defendants

[106] I propose to consider the conspiracy pleadings relative to the Anson Defendants by first describing their alleged involvement in the Conspiracy and then addressing the claims against the Anson Corporate Defendants and the Anson Individual Defendants separately in turn.

The Conspiracy Pleadings and Particulars in Respect of the Anson Defendants

[107] In the Statement of Claim, the plaintiffs plead that in late 2016 West Face encouraged Anson “to support its planned short attack” and disclosed to the Anson Defendants the identity of the Guarantors and its knowledge of co-ordination between the Guarantors. The pleadings further allege that in or about December 2016, the Wolfpack Conspirators, which includes the Anson Defendants, and the Guarantor Conspirators entered into the Conspiracy.

[108] In the Addendum, by way of particulars, the plaintiffs allege that in February 2017 Spears and Puri discussed and agreed to a plan with Langstaff to work up false fraud complaints against the plaintiffs. They also say that, at or after this time, all of the Anson Defendants were in contact, directly or indirectly, with the other Conspirators and agreed to become part of the Conspiracy described in paragraph 64 of the Statement of Claim. In addition, the plaintiffs say that, from and after this time, Spears, Puri and the other Anson Defendants communicated directly or indirectly with the other Conspirators in furtherance of the Conspiracy. These communications, which the plaintiffs say are generally unknown to them but known to the Anson Defendants, are alleged to have included meals in June 2017 at a particular restaurant.

Disposition of the Motions of the Anson Corporate Defendants

[109] The Anson Corporate Defendants argue that the pleadings fail to plead sufficient facts to disclose a claim of conspiracy against them in that there is no pleading of any specific action on the part of the Anson Defendants in respect of the Conspiracy. In particular, they say that the plaintiffs have failed to plead any particulars that enable the Anson Defendants to understand the steps comprising the plan described in paragraph 64 in which they are alleged to have participated. In this regard, it is not disputed that the plaintiffs do not allege that the Anson Defendants made any of the Complaints to the OSC or had any conversations with Copeland.

[110] The Anson Corporate Defendants also suggest that, insofar as the pleadings plead any facts, they are inconsistent with, if not actually contradicted by, the particulars set out in the Addendum. In particular, they say that the timing of the alleged entering into of the Conspiracy by the Anson Defendants in or about February 2017 is inconsistent with, and excludes the Anson Defendants’ participation in, the entering into of the Conspiracy by the other Conspirators in December 2017.

[111] There are clearly difficulties with the pleadings in the Statement of Claim insofar as they address the involvement of the Anson Corporate Defendants in the Conspiracy. As noted, the particulars in the Addendum contradict the pleading that the Anson Defendants entered into the Conspiracy in December 2017. Further, Langstaff is not a Defendant and his only involvement,

- Page 21 -

as pleaded in paragraphs 95 and 96 of the Statement of Claim, was to assist the Wolfpack Conspirators to put short positions in place. Therefore, the allegation in the Addendum that the Anson Defendants and Langstaff were involved in a plan to work up false complaints against the plaintiffs has no connection to the Conspiracy claim as currently pleaded. Moreover, there is no suggestion in the Addendum that Langstaff was the means of the alleged “indirect” communication between Spears, Puri and the Anson Corporate Defendants, on the one hand, and the other Conspirators, on the other hand.

[112] Taking the foregoing into consideration, the allegations pertaining to the Anson Corporate Defendants can be summarized as follows on a generous reading. The Anson Corporate Defendants, as represented by Spears and Puri, agreed with the other Conspirators to become part of the Conspiracy in or after February 2017 and communicated with the other Conspirators after this time, including at meals in June 2017 involving Spears and Puri. The purpose of the Conspiracy was to harm Catalyst and thereby to profit to the detriment of the plaintiffs. The Anson Corporate Defendants were therefore aware, among other things, of the intention of the other Conspirators to implement the Plan, and in particular to cause an article to be published that was defamatory to Callidus. In anticipation of the publication of this article, the Anson Defendants put short positions in the Callidus Shares in place and profited from the decline in the Callidus Shares after publication of the Article at the expense and to the detriment of Callidus and Catalyst.

[113] The issue for the Court is whether these spare pleadings, together with the pleadings regarding the involvement of the other Wolfpack Conspirators and the Guarantor Conspirators, are sufficient to satisfy the requirements of r. 21.01(1)(b). I conclude that these allegations are sufficient to establish a viable claim of conspiracy against the Anson Corporate Defendants in that they address each of the requisite elements of the civil conspiracy claim as set out above.

[114] Further, insofar as the Anson Defendants say that the pleadings do not allow them to know the case against them, I do not agree for the following reasons. The Anson Defendants are in a position to plead with respect to each of the matters referred to above as constituting the requisite elements of a civil conspiracy claim.

[115] In particular, the issues of whether Spears and Puri agreed to the Conspiracy and whether they had the alleged communications with the other Conspirators are factual matters within the knowledge of the Anson Defendants. Insofar as it is necessary to establish knowledge of the Conspiracy on the part of the Anson Corporate Defendants, the plaintiffs’ pleadings, together with the particulars in the Addendum, allege that the Anson Corporate Defendants became aware of the Conspiracy and agreed to it through the involvement of Spears and Puri described above. Further, the Anson Corporate Defendants are alleged to have participated by putting short positions in place to benefit from the anticipated market consequences of the Article and to have profited therefrom. These are also purely factual matters to which the Anson Corporate Defendants are in a position to plead. Conversely, given the allegation of a conspiracy, it is not reasonable to expect that the plaintiffs would necessarily know the specific communications

- Page 22 -

among Spears, Puri and the other Conspirators in respect of the Conspiracy or the extent of the short positions of the Anson Corporate Defendants, if any, in the Callidus Shares.

[116] Based on the foregoing, I conclude that the plaintiffs' pleadings of conspiracy against the Anson Corporate Defendants disclose a reasonable cause of action for the purposes of r. 21.01(1)(b).

Enterprise Liability

[117] As an alternative argument, the Anson Corporate Defendants say that paragraph 20 of the Statement of Claim should be struck in respect of the Anson Corporate Defendants because it alleges liability on an enterprise-wide basis, rather than against individual corporations. As I understand this argument, the Anson Defendants say that such a pleading fails to assert a viable cause of action against any of them individually for the purpose of r. 21.01(1)(b).

[118] Paragraph 20 of the Statement of Claim alleges, in effect, that the Anson Individual Defendants and the entities that comprise the Anson Corporate Defendants at all material times operated, acted, and marketed themselves as a single entity. Accordingly, this pleading in paragraph 20 would treat all of the Anson Corporate Defendants as a single entity for the purposes of the conspiracy claim. It is also alleged in paragraph 20 that the Anson Individual Defendants and the Anson Corporate Defendants are vicariously liable for the acts and omissions of one another or alternatively that they acted as agent for the other Anson Defendants. These latter pleadings of vicarious liability and agency are not at issue in this section.

[119] The Anson Corporate Defendants say that courts have struck pleadings that are drafted on the "enterprise liability" approach. They refer to and rely on *Hughes v. Sunbeam Corp. (Canada)* (2000), 11 B.L.R. (3d) 236 (Ont. S.C.) at paras. 48-49, varied on other grounds, 61 O.R. (3d) 433 (C.A.); and on *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, 27 C.P.C. (7th) 32, at para. 120, affirmed, 2013 ONSC 1169 (Div. Ct.). However, these cases exhibited compelling reasons on the facts as pleaded for excluding particular corporate entities from potential liability.

[120] In the present case, it is alleged that Spears and Puri are respectively a principal of, and an analyst at, all of the Anson Corporate Defendants. Their actions and their knowledge are, therefore, the actions and knowledge of all of the Anson Corporate Defendants. Further, each of the Anson Corporate Defendants is alleged to trade in securities. There are no facts before the Court that would narrow the class of Anson Corporate Defendants who could have participated in the Conspiracy by putting short positions in place to profit from the decline in the market price of the Callidus Shares. Nor is there any basis for excluding the possibility that a short position of one of the Anson Corporate Defendants was taken on behalf of one or more other Anson Corporate Defendants – that is, was allocated among the Anson Corporate Defendants.

[121] Accordingly, I do not accept the argument that paragraph 20 of the Statement of Claim should be struck by virtue of the pleading therein of liability on an "enterprise liability" basis.

- Page 23 -

Disposition of the Motions of the Anson Individual Defendants

[122] The Anson Individual Defendants also submit that the conspiracy claim against them should be struck on the basis that the plaintiffs have failed to plead any particulars of their involvement that satisfy the requirements of r. 25.06(1).

[123] Given the conclusion above that the conspiracy claim should not be struck in respect of the Anson Corporate Defendants because, in part, of the actions of Spears and Puri in agreeing to the Conspiracy on behalf of the Anson Corporate Defendants and the allegation that, as Defendants, Spears and Puri took short positions in the Callidus Shares or otherwise benefitted from such trading, there is no basis for striking out the claims against them. The pleadings in respect of these parties are essentially the same as the pleadings against the Anson Corporate Defendants. For the reasons discussed above, such pleadings satisfy the requirements for a civil conspiracy pleading.

[124] However, in my view the claim of conspiracy against Kassam must be struck for want of any pleading of any overt act on his part pertaining to his involvement in the Conspiracy. The pleadings in respect of Kassam therefore fail to plead an essential requirement for a claim of civil conspiracy. Based on the pleadings, and the Addendum, Kassam also cannot know the case against him that he has to meet. He is therefore not in a position to plead in any meaningful way based on the plaintiffs' pleadings in respect of him.

[125] Accordingly, the conspiracy claim against Kassam should be struck under r. 21.01(1)(b) as failing to disclose a reasonable cause of action against him.

Clarity/Anderson

[126] I will deal in turn with the conspiracy claims against Clarity and Anderson after first setting out the pleadings and particulars of the plaintiffs in respect of these claims.

The Conspiracy Pleadings and Particulars in Respect of Clarity/Anderson

[127] In the Statement of Claim, the plaintiffs plead that West Face contacted Clarity and "encouraged it to participate in the upcoming wave of short attacks against Callidus". Clarity and Anderson are included in the Wolfpack Conspirators and, as such, are included in the pleading that alleges that, on or about August 9, 2017, the Wolfpack Conspirators took naked short positions in the Callidus Shares and covered those positions later to their profit.

[128] The pleadings further allege that Clarity and Anderson entered into the Conspiracy in or about December 2017. Thereafter, in paragraph 68 the plaintiffs allege that Clarity or Anderson agreed to file, and did file, false "whistleblower" complaints with the OSC in coordination with the other Complainants in order to portray different alleged issues with Callidus' continuous disclosure and with matters relating to Catalyst.

- Page 24 -

[129] In addition, the pleadings allege that Anderson, who had a prior relationship with Copeland, recruited Copeland to write the Article to further the Conspiracy. The Statement of Claim alleges that Copeland was directed by the Conspirators to “interview” McFarlane. It also alleges that Copeland had a conversation with Anderson that was “similar” to his conversation with McFarlane.

[130] In the Response, the plaintiffs provide, by way of particulars, that Anderson and Clarity communicated frequently with the other Conspirators from and after January 2017 and agreed to join and participate in the Conspiracy prior to June 2017.

Disposition of the Motions of Clarity/Anderson

[131] Clarity and Anderson say that the pleadings fail to identify their actual involvement in the Conspiracy. In particular, they rely upon the inconsistencies between the Statement of Claim and the particulars in the Response.

[132] There is a clear inconsistency between the timing of the alleged agreement of Clarity and Anderson to enter into the Conspiracy as pleaded in the pleadings and as provided in the particulars in the Response. Further, insofar as the plaintiffs allege that Clarity and Anderson did not agree to participate in the Conspiracy until sometime in 2017 prior to June, the allegation that Clarity and Anderson filed a false “whistleblower” complaint to the OSC in furtherance of the Conspiracy cannot stand. This timing is contradicted by the pleadings in the Statement of Claim that the Complaints were filed with the OSC in late 2016 or early 2017.

[133] In addition, I have dealt earlier with the issues of the substance of McFarlane’s alleged conversation with Copeland in the context of the defamation claims against Anderson and Clarity. For present purposes, the allegation in paragraph 86 regarding Anderson’s communication with Copeland is deficient in failing to set out the subject matter of such conversation. As mentioned earlier, Anderson was not the subject of a guarantor action by Callidus. There is also nothing in the Article that has been attributed to Anderson, whether pertaining to any alleged “whistleblower” complaint by him or otherwise.

[134] Taking the foregoing into consideration, the pleadings pertaining to Clarity and Anderson are substantially similar to the pleadings in respect of the Anson Defendants. The plaintiffs allege that Clarity and Anderson agreed to participate in the Conspiracy by June 2017 and that the purpose of the agreement was to harm Catalyst and thereby to profit to the detriment of the plaintiffs. As a result, Clarity and Anderson were aware, among other things, of the intention of the other Conspirators to implement the Plan, and in particular to cause an article to be published that was defamatory to Callidus. In anticipation of the publication of this article, Clarity and Anderson put short positions in the Callidus Shares in place and profited from the decline in the Callidus Shares after publication of the Article at the expense and to the detriment of Callidus and Catalyst.

[135] The issue for the Court is whether these pleadings, together with the pleadings regarding the other Wolfpack Conspirators and the Guarantor Conspirators, are sufficient to satisfy the

- Page 25 -

requirements of r. 21.01(1)(b). I conclude that these allegations are sufficient to establish a viable claim of conspiracy against Clarity and Anderson in that they address each of the requisite elements of a civil conspiracy claim as set out above.

[136] Further, insofar as Clarity and Anderson say that the pleadings do not allow them to know the case against them, I do not agree. Clarity and Anderson are in a position to plead with respect to each of the matters referred to in the preceding paragraph as constituting the requisite elements of a civil conspiracy claim for the same reasons that I concluded that the Anson Defendants were in a position to plead with respect to the civil claim against them.

[137] Accordingly, I conclude that the plaintiffs' pleadings of conspiracy against Clarity and Anderson disclose a reasonable cause of action for the purposes of r. 21.01(1)(b).

Molyneux/Levitt

[138] I propose to treat the plaintiffs' pleadings of conspiracy against Molyneux and Levitt together as, for present purposes, the claims against each of them are virtually identical.

The Conspiracy Pleadings in Respect of Molyneux and Levitt

[139] In the Statement of Claim, Molyneux and Levitt are included as Guarantors and Guarantor Conspirators. Their involvement in the activities preceding the alleged agreement regarding the Conspiracy in December 2016, and its significance for the plaintiffs' conspiracy claim, has been described above. With respect to the Conspiracy, the pleadings allege that Molyneux and Levitt entered into the agreement to implement the Plan in December 2016. The pleadings further allege that Levitt or Molyneux filed a false "whistleblower" complaint with the OSC in late 2016 or early 2017 relating to Callidus and Catalyst in furtherance of the Conspiracy. In addition, in paragraph 86 of the Statement of Claim, it is alleged that both Molyneux and Levitt had conversations with Copeland "similar" to the conversation between Copeland and McFarlane. Lastly, Molyneux and Levitt are included in the Wolfpack Conspirators who are alleged to have taken short positions, directly or indirectly, in the Callidus Shares on or about August 9, 2017 and to have profited therefrom.

Disposition of the Motions of Molyneux and Levitt

[140] Molyneux and Levitt submit that, even with the particulars provided in the Response, they do not know the case they have to meet. There are two principal aspects to this position to be addressed.

[141] First, Molyneux and Levitt argue that, to the extent they are alleged to have participated in the Conspiracy by making false statements to Copeland regarding Callidus and Catalyst, there is no pleading that states what they are alleged to have said.

[142] I have dealt with this issue in the context of the defamation claims against Molyneux and Levitt. For this purpose, Molyneux and Levitt are in essentially the same position as Anderson,

- Page 26 -

notwithstanding that, unlike Anderson, each is the subject of litigation by Callidus on their guarantees. Moreover, there is no pleading that the Article refers to any of Fortress Resources, Molyneux or Levitt, nor is there any pleading attributing any particular statements in the Article to Molyneux or Levitt or any pleading regarding any alleged defamatory statements made by Molyneux or Levitt to Copeland.

[143] However, setting aside the aforementioned pleadings, the pleading of conspiracy that remains alleges that Molyneux and Levitt entered into the Conspiracy, and were therefore aware of the elements of the Plan to be implemented, were aware that the purpose of the Conspiracy was to harm Catalyst and thereby to profit to the detriment of the plaintiffs, took short positions in the Callidus Shares, and profited therefrom by covering those positions after the market decline that followed the release of the Article. While these assertions may well be factually incorrect, the Court is required to assume the truth of the pleadings for the purposes of these motions to strike. The proper means of addressing any factual inaccuracies is a summary judgment motion.

[144] For the reasons set out above in respect of the other applicants on these motions, I am of the opinion that the foregoing pleadings of conspiracy against Molyneux and Levitt, together with the pleadings regarding the Wolfpack Conspirators and the other Guarantor Conspirators, disclose a reasonable cause of action for the purposes of r. 21.01(1)(b) in that they address each of the requisite elements of a civil conspiracy claim against Molyneux and Levitt as set out above.

Conclusion

[145] Based on the foregoing, the plaintiffs' claims of defamation, intentional interference with economic relations, and unjust enrichment are struck in respect of each of the Anson Defendants, Clarity, Anderson, Molyneux and Levitt. In addition, the plaintiffs' claim of civil conspiracy against Kassam is also struck.

Costs

[146] The applicants were partially but not completely successful on these motions. While most of the plaintiffs' claims against them have been struck, the principal claims of conspiracy have not been. In these circumstances, I think that the applicants should be entitled to a portion of their costs respecting an appropriate allocation between the claims struck and the conspiracy claims. For this purpose, I find the appropriate allocation to be 2/3 : 1/3 based on a combination of the relevant portions of the parties' facts and the time required for submissions on the hearing of these motions. Further, I see no basis in the plaintiffs' conduct in respect of these motions to support costs on a substantial indemnity.

[147] The Anson Defendants seek total costs of \$37,467.86 on a partial indemnity basis. They took the primary responsibility for these motions. Given the importance of these motions to the Anson Defendants, and to the other applicants, the relative complexity of the motions, and the

- Page 27 -

relative seniority of counsel, I find this aggregate amount to be reasonable. Accordingly, I fix fair and reasonable costs of the Anson Defendants at \$25,000 on an all-inclusive basis.

[148] Clarity/Anderson seek costs of \$7,8436.90 on a partial indemnity basis. This is reasonable, given the issues affecting them and the time spent on this motion by their counsel. Accordingly, I find fair and reasonable costs of these applicants to be \$5,230.

[149] Molyneux seeks costs of \$11,685.45. However, given the extent of his involvement in this motion, and the relative complexity of his arguments, neither of which exceeded that of Clarity/Anderson, I think that fair and reasonable costs would be the same amount as awarded to these other applicants. Accordingly, I find fair and reasonable costs to be \$5,230.

[150] Levitt did not provide a costs submission as he had left the hearing for a medical appointment before this matter was addressed by the Court. If Levitt wishes to make a costs submission, he will have thirty days to make written submissions not exceeding five pages in length together with a costs outline in the form required by the *Rules of Civil Procedure*.

Wilton-Siegel J.

Date: January 9, 2019

TAB 9

CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2021 ONSC 125
COURT FILE NO.: CV-17-587463-00CL
DATE: 20210111

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	)	<i>David C. Moore, Kenneth G. Jones, John E. Callaghan, Benjamin Na and Matthew Karabus</i> for the Plaintiffs and for Newton Glassman, James Riley and Gabriel De Alba, Defendants by Counterclaim
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	)	<i>Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson and Maura O'Sullivan</i> for West Face Capital Inc. and Gregory Boland
	)	<i>Linda M. Plumpton, Andrew Bernstein and Leora Jackson</i> for M5V Advisors 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 (collectively, the "Anson Defendants")
	)	<i>Devin Jarcaig</i> for Bruce Langstaff
	)	<i>Phil Tunley, Jennifer Saville, Alexi Wood and Lillian Cadieux-Shaw</i> for Rob Copeland
	)	<i>Kevin Baumann</i> in person
Defendants)	
- and -		
CANACCORD GENUITY CORP.)	
Third Party)	

AND BETWEEN:)
)
WEST FACE CAPITAL INC. and)
GREGORY BOLAND)
)
Plaintiffs by Counterclaim)
)
– and –)
)
THE CATALYST CAPITAL GROUP)
INC., CALLIDUS CAPITAL)
CORPORATION, NEWTON)
GLASSMAN, GABRIEL DE ALBA,)
JAMES RILEY, VIRGINIA)
JAMIESON, EMMANUEL ROSEN,)
B.C. STRATEGY LTD. D/B/A)
BLACK CUBE, B.C. STRATEGY UK)
LTD. D/B/A BLACK CUBE and)
INVOP LTD. D/B/A PSY GROUP)
)
Defendants to the Counterclaim)
)
AND BETWEEN:)
)
BRUCE LANGSTAFF)
)
Plaintiff by Counterclaim)
)
– and –)
)
)
THE CATALYST CAPITAL GROUP INC.)
and CALLIDUS CAPITAL)
CORPORATION)
)
Defendants to the Counterclaim)
)
)
)

HEARD BY ZOOM CONFERENCE:
December 2, 3 and 4, 2020

RULING ON PRIVILEGE MOTIONS**C. BOSWELL J.**

For millions of years, mankind lived just like the animals. Then something happened which unleashed the power of our imagination. We learned to talk and we learned to listen. Speech has allowed the communication of ideas, enabling human beings to work together to build the impossible. Mankind's greatest achievements have come about by talking, and its greatest failures by not talking. It doesn't have to be like this. Our greatest hopes could become reality in the future. With the technology at our disposal, the possibilities are unbounded. All we need to do is make sure we keep talking.

Stephen Hawking

[1] Sometimes people talk *too* much. Sometimes they get themselves into trouble doing so. Sometimes they hurt other people by what they say. And sometimes they do so intentionally.

[2] Dr. Hawking was right, of course. It's impossible to overstate the important place that communication has had in much of human achievement. But language can also be used to demean and demoralize, provoke and offend. It can be used to shape public perception and behavior. It can be used to discredit known facts or promote false narratives. It can be weaponized.

[3] This multi-tentacled lawsuit is all about the trouble that talking – both the written and spoken word – can create. At the core of the lawsuit are two very wealthy and powerful men; competitors of one another in the private equity investment business. Each accuses the other of weaponizing language against him and his business. Each seeks hundreds of millions of dollars from the other as damages for defamation.

[4] This ruling will not offer any conclusions about whether either man's allegations are well-founded. This is, in effect, a disclosure motion – just one small battle in a larger war.

[5] One of the protagonists (Mr. Boland) says the other (Mr. Glassman) directed agents to conduct a smear campaign against him and his business. He alleges that the agents engaged in some unethical behavior, including (1) conducting pretext interviews of his employees in an attempt to elicit confidential information from them; and (2) publishing, or attempting to publish, false and defamatory statements about him and his business in social and mainstream media outlets. He seeks production of any documents relating to the activities of those agents.

[6] The documents have not been produced, not because they are not relevant to the live issues between the parties, but because the plaintiff, Catalyst, alleges that they are subject to either solicitor-client privilege or litigation privilege.

[7] West Face, the Anson Defendants and Mr. Baumann, supported by Mr. Copeland and Mr. Langstaff, ask, on motion, that the court declare Catalyst's privilege claims to be unsustainable and that the court order production of the documents in issue.

[8] This ruling is unavoidably lengthy and somewhat dense, so a roadmap may be helpful. I intend to proceed as follows.

[9] First, I will provide an overview of the context in which the motions are situated. Because of the detail required, I will break the overview down into six parts:

- (a) An introduction of the parties involved in the motions;
- (b) A description of the sale of WIND Mobile, which was a triggering event to a series of lawsuits between the principal parties;
- (c) A review of the "Moysse" action, which was the first lawsuit between the parties subsequent to the WIND Mobile transaction;
- (d) An overview of "Project Maple Tree" which was a code-named operation involving a host of projects undertaken by agents of Catalyst. One of the goals of the operation was to undermine the integrity of the trial judgment in the Moysse action. The documents generated in the course of the planning and implementation of Project Maple Tree are the subject matter of these motions;
- (e) A general description of the core aspects of this lawsuit, known by the parties as the "Wolfpack" action; and,
- (f) A brief history of the privilege motions now before the court. They were initiated over two years ago but never heard. They were revived as an interlocutory step to a number of pending anti-SLAPP motions, which is significant for reasons I will outline.

[10] With the contextual overview in place, I will expand on the live issues and the parties' positions with respect to them.

[11] Finally, at the discussion stage of these reasons, I will analyze a jurisdictional issue raised by Black Cube as well as Catalyst's assertions of solicitor-client and litigation privilege.

I. OVERVIEW

[12] The Catalyst Capital Group Inc. and West Face Capital Inc. are both significant players in the Canadian private equity market. Both were suitors of WIND Mobile when it was put up for sale in 2014. West Face prevailed. Catalyst cried foul and sued. West Face prevailed again. Catalyst appealed. While the appeal was pending, agents of Catalyst engaged in a systematic effort to unearth fresh evidence that might undermine the integrity of the judgment in favour of West Face, to diminish the public reputation of West Face and to promote the public image of Catalyst. Some of their tactics were ethically dubious.

[13] This lawsuit is the fourth in a string of actions involving Catalyst and West Face. Each accuses the other of manipulating public discourse to unfairly influence the private equity market.

[14] Catalyst claims that West Face and others conspired to harm it and a related company – Callidus Capital Corporation – through false, negative publicity and a targeted short-selling of the publicly-traded shares of Callidus. West Face countersues, claiming that Catalyst engaged in a course of conduct designed to defame West Face and its principals and to unfairly harm its position in the market.

[15] The underlying action is complex to say the least. The stakes are a half a billion dollars. There are multiple parties and layers of claims, counterclaims and claims over. The pleadings are voluminous. The materials filed on this motion are similarly voluminous and run to the many thousands of pages.

[16] Understanding the privilege issues engaged by this motion requires at least some appreciation of the broader issues in the action. That said, it would be easy to get lost in the labyrinthine factual context in which these motions are situated. Any attempt to summarize all of it is a fool’s errand. While a somewhat detailed overview is necessary, I will do my best to keep it manageable by focusing on only what is relevant and material to this particular battle. I begin with a brief introduction of the central parties.

1. THE PRINCIPAL PARTIES

[17] There are close to forty parties involved in this lawsuit in one capacity or another. Most of them are not directly engaged in this particular skirmish. I will identify only those who played an active role in the motions.

[18] Catalyst, as I alluded to, is a private equity investment firm based out of Toronto.

[19] Callidus is a private lender specializing in loans to financially distressed borrowers. Catalyst and Callidus are related companies. Specifically, a number of Catalyst funds hold, in the aggregate, the majority of the shares of Callidus.

[20] Newton Glassman is a founding partner of Catalyst, the chief executive officer of Callidus and one of the two principal protagonists I referred to above.

[21] James Riley and Gabriel De Alba were also executives at Catalyst at all material times.

[22] Like Catalyst, West Face is a private equity investment firm based out of Toronto. West Face and Catalyst are competitors.

[23] Gregory Boland is the chief executive officer of West Face. He is the other principal protagonist I referred to above.

[24] The Anson Defendants are a related group of hedge funds and some of their principals. They are alleged to have participated in a defamation campaign against Catalyst and Callidus as

part of a “Wolfpack” of conspirators whose aim was to drive down the price of Callidus shares, whilst short-selling them.

[25] Bruce Langstaff is a former employee of Canaccord Genuity Corp. Canaccord is an independent investment dealer. Mr. Langstaff was its managing director of Canadian equity sales. He is alleged to have facilitated short-selling trades by Wolfpack members in Callidus shares.

[26] Rob Copeland is a reporter for the Wall Street Journal (the “WSJ”). He is alleged to have penned a defamatory article, published in August 2017, that had the effect of driving down the Callidus share price.

[27] Kevin Baumann is the former president of Alken Basin Drilling Inc., a borrower of Callidus. He is alleged to have made, in a conspiracy with West Face and others, defamatory statements against Catalyst and Callidus including false “whistleblower” complaints to the Ontario Securities Commission.

[28] Black Cube is a private investigation firm based in Israel and comprised of former members of the Israeli Defence Force and the Mossad, Israel’s national intelligence agency. They ostensibly provided “litigation support” services to Catalyst. They are a central party to these motions and I will explore their role in these proceedings in some detail as these reasons unfold.

[29] Other companies and individuals, while not active participants in the motions, do assume prominent roles and are worth a mention. They include:

- (a) Brian Greenspan is a prominent Toronto criminal lawyer and has acted as counsel to Catalyst from time to time;
- (b) Tamara Global Holdings Ltd. is an Israeli security and litigation support firm, whose principal is Yossi Tanuri. Tamara was retained by Catalyst in the summer of 2017 to provide litigation support services as the date scheduled for the hearing of Catalyst’s appeal of the judgment in the Moyse action approached;
- (c) Invop Ltd. is a now-insolvent Israeli public relations firm that carried on business as “Psy Group”. They specialized in influencing public opinion through the dissemination of information in mainstream and social media platforms. Royi Burstein was the CEO of Psy Group. Emmanuel Rosen was employed with Psy Group as a public relations specialist. Psy Group and Black Cube were subcontractors of Tamara;
- (d) Phillip Elwood is a Washington, D.C.-based independent public relations consultant. He was retained by Psy Group to assist them in their role as a subcontractor to Tamara;
- (e) Virginia Jamieson is a New York City-based public relations consultant. She was also retained by Psy Group for reasons similar to Mr. Elwood;

- (f) Christie Blatchford was a well-known writer for the National Post. She authored an article in late November 2017 titled, "*The Judge, The Sting, Black Cube and Me*"; and,
- (g) Frank Newbould is a former justice of this court. He presided at the trial of the Moyse action and rendered a judgment that Catalyst found to be entirely unsatisfactory.

[30] The roles each of the parties played in the complex history to this proceeding will become clearer as this ruling unfolds. For our purposes, the story begins in 2014 with the sale of WIND Mobile.

2. THE WIND MOBILE DEAL

[31] WIND Mobile was a wireless telecommunications provider founded in 2008. It was substantially funded through foreign parties. The Canadian government restricts foreign ownership of telecommunications companies operating in Canada. To comply with Canadian regulations, WIND Mobile's ownership structure was as follows: Globalive Communications Corporation, a Canadian company, held two-thirds of the voting shares in WIND Mobile, but one-third of the equity. VimpelCom Inc., a Russian company, held the other two-thirds of the equity and one-third of the voting shares.

[32] In 2014, VimpelCom made it known that it was going to sell its ownership stake in WIND Mobile at a fixed price of \$300 million.

[33] Catalyst soon found itself in the catbird seat, having secured exclusive negotiating rights with VimpelCom beginning in the third week of July 2014. Catalyst was not able, however, to reach an agreement with VimpelCom and their period of exclusivity expired in mid-August, 2014. It proved to be a missed opportunity of epic proportions.

[34] A month after Catalyst's exclusive negotiating window closed, VimpelCom sold its interest in WIND Mobile to a consortium of investors that included West Face. About a year and a half later, that consortium sold WIND Mobile to Shaw Communications Inc. for \$1.6 billion.

3. THE MOYSE ACTION

[35] Catalyst and West Face have been litigating hard against one another since June 2014. The commencement of legal friction between them corresponds with the sale of WIND Mobile from VimpelCom to the West Face consortium.

[36] In 2014 Brandon Moyse was a young financial analyst. He had been working for Catalyst in that capacity for about two years. For reasons best known to him, he left that employment in May 2014. He joined West Face a month later, notwithstanding that he had a six month non-competition clause in his contract of employment with Catalyst.

[37] Mr. Moyse had been part of Catalyst's "core telecommunications team". He was aware that Catalyst was interested in acquiring WIND and he had done some work on that project.

Catalyst was concerned that he would share confidential information with their competitor, West Face. They sued West Face and Mr. Moyse to enforce the provisions of the non-competition clause, alleging that Mr. Moyse may have imparted unspecified confidential information to West Face. Shortly after the lawsuit commenced, the parties consented to an order that Mr. Moyse would be placed on leave. As it happens, he never returned to work at West Face and his total tenure there was less than a month.

[38] When Catalyst subsequently learned of the acquisition of WIND Mobile by West Face and others in September 2014, they amended their claim. They alleged that in acquiring WIND, West Face had improperly used confidential information about Catalyst's negotiations with WIND, given to them by Mr. Moyse. Catalyst sought a constructive trust interest in West Face's interest in WIND and an accounting of any profits earned by West Face as a result of its acquisition of WIND.

[39] The Moyse action came on for trial in early June 2016 and was heard over six days before Justice Frank Newbould, at the time the lead judge of the Commercial Court in Toronto. Catalyst's case was constructed on a body of circumstantial evidence from which it asked Justice Newbould to infer that West Face and Mr. Moyse had improperly made use of Catalyst's confidential information.

[40] On August 18, 2016 Justice Newbould released a 49 page decision. He did not draw the inferences urged upon him by Catalyst. Instead, he dismissed the claim in its entirety.

[41] Compounding the loss were two aspects of Justice Newbould's ruling that appear, in my view, to have stuck in Catalyst's craw.

[42] First, the less than favourable observations he made about the evidence of Mr. Glassman and Mr. De Alba.

[43] Second, the rejection by the trial judge of Catalyst's claims of spoliation in relation to digital evidence deleted by Mr. Moyse.

[44] Mr. Moyse admitted that he transferred confidential Catalyst information to West Face during his interview process. He then covered his tracks by deleting evidence of that communication. His testimony was to the effect that the transfer was inadvertent and that the information in issue had nothing to do with WIND.

[45] Of arguably greater concern was the deletion by Mr. Moyse of the browsing history on his personal computer immediately prior to a scheduled forensic imaging of the computer's hard drive.

[46] On July 16, 2014 West Face and Mr. Moyse consented to an order that Mr. Moyse would preserve his records relevant to his activities from and after March 27, 2014. Mr. Moyse further agreed to have his personal electronic devices, including his computer, forensically imaged. Subsequently, the court authorized an independent supervising solicitor to review the forensic images.

[47] The report of the independent supervising solicitor included a finding that, on the morning of July 16, 2014, Mr. Moyse downloaded deletion software to his personal computer. He used that software to delete his internet browsing history before his computer was forensically imaged.

[48] Counsel to Catalyst urged Justice Newbould to reject Mr. Moyse's evidence and to infer that he likely destroyed relevant evidence supportive of the plaintiffs' claim.

[49] Justice Newbould again rejected the inferences urged upon him by counsel to Catalyst. Instead he accepted Mr. Moyse's explanation that he deleted his browser history because he was concerned that it would show he had visited adult entertainment websites. Newbould J. found that Catalyst had failed to establish that Mr. Moyse deleted any documents relevant to the WIND transaction and that Mr. Moyse never communicated to anyone at West Face anything about Catalyst's dealings with WIND Mobile or about their strategy to acquire WIND. He found that even if Mr. Moyse *had* breached his duty of confidentiality, Catalyst had failed to establish that it suffered any resulting detriment or damage. He concluded that Catalyst failed to acquire WIND because of the positions it took in the negotiations with VimpelCom and not because of any misuse of confidential information by West Face or anyone else. In short, Catalyst was the author of its own misfortune.

[50] The day after Justice Newbould's ruling was released, an article about the trial appeared in the Financial Post. It quoted a spokesperson from Catalyst as saying:

We are deeply disappointed by the decision and the severe indications of possible bias displayed by Judge Newbould. We believe that he did not give fair consideration to all of the evidence presented, ignored contradictory statements made by the defendants that are part of the court record and delivered a judgement containing clear misstatements of fact.

[51] The principals of Catalyst were clearly unhappy with Justice Newbould's decision.

[52] Catalyst appealed the judgment. The appeal was scheduled to be heard September 26, 2017.¹ What happened in the weeks leading up to the scheduled appeal date is at the heart of these motions.

4. PROJECT MAPLE TREE

[53] Project Maple Tree is the name given to a multi-pronged, joint operation undertaken by foreign agents hired by Catalyst to provide what they describe as "litigation support". The agents involved were engaged by Tamara Global, which had been retained by Catalyst in late August 2017. The documents over which privilege is asserted by Catalyst and challenged by the moving parties relate to the creation and implementation of Project Maple Tree, so I will describe it in some detail.

¹ Catalyst's appeal in the Moyse action was adjourned to February 2018 and dismissed at that time. A motion for leave to appeal to the Supreme Court of Canada was dismissed on March 28, 2019.

4.1 The Retainer of Tamara Global

[54] Mr. Glassman executed an affidavit in response to these motions on November 24, 2020. He described in it a number of growing concerns that were troubling him in the summer of 2017. He was concerned, he said, that he and his family, his business partners and their families and Catalyst and Callidus were under attack by persons who, because of a strongly held animus, were intent on destroying his business interests.

[55] His concerns were based on factors which included:

- (a) A sophisticated cyber attack on Callidus' computer system on July 22, 2017;
- (b) The appearance of factually false communications about Catalyst and Callidus on Twitter and other social media platforms;
- (c) Being advised by reporters at Thomson Reuters that they were going to publish a story that Catalyst and Callidus were the subject of an active police investigation (which was false);
- (d) The publication of an article in the WSJ on August 9, 2017 which suggested that the Security Exchange Commission and the Toronto Police Service were each investigating Catalyst for fraud. Mr. Glassman refers to this article as the "False Fraud Article" because its contents were untrue – there were no fraud investigations. Publication of the article caused a dramatic drop in the price of Callidus shares;
- (e) The receipt, on August 11, 2017, of an email from someone named Vincent Hanna, who advised Mr. Glassman that a "cabal of conspirators" caused the publication of the WSJ article. Mr. Hanna advised him that a group of funds were targeting Callidus and Mr. Glassman personally. They were spreading false rumours through the market and acting in concert to short Callidus stock. The cabal purportedly included Mr. Boland of West Face, some of the Anson Defendants and others;
- (f) The discovery by maintenance staff of a person rummaging through the garbage containers at Mr. Glassman's Muskoka cottage;
- (g) The discovery in early September 2017 that the backup generator at Mr. Glassman's Toronto home had been compromised, which he believes was an attempt to compromise his home security system; and,
- (h) Two "brush pass" verbal threats on the sidewalk in Toronto's financial district, during which a man threatened that Mr. Glassman and his young son would be "gotten to" shortly.

[56] Mr. Glassman deposed that he considered it essential to obtain and understand the best possible information about what was transpiring so that a fully informed legal strategy could be formulated. He thought he knew the ideal person to help.

[57] Yossi Tanuri is Mr. Glassman's friend. They have participated together in numerous philanthropic activities. Mr. Glassman knew Mr. Tanuri to have been a member of an elite commando unit in the Israeli Defence Forces known as "Matkal". He now operates Tamara Global – an investigation and security company. Mr. Glassman determined that Mr. Tanuri's firm was ideally suited to help him get the information he thought was essential to address the issues that were troubling him in the summer of 2017.

[58] The Tamara retainer was handled by one of Catalyst's lawyers, Brian Greenspan.

[59] Mr. Greenspan executed an affidavit on November 10, 2018 in relation to a prior iteration of these privilege motions. It was refiled as part of Catalyst's response to the current motions. Mr. Greenspan deposed that, on instructions from Catalyst, he retained Tamara on August 31, 2017 to conduct a "qualitative property, personnel and equipment assessment of the current needs and future requirements of the Catalyst Defendants".² It is unclear to me how a retainer of that description matches up with the concerns identified as troubling Mr. Glassman.

[60] At any rate, Mr. Greenspan noted that Tamara's retainer included the authorization to retain subcontractors or consultants. He went on to say,

Consequently, Tamara Global retained [Black Cube] as a subcontractor to conduct investigations relating to ongoing and potential litigation of the Catalyst Defendants, including litigation between the Catalyst Defendants and West Face. Pursuant to the resulting retainer arrangement between Tamara Global and [Black Cube], [Black Cube] was to undertake any such investigative work in accordance with its best professional judgment and in compliance with all local laws.

The purpose of the retainer arrangements and the work undertaken by [Black Cube] on behalf of the Catalyst Defendants were (*sic*) in support of litigation...and/or were used by the Catalyst Defendants to obtain legal advice.

[61] As Mr. Glassman recounts, Mr. Tanuri flew to Toronto to meet with him on an urgent basis in late August 2017. He was accompanied by a man named Gadi Ben Efraim who was apparently, at that time, still an active agent in one of the Israeli intelligence services. Mr. Glassman wouldn't say what was discussed at this urgent meeting; he asserts privilege over the communications he had with Messrs. Tanuri and Ben Efraim. But he was willing to say that as a result of the discussion, he decided that the inclusion of media advice and assistance was "a part of any litigation plan and legal advice going forward". He reached that conclusion because of his perception that weaponized language was being used against him and his business interests through a variety of media sources.

² By the "Catalyst Defendants" he meant Catalyst, Callidus, Mr. Glassman, Mr Riley and Mr. De Alba, each of whom is a named defendant to the counterclaim of West Face.

[62] More particularly, Mr. Glassman concluded that “any litigation plan had to include and be coordinated with a positive media strategy to counteract and mitigate” the effects of false social media attacks and the WSJ False Fraud article. He thought it was necessary to “set the record straight”.

[63] While Mr. Glassman did not elaborate on the instructions he gave to Mr. Tanuri, I think it can be readily inferred that they included the need to create a counter-strike media strategy.

4.2 The September 6, 2017 Meeting in London

[64] September 6, 2017 was a pivotal date in the course of the battle between Catalyst and West Face. On that date, Mr. Glassman flew to London, England for a meeting with Mr. Tanuri and Mr. Ben Ephraim. He had been invited there by Mr. Tanuri to meet, he said, with a group of investigators that Mr. Tanuri had hired to provide litigation support. Those investigators were, for the most part, Black Cube employees.

4.3 The September 13, 2017 Email

[65] Tamara retained not only Black Cube agents, but agents of Psy Group as well. It appears that at least one representative from Psy Group attended the meeting in London on September 6, 2017.

[66] A week after that meeting, the CEO of Psy Group, Royi Burstein, sent an email to a number of Psy Group employees, including, but not limited to, Emmanuel Rosen, Avi Eliyahou, Ori Amir and someone named Yossef. The subject-line of the email was, “Project Maple Tree”.

[67] According to the content of the email, Project Maple Tree had four missions. Those missions were loosely organized around (1) Justice Newbould; (2) the Wolfpack conspirators; (3) West Face and Mr. Boland; and (4) Catalyst and Callidus. A fifth mission, described as “HUMINT Mission 1” was also discussed.

[68] The email contains information provided by “the client”, presumably Mr. Glassman, in respect of each mission. It does not, however, go into any detail about what each mission will entail.

[69] The discussions surrounding Mission 1 and HUMINT Mission 1 provide at least some clues about the type of activities Black Cube and Psy Group were retained to conduct.

[70] Mission 1 had a target – Justice Newbould – and a target audience – the Court of Appeal. It had a six-week timeframe. Its goal was to promote the message that Justice Newbould was racist, anti-Semitic and biased. Further, that he disregarded evidence in the Moyse trial and approved of the destruction of evidence by Mr. Moyse.

[71] HUMINT Mission 1 also had a target – Bei Heung – a controller at West Face. She purportedly advised a close friend of Mr. Glassman that West Face was “imploding” and that the partners were fighting. The mission was to approach her, determine her motives and obtain information about the real situation at West Face.

4.4 The September 14, 2017 Meeting in New York

[72] Philip Elwood, as I noted earlier, is a public relations consultant based in Washington, D.C. He swore an affidavit dated May 12, 2020 which was filed by West Face in support of this motion.

[73] Mr. Elwood deposed that he was retained by Psy Group in September 2017 to work on a matter for Catalyst and Mr. Glassman. He described Psy Group's business as "collecting business intelligence and then deploying that intelligence for the benefit of its clients." He said Psy Group's operatives were former members of the Mossad or the intelligence branch of the Israeli Defence Force. Psy Group and Black Cube were in competition with one another.

[74] Collecting business intelligence, he said, could take a number of forms. It could include online research. It could also involve covert operations including physical surveillance or contacting targets under false pretenses, as well as the making of surreptitious audio and video recordings of targets discussing sensitive topics.

[75] Though not entirely clear from his affidavit, it appears that Mr. Elwood's role was not in the collection of intelligence, but in its deployment. That deployment, he said, could involve working with legitimate journalists, creating websites, manipulating Google search results or publishing messages favourable to the client on social media platforms.

[76] Mr. Elwood deposed that he was contacted by Royi Burstein in late August or early September 2017 about meeting with a new client (Mr. Glassman) in New York City. Mr. Elwood was not clear on the date of the meeting, but Mr. Glassman's daytimer provides clear evidence that the meeting occurred on the morning of September 14, 2017.

[77] Mr. Elwood said that in addition to him and Mr. Glassman, there were a number of representatives from Psy Group in attendance at the meeting including Royi Burstein, Emmanuel Rosen, Ori Amir, Abraham Ronan, Avi Eliyahou and someone named Yossef.

[78] The meeting, according to Mr. Elwood, lasted all day. The first half was taken up by Mr. Glassman explaining his concerns about a "Wolfpack" of hedge funds conspiring against him; trying to harm him in litigation and in the financial markets. His focus appeared to be on West Face and Mr. Boland.

[79] The second half of the meeting involved Mr. Burstein describing a two-pronged operation known as Project Maple Tree. There was to be a "white prong" and a "black prong". The white prong involved utilizing mainstream media sources to generate positive publicity for Catalyst and Mr. Glassman. The black prong involved generating stories about the Wolfpack conspiracy; publishing any kind of negative information possible about West Face and Mr. Boland; and portraying Justice Newbould as corrupt and anti-Semitic.

4.5 The September 16, 2017 Emails

[80] Royi Burstein sent out two emails to Psy Group agents on September 16, 2017 that elaborate on the contours of Project Maple Tree.

[81] The first was sent at 7:15 p.m. to a group that included Emmanuel Rosen, Phil Elwood, Abraham Ronen, Avi Eliyahou and Yossef. Mr. Burstein stressed the importance of the upcoming week and he provided more details on 3 projects:

- (i) The negative campaign. He identified the most urgent mission as follows:

[To] hear/see "chatter" on social media etc of rumors of an alleged Wolfpack, rumors of west face/anson partners involvement therein, rumors of 8 or more victims, rumors of boland being looked at (not yet criminal investigation) for criminality etc.

He also instructed "Emmanuel" and "Phil" to move forward with organizing the materials for the journalists they wanted to contact.

- (ii) The Humint campaign. Mr. Burstein stressed the urgency of moving on this aspect of the project as quickly as possible. He said he expected to "have targets by Monday latest". He alluded to Black Cube's involvement in the project as well, saying,

As you all know, here we are under competition with the Cubes. According to client they have already made headway with one of the targets and intend to meet him this week. We need to MOVE FAST.

- (iii) The positive campaign. This was also stressed as urgent and Mr. Burstein instructed that they should be already "working on the obvious components, such as posting positive articles.

[82] Mr. Burstein sent a second email to a similar group of individuals at 10:24 p.m. that same day. The subject of the email was "notes from second meeting with client – Sep 15".

[83] In this email, Mr. Burstein identified the "mission priorities" as:

1. Discredit Westface
2. (indirectly) discredit newbould

4.6 The Implementation of Project Maple Tree

[84] Given the state of disclosure at this point, the details of how Project Maple Tree was implemented are somewhat sketchy. Certain elements of it have come to light and they are the driving factors behind this motion.

[85] Philip Panet is the chief operating officer and general counsel of West Face. He swore a lengthy affidavit which was filed by West Face in support of these motions. He deposed that within several days of Mr. Burstein's September 13, 2017 email, a "wave of false and

defamatory statements concerning West Face (and other members of the purported ‘Wolfpack’) began to appear on the internet.”

[86] He mentioned two examples. The first was a silent video posted on YouTube on September 19, 2017 by a person using the pseudonym, “Wolf Pack”. Titled, “Judicial and Economical Corruption in Canada”, it said that West Face, Anson Funds and others had formed a “Wolf pack” designed to target companies and bring them down.

[87] The second was an internet posting that appeared on a number of websites on September 19, 2017 which suggested that West Face, Anson Funds and others were co-operating to “bring down stock and purchase floundering companies at rock bottom prices.”

4.7 The Sting on Justice Newbould

[88] Justice Newbould retired from the Superior Court of Justice in June 2017. He joined an arbitration practice following his retirement.

[89] A Black Cube operative approached him on September 13, 2017 posing as a potential arbitration client. They met at his office on September 18, 2017 and arranged to have dinner together later that evening. Justice Newbould was unaware, of course that the entire engagement was a pretext. During both meetings he was baited by the operative in an effort to elicit anti-Jewish sentiments. Both meetings were secretly recorded.

[90] Mr. Glassman deposed that he was contacted by Mr. Tanuri on September 18, 2017 and told that he needed to travel to London the next day for an important briefing. He said he was not aware, before this meeting, of any plan to conduct a pretext investigation on Justice Newbould. He did not authorize such an operation and his counsel have made it clear that their camp does not approve of it having been done. Indeed, Mr. Greenspan’s firm made it clear to Black Cube that they were to immediately desist in any further such investigations because that is not how things are done in Canada.

[91] Nevertheless, Mr. Glassman was, as he said, “troubled” by what he heard in the taped conversations and, later, by what he read in the transcripts of the recordings. He formed the view that it may be pertinent “fresh evidence” to be adduced on Catalyst’s appeal of the Moyse trial decision.

[92] At the same time, the sting on Justice Newbould and some of the content of the recorded discussions created difficulties between Catalyst and its then counsel, Lax, O’Sullivan, which resulted in a break in that relationship. Catalyst was required to retain new counsel on the eve of the hearing of the Moyse appeal.

[93] The appeal was adjourned from September 2017 to February 2018 to permit new counsel to be retained and for counsel to consider whether there was merit to a fresh evidence application. It was ultimately determined that the transcripts of the sting on Justice Newbould would not be submitted to the Court of Appeal as fresh evidence.

4.8 The Approach to Christie Blatchford

[94] A different decision appears to have been made about submitting the transcripts to the press.

[95] On September 15, 2017, Virginia Jamieson, an independent public relations consultant in New York City, initiated contact with several journalists, including Christie Blatchford, then a reporter with the National Post. This was a cold call. Ms. Jamieson said only that she understood Ms. Blatchford had covered “Judge Neubolt” and that she had a source who wanted to talk to Ms. Blatchford about how “Judge Neubolt” had allowed the destruction of evidence in the Catalyst/West Face action.

[96] The evidentiary record is unclear as to exactly how Ms. Jamieson came to be retained, but it is apparent from other email communications that she was receiving instructions from Emmanuel Rosen of Psy Group. Mr. Rosen, for instance, sent an email to Ms. Jamieson on September 17, 2020 under the subject line, “The Story”. It attached an article (or proposed article) titled, “Judge Frank Newbould’s record might unravel September 20th.” The article is critical of Justice Newbould’s decision in the Moyse trial, suggesting that he ignored a “cascade of confidential documents having been passed by Moyse” to West Face. It suggests that Justice Newbould was biased. The author of the article is unknown to me.

[97] Ms. Jamieson sent a copy of the same article to Ms. Blatchford later that same day.

[98] Ms. Blatchford passed away in February 2020, but she swore an affidavit on May 21, 2019 outlining her involvement with Ms. Jamieson and attempts made by a number of the defendants to the counterclaim of West Face to induce her to write an article about Justice Newbould and a “Wolfpack” of companies seeking to profit by disseminating false information about public companies. Counsel to West Face filed a copy of that affidavit in support of its motion.

[99] I need only hit the highlights of Ms. Blatchford’s affidavit. It outlines the initial contact made by Ms. Jamieson and proceeds chronologically to cover the increasing pressure directed at her to publish a story damaging to Justice Newbould and to the “Wolfpack” members.

[100] On September 19, 2017, Ms. Jamieson emailed a document to Ms. Blatchford which contained edited extracts from the trial ruling of Justice Newbould. Later that day, she offered to arrange a meeting between Ms. Blatchford and one of the principals of Catalyst. The suggested meeting never occurred.

[101] On September 21, 2017, Ms. Jamieson met with Ms. Blatchford at a café in Toronto. There, Ms. Blatchford was provided with a USB flash drive which contained edited portions of the surreptitiously recorded conversations between a Black Cube operative and Justice Newbould. I am satisfied that the USB drive was provided to Ms. Jamieson by James Riley.

[102] On October 12, 2017, Ms. Blatchford met with Psy Group’s Emmanuel Rosen in Toronto. They discussed the contents of the USB key. She deposed that Mr. Rosen encouraged her to publish an article portraying Justice Newbould as corrupt. She said she became suspicious

about Mr. Rosen's motives, given that she did not believe the contents of the USB key supported his position. Moreover, Mr. Rosen advanced the implausible suggestion that an Aboriginal group was responsible for the sting on Justice Newbould.

[103] Ms. Blatchford came to believe that she was being duped into writing an article to advance someone's individual agenda. She began to press Ms. Jamieson for answers about who was giving her instructions. She pursued information from Mr. Greenspan, who was authorized to speak on Catalyst's behalf. Mr. Greenspan made it clear, she said, that the principals of Catalyst did not approve or even know of, the sting on Justice Newbould before it happened.

[104] Ms. Blatchford eventually did write an article, but not the one Ms. Jamieson's principals had hoped for. Her article was published in the online version of the National Post on November 24, 2017 and it was entitled *The Judge, The Sting, Black Cube and Me*. The article highlighted Catalyst's unhappiness with the Moyse ruling, its hiring of Black Cube for security reasons and the sting perpetrated on Justice Newbould by Black Cube agents. The overall tone of the article was singularly unflattering to Catalyst.

4.9 Additional Stings

[105] Justice Newbould wasn't the only one subjected to a pretext operation. A number of West Face's current and former employees were as well, including Brandon Moyse, Alexander Singh, Bei Huang and Yujia Zhu.

[106] Mr. Singh was pursued in an a particularly aggressive manner. Black Cube agents posed as recruiters for a European private equity firm interested in hiring him. He had been general counsel to West Face at the time of the WIND deal. Black Cube agents met with him in Toronto and subsequently flew him to London, England to meet with him again. They questioned him extensively about the hiring of Brandon Moyse and the Moyse litigation in an apparent effort to obtain evidence that would support Catalyst's assertion that Mr. Moyse provided West Face with confidential information about Catalyst's WIND strategy.

5. THE WOLFPACK ACTION

[107] On November 7, 2017, Catalyst and Callidus commenced this action. The parties refer to it as the "Wolfpack" action.

[108] Two other actions were commenced by Catalyst against West Face and others between the Moyse action and the Wolfpack action. They warrant brief mention.

[109] On June 18, 2015 Catalyst issued a claim against West Face and a company named Veritas Investment Research Corporation. Veritas is an independent equity research firm.

[110] In the Veritas action, Catalyst and Callidus allege that West Face and Veritas published defamatory statements about Callidus with the intention of driving down the share value of Callidus and profiting on that decline by short-selling Callidus stock. Mr. Glassman describes their strategy as a "short and distort" campaign.

[111] Catalyst's assertion is that when it amended its claim in the Moyse action to assert a constructive trust interest in West Face's stake in WIND Mobile, West Face conspired with Veritas to interfere with the financial interests of Callidus by publishing false and defamatory statements about Callidus. The alleged goal was to induce a sell-off of Callidus stock, which would drive down its market price. Concurrently West Face and Veritas short-sold Callidus stock and thereby profited from the decline in share price.

[112] The Veritas action has not proceeded past the exchange of affidavits of documents.

[113] On May 31, 2016, just days before the trial of the Moyse action began, Catalyst initiated a claim against VimpelCom, Globalive, West Face and others. Catalyst alleged that West Face had participated in a conspiracy to induce VimpelCom to breach its exclusivity arrangement with Catalyst. More broadly, Catalyst alleged that a number of the defendants to the action committed the torts of inducing breach of contract, conspiracy and breach of confidence which had the effect of preventing Catalyst from acquiring WIND Mobile.

[114] The VimpelCom action had no legs. West Face moved in August 2017 to dismiss it on the basis of the equitable doctrines of issue estoppel, cause of action estoppel and abuse of process. The motion came before Hainey J. in August 2017 and proceeded over two days in August and a further day in April 2018.

[115] Justice Hainey released an endorsement on the motion on April 18, 2018. He concluded that the VimpelCom action was barred by each of the three equitable doctrines relied upon by the defendants. He dismissed the action.

[116] Catalyst appealed the decision of Justice Hainey. Their appeal was dismissed on May 2, 2019. A motion for leave to appeal to the Supreme Court of Canada was dismissed on November 14, 2019.

[117] The Wolfpack action appears to me to be a significantly expanded version of the Veritas action. It includes similar allegations of a conspiracy to harm the financial interests of Catalyst and Callidus through a strategy of using defamatory statements and misinformation to drive down the market value of Callidus' shares and targeted short-selling³ to profit from the falling stock price.

[118] More particularly, the plaintiffs allege in the Wolfpack action that a group of investors – the "Wolfpack" – conspired to manipulate the market price of Callidus shares through the

³ The basics of short-selling are straightforward enough. "Going short" is the opposite of a buy and hold strategy or playing the long game – buying a stock and holding it with the hope that it will increase in value over time. Short-selling is based on the expectation that a stock price is going to drop. A short-seller will often borrow stock from a broker and sell it. Eventually the borrowed stock has to be returned to the broker and when that time arrives, the borrower must go into the market and purchase the shares to be returned. Provided the market price has dropped between the sale of the borrowed shares and the purchase of the replacement shares, the short-seller will make a profit.

publication of false and defamatory statements about Catalyst and Callidus. They intended to, and did, drive the share price down, at a time when they were shorting Callidus stock.

[119] The defamation campaign alleged by the plaintiffs reflects the weaponization of language through the following means:

- (a) Utilizing the Bay Street “rumour mill” to circulate negative information about Catalyst and Callidus;
- (b) The generation of negative stories about Callidus in the press;
- (c) Making “whistleblower” complaints about Catalyst and Callidus with the Ontario Securities Commission and the U.S. Securities and Exchange Commission, consistent with the negative stories circulated through the press; and,
- (d) The publication of the WSJ False Fraud Article on August 9, 2017.

[120] The alleged Wolfpack conspirators include West Face, its principal, Mr. Boland, numerous other investors (largely the Anson Defendants), certain guarantors of Callidus loans, Mr. Langstaff (who purportedly facilitated the short-sell trades) and members of the media.

[121] West Face and Mr. Boland filed a defence and counterclaim to the Wolfpack action on December 29, 2017. Their counterclaim, seeking \$450 million in damages for defamation, names Catalyst, Callidus, Messrs. Glassman, De Alba and Riley, Virginia Jamieson, Emmanuel Rosen, Black Cube and Psy Group as defendants.

[122] West Face and Mr. Boland allege that Mr. Glassman has directed a campaign of defamation against them, carried out by the defendants to the counterclaim. That campaign – essentially Project Maple Treet – has included:

- (a) Retaining Black Cube to conduct a number of pretext operations including:
 - (i) stings against current and former employees of West Face, with the goal of obtaining confidential information of West Face; and,
 - (ii) a sting against former Justice Newbould in an effort to embarrass and humiliate him, to undermine the integrity of his judgment in the Moyse action and to shroud West Face in controversy; and,
- (b) Retaining Psy Group to publish false and defamatory statements about them, primarily on websites, blogs and social media sites.

[123] The theory of West Face is that Mr. Glassman orchestrated the campaign of defamation against them as retaliation for their successes, both in the acquisition of WIND Mobile and in the litigation that has followed. The ultimate goal, they suggest, is to damage the reputations of West Face and Mr. Boland and to discourage market participants from doing business with them.

[124] I want to again be clear, this ruling has nothing to do with the merits of the claim or counterclaim. This ruling is only about whether documents generated during the planning and implementation of Project Maple Tree must be disclosed.

6. THE PRIVILEGE MOTIONS

[125] The moving parties want access to all communications and documents associated with Project Maple Tree. Catalyst resists. It maintains that Tamara Global was retained to provide litigation support with respect to ongoing and contemplated litigation. Their position is that any communications between Catalyst's counsel and Tamara or any of Tamara's subcontractors are privileged, as are any documents generated by Tamara and its subcontractors during the course of carrying out the litigation support roles they were retained to engage in.

[126] West Face does not accept the validity of Catalyst's assertions of privilege. They first moved for production of all Black Cube documents in September 2018. The motion was scheduled to be heard on November 27, 2018. The hearing was postponed, however, as a result of an agreement between the parties that they would engage in mediation with Justice Hainey in an attempt to resolve some or all of Catalyst's privilege claims. The mediation commenced in October 2018 and continued for several months.

[127] The mediation ultimately failed. I am unclear about why the privilege motion was not rescheduled. I suspect because it was overtaken by a series of anti-SLAPP motions initiated in the latter half of 2019.

[128] Litigating in court is very expensive; everyone knows that. Some parties are better able to afford it than others. Sometimes parties are able to use the cost of litigation to their advantage. As an example, some parties have historically been able to use the cost and aggravation of defamation litigation to suppress free speech. Lawsuits of that nature are often referred to as "gag" proceedings because they have the effect of stifling free expression. For those who prefer more cumbersome language, they are known as "strategic lawsuits against public participation" ("SLAPP").

[129] The Supreme Court recently referred to SLAPPs as "façades" for plaintiffs who are "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." See *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 at para. 2 ("Pointes Protection").

[130] To combat the menace posed by SLAPPs to Ontarians' freedom of expression, the provincial government introduced the *Protection of Public Participation Act*, S.O., 2015, c. 23. That Act brought into force anti-SLAPP provisions by way of amendments to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA"), specifically by adding sections 137.1-137.5.

[131] The purposes of the Ontario anti-SLAPP provisions are identified in s. 137.1(1) of the CJA, and broadly include promoting open discourse on matters of public interest and discouraging the use of litigation as a means of limiting such public discourse.

[132] Justices of this court have been granted the discretion to dismiss a proceeding against any person who satisfies the justice that the proceeding arises from an expression made by a person that relates to a matter of public interest. See *CJA* s. 137.1(3).

[133] In November 2019, a number of parties to these proceedings initiated anti-SLAPP motions seeking to have claims or counterclaims dismissed as against them. Those motions are being case-managed by Justice McEwen and are scheduled to be heard by him in early March 2021.

[134] In the course of the anti-SLAPP motions, West Face filed the affidavit of Philip Elwood sworn May 12, 2020. Attached to his affidavit were a number of emails that referenced Project Maple Tree, including some of the emails I referred to earlier as being sent by Mr. Burstein to Psy Group agents on September 13 and 16, 2017. I will refer to these documents, as the parties have, as the “Elwood Documents”.⁴

[135] Mr. Elwood had disclosed the Elwood Documents to West Face in September 2019 and they appeared in the affidavit of documents of West Face circulated amongst the parties in December 2019.

[136] Whether and how Catalyst first asserted privilege over the Elwood Documents is a matter of debate. Catalyst certainly claimed privilege over them when Mr. Elwood’s affidavit was circulated in relation to the anti-SLAPP motions. Their assertion of privilege triggered the motions now before the court.

[137] West Face moves for an order declaring that Catalyst has no sustainable claim of privilege over the Elwood Documents or Mr. Elwood’s affidavit more generally, as well as any documents relating to the planning and implementation of Project Maple Tree. They are already in possession of the Elwood Documents and they seek production orders in relation to the balance of Project Maple Tree documents.

[138] The Defendants, Bruce Langstaff and Rob Copeland, each filed factums joining in the relief requested by West Face.

[139] The Anson Defendants and Kevin Baumann each filed their own notices of motion seeking an order declaring that Catalyst has no sustainable claim to privilege over the Elwood Documents.

[140] The fact that the privilege motions are interlocutory to the anti-SLAPP motions may be of some consequence, given the operation of s. 137.1(5) of the *CJA* which provides:

⁴ There were, in fact, 16 documents produced to West Face by Mr. Elwood in September 2019. Fifteen were identified in Schedule “A” to the affidavit of documents of West Face and 1 was identified in Schedule “C”. Only 12 of them were attached as exhibits to Mr. Elwood’s affidavit. Any reference I make to the “Elwood Documents” includes all 16 documents disclosed by Mr. Elwood to West Face.

Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

[141] The parties are not agreed on the impact of s. 137.1(5), or about a number of other issues. I will turn now to a summary of the issues in dispute and the parties' positions with respect to them.

II. THE LIVE ISSUES AND THE PARTIES' POSITIONS

[142] The motions were argued over three very full days. The parties' oral arguments were supplemented by 167 pages of facta. What follows are merely the highlights of the parties' positions on the live issues.

1. THE JURISDICTIONAL ISSUE

[143] The wording of s. 137.1(5) of the *CJA* is clear. Once an anti-SLAPP motion is initiated, no further steps may be taken in the proceeding until the anti-SLAPP motion has been fully adjudicated.

[144] Black Cube's counsel took the initiative on the jurisdictional issue. It had not otherwise been raised by any other party.

[145] Black Cube submits that s. 137.1(5) unequivocally stays any further steps in a proceeding until the conclusion of the anti-SLAPP motion.

[146] Black Cube recognizes that there may be interlocutory steps that must be taken within the context of an anti-SLAPP motion. Motions may be necessary, for instance, to compel answers to undertakings given or questions refused during cross-examinations. But Black Cube's counsel argues that stringent limitations must be applied to the conduct of anti-SLAPP motions, lest they become unwieldy or prolonged. Absent such controls, an anti-SLAPP motion could ironically become a proxy for the very mischief it is aimed at curtailing – gag litigation.

[147] In Black Cube's submission, interlocutory proceedings are permitted within an anti-SLAPP motion provided they truly arise within that process, are a necessary part of its proper adjudication and will not frustrate the goal of efficiency inherent in the statutory process.

[148] In this instance, Black Cube says, only the issue of privilege with respect to the Elwood Documents truly arises within the anti-SLAPP motions. Those documents were, for the most part, attached as exhibits to an affidavit filed in connection with those motions. The Black Cube and Psy Group documents are not in issue in the anti-SLAPP motions, according to Black Cube's counsel, and it cannot therefore be said that any dispute about privilege over those documents arises within the anti-SLAPP motions.

[149] In Black Cube's view, the fact that the Black Cube and Psy Group documents may be relevant in the broader context of the litigation as a whole does not assist. Anti-SLAPP motions are *not* the equivalent of summary judgment motions. The court is not to take a "deep dive" into

the merits of the proceeding. The Black Cube and Psy Group documents are not necessary for the proper adjudication of the anti-SLAPP motions and therefore proceedings regarding their disclosure are stayed by s. 137.1(5) of the *CJA*.

[150] Catalyst did not independently assert any jurisdictional impediment to the hearing of the motions, but their counsel tended to agree with Black Cube's submission that production of the documents in issue is not necessary for the proper adjudication of the anti-SLAPP motions.

[151] West Face contends that interlocutory proceedings are permitted within anti-SLAPP motions; on this point the parties appear to be in agreement.

[152] The privilege motions, it says, have been identified by the parties and the court as warranted and they have been case-managed. The documents in issue are, West Face suggests, unquestionably relevant to the anti-SLAPP motions.

[153] West Face does not appear to me to disagree with the general need for motions within anti-SLAPP proceedings to be proportionate and not inconsistent with the relevant statutory goals. But West Face argues that the motion is not disproportionate by any measure, in light of the overall litigation and the resources of the parties.

[154] West Face is dismissive of Black Cube's contention that the privilege motion with respect to Black Cube and Psy Group documents does not truly arise within the anti-SLAPP motions and is not necessary for its proper adjudication. The anti-SLAPP motions have been case managed. Within that managed context, the parties have agreed that these motions are appropriate and should be heard and determined.

[155] Finally, in any event, West Face argues that the motion was initiated well before the anti-SLAPP motions were served and recent appellate jurisprudence suggests that fact alone is sufficient to ground jurisdiction.

[156] The other moving parties adopt the position of West Face.

2. THE ASSERTION OF SOLICITOR CLIENT PRIVILEGE

[157] In Ontario, privilege may be established over documents and communications on a class basis or on a case-specific basis. There are no assertions of case-specific privilege here, so I will forego any discussion about the requirements to establish case-specific privilege over a communication.

[158] On the other hand, Catalyst and Callidus advance two assertions of class privilege.

[159] Class privileges presumptively arise when membership in the class is established. Two are in play here: solicitor-client privilege and litigation privilege.

[160] The main thrust of Catalyst's position is that the documents in issue are subject to solicitor-client privilege. Litigation privilege is asserted in the alternative.

[161] In Catalyst's submission, West Face has over-complicated the motion and has waded into issues well beyond the discrete matter of privilege; issues which go more to the merits of the litigation and the anti-SLAPP motions. Provided the court focuses on the discrete privilege arguments, it argues, a conclusion that all of the documents in issue are subject to privilege is inevitable.

[162] By way of context, the principal protagonists, Catalyst and West Face, were involved in a number of ongoing and pending lawsuits in the summer of 2017. Mr. Glassman found himself subjected to a number of attacks on a personal, professional and commercial level. He took the necessary steps to investigate and respond to these attacks including, through counsel, the retention of an investigative firm, Tamara Global.

[163] Catalyst's intention was that Tamara, and any agents retained by it, would be part of an integrated team, which included the principals of Catalyst and its counsel. This integration is crucial to Catalyst's assertions of privilege. In particular, Catalyst contends that the operations undertaken by Tamara, Black Cube and Psy Group were all intended to be used to obtain legal advice and to develop and implement a litigation strategy. There was, at all times, an expectation on the part of Catalyst, that all communications and documents generated within the investigative team would remain confidential.

[164] Catalyst submits that there are no circumstances set out in the record here that would abrogate Catalyst's claim to privilege, such as waiver or criminality.

[165] Black Cube supports Catalyst's position.

[166] West Face gave short shrift to Catalyst's assertion of solicitor-client privilege. Counsel to West Face asserts that solicitor-client privilege arguably attaches to only one document. Specifically, several pages of notes written by a lawyer in Mr. Greenspan's office in relation to a witness interview that came to be in the possession of Mr. Elwood. They were passed on to West Face and were identified at Schedule "C" to its affidavit of documents.

[167] In the submissions of West Face, solicitor-client privilege simply cannot attach to any of the Project Maple Tree documents – not Black Cube documents, Psy Group documents or the Elwood Documents. Solicitor-client privilege is confined to communications between a solicitor and his or her client.

[168] The balance of the moving parties adopt the position of West Face.

3. THE ASSERTION OF LITIGATION PRIVILEGE

[169] Catalyst also advances a claim to litigation privilege over a significant portion of the documents in issue. It again relies on the integration of its investigative team and its undiminished expectation of confidentiality. It submits that each of the documents in issue was created for the dominant purpose of obtaining legal advice and formulating a litigation strategy with respect to ongoing or contemplated litigation.

[170] The bulk of West Face's submissions focus on Catalyst's assertion of litigation privilege. Their counsel advances a four-pronged argument as to why that assertion is not sustainable:

- (i) Catalyst has failed to tender sufficiently cogent evidence to establish that litigation privilege attaches to any of the documents in issue;
- (ii) Any privilege that may have attached to the documents expired when the Moyse action and the VimpelCom action were disposed of on a final basis;
- (iii) The misconduct of Catalyst, or of its principals, servants or agents vitiates any privilege that may have attached; and,
- (iv) Any privilege that may have attached to the documents has been waived.

[171] In the submission of counsel to West Face, each prong of its argument is, on its own, sufficient to undermine Catalyst's assertion of litigation privilege. West Face, they say, need only prevail on any one of its arguments to succeed on this motion.

[172] The other moving parties join in the position of West Face, though each of the other moving parties is concerned only with the privilege claims being asserted over the Elwood Documents.

[173] The Anson Defendants emphasize the point that the Elwood Documents are not related to litigation but reflect a public relations strategy. They also emphasize the issue of waiver. They say they have received the Elwood Documents three times. First, they were produced by West Face in its Affidavit of Documents in December 2019. Second, they were included in West Face's motion record served in May 2020. Third, in August 2020, they got the motion record of Rob Copeland, which also included the Elwood Documents.

[174] While Catalyst has been aware of the production and circulation of the Elwood Documents on each occasion, they have not, at any time, contacted the Anson Defendants to assert privilege. It was not until they received Mr. Glassman's affidavit, affirmed November 24, 2020, that they first observed Catalyst claiming privilege.

[175] Catalyst's singular delay in asserting privilege is, in the view of the Anson Defendants, fatal to that privilege.

[176] Catalyst denies that privilege has been waived or vitiated in any way. It asserts that this Wolfpack litigation is closely related to all other litigation between the parties and therefore that the doctrine of expiration does not apply. It agrees that some of the conduct of Black Cube was regrettable. It submits, however, that it did not instruct Black Cube to undertake pretext investigations. Moreover, when those investigations came to light, it instructed Black Cube to desist in the further use of any such techniques. In the circumstances, Catalyst says it ought not to be painted with the brush of impropriety. At any rate, Catalyst's counsel points out that there is nothing inherently improper or illegal about the employment of pretext investigations, or about the use of the fruits of any such investigations.

[177] Black Cube weighed in on the allegations of impropriety. They submit that the evidentiary record is insufficient and lacking in detail and does not support a conclusion that privilege has been abrogated on the basis of malfeasance. Black Cube accuses West Face of making impassioned and sweeping allegations of misconduct and failing to tie any specific misconduct to any particular documents. Each document has to be considered separately and each party, counsel says, is entitled to careful consideration of his, her or its conduct and the consequences that might flow from it.

4. BLACK CUBE'S PUBLICATION BAN REQUEST

[178] As I noted, Black Cube's principal position is that the court does not have the jurisdiction to hear these motions. Should that position not prevail, however, they are concerned that any disclosure of Black Cube documents risks publicly identifying Black Cube agents. The ability of those agents to conduct covert investigations depends on their continued anonymity. Their counsel asks that the court permit the redaction of identifying information from any Black Cube documents that may be ordered produced.

[179] West Face opposes any such limitation on production. They urge the court to refuse to provide such discretionary relief because the foreign agents of Black Cube have conducted themselves in a manner abusive of the court and its processes.

5. THE FILING OF MOTION MATERIALS

[180] Following a case conference with counsel conducted prior to the argument of the motions, it was agreed that they would deliver their motion materials directly to me. The motion materials contain sensitive elements, some of which I have mentioned already. Directions must be given with respect to the filing of materials with the court office. Counsel have left those directions to the discretion of the court.

III. DISCUSSION

[181] Before delving into the issues raised by the parties, I want to briefly address the evidentiary record as it relates to the documents in issue.

[182] I have identified the documents in issue as being communications and documents generated by the planning and implementation of Project Maple Tree. These documents appear to fall into four broad categories: the Elwood Documents; the Tamara Global documents; the Black Cube documents; and the Psy Group documents.

[183] I have already particularized the Elwood Documents to some extent. They are more easily managed than the balance of the documents in issue for two principal reasons. First, there aren't very many of them; just 16 in total. Second, they have already been widely circulated amongst the parties. The upshot is that I have been able to review their contents. That ability certainly aids in the assessment of the privilege claims asserted over them.

[184] By contrast, I have very few of the other documents in issue. A modest selection of them was provided to me by Catalyst's counsel. My decisions about the privilege claims asserted over these documents must, for the most part, be made without access to their contents.

[185] Only a handful of the Tamara and Black Cube documents have been produced for my inspection, by way of a two-volume confidential Privileged Documents Brief. I intend to consider the assertions of privilege over these documents, one-by-one. These documents must otherwise serve as a proxy for the balance of any Tamara and Black Cube documents not produced for inspection.

[186] Said another way, I am proceeding from the premise that the onus is on Catalyst to provide a sufficient evidentiary record to establish the privilege claimed with respect to each document in issue. Catalyst has provided me with a select group of Tamara and Black Cube documents for consideration. I am proceeding on the basis that the documents provided to me are representative of the character of the Tamara and Black Cube documents in issue on the whole.

[187] Psy Group is an Israeli-based company. It is insolvent. It has not actively participated in this litigation. West Face has obtained a number of orders here in Ontario requesting the assistance of the Israeli courts in ordering the preservation and production of Psy Group documents. To date there has been no success in obtaining Psy Group's documents.

[188] I pause to comment on a submission by Catalyst's counsel. The orders made by the Commercial Court in Toronto seeking the assistance of the Israeli courts in West Face's pursuit of Psy Group documents, include a mechanism for determining any claims of privilege over any such documents. Catalyst's counsel suggested that the parties ought to be following the process established by those orders, rather than engaging in this free-standing privilege motion.

[189] I have three observations to make. First, in my view, if a mechanism was created for Psy Group to advance privilege claims over any of its documents whose disclosure was otherwise compelled by the assistance orders, that mechanism does not handcuff me in any way.

[190] Second, the appropriate time to raise arguments of this nature would have been when these motions were scheduled by the case management judge.

[191] Third, though Catalyst did not frame its argument this way, one might argue that it is not possible to assess any claim to privilege over documents that have not been identified and which Catalyst does not, apparently, have in its possession or control. It might be suggested that the mechanism contained in the assistance orders offers the best or fairest process to determine any privilege issues with respect to Psy Group documents.

[192] While I certainly see some attractiveness to such an argument, I reject it. I have sufficient evidence of Psy Group's role in Project Maple Tree and sufficient particulars of how and why any Psy Group documents may have been created, to render an informed decision about whether any may be protected by solicitor-client or litigation privilege.

[193] I will move on to an analysis of the live issues.

1. THE JURISDICTIONAL ISSUE

1.1 The Governing Principles

[194] For ease of reference, I will repeat the content of s. 137.1(5) of the *CJA*:

Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

[195] The anti-SLAPP provisions are relatively new to Ontario and there is limited caselaw addressing the implications of the stay provision.

[196] Despite the paucity of caselaw interpreting s. 137.1(5), I think its purpose is clear. The prohibition on any further steps in a proceeding once an anti-SLAPP motion has been served prevents parties from engaging in extraneous litigation that may undermine the efficiency of the process established by s. 137.1 or otherwise compound the mischief the anti-SLAPP provisions are designed to prevent. See *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 904, para. 16.

[197] The plain wording of the stay provision makes it apparent that it is non-discretionary. It permits no exceptions. *United Soils*, paras. 1 and 16. That said, it may be possible to draw a distinction between taking steps in the proceeding and taking steps in the motion. *United Soils*, para. 20. The parties appear to agree on this distinction and I take no issue with it. The jurisprudence has, however, yet to offer any guidance on what steps within the motion may be permissible.

[198] In assessing whether and to what extent interlocutory steps may be permitted within an anti-SLAPP motion, I believe consideration must be given to the design of the process established by s. 137.1. It is intended to be an efficient and economical means of identifying and stopping SLAPP proceedings in their tracks.

[199] The intention of anti-SLAPP legislation is to prevent deep-pocketed parties from misusing the court's processes to grind down litigants of lesser means, effectively preventing them from meaningfully participating in public discourse. The process established to identify and weed out SLAPPs has been designed in harmony with the legislative intention. For instance, anti-SLAPP motions require an evidentiary record, but one that is, by design, limited. The record is meant to reflect the nature of the process and the stage of the proceedings at which it occurs. As Coté J. observed in *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 at para. 52, a motion judge hearing an anti-SLAPP motion "is to engage in only a limited weighing of the evidence" and avoid a "deep dive" into the evidentiary record. The goal is to dispose of the motion as efficiently and economically as possible.

[200] It seems to me that any discretion to permit interlocutory motions within an anti-SLAPP motion must be exercised having regard to the aspirations of the legislation in terms of efficiency and economy. A multiplicity of interlocutory steps, or steps that fail to pass muster on a costs/benefits assessment ought to be avoided.

[201] The concept of proportionality is another means of expressing the essence of the costs/benefits analysis. It has taken on increasing prominence in the interpretation of the *Rules of Civil Procedure* over the past decade. It is a concept that, in my view, is of vital concern to the management of anti-SLAPP motions. Interlocutory steps that are disproportionate to the requirements of the anti-SLAPP motion(s) and the circumstances of the parties should be discouraged.

[202] To summarize, I accept Justice Penny's distinction, in *United Soils*, between steps in the proceeding and steps within the anti-SLAPP motion itself. The former are stayed. The latter are permissible, in the court's discretion. That discretion must be exercised having regard to the purposes and goals of the anti-SLAPP statutory regime – principally efficiency and economy. Accordingly, any proposed interlocutory steps must be subject to a costs/benefits analysis. Those steps found to be disproportionate to the needs of the anti-SLAPP motion or the circumstances of the parties should not be permitted.

[203] One further issue that arose during the course of argument was whether s. 137.1(5) has the effect of staying interlocutory proceedings already in process prior to the service of an anti-SLAPP motion. This issue arose largely as a result of the release by the Court of Appeal, on December 3, 2020, of its ruling in *Zoutman v. Graham*, 2020 ONCA 767.

[204] *Zoutman* was a defamation action commenced by a doctor against an individual who had made derogatory comments about him on a website known as RateMDs.com. The plaintiff moved for summary judgment once pleadings had closed. Two months after the summary judgment motion was served – and a month before it was scheduled to be heard – the defendant moved to strike the claim under s. 137.1 of the CJA. The two motions were ordered heard together. The judge hearing the motions dismissed the defendant's anti-SLAPP motion and granted the motion for summary judgment, awarding \$50,000 in damages. The defendant appealed.

[205] One of the arguments raised on appeal was that the summary judgment motion ought not to have been heard until the anti-SLAPP motion was disposed of, in light of s. 137.1(5). The Court of Appeal rejected that argument, saying, at para. 17:

...[T]he respondent brought and scheduled his summary judgment motion well before the appellant brought his motion under s. 137.1. Furthermore, the two motions were ordered to be heard at the same time, and the appellant did not seek to appeal that decision. In this context, the appellant did not take any further step within the meaning of s. 137.1(5).

[206] Counsel to West Face submit that the upshot of *Zoutman* is that any motion initiated prior to the service of an anti-SLAPP motion may continue, notwithstanding the operation of s. 137.1(5) of the CJA. They remind the court that their privilege motion was first launched in the fall of 2018.

[207] With respect to counsel, I do not read *Zoutman* as supportive of such a broad proposition. An interlocutory order had been made in *Zoutman* that provided for the combined hearing of the

defendant's anti-SLAPP motion and the plaintiff's summary judgment motion. That order was not appealed from. Moreover, it does not appear that any further steps were taken with respect to the summary judgment motion between the time that the anti-SLAPP motion was served and when the combined motions were argued. There was, in the result, arguably no breach of s. 137.1(5). Finally, on the facts of *Zoutman*, it would appear that combining the two outstanding motions did not run afoul of the legislative goals of efficiency and economy.

1.2 Analysis

[208] I am satisfied that the court has the jurisdiction to hear and determine the motions regarding Catalyst's assertions of privilege. There are a number of reasons supporting this conclusion.

[209] First, I am satisfied that these motions are not further steps in the proceeding at large, but are legitimate interlocutory steps within the anti-SLAPP motions.

[210] Second, the anti-SLAPP motions are being closely case managed by a judge of the Commercial List. These motions – and their parameters – have been case conferred at length. Significant efforts, including the engagement of the Chief Justice's office, were taken to schedule the motions before an out-of-jurisdiction judge. At no time during that entire process did any party assert that the court lacked the jurisdiction to hear the motions as a result of the impact of s. 137.1(5) of the *CJA*, or otherwise. That argument was only raised during the hearing of the motions by Black Cube, a non-party to the anti-SLAPP motions.

[211] Third, while arguments were advanced before me to the effect that the documents in issue are not relevant or necessary to the determination of the anti-SLAPP motions, those assertions lacked conviction. I am satisfied that the parties actually engaged in the anti-SLAPP motions have always proceeded on the basis that the documents in issue are relevant to the determination of those motions. How significant they may be I am unable to say, but again, I defer to the fact that it was determined, through a case management process, that the motions should proceed.

[212] Fourth, I agree with Black Cube's submission that the court must manage interlocutory proceedings within an anti-SLAPP motion with regard to the goals of the legislated process in mind. Interlocutory steps within an anti-SLAPP motion may be permitted, but they must be proportionate and not undermine the goals of efficiency and economy.

[213] On this last point, I note that this is a \$450 million lawsuit. This is not a David and Goliath battle. This is Goliath v. Goliath. The anti-SLAPP motions were initiated in November 2019. They will not be argued until at least early March 2021 – some 16 months in the making. There have been substantial materials filed in connection with the motions. There have been, or will be, cross-examinations on those materials. In terms of the privilege motions, I have received well in excess of 4,000 pages of materials. No party has shied away from supplementing the record.

[214] Proportionality takes on a different hue in a case like this. The main protagonists here have been litigating hard against each other for almost five years now. In the scheduling of these motions, no one appears to have raised any alarms about their cost, the time they would

take, or the resources they would consume. Again, only Black Cube, a non-party to the anti-SLAPP motions, suggests that perhaps the costs associated with these privilege motions outweigh any benefits they might bring to the process. The parties actually litigating the anti-SLAPP motions do not appear to agree.

[215] In the circumstances, I conclude that:

- (a) These privilege motions do not run afoul of the prohibition on further steps set out in s. 137.1(5) of the *CJA* because they are permissible steps within the anti-SLAPP motions; and,
- (b) I am not satisfied, in the unique circumstances of this litigation, that the privilege motions undermine the goals of the anti-SLAPP process to such a degree that they should be prohibited. They are not disproportionate within the context of this litigation.

[216] In the result, I am satisfied that I have the jurisdiction to hear the motions and I will proceed to a consideration of the substantive issues.

2. THE ASSERTION OF SOLICITOR-CLIENT PRIVILEGE

2.1 The Governing Principles

The Basics

[217] Solicitor-client privilege is a class privilege. It protects the confidential relationship between a solicitor and his or her client. It has a constitutional dimension. Beginning as a rule of evidence, it has evolved into a principle of fundamental justice and a civil right of fundamental importance in Canadian law. See *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455, and *R. v. Fink*, 2002 SCC 61.

[218] The basic rationale for solicitor-client privilege is well known and easily understood. Comprehensive and meaningful legal advice is realistically only possible where the client can be confident that what is said between her and her solicitor will not be disclosed. This rationale was explained as more than simply “utilitarian” by Justice Doherty, dissenting, but not on this point, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, [1999] O.J. No. 3291 (C.A.) at para. 92. He described the privilege as “an expression of our commitment to both personal autonomy and access to justice.”

[219] The onus is on the party asserting privilege to establish an evidentiary basis for it. See *Chrusz* at para. 95.

[220] The conditions necessary to establish the privilege are grounded in its rationale. They were identified in the seminal case of *Solosky v. The Queen*, as above. There are three. The communication over which privilege is asserted must:

- (a) be a communication between lawyer and client;
- (b) which entails the seeking or giving of legal advice; and,
- (c) which is intended to be confidential by the parties.

See also *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 15.

[221] The privilege is assiduously protected, but it is not entirely impenetrable nor without exceptions. Its scope does not extend to communications where legal advice is not sought or offered or where the communications are not intended to be confidential. It is also not engaged where the communications themselves are criminal or where the client's purpose in obtaining legal advice is to facilitate the commission of a crime: see *Solosky*, as above, as well as *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 and *Pritchard*, as above, at para. 16.

[222] The criminal purpose exception has arguably been extended to communications made with the intent of committing tortious conduct, or abuses of the court's processes. See *McDermott v. McDermott*, 2013 BCSC 534.

The Limited Extension to Communications with Third Parties

[223] Of particular interest to this case is the question of whether solicitor-client privilege can extend to communications between a solicitor and a third-party, notwithstanding the apparently clear pre-conditions described in *Solosky*. The short answer is yes it can, but only in limited circumstances.

[224] Prior to the Court of Appeal decision in *Chrusz*, as above, the jurisprudence appears to have recognized solicitor-client privilege over communications between a solicitor and a third party only in the following, very limited, circumstances:

...where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege.

See *Chrusz*, as above, at para. 106.

[225] In *Chrusz*, Doherty J.A. expanded somewhat the protection of solicitor-client privilege over communications between a solicitor and a third party. Communications between a solicitor and a third party will continue to be recognized as subject to solicitor-client privilege where the third party acts as an agent or channel of communication between the client and the solicitor. They will also attract solicitor-client privilege where the third party's retainer "extends to a function which is essential to the existence or operation of the client-solicitor relationship". (*Chruz*, para. 120).

[226] An example of this latter situation is provided by the English case of *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27. In that case, the client's financial advisors met with the solicitor to convey information about its business affairs. They acted essentially as translators and as a "conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer". (*Chrusz*, para. 111).

[227] Justice Doherty summarized the extension of solicitor-client privilege to communications between the solicitor and third parties as follows:

Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected. (*Chrusz*, paras. 121-122).

[228] Generally, a third party investigator who gathers information to be used by counsel for the purpose of preparing for litigation or providing legal advice will not be considered essential to the maintenance or operation of the solicitor-client relationship. See *Ontario (Liquor Control Board v. Lifford Wine Agencies Ltd.)*, [2005] O. J. No. 3042 (C.A.).

Waiver

[229] Solicitor-client privilege belongs to the client and can only be waived by the client or through his or her informed consent: *R. v. Fink*, as above, at para. 39 and *R. v. McClure*, 2001 SCC 14.

[230] Waiver may be express or, where fairness requires it, implied. The Court of Appeal explained the distinction in *R. v. Youvarajah*, 2011 ONCA 654 at paras. 146-147:

An express waiver of privilege will occur where the holder of the privilege (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive it: *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] B.C.J. No. 1499, [1983] 4 W.W.R. 762 (S.C.), per McLachlin J.

Despite these requirements, an implied waiver of solicitor-client privilege may occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it...

[231] Implied waiver arises, in other words, where the holder of the privilege takes some action or position inconsistent with the maintenance of the privilege. See *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 92. One example of implied waiver, offered by the Court of Appeal in *Youvarajah*, is where a client alleges a breach of duty by his or her counsel. Another, offered by McLachlin J., as she then was, in *S & K Processors*, as above, is where a party relies on legal advice to justify or explain its conduct. Moreover, disclosure of a portion of an otherwise privileged communication may sometimes, as a matter of fairness, require that the whole of the communication be disclosed. See for instance, *Howard v. London (City)*, 2015 ONSC 3698.

[232] The “shield and sword” analogy is sometimes invoked to explain the circumstances in which implied waiver will arise. A privilege holder may not at once attempt to use privileged documents to her benefit and at the same time shelter behind the privilege to prevent an opposing party from testing the evidence. See *Huang*, as above, at para. 143.

2.2 Analysis

2.2.1 The Elwood Documents

[233] The first prerequisite to a finding that solicitor-client privilege attaches to a communication is that the communication be between a solicitor and his or her client.

[234] For the purposes of the motions now before the court, I am interpreting the “client” as broadly including Catalyst and Callidus as well as their principals, Mr. Glassman, Mr. Riley and Mr. De Alba. Their solicitors have included, at varying times, the Greenspan firm, the Lax O’Sullivan firm, Moore Barristers and Gowling WLF (Canada) LLP.

[235] None of the Elwood Documents is a communication between a solicitor and client. They consist of email communications amongst Psy Group employees; email communications between Psy Group employees and Mr. Elwood; and emails between Virginia Jamieson and various parties. Privilege is also asserted over the contents of Mr. Elwood’s affidavit, none of which has anything to do with communications between solicitor and client, save perhaps for the “Schedule ‘C’ Document” which I will come to in a moment.

[236] None of the Elwood Documents could even be said to be communications between a solicitor and a third party acting as a conduit for the client. Again, save for the Schedule “C” Document, none of the communications forming the Elwood Documents even involves a solicitor.

The Schedule "C" Document

[237] The only one of the Elwood Documents that involves a solicitor are the notes of Naomi Lutes, which were listed at Schedule "C" to West Face's Affidavit of Documents.

[238] Ms. Lutes is a lawyer at Greenspan Humphrey Weinstein. The notes in question were provided to me by counsel to Catalyst. None of the moving parties has seen the contents of the notes. Though a copy of them was provided to West Face's lawyers by Mr. Elwood, West Face's lawyers did not read them, out of respect for their apparent confidential nature.

[239] The notes reflect the content of a meeting on September 12, 2017 between Ms. Lutes, Mr. Riley, John Philips and Derrick Snowdy. I do not know who John Philips is. Mr. Snowdy is a private investigator and appears to have been providing evidence of the "short and distort" actions of what is referred to in the notes as a "cabal". I believe the so-called cabal is more or less the same group referred to throughout this litigation as the "Wolfpack".

[240] Ms. Lutes took handwritten notes of the meeting and then subsequently created a typed version of them. The typed version is in the form of a Memorandum from Ms. Lutes to Jim Riley. It is marked "Solicitor-Client Privileged".

[241] Ms. Lutes sent the notes by email to Yossi Tanuri of Tamara Global on September 14, 2017. They were subsequently shared with Royi Burstein at Psy Group, who emailed them to Emmanuel Rosen, Phil Elwood, Avi Eliyahou, Abraham Ronen and others on September 16, 2017.

[242] In my view, there can be no sustainable claim to solicitor-client privilege over Ms. Lutes' notes for at least three reasons:

- (a) The handwritten notes are not a communication between solicitor and client. They are a record of discussions between the solicitor and a potential witness. The fact that Mr. Riley was present during the meeting with the witness does not alter the nature of the communication. The communicating was between Mr. Snowdy (a witness) and others, including Ms. Lutes;
- (b) Typing up a copy of the handwritten notes does not alter their character, even when the reference to "Solicitor-Client Privileged" is added. One cannot make a non-privileged document privileged just by writing "Privileged" on it. Having said that, the typed version of the notes contains a number of bracketed comments by Ms. Lutes, which I may have considered privileged, were it not for my next point;
- (c) Whatever privilege may have attached to the notes was waived when the memorandum was delivered by Ms. Lutes to Yossi Tanuri and subsequently passed on to Psy Group and others, including Mr. Elwood.

[243] It is important to recall that privilege belongs to the client and it is the client's to waive. In this instance, the memorandum was sent to Mr. Tanuri with an email from Ms. Lutes that said, "Hi Yossi: Jim asked me to email you my notes of today's meeting. Please see attached."

[244] I understand “Jim” to be a reference to Jim Riley. I find that the memorandum of Ms. Lutes’ notes was deliberately sent to Mr. Tanuri by counsel, on express instructions from the client. In the circumstances, if solicitor-client privilege at any time applied to the notes, it has been unequivocally waived.

[245] To close off this section, I will briefly address the possibility that solicitor-client privilege extended to communications between counsel (Ms. Lutes) and Tamara. In my view, it did not. Tamara did not act as a conduit between the client and counsel. Moreover, the communication of the memorandum to Tamara could not be described as essential to the maintenance or operation of the solicitor-client relationship.

[246] Tamara was hired as a security/investigations firm. They were to gather information and report it back to the client or counsel and they were to act on instructions from the client or counsel. They were not essential to the privileged relationship between counsel and client.

[247] In the result, I find that none of the Elwood Documents, including the Schedule “C” Document, is protected by solicitor-client privilege.

2.2.2 Communications Between Counsel and Tamara Global

[248] Recall that Tamara was retained by Catalyst, through Mr. Greenspan, on August 31, 2017. Tamara had the authority to retain third parties as subcontractors or consultants. Relying on that authority they retained Black Cube and Psy Group.

[249] Mr. Greenspan’s letter engaging Tamara included the following paragraph:

During the course of your retainer, we will provide you with information, data, and access to both principals and employees of the client/clients. The information provided to you or to consultants retained by you as subcontractors is to remain confidential and subject to solicitor-client privilege. Any results of your assessment and reports provided to us as counsel for the client/clients are to remain confidential and subject to solicitor-client privilege.

[250] With the greatest of respect to Mr. Greenspan, it simply cannot be that communications between counsel and Tamara are protected by solicitor-client privilege. At a very basic level they are simply not communications between a solicitor and client. And as I have found, Tamara is not the sort of third party to whom solicitor-client privilege might be extended. They were not essential to the solicitor-client relationship between Catalyst and any of its counsel.

2.2.3 The Black Cube and Psy Group Documents

[251] I reach the same conclusion with respect to any Black Cube and Psy Group documents. The assertion that they are protected by solicitor-client privilege is even less compelling than the assertion that communications between counsel and Tamara are protected by solicitor-client privilege.

[252] Black Cube and Psy Group are both independent contractors hired by Tamara to assist Tamara in carrying out its retainer with Catalyst. They were the subcontractors or consultants of Tamara. They are clearly not the “client” claiming privilege. They are third parties to the relationship between counsel and Catalyst, Callidus and their principals.

[253] As third parties there is only a narrow path to the protection of solicitor-client privilege over their communications and documents. And that narrow path is not present here. They did not act as a communications conduit between counsel and Catalyst. Nor did either play any role that one could characterize as essential to the solicitor-client relationship. Indeed, each of them appears to have had few, if any, direct communications with either the client or the solicitors.

[254] In my view, none of the documents of Tamara, Black Cube and Psy Group are subject to solicitor-client privilege. My conclusion includes any communications between Tamara, Black Cube or Psy Group whether internal, with counsel, with each other, or with third parties.

2.2.4 Other Documents

[255] Included in the 30-document brief of ostensibly privileged documents submitted by Catalyst’s counsel were a number of communications clearly subject to solicitor-client privilege. They include:

- (a) An email dated September 7, 2017 from Rocco DiPucchio – then counsel at Lax O’Sullivan – to Mr. Glassman regarding the prosecution of various actions on behalf of Catalyst;
- (b) Two emails dated September 21, 2017 from David Moore to Brian Greenspan regarding the Moyse appeal and the possible use of fresh evidence; and,
- (c) An email dated September 27, 2017 from David Moore to Brian Greenspan regarding a potential motion to adduce fresh evidence.

[256] None of the foregoing communications is subject to disclosure. As I understand the positions of the moving parties, none is seeking to get access to communications of this nature.

[257] I will turn now to a consideration of the assertion of litigation privilege.

3. THE ASSERTION OF LITIGATION PRIVILEGE

3.1 The Governing Principles

[258] Litigation privilege is another class privilege. Unlike solicitor-client privilege, it does not protect a relationship. Instead, it protects an area – a “zone of privacy” – necessary to foster the needs of our adversarial model of adjudication. See *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 34. It protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. See *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 1.

[259] The purpose of the privilege, says the Supreme Court,

...is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. (*Blank*, para. 27).

[260] The parameters of litigation privilege strike a balance between the need for a protected area of privacy in which preparation for adversarial litigation takes place and the need for full disclosure to ensure trial fairness. As *Carthy J.A.* observed in *Chrusz*, “the modern trend is in the direction of complete discovery...[L]itigation privilege is the area of privacy left to a solicitor after the current demands of discovery have been met.” (Para. 25).

[261] The Supreme Court described the ambit of litigation privilege succinctly in *Lizotte*, as above, at para. 19:

Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts.

[262] The privilege applies only to communications made at a time when litigation was commenced or contemplated and where the dominant purpose of the communication (and not just a substantial purpose) was for use in, or advice concerning that litigation. See *Blank*, as above, at para. 60 and *LCBO v. Lifford Wine Agencies*, as above, at para. 74.

[263] Again, the onus is on the party asserting the privilege to establish, with respect to each document in issue, that the dominant purpose for its creation was existing or contemplated litigation. See *Bartucci v. Lindsay*, 2010 ONSC 3942, at para. 11.

[264] The time at which the dominant purpose for a document's creation is to be assessed is the time when it was created. See *Nova Chemicals (Canada) Ltd. v. Ceda-Reactor Ltd.*, 2014 ONSC 3995 at para. 35.

Expiration

[265] Litigation privilege, unlike solicitor-client privilege, is of temporary duration. Its purpose is to foster the litigation process and it makes sense, therefore, that it expires when the litigation it relates to comes to an end. *Blank*, para. 9. One must be cautious, however, in the determination of when litigation has come to an end. Sometimes parties remain engaged, over a number of legal proceedings, in what is fairly understood to be the same battle. Provided the ongoing proceedings are “closely related” to the litigation in which the privilege first arose, it will continue.

[266] “Closely related” litigation is that which involves the same or related parties and arises from the same or a related cause of action. *Blank*, para. 39.

Abrogation

[267] Over two paragraphs in *Blank*, the Supreme Court established an exception to the application of litigation privilege where disclosure would afford evidence of the misconduct or abuse of process of the party claiming privilege. Fish J. described the exception, at para. 45, as follows:

Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

[268] The “*Blank* exception” appears to have application beyond instances of strictly *actionable* misconduct. As Sharpe J.A. described the exception in *Moore v. Getahun*, 2015 ONCA 55, at para. 77, “the ends of justice do not permit litigation privilege to be used to shield *improper* conduct.” (Emphasis mine).

[269] The issue in *Moore* was the propriety of communications between counsel and a medical expert hired by counsel to provide an opinion on standard of care and causation in a medical malpractice action. The Court of Appeal held that there is nothing inherently improper about counsel communicating with the expert during the preparation of a report. But those communications become improper if counsel communicates with the expert “in a manner likely to interfere with the expert witness’s duties of independence and objectivity.” The court concluded that where the opposing party can show reasonable grounds to suspect such improper communications have taken place, disclosure of those communications may be compelled, under the *Blank* exception.

[270] *Moore* is, in my view, significant for three reasons. First, it extends the *Blank* exception to improper conduct beyond that which is actionable. Second, it makes it evident that the misconduct in issue is not limited to the conduct of the client. Third, it permits compelled production where an opposing party establishes “reasonable grounds to suspect” improper conduct, which is arguably a lower threshold than a “*prima facie* showing”.

Waiver

[271] Litigation privilege may be waived in the same manner as solicitor-client privilege, either expressly or implicitly.

3.2 Analysis

[272] Catalyst's claims to litigation privilege are significantly more difficult to assess than its claims to solicitor-client privilege. The difficulty can largely be explained by the fact that there are multiple lawsuits between Catalyst and West Face. Some of those lawsuits are now at an end, including the Moyse and VimpelCom actions. Others remain extant, including this Wolfpack action and the Veritas action.

[273] The first prerequisite to a valid claim of litigation privilege is that the communications in issue were made at a time when litigation was commenced or contemplated. The second prerequisite is that the dominant purpose of the communication was for use in, or advice concerning, that litigation.

[274] The Moyse and VimpelCom actions are both clearly at an end. They have each been finally disposed of at the trial court level, been unsuccessfully appealed to the Court of Appeal and denied a substantive hearing by the Supreme Court. Communications or documents that might otherwise have been clothed with litigation privilege in relation to the Moyse or VimpelCom actions will no longer be subject to that privilege, unless I conclude that this action is closely related to them.

[275] In my view, while this Wolfpack action shares some DNA with the earlier proceedings, they are not closely related.

[276] The Moyse and VimpelCom actions directly related to whether there was some impropriety with the way the WIND Mobile deal transpired. The Moyse action was about whether Mr. Moyse had given West Face confidential information belonging to Catalyst that somehow aided West Face in its pursuit of WIND. The VimpelCom action was about whether an exclusive negotiating agreement between VimpelCom and Catalyst had been breached and whether West Face had somehow induced that breach. The damages sought in each case were directly related to the profit West Face made on the WIND deal.

[277] The Wolfpack action has nothing to do with the WIND deal – at least not on paper. It may be born of the hard-feelings generated by the prior litigation, but as a matter of law, the issues here are totally different than those engaged by the earlier proceedings. At the core of the Wolfpack action are allegations and counter-allegations of defamation and market manipulation.

[278] What all of this means is that communications made, and documents created, for use in or advice concerning the Moyse or VimpelCom actions are no longer protected by litigation privilege. Any such privilege, if it existed, has expired.

[279] In some instances, there isn't a bright line between communications/documents in relation to the prior litigation and those related to the current litigation. At the time Tamara, Black Cube and Psy Group were active, the Moyse and VimpelCom actions were ongoing and the Wolfpack claim was at least contemplated, if not ongoing.

[280] I will again, consider each broad group of documents in turn. In the last section, I began my analysis with the Elwood Documents, then moved on to the communications and documents

of Tamara, Black Cube and Psy Group. In this section, I am going to begin with Tamara Global, simply for reasons of efficiency.

3.2.1 Communications with Tamara Global

[281] I have little to go on in terms of the communications Tamara has had with Catalyst or with its counsel, over which litigation privilege may be asserted. As I noted, I have been provided with specific documents to review by way of a Privileged Documents Brief submitted by Catalyst's counsel, but it contains relatively few documents.

[282] I am not privy to the rationale used to select the particular documents disclosed to me for review. I see no other reasonable way to approach these documents than to go through them individually, then to extend the reasoning I employ to the wider group of documents not otherwise produced for my review.

[283] The Privileged Documents Brief was filed in two volumes. The second volume, consisting of 8 tabs, reflects Black Cube documents. I will address these in a later section dedicated to Black Cube.

[284] The first volume contains a variety of documents, 22 in total, some of which involve communications between counsel and Tamara. My conclusions about these documents are as follows:

Tab 1:

[285] Tab 1 is copy of the Tamara Global retainer letter dated August 31, 2017. The retainer is expressly for the following reasons:

The scope of the assignment authorized pursuant to this Retainer Agreement relates to a qualitative property, personnel and equipment assessment of the current needs and future requirements of our client/clients in order to more effectively and lawfully carry on their business objectives. The assignment may be expanded or modified by written or verbal instructions from authorized representatives of our office.

[286] What is immediately apparent from the language of the retainer agreement is that its dominant purpose – indeed any purpose – is not related to pending or contemplated litigation. It is not subject to litigation privilege.

Tabs 2 - 4

[287] Tabs 2 – 4 consist of three emails from Mr. Greenspan to Mr. Tanuri on September 1, 2017.

[288] The first email has a number of attachments including Veritas research alerts on a number of companies and a document/memo entitled, "Evidence that Veritas Investment Research has a

long history of conspiring with short sellers". Most of the documents attached are public documents and as such are disclosable, assuming they're relevant. They do not attract privilege simply because they came to be filed in the solicitor's brief. The one-page memo on Veritas' history of conspiracy is puzzling. I have no idea who created it or for what purpose. In the absence of evidence to that effect, I am not prepared to make a finding that it was prepared for the dominant purpose of the Veritas lawsuit or other, ongoing or pending litigation.

[289] The second email encloses a string of other, rather cryptic, emails about a number of subjects. Again, I am not prepared to speculate about how litigation privilege may attach to these documents or communications.

[290] The third email attaches some handwritten charts of parties and how they may be connected. I am satisfied that this document was created for the dominant purpose of the Wolfpack litigation and is subject to litigation privilege.

Tab 5

[291] Tab 5 is an email between Mr. DiPucchio and Mr. Glassman dated September 7, 2017. I have addressed it above. It is subject to solicitor-client privilege.

Tabs 6 - 7

[292] Tabs 6 and 7 include a copy of the retainer agreement between Black Cube and Tamara for what they refer to as "Project Camouflage", as well as some email communications dated September 7-9, 2017 between Mr. Tanuri and Mr. Greenspan regarding the content of the retainer. Arguably Tamara may have a viable assertion of solicitor-client privilege over the email communications, but no such claim has been asserted by them in this litigation.

[293] I will elaborate on this point a little later, but I am of the view that Black Cube's activities, ostensibly provided as "litigation support" are not properly characterized as having legitimate litigation as their dominant purpose. In my view, attempting to humiliate and denigrate a judge whose ruling one disapproves of, and lying and cheating one's way to extracting another party's private and confidential information, are not proper components of legitimate litigation. Moreover, I consider that a *prima facie* case of impropriety has easily been made out in relation to the conduct of Black Cube, such that any claim to litigation privilege over any of its relevant communications and documents has been vitiated.

Tabs 8 - 9

[294] Tabs 8 and 9 are copies of Ms. Lutes' handwritten and typed notes of the meeting with a witness on September 12, 2017. I will consider the claim to litigation privilege over these notes as part of my analysis of the Elwood Documents.

Tab 10

[295] Tab 10 is an email communication between Ms. Lutes and Mr. Tanuri dated September 14, 2017 which includes transcripts of "guarantors" requested by Mr. Tanuri. These appear to

relate to an OSC investigation. The transcripts are not subject to litigation privilege in this action, but I am satisfied that the dominant purpose of Ms. Lutes' email was this litigation and that the email itself is subject to litigation privilege.

Tab 11

[296] Tab 11 consists of a series of emails between counsel and Mr. Tanuri. They clearly have to do with the Moyse litigation and are no longer subject to litigation privilege.

Tabs 12 and 13

[297] These tabs are transcripts of meetings between a Black Cube agent and Justice Newbould on September 18, 2017 as part of Project Camouflage. The sting on Justice Newbould related solely to the Moyse action. If these transcripts were ever subject to litigation privilege, that privilege has expired as a result of the termination of Moyse litigation. I also consider the entire sting on Justice Newbould to be an abuse of the court's processes and, pursuant to the *Blank* exception, I would not uphold litigation privilege over these transcripts even if it had not otherwise expired.

Tabs 14 and 15

[298] These documents are emails between Mr. Moore and Mr. Greenspan which I referred to earlier. They are clearly subject to solicitor-client privilege.

Tab 16

[299] Tab 16 consists of notes Ms. Lutes took of a meeting on September 25, 2017 with Black Cube agents. They reflect discussions about sting operations which I find to have been wholly related to the Moyse action. As such any litigation privilege that may have applied to them has expired. And again, in view of my finding that the stings conducted by Black Cube on Justice Newbould and others were improper, I would not otherwise have upheld any assertion of litigation privilege in any event.

Tab 17

[300] Tab 17 is another email from Mr. Moore to Mr. Greenspan which, as I have found, is subject to solicitor-client privilege.

Tab 18

[301] This document is a memo prepared by a junior counsel in Mr. Greenspan's firm regarding a potential fresh evidence application in the Moyse appeal. It undoubtedly was covered by litigation privilege at one point, but that privilege has expired.

Tabs 19 - 21

[302] Tabs 19-21 consist of communications between Mr. Greenspan and Mr. Tanuri and between Mr. Tanuri and Mr. Glassman. The emails concern the pretext investigations (stings) conducted by Black Cube and concerns about keeping a lid on the transcripts of those operations. These documents related only to the Moyse litigation in my view and any litigation privilege that may once have applied has expired. Again, I am also of the view that any such privilege has been abrogated by Black Cube's improper conduct.

Tab 22

[303] Tab 22 consists of a package of documents purportedly provided to former Justice Stephen Goudge, together with an opinion he rendered to West Face's counsel about whether solicitor-client privilege attaches to the notes of Ms. Lutes attached as Schedule "C" to the West Face Affidavit of Documents.

[304] None of the documents provided to Mr. Goudge are subject to privilege. I have by and large already dealt with each of them. His opinion may have been subject to a claim of litigation privilege by West Face, but they have released the opinion as an exhibit to Mr. Panet's affidavit. It is certainly not subject to privilege in the hands of Catalyst or any other party.

Conclusions

[305] Of the documents I have just reviewed, I have found that just two are covered by sustainable litigation privilege. They are both communications between counsel and Tamara regarding, and limited to, the Wolfpack litigation.

[306] I said earlier that I am treating the documents produced to me as a proxy for the thousands of documents that have not been produced. I accept that one might argue that Catalyst's failure to produce a document and prove that it is covered by privilege is a failure of Catalyst to meet its onus.

[307] Realistically, however, the court is not able, as a practical matter, to review thousands of individual documents and render one-off rulings with respect to each one. There was always going to have to be some means of dealing with documents as a group or groups. I do not fault the approach taken by Catalyst's counsel to deal with the documents in a practical way.

[308] I would hold, in the result, and using the documents produced as a proxy for the larger group of documents in issue, that any communications between counsel and Tamara dealing solely with the Wolfpack or Veritas litigation are subject to litigation privilege. If there are questions about any particular documents and whether they fall into this category, I may be spoken to. The balance of any Tamara Global documents related to the planning and implementation of Project Maple Tree are not privileged and must be disclosed.

[309] I will proceed to consider the Elwood Documents.

3.2.2 The Elwood Documents

[310] The Elwood Documents are not, in my view, subject to litigation privilege, save for the Schedule “C” Document. There are a number of factors that support this conclusion.

[311] Save for the Schedule “C” Document, none of them are the types of documents that one would classically associate as being subject to litigation privilege. None form part of the solicitor’s brief and none are communications between counsel and a third party, such as a witness or expert.

[312] Having said, that, a document need not be one of the “classically” recognized types I have just described in order to attract litigation privilege. But it must be a document created at a time when litigation was pending and it must have been created for the dominant purpose of that litigation.

[313] I do not intend to go through the Elwood Documents individually. I do not believe it necessary to do so. I am not satisfied that any of them – save the Schedule “C” Document – were created for the dominant purpose of litigation.

[314] The Elwood Documents all relate, in one way or another, to Project Maple Tree and its implementation.

[315] Mr. Elwood described Project Maple Tree as having two prongs, white and black. The white prong involved a media campaign to, as Mr. Elwood deposed, “generate positive publicity in the mainstream media for Catalyst and Glassman, such as touting their business successes and charitable donations.” The black prong also included an element of public relations. Specifically, generating negative media attention to West Face and Mr. Boland.

[316] In my view, the “black and white” public relations elements of Project Maple Tree (for instance, any communications involving Ms. Jamieson and her attempts, on behalf of Psy Group, to persuade Ms. Blatchford and others to publish articles about West Face, the Wolfpack conspirators, or Justice Newbould) had nothing to do with litigation.

[317] Even if I were to accept that the media aspects of Project Maple Tree were somehow part of an overall litigation strategy, I am *not* satisfied that documents or communications relating to public relations were created for the *dominant* purpose of litigation. Their dominant purpose was clearly related to the management of the public images of West Face and Catalyst.

[318] The black prong of Project Maple Tree also had some more nefarious elements, as I have set out above, including pretext stings on Justice Newbould as well as current and former employees of West Face. These elements had to do with undermining the integrity of the trial decision in the Moyse action. That action is over and any litigation privilege that applied to any such documents or communications has now expired.

[319] Determining the dominant purpose of some of the communications contained in the Elwood Documents is made more difficult by the fact that some of them refer to multiple topics. Mr. Burstein’s emails of September 13 and 16, 2017 are good examples. They reference Project Maple Tree and its various aspirations. They include references to investigations surrounding the alleged Wolfpack conspirators.

[320] If reference to the Wolfpack was *all* these emails talked about, I would not hesitate to conclude that they are subject to litigation privilege. But none of them could be described that way. Each includes a variety of topics – some Wolfpack; some public relations; and some related to the improper planned activities of Black Cube agents.

[321] In the result, at best, I would say that the investigation into the Wolfpack conspirators was a *substantial* element of some of the communications. But a substantial element is not sufficient to attract litigation privilege.

The Schedule “C” Document

[322] The Schedule “C” Document is, again, distinguishable from the balance of the Elwood Documents. It reflects Ms. Lutes’ notes of a meeting between counsel and a potential witness in the Wolpack action. The memorandum she prepared would most certainly be considered part of the solicitor’s brief. Moreover, it directly relates to contemplated litigation which remains extant.

[323] The central question for determination, however, is whether Catalyst can sustain a claim to privilege over the document in Mr. Elwood’s possession. I find that they cannot.

[324] The evidentiary record reflects the chain by which the document came into Mr. Elwood’s possession. It was sent by Ms. Lutes to Mr Tanuri, on Mr. Riley’s instructions. This was enough to waive any claim to solicitor-client privilege in the document, but I would not conclude that it was enough, on its own, to amount to a waiver of litigation privilege. To paraphrase Justice Carthy’s reasoning in *Chrusz*, there is nothing inconsistent in giving a copy of the notes to Catalyst’s investigator and maintaining privilege against its adversary. (*Chrusz*, para. 58).

[325] But Catalyst, and in turn their counsel, knew that Tamara had been retained to do more than just investigate the alleged Wolfpack conspirators. The aspirations of Project Maple Tree were well-known to Catalyst. Those aspirations included positive and negative media relations campaigns.

[326] There is no evidence in the record that would support a finding that the further distribution of Ms. Lutes’ notes within the investigative group was inadvertent. I would, in fact, infer that Catalyst and its counsel would have been alive to the fact that Mr. Tanuri was likely to share the notes with other investigators.

[327] The notes came to be delivered to Mr. Elwood. Again, there is no evidence to suggest that the disclosure was inadvertent. Indeed, it appears entirely intentional. Mr. Elwood’s role in Project Maple Tree had nothing to do with preparation for litigation. He was not engaged to investigate the allegations of a Wolfpack conspiring to harm the financial interests of Catalyst or Callidus. He was hired to find a way to get stories to print in the mainstream media.

[328] I conclude that Ms. Lutes’ notes were provided to Mr. Elwood for the purpose of shoring up the credibility of the stories he was to promote to media outlets. There is no evidence I have seen that suggests Mr. Elwood’s use of those notes was restricted in any way or that he was instructed to keep them confidential.

[329] In my view, the wide dissemination of the notes to various parties for various purposes is antithetical to a sustainable claim to privilege of any sort over them.

[330] In the result, I find that Catalyst has no sustainable claim to litigation privilege in the Elwood Documents, including the Schedule “C” Document.

3.2.3 The Black Cube Documents

[331] The Black Cube Documents are extensive. Only a small number have been produced to me for inspection. In my view, none of them are subject to sustainable claims of litigation privilege.

[332] As I noted, volume two of Catalyst’s Privileged Documents Brief includes 8 tabs, all related to Black Cube. I will review them in turn.

Tab 1

[333] The document at Tab 1 is interesting because it is a signed copy of the Black Cube retainer agreement. It is dated September 11, 2017 and is significantly longer than the September 7, 2017 copy found at Tab 6 of volume one of the Brief of Privileged Documents. While the main body of the agreement remains vague as to the subject-matter of the engagement, there is a schedule attached to it that sets out a bonus payment structure. That schedule gives a much clearer idea of the contours of Black Cube’s engagement.

[334] West Face took the position on these motions that there is no evidence that Black Cube was involved in any investigations having to do with any litigation other than the Moyse action. It follows, in their submission, that any claim to litigation privilege over Black Cube documents has expired.

[335] Their counsel has not been privy to the document at Tab 1. It clearly demonstrates that part of Black Cube’s retainer was the investigation into an alleged Wolfpack and its members.

[336] Again, if all Black Cube was doing was investigating the existence of a Wolfpack and its membership, I would be inclined to agree with Catalyst’s position regarding the privileged nature of its communications and documents. But that is not the case.

[337] To be sure, one purpose of the Black Cube retainer, perhaps even a substantial purpose, was to conduct investigations relating to membership in the alleged Wolfpack. I accept that such an investigation was legitimate and appropriate. But an equally or more substantial purpose was the investigation of Justice Newbould, along with other targets, with the goal of undermining the integrity of the trial court ruling in the Moyse action.

[338] To suggest that conducting sting operations such as the ones carried out in this instance is properly construed as a legitimate “litigation purpose” is misguided in my view. I find that the Black Cube retainer agreement, with attachments, found at Tab 1 has a mix of purposes – some related to litigation, others related to more mischievous pursuits. I am not satisfied, in the circumstances, that the *dominant* purpose of the document is litigation.

[339] The trend in civil litigation is towards full disclosure, as a function of trial fairness and in service of the truth-seeking goal of the adjudicative process. The goal of litigation privilege is to promote the efficacy of the adversary process: *Blank*, para. 27. These goals tend to bump up against one another. Striking a balance between them can be difficult. I have to say, however, that activities that tend to undermine the integrity of the litigation process ought not to be recognized by the court as worthy of the court's protection. In my view the balance points clearly towards disclosure.

[340] In a moment I will address more generally the application of the *Blank* exception to the assertion of litigation privilege over Black Cube documents. At this stage, I am making the point that the September 11, 2017 retainer agreement was not created for the dominant purpose of litigation. It was created in part for a legitimate purpose of litigation support and at least equally for the purpose of engaging in mischief with the goal of undermining the integrity of the court's processes. On the "dominant purpose" test, the claim for litigation privilege fails.

Tabs 2 and 3

[341] Tabs 2 and 3 are spreadsheets that identify targets to be investigated by Black Cube. I reject the claim to litigation privilege for the exact same reason I rejected it in relation to the document at Tab 1. It fails to meet the dominant purpose test.

Tab 4

[342] The document at Tab 4 is an exchange of emails between a Black Cube agent and a Psy Group agent. Its contents unequivocally belie Dr. Yanus' evidence that "Black Cube did not coordinate its efforts with those of Psy Group." The contents of this email exchange relate to the sting on former Justice Newbould. That sting cannot, in my view, fairly be described as serving a proper litigation purpose. Accordingly, I again find that this document fails to meet the prerequisite of being prepared for the dominant purpose of litigation.

[343] It also fails because it solely relates to the Moyse litigation, which is now complete. If litigation privilege applied at one time, it has expired.

Tab 5

[344] Tab 5 is a letter dated September 21, 2017 on the letterhead of K. Wruck & Associates, a licensed Ontario private investigation firm. They were apparently retained by Black Cube in an effort to comply with the provisions of the *Private Security and Investigative Services Act, 2005*, S.O. 2005, chapter 34.

[345] At any rate, the content of the letter relates to the sting on Justice Newbould. I would not clothe this document with litigation privilege for the same reasons as I expressed in relation to the documents at Tab 4.

Tab 6

[346] Tab 6 is an encrypted chat exchange between a Black Cube agent and a Psy Group agent. The email reveals a plan to exchange lists of objects between themselves. I have no other evidence about this document and will not speculate about its specific purpose. Catalyst has failed to establish why litigation privilege applies to it.

Tab 7

[347] Tab 7 is an email exchange between the same agents referenced in the document at Tab 6. The agents are divvying up targets. Some have to do with West Face and others with suspected Wolfpack members. I am not satisfied that litigation privilege should apply to these emails for the same reason I am not satisfied that it should apply to the document at Tab 1. Specifically, some of the investigations being undertaken may well have had a legitimate litigation purpose to them. Others, as I have found, did not. And for that reason, I am unable to say that the legitimate litigation purpose was anything more than a substantial reason for the document's creation.

Tab 8

[348] The document at Tab 8 consists of 200 plus pages of transcribed conversations in an encrypted chat room called "Hummus Abu-Gosh". The conversations appear to be amongst Black Cube members. I have no evidence about (1) who created the chat group; (2) why it was created; or (3) what all of the topics discussed mean.

[349] It is self-evident that it was intended to be a secure means by which agents of Black Cube could communicate with one another. It is not the case, however, that its content was restricted to one or another particular topic. I do not consider it my function to review over 200 pages of text messages to try to figure out, on my own, what was being discussed and how it might relate to a legitimate litigation purpose. Catalyst has failed, in other words, to satisfy me that this document was created for the dominant purpose of (legitimate) litigation, and for that matter, litigation that remains extant. For that reason alone any claim to litigation privilege over it is rejected.

The *Blank* Exception

[350] I have a broader basis, however, to reject any claim to litigation privilege over Black Cube documents. Specifically, the *Blank* exception.

[351] I repeat a line from *Moore*, as above, at para. 77: "The ends of justice do not permit litigation privilege to be used to shield improper conduct".

[352] Conducting a pretext investigation on a former justice of this court may not be illegal or even actionable. Conducting pretext investigations on current or former employees of a business competitor may also not be illegal or an actionable wrong.

[353] But in my view luring a judge into a conversation based on a false pretext and attempting to bait him into making anti-Semitic remarks is remarkably improper. On September 18, 2017 “Arik” from Psy Group emailed “Guy” from Black Cube and made the goal of the operation clear: “Basically we’re trying to prove that he’s a racist, a depraved anti-Semite, and trying to find information that could paint him in as negative a light as possible.”

[354] There was nothing in the judgment of Justice Newbould that would suggest he was biased, a racist or a depraved anti-Semite. The sting perpetrated on him was unvarnished random virtue testing or worse.

[355] Equally problematic were the stings on West Face employees. They too were lured in by lies. Efforts, sometimes quite significant, almost always adhering to the adage, *in vino veritas*, were made to persuade them to divulge West Face’s confidential information.

[356] One of the factors that enabled Black Cube was the fact that the common law in Ontario lacks a robust framework for assessing the admissibility, in civil actions, of illegally, surreptitiously or otherwise improperly obtained evidence. A rule presumptively excluding from civil trials, evidence obtained by improper means would serve as a strong disincentive for parties to engage in the type of conduct Black Cube agents engaged in here. To date, no such rule exists in the civil context.

[357] By contrast, in the criminal law context there is a well-developed body of jurisprudence under s. 24(2) of the *Charter of Rights and Freedoms* which addresses the exclusion of evidence obtained in a manner infringing any of the *Charter*’s provisions. There is also a growing body of law in the family law context which requires, as a condition of admissibility, a showing that the probative value of surreptitiously-obtained evidence exceeds any systemic or case-specific prejudice that may arise if the evidence is admitted. See *Sordi v. Sordi*, 2011 ONCA 665.

[358] Counsel to Catalyst and Black Cube submit that there is nothing inherently improper about pretext investigations. On some level, I agree with that. As an example, imagine a district manager of a chain of retail clothing stores who occasionally and randomly drops into one or another of the stores under her management, posing as a shopper, just to see if the sales staff are adhering to company policies regarding customer service. This classic “undercover boss” scenario does not strike me as inherently improper, though it clearly has a pretext element to it.

[359] The undercover boss scenario is, by and large, harmless. It doesn’t depend on active deceit and doesn’t compromise the autonomy and privacy rights of employees. Countenancing it would not likely have any negative impact on the reputation of the administration of justice in the eyes of reasonably informed and objective members of the community.

[360] Perhaps a closer analogy to the pretext investigations conducted by Black Cube in this case are Mr. Big investigations conducted from time to time by Canadian law enforcement agencies.

[361] An invention of Canadian law enforcement, the Mr. Big technique is the ultimate pretext investigation. In short, it typically involves undercover police agents, posing as members of a criminal organization, luring a target into joining their organization on the promise of friendship

and easy money. The goal is to have the target confess, to the head of the fictitious criminal organization, his involvement in a serious criminal offence. The confession is induced through lies and deception. Classically, the target is told that the organization is aware of his involvement in an offence (usually a homicide) and has a means of eliminating the risk of prosecution, provided they are made aware of all of the details. The target, wanting to remain a part of the organization and wanting to avoid prosecution, confesses to the boss (Mr. Big). See, for instance, *R. v. Hart*, 2014 SCC 52.

[362] It may be tempting to conclude that if Canadian courts are prepared to accept the validity of pretext investigations in the Mr. Big context, they should certainly be prepared to accept the validity of the pretext investigations conducted by Black Cube agents. But that would be an unsafe conclusion.

[363] First of all, Mr. Big operations are never about disclosure. They are about admissibility. The issue before the court in the case at bar is not about admissibility; it is about whether the details of the pretext investigations, otherwise relevant to a material issue in the litigation, ought to be disclosed. The legal principles engaged in disclosure (or privilege) issues are different than those engaged in admissibility issues.

[364] Second, it must be recognized that confessions generated through Mr. Big investigations are presumptively inadmissible. Though the Mr. Big technique is not illegal in Canada (as it is in many other jurisdictions including the United States) its use makes courts very uneasy. Confessions that arise in the context of lies, deception and inducements have to be looked at very carefully in terms of their reliability. Moreover, every Mr. Big investigation is subjected to close scrutiny for abusive conduct by state actors.

[365] In the context of Black Cube's pretext investigations, I would suggest that they too warrant close scrutiny, not because of concerns about the reliability or admissibility of any evidence they may have generated, but because of concerns about abusive conduct and their intrusion on the privacy and dignity interests of the targets. The court must be wary of protecting abusive conduct, even when not the actions of state agents, lest the administration of justice be brought into disrepute.

[366] Improper, even illegal, conduct may very well result in the creation of documents whose dominant purpose is litigation. But the court cannot sanction the suppression of such evidence because to do so would effectively make the court an accessory to the improper or illegal conduct. The court must distance itself from such conduct in order to maintain its integrity and reputation. That is what the *Blank* exception is all about.

[367] Black Cube agents lied to former Justice Newbould. They took him to dinner, bought him drinks, pretended like they wanted to retain him as an arbitrator and then did their best to dupe him into making utterances that might embarrass him. They did so not because there was any credible evidence that he was biased against Jews or Catalyst or anyone else. They did so because they were being paid a very large amount of money to do so by someone who was very unhappy with a decision that he had rendered in his capacity as a Superior Court Justice.

[368] Black Cube agents also deceived a number of employees of West Face, both active and former. They pretended to offer lucrative and interesting employment opportunities. They acted like they thought the targets were unique, accomplished and special. At times they went to significant lengths. With Mr. Singh, for instance, they took him out for dinner and drinks and did their best to induce him to implicate Mr. Moyse in a breach of confidence. When their first effort failed, they flew him to London, England, took him out for dinner and more drinks and took another run at him.

[369] Black Cube's efforts were designed to, by hook or by crook, obtain confidential information about West Face. They were, in my view, corporate espionage.

[370] The conduct of Black Cube agents was an affront to justice. It is the type of conduct that the court must distance itself from.

[371] Again, this is not an admissibility ruling. I do not have to decide whether any evidence generated through the stings conducted by Black Cube might be admissible despite the manner in which it was obtained. This is a disclosure ruling. The sole question for determination is whether the court should recognize a claim to privilege over communications and documents generated by and in furtherance to a course of conduct deemed by the court to be improper.

[372] In view of the decisions in *Blank* and *Moore*, I think the answer is clearly no.

[373] The means by which the court distances itself from Black Cube's conduct is to refuse to shield evidence of their activities from the disinfecting light of day.

[374] I would add the following observation: the purpose underlying litigation privilege is the need to foster the needs of our adversarial model of litigation. Offering safe harbor to Black Cube's odious methods would not foster those needs. It would only serve to encourage the use of these types of investigative techniques; to dilute personal privacy and dignity; and to bring the administration of justice into disrepute.

[375] I am proceeding on the basis that Black Cube's documents are relevant to live issues in the anti-SLAPP motions and the litigation in general. Ordering production of those documents serves the truth-finding function of the adjudicate process. At the same time, in the circumstances of this case, ordering production does not, in my view, impair the efficacy of the adversary process. The documents in issue overwhelmingly have to do with the Moyse litigation and Catalyst's unhappiness with the result. They have little, if anything, to do with the ability of counsel to properly prepare for the extant litigation – this Wolfpack action or the Veritas action, if it is seriously being pursued.

[376] I understand Catalyst's argument that the privilege in issue is theirs and not Black Cube's. Further that the principals of Catalyst did not know about the specific investigations Black Cube was planning to conduct and certainly did not approve of them.

[377] But as I observed earlier, misconduct that meets the *Blank* exception test need not be that of the party asserting privilege. In *Moore*, as above, it was the conduct of the party's solicitor that was in issue. Here it is the conduct of the party's agent.

[378] The purpose of the *Blank* exception is to avoid litigation privilege being used to shield improper conduct. That purpose would not be well-served if a party could simply disavow responsibility for the misconduct of its retained agent.

[379] I am also somewhat concerned about what inferences the specifics of Black Cube's retainer give rise to. Their base fee was \$1.5 million U.S. A bonus structure – the particulars of which I will not elaborate on – provided for maximum fees up to \$11 million U.S. Catalyst was the party ultimately paying Black Cube's fees. Even for Catalyst, \$11 million is a big number. A natural inference is that the payor of such a significant sum will want to know what it is they are paying for. How else will they know if the fees are reasonable? The alternative is that they do not want to know. Actual knowledge and willful blindness are close cousins.

[380] As I said earlier, I am proceeding on the basis that the Black Cube documents provided to me are representative of the whole of the Black Cube documents over which privilege is asserted. In other words, the sample is a proxy for the whole. Unlike the case with respect to the Tamara documents, none of the Black Cube documents presented to me meets the criteria for a finding of litigation privilege. In the result, and by extension, I conclude that none of Black Cube's purportedly privileged communications and documents are protected by litigation privilege.

[381] At this point, I would move on to a consideration of the Psy Group documents. Almost none of those documents have been produced to me for inspection, save for those that are reflected in the Elwood Documents.

[382] I have rejected the claims to solicitor-client privilege and litigation privilege with respect to the Elwood Documents on the whole. I have no reason to believe that any of the Psy Group documents relating to Project Maple Tree is subject to solicitor-client privilege or litigation privilege based on the reasoning I applied to the balance of the Elwood Documents.

4. BLACK CUBE'S PUBLICATION BAN CLAIM

[383] Black Cube urges the court to permit them to redact any reference in any document that may tend to identify any of their agents. They depend on undercover, "pretext", investigations as a significant part of their business model.

[384] Black Cube has not, however, established the court's jurisdiction to permit such redactions. Assuming, for the sake of argument, that I have a discretion to permit the redaction of documents otherwise subject to disclosure, ought I to exercise that discretion in favour of Black Cube in the circumstances of this case? In my view, no.

[385] Presumably any discretion to permit redactions must be exercised in the interests of justice. I have no evidence that would establish why the interests of justice require the redactions sought. Nothing in Dr. Yanus' affidavit suggests, for instance, that the safety of Black Cube agents would be endangered if their identities were revealed. At best, it appears that Black Cube's business model might be impacted. This is the same business model that gave rise to Black Cube's improper conduct in this case.

[386] Undoubtedly privacy interests are in play, but no evidence was tendered about the privacy interests of the agents, nor was any specific argument made directed at those interests and how they might be balanced against other interests in play.

[387] It is also a little rich for a party to raise concerns about privacy interests when their business model involves lying to others in the hopes that they may inadvertently disclose otherwise private and confidential information. Black Cube appears to have been unconcerned about the privacy and dignity interests of former Justice Newbould or any of the West Face employees it conducted pretext interviews on. I have no doubt that Black Cube understands that if you live by the sword you die by the sword.

[388] At any rate, I am not prepared to grant the relief sought by Black Cube in the absence of a formal motion for that relief. The relief essentially amounts to a publication ban and there is a protocol in place that must be adhered to when such relief is requested. Specifically, a formal Notice of Motion must be served and notice of the motion must be provided to the media by completing and submitting the Notice of Request for Publication Ban described at Part V of the Superior Court's Consolidated Practice Direction.

[389] The redaction request is denied.

5. SUMMARY

[390] I have identified certain communications between Mr. Morris and Mr. Greenspan that are clearly subject to solicitor-client privilege. I am sure that there are other communications between the Catalyst parties and their various solicitors that are undoubtedly subject to solicitor-client privilege. I understand that the moving parties are not trying to get access to documents of that nature.

[391] With respect to the specific requests in the notices of motion, I find that:

- (a) There is no sustainable claim to privilege, whether solicitor-client or litigation privilege, over any of the Elwood Documents, including the Schedule "C" document;
- (b) There is no sustainable solicitor-client privilege or litigation privilege in any of the Tamara Global documents, Black Cube documents or Psy Group documents, save for:
 - (i) the third email from Brian Greenspan to Yossi Tanuri on September 1, 2017;
 - (ii) the email communication between Ms. Lutes and Mr. Tanuri dated September 14, 2017 produced at Tab 10 of volume one of Catalyst's Privileged Documents Brief; and,
 - (iii) any other direct communications between counsel and Tamara relating solely to the Wolfpack or Veritas actions. Again, I may be spoken to if there is any question about whether a particular document falls under this umbrella.

[392] West Face refers to the documents in issue generally as documents relating to the “Defamation Campaign”. I prefer to steer clear of that kind of language, given that it is at the core of the litigation. That said, I believe my ruling should be clear that of the documents in issue, only the ones listed in subparagraphs (b)(i), (ii) and (iii) are properly subject to a sustainable claim of privilege. Any other documents related to Project Maple Tree or Project Camouflage or to the retainers of Tamara Global, Black Cube or Psy Group more generally, are not subject to established and sustainable claims of privilege.

[393] Again, to be clear, only a small fraction of the documents were presented to me for review and consideration. I have proceeded on the basis that those documents are representative of, and serve as a proxy for, all of the documents in issue.

[394] Catalyst, Tamara Global, Black Cube and Psy Group are each ordered to produce revised Affidavits of Documents within 30 days, reflecting the substance of this ruling and shall produce, upon request and within a reasonable time, all Schedule “A” documents reflected in their revised Affidavits of Documents.

6. THE FILING OF MOTION MATERIALS

[395] There is a good deal of sensitive material filed in relation to these motions. I am directing that the parties file copies of their notices of motion with the court and that they pay the associated filing fees. In addition, the affidavits filed in support of the motions must be filed, along with any exhibits referred to in the affidavits. But those affidavits and exhibits, as well as the parties’ factums, will be sealed, subject to further order of the court.

[396] I recognize that one or another party may seek leave to appeal this ruling. The ruling contains references to documents over which privilege has been asserted. For that reason, I order that the ruling not be disseminated or published in any way, beyond counsel and the principals of the parties hereto, for a period of 30 days. If any party moves for leave to appeal this ruling within that 30 day period, then this publication ban will continue until the motion for leave has been determined by the Divisional Court. This publication ban expires if no party moves for leave to appeal within 30 days.

7. COSTS

[397] The parties are encouraged to reach an agreement on the issue of costs.

[398] Absent an agreement, the parties are invited to make written submissions on the issue of costs on a 14-day turnaround. The moving parties should serve and file their submissions by January 25, 2021 and the responding parties by February 8, 2021. Submissions should not exceed 3 pages in length, not including Cost Outlines and caselaw.



Boswell J.

TAB 10

CITATION: Fournier v. Mercedes-Benz Canada, 2012 ONSC 2752
COURT FILE NO.: CV-10-4306-00
DATE: 2012 05 16

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
FOURNIER LEASING COMPANY	) B. Osler and G. Hotz for the Plaintiffs
LTD., CANADIAN AUTO)
ASSOCIATES LTD. and WESTPORT)
MOTOR CARS LTD.)
)
	Plaintiffs)
- and -)
)
)
MERCEDES-BENZ CANADA INC.,	) D. Kent and M. Seers for the
MERCEDES-BENZ USA LLC, and	) Defendants Mercedes-Benz Canada
BMW CANADA INC., and THE	) Inc. and Mercedes-Benz USA LLC
ATTORNEY GENERAL OF CANADA)
	) A. McKinnon for the Defendant BMW
	) Canada Inc.
)
	) B. Brucker and V. Paolone for the
	) Defendant The Attorney General of
	) Canada

Reasons for Decision on Rule 21 Motion

K.M. van RENSBURG J.

A. Introduction

[1] This proposed class proceeding concerns claims by the plaintiffs who are car dealers who imported vehicles into Canada. The plaintiffs seek to represent a class of persons in Canada who imported Mercedes Benz, BMW and Mini vehicles into Canada from the United States. While the class period is not

- 2 -

specifically identified, it appears from the Fresh Statement of Claim that the impugned conduct occurred between August 2006 and July 4, 2008 for the Mercedes defendants and November 27, 2007 and July 4, 2008 for BMW.

[2] By way of overview, the plaintiffs allege that, at the request of Mercedes, in August 2006 Transport Canada's admissibility list for vehicles imported from the U.S. to Canada was revised to state that the manufacturer had not provided admissibility information to Transport Canada, that modifications to Mercedes vehicles to meet Canadian standards had to be performed by an authorized Mercedes dealer, and that a letter of admissibility from Mercedes was required to import Mercedes vehicles. It is alleged that similar changes to Transport Canada's admissibility list were made at the request of BMW in November 2007 for BMW and Mini vehicles.

[3] As a result of the changes to the admissibility list, Mercedes and BMW were able to withhold admissibility and recall information until importers paid fees for the information and effected unnecessary vehicle modifications which were made by Mercedes and BMW dealers. This allowed Mercedes and BMW to maintain artificially high prices for the modification and certification of imported vehicles and to allocate the market for modifications of Mercedes vehicles to Mercedes and of BMW vehicles to BMW. This continued until the admissibility list in respect of such vehicles was revised on July 4, 2008 to remove the objectionable statements, and to return to the pre-August 2006 statements in relation to such vehicles.

[4] The Amended Amended Statement of Claim that was before the court at the commencement of the motion alleged that the defendants conspired with the Attorney General of Canada (the "AG"), representing Transport Canada and Canada Border Services Agency ("CBSA"), and their respective dealers, to force Canadians to pay for unnecessary modifications and certifications on vehicles imported from the United States. There were also allegations of misrepresentation against the AG, as well as allegations of violations of consumer protection and competition laws.

[5] This decision is in respect of a motion by the defendants Mercedes-Benz Canada Inc. ("Mercedes Canada"), Mercedes-Benz USA LLC ("Mercedes US") (together the "Mercedes defendants") and BMW Canada Inc. ("BMW") to strike the claims against them in this action pursuant to rules 21 and 25.11.

[6] There was also a motion to strike brought at the same time by the AG, however during the course of argument plaintiffs' counsel advised that they would be seeking a dismissal on consent of the claims against the AG and

certain amendments to the Amended Amended Statement of Claim respecting the AG's involvement in the matters in dispute.

[7] An order was made dismissing the claims by the plaintiffs against the AG without costs. The order was made on the basis that the dismissal did not bind other parties from any proceeding involving the same or related subject matter. The Amended Amended Statement of Claim was amended on consent, and the pleading at issue is now the Fresh Statement of Claim (the "Claim"), which continues to contain references to, but no allegations of wrongdoing against, the AG. Also on consent references in the pleadings to "Volvo" vehicles were removed from the pleading.

[8] In the current version of the pleading there is no longer an allegation of conspiracy involving the government. There are no longer any pleadings of misrepresentation, at least as a separate cause of action, as the AG was the only party originally against whom such allegations were made. What remains of the pleading is at times awkward and disjointed, because of the deletion of certain paragraphs, sentences and words. The Claim purports to plead the following causes of action against the remaining defendants:

- (a) a civil conspiracy between BMW Canada and its dealers (who are not named as defendants in the action);
- (b) a civil conspiracy between the Mercedes defendants and their dealers (who are not named as defendants in the action); (Note that there is no allegation of a conspiracy between BMW and the Mercedes defendants);
- (c) breach of s. 17 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A.;
- (d) conduct contrary to Part VI of the *Competition Act* R.S.C.1985 c. C-34;
- (e) interference with economic interests;
- (f) unjust enrichment; and
- (g) waiver of tort.

B. Facts

[9] In a motion to strike for failure to disclose a cause of action, the facts as pleaded are assumed to be true, unless they are manifestly incapable of being

proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 455. What follows are the material facts as pleaded in the Claim.

1. Importing Vehicles from the U.S. into Canada

[10] The action relates to the importation of motor vehicles from the United States into Canada. With the Canadian dollar close to par against the American dollar, vehicle prices are generally lower in the United States.

[11] Transport Canada operates a program to allow Canadians to import vehicles from the United States. Between January 1, 2006 and June 30, 2010 more than 750,000 vehicles were imported through Transport Canada's import program. The plaintiffs were importers of BMW and/or Mercedes vehicles through this program.

[12] Mercedes Canada sells, markets and services Mercedes vehicles in Canada, while Mercedes US sells, markets and services Mercedes vehicles in the U.S. BMW sells, markets and services BMW vehicles in Canada.

[13] Since 2005, the same or similar vehicles sold and distributed by the Mercedes defendants and BMW were priced 10 to 35 per cent higher than the same or similar make and model vehicles sold in the United States. There was consumer demand for the purchase and importation of such vehicles from the United States because of lower prices in the U.S.

2. The Regulated Process

[14] The importation of vehicles from the U.S. is a regulated process. Canada has enacted laws and regulations which, if followed, entitle a person to import a vehicle from the U.S. into Canada through Transport Canada's import program, known as the RIV program, which was established in 1995. The laws and regulations are administered by Transport Canada and CBSA.

[15] When a vehicle is imported from the U.S. into Canada it must be inspected and certified to ensure that the vehicle is compliant with Canadian motor vehicle safety standards. Such standards are similar to American motor vehicle safety standards, although there are some minor differences. Most American vehicles can be easily modified to meet Canadian standards and many vehicles do not need any modifications at all. The inspection and certification are carried out by Transport Canada through a contractor under the *Motor Vehicle Safety Act* (the "Act").

- 5 -

[16] A person is entitled to import a motor vehicle into Canada from the U.S. as long as the importation complies with the Act and the regulations prescribed thereunder (the “regulations”).

[17] Under s. 7(2) of the Act, a person may import a vehicle from the U.S. as long as the importer makes a declaration to Transport Canada in the prescribed form that the vehicle will be brought into conformity with Canadian safety standards in place at the time the vehicle was originally manufactured, and the vehicle will be certified as conforming to Canadian safety standards in the prescribed form and manner by a person designated by the regulations. The person designated by the regulations to certify that imported vehicles comply with Canadian safety standards is known as the Registrar of Imported Vehicles (“RIV”). RIV is currently operated by a private corporation, Livingston International Inc.

3. The RIV Program

[18] The prescribed importation process is set out in detail in the Act and regulations. An importer must follow certain procedures which include:

- (a) Confirming that the vehicle is on a list maintained by Transport Canada of vehicles that are admissible into Canada from the United States on the basis that the vehicles can be modified to meet Canadian safety standards;
- (b) Confirming that there are no outstanding recalls on the vehicle issued by the United States national Highway Traffic Safety Administration that have not yet been repaired;
- (c) Determining the modifications required to bring the vehicle into conformity with Canadian safety standards;
- (d) Submitting to CBSA proof of ownership of the vehicle;
- (e) Filling out a Transport Canada document, known as Form 1, that is submitted by the importer to CBSA, which requires the importer to provide certain information about the vehicle and the importer, such as the vehicle identification number, type of vehicle, make, model, importer name, address and telephone number;
- (f) Obtaining verification from CBSA that the vehicle is not inadmissible for importation into Canada – i.e. the vehicle is not listed as inadmissible on Transport Canada’s list of admissible vehicles;

- (g) Paying to CBSA the mandated fee for RIV which is \$195 plus tax. Part of the fee is held in trust by RIV for Transport Canada;
- (h) Submitting to CBSA proof that there are no outstanding recalls on the vehicle that have not yet been repaired. Proof that there are no outstanding recalls and Form 1 are delivered by CBSA to RIV;
- (i) Obtaining an inspection form from RIV (Form 2), which sets out the modifications required to bring the vehicle into compliance with Canadian safety standards;
- (j) Completing any modifications to the vehicle required to bring the vehicle into compliance with Canadian safety standards, which modifications may be completed by any vehicle repair service provider;
- (k) Taking the vehicle to an RIV inspection centre to enable RIV or its agent to determine if the vehicle conforms to Canadian safety standards. Necessary modifications can be performed by the inspection centres;
- (l) Obtaining a certified Form 1 from the inspection centre to confirm that the vehicle has been inspected and has been certified as complying with Canadian safety standards;
- (m) Obtaining a certification label from RIV to affix to the vehicle; and
- (n) Presenting the certified Form 1 to a provincial vehicle licensing office to enable the importer to license the vehicle for use in Canada.

4. The Admissibility List

[19] Importers were directed by Transport Canada on its website and elsewhere to consult the Transport Canada admissibility list prior to import to determine if the vehicle could be imported into Canada and to follow the directives on the admissibility list. The website stated that there are questions that need to be dealt with before a vehicle is imported and that the steps that importers must take are listed on the RIV website, which stated that “before you import, make sure you check your vehicle against Transport Canada’s list of vehicles admissible from the United States”.

[20] The Claim alleges that Transport Canada required importers to rely on and follow the directives on the admissibility list, and that importers relied on the

accuracy and truthfulness of the statements made by Transport Canada on the admissibility list.

[21] The admissibility list contained statements relating to the admissibility of Mercedes, BMW and Mini vehicles. The admissibility list was populated from information provided by vehicle manufacturers. The admissibility list shows which vehicle models can be imported from the U.S. on the basis that they can be certified by RIV as meeting Canadian safety standards, and which vehicle models are inadmissible because they cannot be certified as meeting such standards.

5. Allegations re: Changes to the Admissibility List

[22] It is alleged that in 2006, in an effort to deter Canadians from importing vehicles from the U.S. where prices were lower, Mercedes demanded that Transport Canada remove all of its vehicles from the admissibility list. Transport Canada initially had reservations about this demand. On June 28, 2006, Pierre Tremblay, Chief, Importation and Audit Inspection, Transport Canada, sent Manfred Mokry, Manager, Product Compliance & VPC Coordination, Mercedes, an email stating:

As I explained to you last week, we cannot have a list of vehicles that are admissible from the United States and then have the same vehicles denied entry by the manufacturer of the vehicle.

[23] Notwithstanding Mr. Tremblay's concerns and that Mercedes had provided complete information about the admissibility of its vehicles, Transport Canada removed all of the Mercedes vehicles from the admissibility list. Transport Canada ultimately changed its admissibility list to state, "The manufacturer has not provided information to Transport Canada on the admissibility of Mercedes-Benz vehicles".

[24] It is alleged that Mercedes was adamant about preventing Canadians from buying their vehicles in the United States and importing them into Canada. Mercedes went back to Transport Canada and demanded that vehicles not be allowed into Canada unless Mercedes granted permission for an import in the form of a "letter of admissibility". The term "letter of admissibility" was branded by Mercedes, and there has never been any requirement in the Act for a letter of admissibility from any manufacturer. In August 2006 Transport Canada changed the admissibility list to state, "A formal letter of admissibility for Mercedes Benz must be presented to CBSA offices at the time of importation".

[25] By November 27, 2007 BMW had asked Transport Canada to make the same statements on the admissibility list for BMW and Mini vehicles. Transport

Canada agreed to remove all BMW and Mini vehicles from the admissibility list and stated, "The manufacturer has not provided information to Transport Canada on the admissibility of BMW and Mini vehicles".

[26] The admissibility list also stated that modifications of Mercedes, BMW and Mini vehicles had to be done by an authorized Mercedes or BMW dealer respectively. The admissibility list did not contain any such representation for any other make of vehicle.

[27] On July 4, 2008, after the issuance of this action, Transport Canada removed the statement that it had no information about Mercedes, BMW and Mini vehicles from its admissibility list and the statement about modifications having to be done by an authorized dealer and the statement about admissibility letters. All of the Mercedes, BMW and Mini vehicles that Transport Canada knew were admissible into Canada were returned to the list.

[28] BMW currently acknowledges on its website that letters of admissibility are not required, while Mercedes acknowledges that such letters are not required, but continues to misrepresent that letters of admissibility are "recommended".

[29] The misrepresentations on the admissibility list gave Mercedes and BMW the ability to deny entry into Canada of vehicles that could properly be imported through the RIV program unless importers paid fees and charges to these companies for unnecessary certifications and vehicle modifications, including modifications to instrument clusters, heater control modules and daytime running lamps. BMW and Mercedes withheld letters of admissibility unless the unnecessary modifications were completed and fees were paid to them by importers. It is alleged that the modifications were not required to bring the vehicles into compliance with Canadian standards.

[30] From November 27, 2007 onward, Transport Canada and CBSA required that letters of admissibility be presented at the border by importers of Mercedes, BMW and Mini vehicles.

[31] BMW and Mercedes charged a standard fee to issue a letter of admissibility. Some vehicles required no modification at all, but BMW still charged a fee to issue a letter of admissibility.

[32] It is alleged that vehicles were physically prevented from entering Canada unless importers had paid Mercedes and BMW the fees for unnecessary modifications and certifications. The plaintiffs and other importers acted reasonably in following the directives and instructions on the admissibility list.

6. Allegations of Wrongdoing by the Defendants

[33] I turn now to consider the specific causes of action alleged against the remaining defendants. As stated earlier, the action as originally framed alleged misrepresentation by Transport Canada in connection with the statements about Mercedes, BMW and Mini vehicles on the admissibility list. There were also allegations of negligence against Transport Canada and CBSA in connection with the refusal of entry of vehicles that were in fact admissible. There were also allegations of conspiracies between Transport Canada, CBSA and each of Mercedes and BMW and their dealers. There are now no allegations of misrepresentation as a cause of action against any of the remaining defendants and the conspiracy allegations do not include the AG as a defendant or as a participant in the alleged conspiracies.

[34] In support of the claims of civil conspiracy, breach of Part VI of the *Competition Act* and intentional interference with economic interests, certain facts are alleged as follows:

Since 2005 senior executives and employees of the defendants and unnamed co-conspirators, acting in their capacities as agents for the defendants and unnamed co-conspirators, engaged in communications, conversations and attended meetings with each other at times and places, some of which are unknown to the plaintiffs, and as a result of the communications and meetings of the defendants and unnamed co-conspirators, they unlawfully agreed and/or arranged to:

- (a) *withhold recall information from importers until they agreed to pay fees for the recall information and until they paid fees for unnecessary modifications;*
- (b) *force vehicle importers to pay, to the Mercedes defendants and BMW and their dealers, fees for making unnecessary modifications and certifications to vehicles that already complied with Canadian safety standards;*
- (c) *fix, increase and/or maintain at artificially high levels the prices at which modifications and certifications for importation of Mercedes, BMW and Mini vehicles were sold in Canada;*
- (d) *allocate the entire market for modifications for importation of BMW and Mini vehicles to BMW; and*
- (e) *compel vehicle importers to pay fees and charges, including artificially high fees and charges, to the Mercedes defendants and*

BMW for information about recalls on their vehicles notwithstanding that the Mercedes defendants and BMW are obliged to remedy recalls and provide information about recalls on American and Canadian vehicles at no charge to vehicle owners.

[35] The italicized words, which were included in the Amended Statement of Claim, appear to have been unintentionally deleted from the Fresh Statement of Claim. For the purpose of deciding this rule 21 motion, I assume that these paragraphs form part of the current pleading, as this is the only place where the substance of the unlawful agreement or arrangement appears to be pleaded. (Counsel have since confirmed that the italicized words were unintentionally deleted and should form part of the pleading.)

[36] The Claim alleges the following acts in furtherance of the conspiracy, combination, agreement and/or arrangement (again, the italicized words were unintentionally deleted and should form part of the pleading):

In furtherance of the conspiracy, combination, agreement and/or arrangement, during this period, the following acts were done by the defendants, their servants and agents and unnamed co-conspirators:

As between the Mercedes defendants and their dealers:

- i. They knowingly made misrepresentations to vehicle importers related to requirements for importing Mercedes vehicles into Canada;
- ii. They imposed unnecessary modifications, procedures, fees and costs that were not required by law on importations of Mercedes vehicles;
- iii. They unlawfully transferred the inspection and certification authority for imported vehicles prescribed by law to Mercedes;
- iv. They knowingly compelled importers of Mercedes vehicles to pay fees to the Mercedes defendants for providing recall information on their vehicles notwithstanding that the Mercedes defendants had an obligation to remedy recalls and provide information about recalls on these vehicles at no charge to importers;
- v. They agreed that the dealers would no longer provide recall information to importers (which they previously provided at no charge) to force importers to buy recall information from the

- Mercedes defendants and to force importers to pay for unnecessary modifications in order to obtain recall information;
- vi. They agreed to charge and collect unlawful estimate fees from consumers;
 - vii. They instructed members of the conspiracy not to divulge the existence of the conspiracy; and
 - viii. They disciplined any corporation or person who failed to comply with the conspiracy.

[37] Essentially the same allegations are made against BMW, with the exception of the allegation about the collection of unlawful estimate fees from consumers.

[38] It is alleged that the purpose of these conspiracies, combinations, agreements and/or arrangements was to illegally increase profits earned by the Mercedes defendants and BMW on modifying, certifying and providing recall information for vehicles imported into Canada from the United States.

[39] It is alleged that the defendants had sufficient market power to behave independently of the market and intentionally engaged in particularly injurious behaviour likely to injure competition, which did indeed lessen competition substantially. The defendants were aware, or ought to have been aware, that their conspiracies, combinations, agreements and/or arrangements, if implemented, would result in an undue restraint of competition.

[40] It is alleged that the acts were in breach of Part VI of the *Competition Act*, in particular s. 45(1) and render the defendants liable to pay damages pursuant to s. 36 of the *Competition Act*. In the latest amendment to the Claim the plaintiffs also rely on s. 52(1) of the *Competition Act*, which is also in Part VI.

[41] It is alleged that the participation of Mercedes and BMW dealers was essential because importers needed certain recall information to pass the RIV inspection. Importers were forced to obtain the recall information from the Mercedes defendants and BMW and they would only supply the recall information after importers paid for unnecessary modifications and certifications.

[42] There are also allegations of breaches of sections 17(1) and 57(3) of the *Consumer Protection Act*, unjust enrichment, waiver of tort and constructive trust (which causes of action and facts pleaded in support are described later in these reasons).

7. Claim for Damages

[43] The Claim alleges that the plaintiffs and other importers have suffered damages as a result of the acts of the defendants, which had the effect of unreasonably raising, maintaining and stabilizing prices of modifications, certifications and recall information on imported Mercedes, BMW and Mini vehicles at artificial and non-competitive levels. The plaintiffs and other importers paid for work that was unnecessary and/or paid more for modifications, certifications and recall information on such vehicles, suffering injury to their business and property, and damages.

[44] The plaintiffs claim damages on an aggregate or individual basis. They also claim punitive damages.

C. Test on a Rule 21 Motion

[45] In a rule 21 motion, the court must be satisfied that it is plain and obvious that the allegations pleaded are incapable of supporting a cause of action and that the claim cannot succeed: *Hunt v. Carey*, [1990] 2 S.C.R. 959. The statement of claim must be read generously, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies: *Apotex Inc. v. Hoffmann La-Roche Ltd.*, [2000] O.J. No. 4732 (C.A.) at para. 5.

[46] The usual practice is to grant the plaintiff leave to amend unless it is clear that the plaintiff cannot improve its case by any further and proper amendment: *AGF Canadian Equity Fund v. Transamerica Commercial Finance Corp. Canada* (1993), 14 O.R. (3d) 161 (Gen. Div.) at 173.

D. Competition Act Claims

[47] Section 36 of the *Competition Act* provides for a statutory cause of action for a private party who has suffered damage as a result of conduct contrary to the criminal provisions of the Act (Part VI). Even where there are no criminal charges, a plaintiff may seek recovery by proving breach of such provisions and resulting damages.

[48] The conspiracy provisions of the *Competition Act* were amended in March 2010 such that they apply only to conspiracies between competitors. At the relevant time however section 45(1) provided as follows:

Everyone who conspires, combines, agrees or arranges with another person

- (a) To limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

- (b) To prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
- (c) To prevent or lessen, unduly, competition in the production, manufacture purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
- (d) To otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

[49] Para. 74 of the Claim alleges two conspiracies contrary to the *Competition Act* – one between the Mercedes defendants and their dealers, and the other between BMW and its dealers. The facts relied upon in support of the *Competition Act* claims are set out in paras. 74 to 81 of the Claim as well as the additional subparagraphs and wording that were unintentionally deleted, to which I have referred earlier in these reasons.

[50] Originally conduct by Transport Canada and CBSA was alleged to have been an integral part of the conspiracies. A key objection to the pleading at the hearing of the motion, was that the Crown cannot offend the *Competition Act*. These references have been deleted from the Claim.

[51] The remaining objections to the *Competition Act* conspiracy pleadings are that (a) the claim cannot succeed because the acts alleged were “regulated conduct” and therefore not unlawful; (b) the claim does not allege the necessary element of allocation of markets or impact on competition in Canada; and (c) the claim cannot succeed where the conspirators of BMW are affiliates.

1. The “Regulated Conduct” Defence

[52] The defendants assert that the “regulated conduct” doctrine or defence would apply to exclude any action taken pursuant to a valid regulatory scheme, such that the conduct of the defendants, authorized by the government under a comprehensive regulatory scheme, cannot fall afoul of the *Competition Act*.

[53] Ordinarily, a court will not strike a pleading of a cause of action simply because a defendant may be able to establish a particular defence: See, for example, *Mansoor Electronics Ltd. v. BCE Mobile Communications Inc.*, [1995] F.C.J. No. 1208 (F.C.), where Richard J. refused to strike a claim under the *Competition Act* on the basis that the regulated conduct defence should be pleaded in the Statement of Defence and the court should consider its application on such facts as might be proven at trial (at para. 23). In this case, however, the defendants assert that it is plain and obvious that the defence will succeed; that

is, that they are exempt from Part VI of the *Competition Act* by virtue of the fact that the importation of vehicles from the U.S. into Canada is subject to a comprehensive legislative and regulatory scheme.

[54] In *R. v. Independent Order of Foresters* (1989), 26 C.P.R. (3d) 229 (Ont. C.A.) at 233, the “regulated industries” doctrine was defined as follows:

The doctrine simply means that a person obeying a valid provincial statute may in certain circumstances, be exempted from the provisions of a valid federal statute. But there can be no exemption unless there is a direction or at least an authorization to perform the prohibited act.

[55] In that case, the accused had been charged under the *Combines Investigation Act* with having made misleading advertisements relating to the recruitment of insurance sales personnel. While upholding the convictions, the Court of Appeal concluded that the trial judge had erred in applying the regulated industry doctrine where the defendant was subject to provincial control and regulations under Ontario’s *Insurance Act*. The court stated, at p. 234:

There is no suggestion in the case at bar that the *Insurance Act* authorizes, much less directs [the defendant] to give false or misleading representations or to make any representations that might be deemed false or misleading, to the public.

[56] In *Industrial Milk Producers Association v. British Columbia (Milk Board)*, [1989] 1 F.C. 463 (F.C.), at para. 36, Reed J. referred to the regulated conduct defence as follows:

...I accept counsel for the plaintiffs’ argument that it is a regulated industry defence, not an exemption which is pertinent. Indeed as I read the cases it is a regulated *conduct* defence. It is not accurate merely to identify an industry as one which is regulated by federal or provincial legislation and then conclude that all activities carried on by individuals in that industry are exempt from the *Competition Act*. It is not the various industries as a whole, which are exempt...but merely *activities* which are required or *authorized* by the federal or provincial legislation as the case may be. If individuals involved in the regulation of a market situation use their statutory authority as a spring board (or disguise) to engage in anti-competitive practices beyond what is authorized by the relevant regulatory statute then such individuals will be in breach of the *Competition Act*. (emphasis in original)

[57] In *Garland v. Consumers’ Gas Co.*, [2004] 1 S.C.R. 629, the Supreme Court considered the application of the regulated conduct defence in the context of a consumer class action for restitution of late payment penalties alleged to have violated s. 347 of the *Criminal Code* (respecting criminal rates of interest), but collected pursuant to orders of the Ontario Energy Board. The court held that

the defence only applies where the legislation expressly or by necessary implication contemplates that the impugned conduct will be permitted (at paras. 77 to 79).

[58] The authorities are clear. In order for the regulated conduct exception or defence to apply, the actions in question must have been directed or authorized by the statute or regulation. The fact that the importation program is administered by Transport Canada and the CBSA under a legislative scheme is not sufficient. The defendants were unable to point to any express provision or necessary implication in the regulatory regime that would authorize or direct them to engage in the conduct they are alleged by the plaintiffs to have undertaken, that is to pressure the government agency to insert false statements in the admissibility list, to deny Canadian importers access to recall information, and to prevent importers from using whomever they wish to perform vehicle modifications.

[59] It is not plain and obvious that the regulated conduct defence will apply to preclude the claims under the *Competition Act*, and this ground of attack on the pleading must fail.

2. The Claim Cannot Succeed because it Deals with Lessening Competition in the U.S. Market

[60] The defendant BMW asserts that, while the Claim alleges that its anti-competitive conduct had an impact on markets in Canada, a plain reading of the Claim indicates that the plaintiffs are describing the market for modifications in the United States. The allegation is that, as a result of the changes to the admissibility list and the CBSA's actions, BMW was able to prevent vehicles from being imported into Canada until necessary modifications were made. BMW argues that the necessary implication is that the modifications would have been performed in the U.S. and therefore would not have impacted the Canadian market for repair and modifications. If this is the case, an essential element of the offence would be missing, that the conduct affected competition in Canada.

[61] The plaintiffs contend that the pleading describes the market for modifications in Canada. I agree. The plaintiffs allege that modifications to bring a vehicle into compliance with Canadian safety standards can be done by any vehicle repair service provider. They specifically allege that modifications can be performed by the RIV inspection centres, all of which are located in Canada. As such, the Claim should not be read as a complaint about the defendants' conduct affecting the U.S. market. The defendants' conduct is alleged to have affected the Canadian market, including the market for repairs and modifications. This challenge to the pleading cannot succeed.

3. The Claim Cannot Succeed where Co-conspirators are Affiliates

[62] Former s. 45(8) of the *Competition Act* provides:

Subsection (1) does not apply in respect of a conspiracy, combination, agreement or arrangement that is entered into only by companies each of which is, in respect of every one of the others, an affiliate.

It is asserted by BMW that, on a plain reading of the Claim, what is alleged is a conspiracy between BMW and its dealers who are affiliates, and that this cause of action must of necessity fail.

[63] At this stage the identity of the dealers who are alleged to have conspired is unknown. The Claim alleges conspiracies between the Mercedes defendants and their dealers and BMW and its dealers. In furtherance of the conspiracies, among other things, the dealers are alleged to have agreed to no longer provide recall information to importers without charge.

[64] BMW asserts that elsewhere in the Claim the plaintiffs plead that BMW has been unjustly enriched by the unnecessary modifications performed by its dealers, and this enrichment would only be possible if BMW and its dealers are affiliates. While this may be the case, it is something that can be raised by way of defence. BMW does not assert that all of its dealers are in fact affiliates, and this is not a necessary inference from the pleading. If BMW conspired only with its affiliated dealers, then the *Competition Act* claim would be sure to fail. At this stage however it is not plain and obvious that the dealers referred to are all affiliates, and that a s. 45(8) defence will be made out.

[65] The claims under the *Competition Act* will not be struck out.

E. Civil Conspiracy Claims

[66] The cause of action in civil conspiracy is pleaded at paras. 82 and 83 of the Claim. The plaintiffs plead as follows:

82. The plaintiffs repeat and rely upon the facts set out in paragraphs 74 to 81 and state that the acts particularized therein were unlawful acts directed towards the plaintiffs and other importers of Mercedes, BMW and Mini vehicles, which unlawful acts the defendants knew in the circumstances would likely cause and did cause injury, damages and losses to the plaintiffs and the other importers of Mercedes, BMW and Mini vehicles and the defendants are liable for the tort of civil conspiracy.

83. Alternatively, the primary purpose of the conduct and acts of the Mercedes defendants and BMW was to cause injury and financial losses to the plaintiffs and other importers.

[67] The facts relied upon are those set out in paragraphs 74 to 81 (again, including the subparagraphs and additional wording inadvertently omitted from the latest amendment to the Claim referred to earlier in these reasons).

[68] The defendants raise two objections to the pleading of civil conspiracy in this case. They assert that the Claim does not properly plead either or both types of civil conspiracy, and that the tort has not been pleaded with sufficient particularity.

1. Is the Tort of Civil Conspiracy Properly Pleaded?

[69] According to the leading case of *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, the tort of civil conspiracy can be committed in two ways:

- (a) Where the defendants' conduct is itself unlawful, directed at the plaintiff, and will foreseeably result in harm to the plaintiff; or
- (b) Where the predominant purpose of the defendants' conduct is to injure the plaintiff, regardless of whether the means used are lawful or unlawful.

[70] In *Dale v. Toronto Real Estate Board*, 2012 ONSC 512 (S.C.J.), K. Campell J., citing the relevant authorities, described the elements of the two types of conspiracy as follows (at para. 49):

...[T]he elements of "predominant purpose conspiracy" require the plaintiff to establish that: (1) the defendants acted in combination, that is, in concert, by agreement or common design; (2) the predominant purpose of the defendants was to intentionally harm the plaintiff; and (3) the defendants' conduct caused harm to the plaintiff. The elements of "unlawful means conspiracy" require the plaintiff to establish that: (1) the defendants acted in combination, again that is, in concert, by agreement or common design; (2) the defendants committed some unlawful act such as a crime, a tort, or breached some statute; (3) the defendants' conduct was directed towards the plaintiffs; (4) the defendants knew or ought to have known that injury to the plaintiffs was likely to occur from their unlawful act; and (5) the defendants' unlawful conduct in furtherance of their conspiracy caused harm to the plaintiff. See: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-472; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 35-43; *Lombardo v. Caiazzo*, [2006] O.J. No. 2286 (C.A.) at para. 16-17; *Robinson v.*

Medtronic, Inc., [2009] O.J. No. 4366 (S.C.J.) at para. 85-120; *Harris v. GlaxoSmithKline Inc. et al.* (2010), 106 O.R. (3d) 661 (C.A.) at para. 39-51; *Agribrands Purina Canada Inc. v. Kasamekas* (2011), 106 O.R. (3d) 427 (C.A.) at para. 24-43.

[71] In this case the plaintiffs rely on both types of civil conspiracy. The question is whether it is plain and obvious from the pleading that the tort will not be made out.

a. Unlawful Conduct Conspiracy

[72] For defendants to be liable for the tort of unlawful conduct conspiracy, a plaintiff must prove that (a) the conspirators acted in combination; that is, in concert, by agreement or with a common design; (b) their conduct is unlawful; (c) their conduct is directed towards the plaintiffs; (d) the conspirators should know that, in the circumstances, injury to the plaintiffs is likely to result; and (e) their conduct causes injury to the plaintiffs: *Agribrands Purina Canada Inc. v. Kasamekas* (2011), 106 O.R. (3d) 427 (C.A.), at para. 26.

[73] The defendants assert that the requirement that the defendants engaged in unlawful conduct cannot be met in this case.

[74] “Unlawful conduct” for the purpose of the tort of conspiracy need not be independently actionable, but must be conduct that is a tort, breach of statute or breach of contract. It is not sufficient that the conduct is something that the defendants are “not at liberty to do”: *Agribrands*, at paras. 36 to 38.

[75] Paragraphs 74 to 81 of the Claim (including the passages that were unintentionally deleted in the last revision of the pleading), allege conduct by the defendants and their dealers in violation of the *Competition Act* and the *Consumer Protection Act*. Paragraph 82 of the Claim pleads that the acts were “unlawful acts directed towards the plaintiffs and other importers...which unlawful acts the defendants knew in the circumstances would likely cause and did cause injury, damages and losses”. I am satisfied that the pleading discloses allegations of unlawful conduct by the defendants and their dealers, who are the alleged parties to the conspiracies pleaded, as well as all of the other elements of the tort necessary to plead a cause of action of unlawful conduct conspiracy.

b. Unlawful Injury Conspiracy

[76] The defendants assert that the Claim does not disclose a claim for conspiracy to injure. This type of conspiracy requires that the defendants’ predominant purpose was to harm the plaintiffs. Where the predominant purpose is to promote legitimate self-interest, the unlawful purpose conspiracy will not

succeed, even if it predictably causes damage to another person: *Harris v. GlaxoSmithKline Inc.*, [2010] O.J. No. 5546 (C.A.), at paras. 39 and 44, leave to appeal to S.C.C. denied [2011] S.C.C.A. No. 85. To be predominant, a purpose must be the defendant's chief or principal purpose. Actions taken for the purpose of protecting a party's trade or business interests are not actionable as conspiracy to injure.

[77] In this case the plaintiffs plead in para. 75 of the Claim:

The purpose of these conspiracies, combinations, agreements and/or arrangements [was] to illegally increase profits earned by the Mercedes defendants and BMW on modifying, certifying and providing recall information for vehicles imported into Canada from the United States.

[78] This pleading of the purpose of the conspiracies is inconsistent with the general allegation in para. 83 that the "primary purpose" of the conduct was to cause injury and financial losses to the plaintiffs and other importers. Read as a whole, the Claim alleges that the conduct of the defendants and their co-conspirators was for economic gain, to preserve for themselves the Canadian market for BMW, Mini and Mercedes vehicles, and to dissuade Canadians from purchasing such vehicles in the U.S. and importing them into Canada by imposing additional and unnecessary costs on the imported vehicles.

[79] The Claim alleges that the defendants imposed unnecessary fees for modifications, estimates and certifications, compelled and forced importers to pay for recall information and modifications, and increased the defendants' profits. There is no suggestion from the facts pleaded that the object of the conspiracy was to cause harm to the plaintiffs and other importers as an end in itself. The fact that an alternative purpose is pleaded in general terms in one paragraph of the Claim does not assist, where the Claim, read as a whole, makes it clear that the plaintiffs are alleging a predominant purpose of self-interest, and not to harm the plaintiffs, or as the plaintiffs allege in their factum, to "punish" them.

[80] The pleading of unlawful injury conspiracy contained in para. 83 of the Claim is struck without leave to amend.

2. Is the Tort of Conspiracy Pleaded with Sufficient Particularity?

[81] A pleading of the tort of conspiracy must include the following elements: the parties and their relationship; an agreement to conspire; the precise purpose or objects of the conspiracy; the overt acts alleged to have been done by each conspirator; and the injury and particulars of the special damages suffered by

reason of the conspiracy: *Normart Management Ltd. v. West Hill Redevelopment Co.*, [1998] O.J. No. 391 (C.A.), at para 21. In *Agribrands* at para. 26, the Court of Appeal expressed the “agreement” element more broadly, requiring that the defendants “acted in combination, that is, in concert, by agreement or with a common design”.

[82] The defendants assert that the pleading fails to properly identify the parties to each conspiracy, and that the predicate “agreement” is not properly pleaded.

[83] Paragraph 74 of the Claim refers to conspiracies between senior executives and employees of the defendants and “unnamed co-conspirators” acting in their capacities as agents for the defendants and unnamed co-conspirators. The pleading of “unnamed co-conspirators” would not meet the requirement of identifying the parties to the conspiracy and their relationship. Later however, the pleading refers to conspiracies as between each of BMW and its dealers and the Mercedes defendants and their dealers. No specific dealers are identified.

[84] As presently pleaded only one member of each conspiracy is a named defendant. This is not fatal to the pleading of conspiracy. An action in conspiracy can be maintained although it is brought against only one of the alleged conspirators, and it is not a fundamental defect where all of the co-conspirators are not named: *Dean v. Mister Transmission (International) Ltd.*, [2008] O.J. No. 4372 (S.C.J.) at para. 52, citing *Rose Park Wellesley Investments Ltd. v. Sewell*, [1973] 1 O.R. 102 (Master). In the *Mister Transmission* case Gray J. permitted the conspiracy claim to proceed against the defendants where the conspiracy was between the named defendants and their franchisees who were not specifically named. He observed that, while the “plain and obvious” test was not met, it would make it more difficult for the plaintiff to prove his case if only one of the alleged conspirators is before the court (at para. 52).

[85] With respect to the pleading of an agreement, it is sufficient that the Claim pleads that the defendants and their dealers acted in combination. The Claim clearly pleads that the defendants and their dealers unlawfully agreed and/or arranged to take certain actions that are described in the Claim, and that such actions were taken for the shared purpose identified at para. 75, to illegally increase the defendants’ profits on modifying, certifying and providing recall information for imported vehicles. Accordingly, the defendants’ challenge on this ground must fail.

F. Doctrine of Merger

[86] The defendants assert that the claim of civil conspiracy merges with the underlying causes of action under the *Competition Act* and the *Consumer Protection Act* and should accordingly be struck.

[87] The doctrine of merger provides that where a tort is alleged together with a prior agreement to commit the tort, the prior agreement “merges” in the tort. An allegation of a prior conspiracy to commit the tort “adds nothing” to a claim and is defective: *Normart Management Ltd.*, at para. 28.

[88] In *Bank of Montreal v. Tortora*, 2010 BCCA 139, the B.C. Court of Appeal held that it was appropriate to strike a civil conspiracy claim at the pleadings stage on the basis that the conspiracy claim merged with the other claims. In that case the unlawful acts alleged to support the conspiracy claim were breach of contract and breach of fiduciary duty, which were independently actionable and had been pleaded by the plaintiff against the defendants.

[89] In the present case, the unlawful conduct alleged by the plaintiffs consists of breaches of the *Competition Act* and the *Consumer Protection Act*, which may or may not be found to be independently successful as causes of action, and there is no allegation that the plaintiffs or other class members have suffered damages as a result of the conspiracy that are distinguishable from damages suffered as a result of a breach of the statutory provisions.

[90] In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para. 55, Wilson J. held that it was premature at the pleadings stage to reach a conclusion about the validity of the defendants’ claims about merger. The same approach was taken by Strathy J. in *Cannon v. Funds for Canada Foundation*, [2012] O.J. No. 168 (S.C.J.), where, after reviewing the authorities on this issue at paras. 202 to 218, he refused to strike the conspiracy claims based on merger.

[91] Similarly, in the present case, it is not plain and obvious that the conspiracy claims will stand or fall with the claims based on the breaches of statute alleged. As Strathy J. observed in the *Cannon* case, at para. 216: “It is possible...that the unlawful conduct of the defendants might be sufficient to support the underlying cause of action...but that the cause of action itself might fail for any number of reasons, leaving the cause of action for conspiracy still standing”.

[92] Accordingly, the pleading of conspiracy will not be struck on the basis of merger, which, if pleaded, may well be an issue at trial.

G. Intentional Interference with Economic Interests

[93] The claim of intentional interference with economic interests is set out in paragraphs 84 and 85 of the Claim. The plaintiffs plead that the facts set out in paragraphs 74 to 81 were unlawful acts intended to cause the plaintiffs and other importers economic loss, were intended to interfere with their business, and that, as a result of the acts of the defendants, the plaintiffs suffered economic losses.

[94] The tort of intentional interference with economic interests has the following elements: an intention by the defendant to injure the plaintiff; interference with the plaintiff's method of gaining its living or business by illegal or unlawful means; and economic loss suffered as a result. The actions of the defendant must have been targeted against the plaintiff: *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 (C.A.), at paras. 6 and 7.

[95] The defendants assert that the cause of action cannot be made out in this case because the pleading makes it clear that the defendants' actions were for the purpose of advancing their own economic interests, and not for the purpose of causing harm to the plaintiffs. The defendants also assert that the plaintiffs have failed to plead illegal conduct by the defendants.

[96] With respect to the first objection, it is not essential for this tort that the predominant purpose of the defendants was to injure. The plaintiff need only prove that the unlawful acts were directed against the plaintiff "in some measure". The defendant's predominant purpose might well have been to advance his own interest thereby rather than to injure the plaintiff: *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.) at para. 46, per Laskin J.A., citing Fleming, *the Law of Torts*, 9th ed. at p. 769. "Intentional interference with economic relations requires that the defendant intend to cause loss to the plaintiff, either as an end in itself or as a means of, for example, enriching himself": *Alleslev-Krofchak v. Valcom Limited*, 2010 ONCA 557, at para. 50.

[97] It is not fatal to the pleading that the plaintiffs specifically plead at para. 75 that the defendants' purpose was to illegally increase their profits. The Claim pleads the intention necessary for the tort of intentional interference with economic relations. It is clear from the claim that the plaintiffs plead that the conduct by the defendants was targeted toward importers of Mercedes and BMW vehicles, that the conduct was intended to cause importers to incur additional charges and expense for unnecessary repairs, estimates and letters, and that the defendants were aware of the effects of their conduct on third parties such as the plaintiffs.

[98] With respect to the second objection, the defendants assert that no “unlawful conduct” has been pleaded.

[99] The defendants’ argument centered on the “regulated conduct” defence, acknowledging that the plaintiffs had pleaded various breaches of statutes, and asserting that the conduct was nevertheless lawful because it was pursuant to a valid provincial regulatory scheme. That argument has already been addressed and dismissed earlier in these reasons. Whether the defendants engaged in unlawful conduct in relation to the plaintiffs however is not the issue. The focus is on the conduct of the defendants in relation to a third party, through whom the plaintiff was injured.

[100] In the *Alleslev-Krofchak* case, Goudge J.A. referred to the discussion of the tort of intentional interference in the House of Lords decision in *OBG v. Allan*, [2008] 1 A.C. 1 and emphasized that the essence of the tort is to “provide otherwise unavailable recovery for harm intentionally inflicted by unlawful means through the instrumentality of a third party” (at para. 57). Goudge J.A. stated at paras. 60 and 64:

...it is now clear that to qualify as “unlawful means”, the defendant’s actions (i) cannot be actionable directly by the plaintiff and (ii) must be directed at a third party, which then becomes the vehicle through which harm is caused to the plaintiff...

...any suggestion that the tort might apply where the conduct is directly actionable by the plaintiff has been displaced by subsequent jurisprudence.

[101] The court concluded that the trial judge had erred in finding that the claim of intentional interference with economic relations was made out, since the unlawful conduct relied upon amounted to defamation, which was directly actionable by the plaintiff. Similarly, in *Correia v. Canac Kitchens* (2008), 91 O.R. (3d) 353 (C.A.), the claim was dismissed in part because the unlawful means were directly actionable by the plaintiff.

[102] The definition of “unlawful conduct” for the purpose of the tort of intentional interference with economic relations has been a matter of some debate. In *Reach M.D. Inc.*, the Court of Appeal suggested that the conduct could include an act the defendant “is not at liberty to commit”; that is, an act without legal justification (at para. 50, citing Lord Denning in *Torquay Hotel Co. v. Cousins* [1968] 1 All E.R. 522 (Eng. C.A.)). Goudge J.A. in *Agribrands*, at para. 32, observed that Ontario cases may be moving toward the requirement that the conduct alleged may need to be actionable by the third party in order to be

"unlawful conduct" for the purpose of this tort, although the delineation of actionability remains to be defined.

[103] I have carefully considered the pleadings in the current version of the Claim. To the extent that the plaintiffs rely on the unlawful acts that are pleaded in paras. 74 to 81 of the Claim, these are the same facts pleaded in support of the claims under the *Competition Act* and for the tort of civil conspiracy, that are directly actionable by the plaintiff. The question is whether there is a pleading of unlawful conduct directed at a third party that causes damage to the plaintiffs, for that is the essence of the tort of intentional interference.

[104] I am required to give the pleading a broad and liberal reading. It is apparent that, elsewhere in the Claim (but not at paras. 74 to 81), the plaintiffs allege that, as a result of certain actions taken by the defendants, Transport Canada removed Mercedes, BMW and Mini vehicles from the admissibility list, and stated that a formal letter of admissibility was required from the manufacturer, and the defendants enlisted CBSA to physically prevent such vehicles from passing through the border without a letter of admissibility. Accordingly, there is a claim that the defendants acted through the instrumentality of a third party to cause harm to the plaintiffs, that would amount to a pleading of the tort of intentional interference with economic relations.

[105] It is not appropriate to strike the claim for intentional interference with economic relations, however as presently framed the pleading is deficient. Accordingly, the plaintiffs must amend the Claim to make clear what conduct against what third party is relied upon in support of this tort, and how such conduct is "unlawful".

H. Consumer Protection Act Claims

[106] The plaintiffs claim that the Mercedes defendants and BMW breached s. 17 of the *Consumer Protection Act* (the "CPA") by making false or misleading statements to them regarding modifications required to bring vehicles into compliance with Canadian standards. The plaintiffs further claim that Mercedes Canada breached s. 57(3) of the CPA by charging improper estimate fees as defined in the CPA.

[107] The CPA applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario. Since the defendants are located in Ontario the CPA would apply to vehicle importers located in all provinces.

[108] It is not alleged by the defendants that the pleading fails to assert facts relevant to each cause of action under the CPA. Rather, they assert that the CPA claims must fail as the representative plaintiffs have no standing under that legislation to make a claim.

[109] Under section 1 of the CPA, “consumer” is defined as “an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes”. It is acknowledged that the representative plaintiffs are all corporations in the business of importing cars into Canada. They were not importing cars for personal, family or household purposes. They were acting for business purposes; accordingly, they do not fall under the definition of “consumer” according to the CPA. Paragraph 103 of the Fresh Statement of Claim pleads that “some importers” in the proposed class were consumers as defined by section 1 of the CPA.

[110] The plaintiffs submit that, although the representative plaintiffs would not have a cause of action against the defendants under the CPA, the claims under that statute are nevertheless properly asserted on behalf of class members who are consumers and would therefore have such a claim.

[111] Ordinarily, the court will consider whether an individual plaintiff in an action has a cause of action against each defendant. In a proposed class proceeding, the question is more complicated. Can a claim be asserted on behalf of proposed class members where the representative plaintiff would not be able to assert such a claim? The answer to this question appears to be “yes”, provided that the representative plaintiff has a cause of action against the defendants, and the two causes of action share a common issue of law or fact.

[112] In *Ragoonianan v. Imperial Tobacco Canada Ltd.*, [2000] O.J. No. 4597, 51 O.R. (3d) 603 (S.C.J.), Cumming J. dealt with a pleading that alleged a cause of action by the representative plaintiff against only one defendant, and asserted a similar claim by putative class members against the other defendants. Cumming J. held that for each defendant who is named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant. There must be a reasonable cause of action against each defendant on the face of the pleading (at para. 50).

[113] In *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.), the representative plaintiff, a resident of Ontario, sought to advance claims for the subrogated interests of health insurers in provinces other than Ontario. Nordheimer J. held that claims can be asserted by a representative plaintiff who does not have a particular claim against the defendant, as long as there is a valid

cause of action against the named defendants. Macdonald J. for the Divisional Court agreed at (2003), 640 O.R. (3d) 208, stating at para. 33:

...the scheme of the [Class Proceedings Act] demonstrates the legislature's intention to permit a representative plaintiff, prior to the certification motion, to plead causes of action which are not the representative plaintiff's personal causes of action but which are the causes of action of members of the class, asserted by the plaintiff in a representative capacity.

[114] In *Hughes v. Sunbeam Corp. (Canada)*, [2002] O.J. No. 3457 (C.A.), the court considered a motion to strike in an action where claims were asserted against a number of manufacturers of smoke detectors, as well as other defendants. Laskin J.A. referred with approval to Nordheimer J.'s statement in *Boulanger v. Johnson & Johnson*, that "for each defendant who is named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant."

[115] The court concluded that the representative plaintiff could not claim to have a reasonable cause of action against manufacturers who did not manufacture the smoke alarm he purchased, and he could not therefore resist a rule 21.01(1)(b) motion by alleging that some as yet unknown members of a proposed class may have a cause of action against these other manufacturers if the class action is certified (referring also to the *Ragoonianan* case). The court referred to three decisions of the British Columbia Court of Appeal which suggested that courts in that jurisdiction may be more willing to let a proposed class action proceed against defendants against whom no representative plaintiff has a claim. After stating that, to the extent that the British Columbia decisions conflict with the Ontario cases of *Boulanger* and *Ragoonianan*, he preferred the reasoning in the Ontario cases, Laskin J.A. noted:

In Ontario a statement of claim must disclose a cause of action against each defendant. Thus in a proposed class action, there must be a representative plaintiff with a claim against each defendant. *Hughes*, therefore, may not maintain his action against Sunbeam, BRK Brands and Pittway.

[116] The defendants submit that the *Hughes* case is authority for the principle that "in an Ontario class action, each claim must be capable of being asserted by at least one representative plaintiff". I disagree. *Hughes* dealt with the same concern that faced the court in *Ragoonianan*; that is, whether the pleading contained a claim against each defendant by at least one named plaintiff. It was not enough that a putative class member might have such a claim. The court was not addressing the question of whether, if there is a claim against each defendant by each representative plaintiff, claims could be asserted against the

defendants on behalf of class members, notwithstanding that the representative plaintiffs would not be able to pursue such claims.

[117] This specific issue has been considered in subsequent case law. In *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277 (S.C.J.) it was alleged that the defendants were negligent in exposing class members to tuberculosis. There was a composite class comprised of several discrete groups. A claim in negligence was pleaded in respect of each of the groups. The action was certified. Cullity J. found that the representative plaintiff did not have a cause of action in negligence, but that other class members did, and permitted the claim to proceed.

[118] In *Matoni v. C.B.S. Interactive Multimedia Inc. (c.o.b. Canadian Business College)*, [2008] O.J. No. 197 (S.C.J.), Hoy J. summarized the authorities at paras. 71 to 77, and concluded that the representative plaintiffs, who had valid causes of action against the defendants under the *Business Practices Act*, could assert claims under the successor legislation, the *Consumer Protection Act*, on behalf of other class members.

[119] In *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932 (S.C.J.), Tausendfreund J. permitted claims to proceed under s. 130(1) of the *Securities Act*, notwithstanding that neither plaintiff was a prospectus purchaser in the primary market. In *Topacio v. Batac*, [2011] O.J. No. 711 (S.C.J.), Perrell J. noted, at para. 131:

Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.), at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[120] In the present case, it is not fatal that the representative plaintiffs cannot assert claims under the *Consumer Protection Act*. The substance of the s. 17 CPA claims is that the defendants engaged in unfair practices by charging for unnecessary modifications to vehicles imported into Canada, and the substance of the s. 57(3) CPA claim against Mercedes is that importers were charged a fee represented as an “estimate” prior to advising importers what modifications were required for importation and the cost of the modifications. The Claim alleges that the defendants imposed unnecessary modifications, fees and costs on the

importations, in support of the allegations of contravention of the *Competition Act* and the various tort claims. While the elements of each cause of action are distinct, the claims share common issues of fact respecting the conduct of the defendants in relation to the importation of their vehicles from the U.S. into Canada.

[121] The question at this stage is not whether the plaintiffs can adequately represent the interests of consumer members of the class. That issue will need to be addressed when a motion for certification is considered. The claim can be asserted at this stage, notwithstanding that none of the representative plaintiffs are consumers, and the CPA claims accordingly will not be struck from the Claim.

I. Unjust Enrichment, Waiver of Tort and Constructive Trust

[122] Paras. 112 to 118 of the Claim plead that the plaintiffs waive the torts and that they and other importers are entitled to recover under restitutionary principles. It is alleged that the defendants have been unjustly enriched by the receipt of artificially induced overcharges, fees paid for unnecessary modifications and certifications on the importation of vehicles into Canada, and in the case of the Mercedes defendants, on estimate fees, and that the plaintiffs and other importers have suffered a deprivation in the amount of such charges. It is alleged that the charges resulted from the defendants' wrongful or unlawful acts and there is no juridical reason justifying the retention of such charges. The plaintiffs claim that any contracts upon which the defendants purport to rely to receive the illegal charges are void and illegal. The Claim pleads that the defendants are constructive trustees in favour of the plaintiffs and other importers for the charges and fees, for the reasons asserted in para. 117.

[123] To succeed in unjust enrichment a plaintiff must demonstrate: (a) an enrichment of the defendant; (b) a corresponding deprivation suffered by the plaintiff; and (c) a lack of juristic reason for the enrichment. Juristic reasons would include "valid common law, equitable or statutory obligations": *Garland*, at para. 44.

[124] The defendants assert that it is plain and obvious that the plaintiffs will not succeed with an unjust enrichment claim because there are two clear reasons for the benefit allegedly accruing to them: (a) the alleged benefit was obtained pursuant to a validly enacted regulatory scheme, the validity of which is not challenged by the plaintiffs; and (b) the alleged benefit was obtained pursuant to contracts (with respect to the modifications), the validity of which is not challenged.

[125] The first argument is again an assertion of the regulated conduct defence. I have already determined that it is not plain and obvious that the conduct alleged by the plaintiffs was authorized or directed by the regulatory scheme; to the contrary. The essence of the claim with respect to unjust enrichment is that the defendants were gaining an economic benefit by charging for unnecessary modifications before the plaintiffs and other importers could import their vehicles into Canada. There is nothing in the scheme that the defendants could point to that would authorize such conduct.

[126] With respect to the contention that the plaintiffs do not challenge the validity of the contracts, in fact paragraphs 115 and 116 of the Claim assert that the contracts upon which the defendants purport to rely are void and illegal.

[127] The defendants also argue that, to the extent that modifications were made by their dealers, any enrichment was in favour of the dealers and not the defendants, and that it is therefore plain and obvious that the plaintiffs will not be able to establish that the defendants were unjustly enriched. The Claim asserts that the defendants charged unlawful fees, and that the dealers participated in such conduct. If, in fact, it was the dealers and not the defendants that benefited, then the defendants will be able to successfully defend against a claim of unjust enrichment on this basis. Again, this is something that can be asserted by way of defence. It is not plain and obvious from the pleading that the defendants would not have been enriched, directly or indirectly, as a result of the conduct alleged.

[128] In waiver of tort, the plaintiff gives up the right to sue in tort but seeks to recover on the basis of restitution, claiming the benefits the wrongdoer has derived from the wrongful conduct regardless of whether the plaintiff has suffered damages or not: *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96. Whether waiver of tort is an independent cause of action or a remedy, the plaintiffs have pleaded the elements of waiver of tort and facts to support their claim for it, as part of their claim for restitution in paras. 112 to 118 of the Claim. The pleading of waiver of tort will not be struck from the Claim.

J. Conclusion

[129] The defendants' motion to strike is allowed in part. Paragraph 83 of the Claim which pleads unlawful purpose conspiracy is struck out without leave to amend. The plaintiffs are at leave to amend the Claim with respect to the pleading of intentional interference with economic interests as noted in para. 105 of these reasons, and to amend the Claim to include the wording italicized at paras. 34 and 36 of these reasons. The motion is otherwise dismissed.

- 30 -

[130] If the parties are unable to agree on costs, I will receive brief written submissions (including a costs outline from any party seeking costs) as follows: the plaintiffs' submissions within 20 days, responding submissions within 15 days of receipt of the plaintiffs' submissions and reply submissions, if any, within ten days of receipt of the responding submissions.

K.M. van Rensburg J.

DATE: May 16, 2012

CITATION: Fournier v. Mercedes-Benz Canada, 2012 ONSC 2752
COURT FILE NO.: CV-10-4306-00
DATE: 2012 05 16

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**FOURNIER LEASING COMPANY LTD.,
CANADIAN AUTO ASSOCIATES LTD.
and WESTPORT MOTOR CARS LTD.**

Plaintiffs

- and -

**MERCEDES-BENZ CANADA INC.,
MERCEDES-BENZ USA LLC, and BMW
CANADA INC., and THE ATTORNEY
GENERAL OF CANADA**

Defendants

**REASONS FOR DECISION
on RULE 21 MOTION**

K.M. van RENSBURG J.

Released: May 16, 2012

TAB 11

1987 CarswellOnt 124
Ontario Supreme Court, Court of Appeal

R. v. Kopyto

1987 CarswellOnt 124, [1987] O.J. No. 1052, 24 O.A.C. 81, 39 C.C.C. (3d) 1,
3 W.C.B. (2d) 263, 47 D.L.R. (4th) 213, 61 C.R. (3d) 209, 62 O.R. (2d) 449

R. v. KOPYTO and CRIMINAL LAWYERS' ASSOCIATION

Brooke, Dubin, Houlden, Goodman and Cory JJ.A.

Heard: March 9 to 13, 1987

Judgment: November 27, 1987

Docket: No. C.A. 969/86

Counsel: *C. Roach* and *A. Codina*, for appellant.

D. Hunt, Q.C., for the Crown.

D. Doherty, Q.C., for Criminal Lawyers' Association.

Subject: Criminal; Civil Practice and Procedure

Appeal by accused from conviction of contempt of court.

International conventions considered:

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

art. 10

Dubin J.A. (dissenting in part) (Brooke J.A. concurring):

Introduction

1 I have had the advantage of reading the reasons for judgment of my brothers Houlden, Goodman and Cory. They are all of the opinion that the appellant was guilty of the common law offence of contempt of court, but that the offence itself has now been rendered unconstitutional by reason of the Canadian Charter of Rights and Freedoms. With respect to their contrary opinions, I take a very different view of the issues in this appeal and how they should be resolved.

2 In my opinion, the conviction cannot stand because the requisite elements of the offence, as I understand them, have not been made out. In this respect, I differ from my colleagues as to the essential ingredients of the offence and the manner in which they have defined it. However, that issue now pales into relative insignificance in light of the conclusion of the majority of this court that the offence itself is unconstitutional.

3 In holding that one who would have been previously guilty of the criminal offence of contempt of court in issue in this appeal is now, by reason of the Charter, said to be merely exercising the right of freedom of speech, and thus immunized from process, my colleagues have purported to follow American precedent in preference to long-standing precedent in the United Kingdom, in Canada and throughout the Commonwealth, and to that of the European Convention on Human Rights.

4 Freedom of speech is not a creature of the Charter. It is a fundamental freedom first developed by the common law courts throughout the Commonwealth and in Canada, and is now enshrined in the Charter. In the development of this freedom, it was the common law courts which first recognized free speech as a fundamental freedom, and indeed in Canada it can be said

had been given constitutional status prior to the Charter. It was always recognized that such a freedom extended to a vigorous, outspoken criticism of the courts and of the law. That proposition was restated by Lord Atkin in *Ambard v. Trinidad & Tobago (A.G.)*, [1936] A.C. 322 at 335, [1936] 1 All E.R. 704 (P.C.) [Trinidad & Tobago]:

But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

5 Thus, it is, I think, with respect, trite to say that "the courts are not fragile flowers that will wither in the heat of controversy". This was long recognized in the evolution of freedom of speech itself, but it is not a premise upon which the offence of contempt of court should be held to be unconstitutional. That premise suggests that the law of contempt of court is one to protect the dignity of the court or the vindication of a judge. That is not the case.

6 Our free and democratic society is founded upon the rule of law. The offence of contempt of court in issue in this appeal relates to the rule of law. In our society, resort must be had to the courts as the guardian of our fundamental freedoms and to resolve disputes, be they between the state and its citizens or between the citizens themselves.

7 What had heretofore been recognized was that a remedy was necessary to be taken against those who would destroy the rule of law by seriously impairing the administration of justice and impairing the ability of the courts to protect those fundamental freedoms and the rights of those within its jurisdiction.

8 As was stated by Hugessen A.C.J.S.C. in *Re Ouellet; R. v. Atlantic Sugar Refineries Co.* (1976), 34 C.R.N.S. 256, 28 C.C.C. (2d) 360, 67 D.L.R. (3d) 73 at 93 (C.S. Que.):

[Contempt of court] is not to protect the tender feelings of the Judge or to give him any additional protection against defamation other than that which is available to the ordinary citizen by way of the civil action in damages. Rather it is to protect the public confidence in the administration of justice without which the standards of conduct of all those who may have business before the Courts are likely to be weakened, if not destroyed, with the result that the public, rather than having recourse to the Courts for the settlement of their disputes, will seek other means, legal or illegal. There is an essential public interest in the upholding of the authority of the Courts and of the law.

9 It was for this reason that, parallel to the evolution of freedom of speech, the very common law courts which first proclaimed freedom of speech as a fundamental freedom also recognized the need for a criminal offence of contempt of court, not to protect the dignity of the court or for the vindication of a judge, but to preserve the rule of law. While doing so, the courts were fully mindful that the right of free speech was a fundamental freedom, albeit not an absolute one, and that someone who was guilty of this offence could not be said to be exercising a right of free speech.

10 It is now submitted, with which submission the majority of this court concurs, that, because freedom of speech, now encompassed within the term "freedom of expression", has been declared by the Charter to be a fundamental freedom, the criminal offence of contempt of court in issue in this appeal is unconstitutional, and one who would otherwise be guilty of this offence is now "protected" by the right of free speech and immunized from process. In my respectful opinion, the offence of contempt of court in issue in this appeal does not abridge the right of freedom of expression and is not unconstitutional.

11 Thus, although I agree in the result that the appeal should be allowed and the conviction set aside, I do so not because the offence is unconstitutional, or because the appellant was exercising a right of free speech, but only because the offence was not made out.

12 I propose to deal first with the constitutional issue and then with the merits of the appeal.

Freedom of Speech and Contempt of Court — Pre-Charter***Freedom of speech***

13 The fundamental freedoms now enshrined in our law by the Charter, of which freedom of thought, belief, opinion and expression is now included, are not creatures of the Charter. Indeed, no Act of Parliament to date has defined them. Until of recent date, Parliament and the legislative assemblies in Canada had been content to leave to the common law courts the responsibility of defining and guarding the civil rights of Canadians, and, although these fundamental freedoms have been given a constitutional status, it is still for the courts to define and enforce them.

14 The first statutory reference to fundamental freedoms is to be found in the Canadian Bill of Rights, enacted in 1960. Section 1 reads as follows:

Recognition and Declaration of Rights and Freedoms

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

15 The fundamental freedoms referred to were those which had been evolved by the common law.

16 The historical development of freedom of speech in Canada and the priority placed upon it by the common law courts were thoroughly canvassed by the Supreme Court of Canada in *Retail, Wholesale & Dept. Store Union, Loc. 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 71 N.R. 83 , in the judgment of McIntyre J. at pp. 583-86:

Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica: A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644), and as well John Stuart Mill, "On Liberty" in *On Liberty and Considerations on Representative Government* (Oxford 1946), at p. 14:

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility", he said, at p. 16:

Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals: every age having held many opinions which subsequent ages have deemed not only false but absurd: and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy. The Courts have recognized this fact ...

Prior to the adoption of the Charter, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this court may be said to have given it constitutional status. In *Boucher v. R.*, [1951] S.C.R. 265, 11 C.R. 85, 99 C.C.C. 1, [1951] 2 D.L.R. 369 [Que.], Rand J., who formed a part of the majority which narrowed the scope of the crime of sedition, said, at p. 288:

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

In *Switzman v. Elbling*, [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337 [Que.], where this court struck down Quebec's padlock law, Rand J. again spoke strongly on this issue. He said, at p. 306:

But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject-matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence. As such an inherence in the individual it is embodied in his status of citizenship.

In the same case, Abbot J. said, at p. 326:

The right of free expression of opinion and of criticism, upon matters of public policy and public administration, and the right to discuss and debate such matters, whether they be social, economic or political, are essential to the working of a parliamentary democracy such as ours.

He went on to make extensive reference to the words of Duff C.J.C. in *Reference re Alberta Statutes*, [1938] S.C.R. 100 at pp. 132-133, strongly supporting what could almost be described as a constitutional position for the concept of freedom of speech and expression in Canadian law, and then said, at p. 328:

Although it is not necessary, of course, to determine this question for the purposes of the present appeal, the Canadian constitution being declared to be similar in principle to that of the United Kingdom, *I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate*. The power of Parliament to limit it is, in my view, restricted to such powers as may be exercisable under its exclusive legislative jurisdiction with respect to criminal law and to make laws for the peace, order and good government of the nation.

It will be seen at once that Professor Peter W. Hogg, at p. 713 in his text, *Constitutional Law of Canada*, (2nd ed. 1985), is justified in his comment that:

Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the Charter of Rights.

The Charter has now in s. 2(b) declared freedom of expression to be a fundamental freedom and any questions as to its constitutional status have therefore been settled. [Emphasis added.]

Contempt of court

17 Contempt of court is a common law offence preserved by the Criminal Code, and for its definition one must resort to precedent. Like most rules of the common law, the law of contempt of court has developed to be contemporary and to meet the demands of a modern society.

18 The offence of contempt of court may be committed in several different ways. The complaint in this appeal relates to words spoken out of court, and the offence has been given the nomenclature of contempt of court by scandalizing the court.

19 In the development of the law relating to this branch of contempt of court, the courts were fully mindful of the importance of freedom of speech in a free and democratic society, as is apparent from the passages above stated. It was also recognized that a free and democratic society is based on the rule of law, and there are competing values to be reconciled. The right of freedom of speech was never thought to be an absolute one and did not protect those from process who would otherwise be guilty of the criminal offence of contempt of court.

20 In *Gallagher v. Durack* (1983), 45 A.L.R. 53 (H.C.), the majority of the court posed the problem as follows at p. 55:

The principles which govern that class of contempt of court which is constituted by imputations on courts or judges which are calculated to bring the court into contempt or lower its authority had been discussed by this court in *Bell v Stewart* (1920) 28 CLR 419 and *R v Fletcher*; *Ex parte Kisch* (1935) 52 CLR 248 before *R v Dunabin*; *Ex parte Williams* was decided, and the judgment of Rich J in the last-mentioned case is consistent with what had been said in the earlier decisions. The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon courts of justice which, if continued, are likely to impair their authority": per Dixon J in *R v Dunabin*; *Ex parte Williams* (at 447).

21 The premise upon which the law of contempt is founded is stated in Borrie and Lowe, *The Law of Contempt*, 2nd ed. (1983), at p. 226:

The necessity for this branch of contempt lies in the idea that without well-regulated laws a civilised community cannot survive. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute. [Emphasis added.]

22 In a similar vein what was stated by the majority of the court in *Gallagher v. Durack*, *supra*, at p. 55, is apt:

The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by *baseless* attacks on the integrity or impartiality of courts or judges. [Emphasis added.]

23 Unfortunately, the use of the term "contempt of court" is misleading and may give the impression that the offence is one for the protection of the sensitivity or the dignity of a judge, which is not the case. The offence consists of interfering with the administration of the law and in impeding and perverting the course of justice.

24 That point has been enunciated in many of the cases of contempt of court and has been summarized by Richmond P. in *N.Z. (Solicitor Gen.) v. Radio Avon Ltd.*, [1978] 1 N.Z.L.R. 225 at 229 (C.A.):

It will be as well, before proceeding further, to say something of the expression "contempt of court" and of the purpose of the law of contempt in our society. The use of the term "contempt of court" has been criticised, with some justification, as inaccurate and misleading. As was pointed out by the Report of the Committee on Contempt of Court (Cmnd 5794), presented to the United Kingdom Parliament in 1974, and generally referred to as the Phillimore Report, the term may suggest, in some contexts, that the law of contempt exists to protect the dignity of the judges whereas in fact it exists to protect the administration of justice. This point was made by Lord President Clyde in *Johnson v Grant* 1923 SC 789. The Lord President said:

The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned ... *The offence consists in interfering with the administration of the Law; in impeding and perverting the course of justice* ... It is not the dignity of the Court which is offended — a petty and misleading view of the issues involved — it is the fundamental supremacy of the law which is challenged.

[Emphasis added.]

25 It is the fundamental supremacy of the law which is challenged.

26 In the development by the common law courts of this branch of the offence of contempt of court, the seminal judgment is that of *R. v. Gray*, [1900] 2 Q.B. 36 (Div. Ct.). In that case Lord Russell of Killowen C.J. stated at p. 40:

It cannot be doubted — indeed it has not been argued to the contrary by the learned counsel who represents Howard Alexander Gray — that the article does constitute a contempt of Court; but as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. *The former class belongs to the category which Lord Hardwicke L.C. characterised as "scandalising a Court or a judge."* That description of that class of contempt is to be taken subject to one and an important qualification. *Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published* ... [Emphasis added.]

27 In *Re Duncan*, [1958] S.C.R. 41, 11 D.L.R. (2d) 616, the Supreme Court of Canada considered a charge of contempt of court against a member of the bar. Kerwin C.J.C., in speaking for a unanimous court, stated at p. 44:

There is no doubt that a counsel owes a duty to his client, but he also has an obligation to conduct himself properly before any Court in Canada. That applies particularly to one who, like Mr. Duncan, has been practising for many years and who has had an extensive experience in the Courts of Ontario and in this Court. It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray* [supra], that judges and Courts are alike open to criticism, and if reasonable argument or expostulation

is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category which Lord Chancellor Hardwicke had as early as 1742 characterized as "scandalising a Court or a judge". The matter is put succinctly in the 3rd edition of Halsbury, vol. 8 (1954), at p. 5:

The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in its presence and at a time when it is actually sitting ... It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, *but because there is imposed upon the court the duty of preventing brevi manu any attempt to interfere with the administration of justice*.

[Emphasis added.]

28 It is to be noted that the Supreme Court of Canada specifically adopted what was stated by Lord Russell of Killowen C.J. in *R. v. Gray*, supra. It is also noteworthy that, although the offence of contempt of court being considered in that case could be viewed as an offence of contempt of court in the face of the court, the court made no distinction as to the test to be applied in a case of contempt of court in the face of the court and a case of contempt of court by scandalizing the court.

29 In considering a charge of contempt of court for words spoken outside of the court and not dealing with any pending case, McRuer C.J.H.C. in *R. v. Glanzer*, [1963] 2 O.R. 30, [1963] 1 C.C.C. 364, 38 D.L.R. (2d) 402 (H.C.), set forth the following comment at p. 370:

For at least 200 years it has been the law of England, as it is today the law of Canada, that scandalous and scurrilous abuse of a Judge in his judicial work is a contempt of Court, not because of the injury done to the Judge, nor for the purpose of vindicating his character, nor for the purpose of taking vengeance on the perpetrator of the scandal, but for the purpose of preserving respect for the administration of justice in the Queen's Courts.

These principles were alluded to and were recognized in the Supreme Court of Canada as recently as the year 1957 in *Re Duncan* [supra].

30 Thus the very courts which first proclaimed freedom of speech as a fundamental freedom and which have so zealously guarded it throughout the centuries have never held that right to be a shield for those whose conduct constituted the criminal offence of contempt of court by interfering with the administration of justice and endangering the rule of law.

Contempt of Court and Freedom of Speech — Post-Charter

31 It is now submitted that, by reason of the enactment of s. 2(b) of the Charter, this branch of contempt of court with which we are dealing is not unconstitutional, and those who would otherwise be guilty of the offence are now said to be merely exercising a right of free speech and are immunized from process.

Canadian Charter of Rights and Freedoms

32

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association. [Emphasis added.]

Contempt of court

33 Contempt of court is a criminal offence. Although for its definition one must resort to the common law, the offence is subject to a Charter challenge, as are criminal offences which are defined in the Criminal Code.

34 In this appeal it is submitted that, because freedom of speech has now been declared to be one of our fundamental freedoms, the branch of contempt of court in issue here is unconstitutional. However, in order to make that determination, one must first consider what are the essential ingredients of the offence of contempt of court where the words spoken are not spoken in the face of the court. Like all other criminal offences, there are essential ingredients which the Crown must establish before a conviction can be entered.

35 Although counsel for the appellant and for the intervenant relied solely on s. 2(b) of the Charter as the basis for their submission, regard must also be had to s. 7, which reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This section also reflects traditional common law standards of justice.

Actus reus

36 In holding the present law on contempt of court to be unconstitutional, my colleagues, in my respectful opinion, have minimized the requirements that must be shown before a conviction can be sustained. As my brother Cory put it [p. 285]: "Without requiring any proof of the matter, the offence *assumes* that the words which are the subject matter of the charge will bring the court into contempt or lower its authority." My brother Goodman has stated [p. 259] that: "The nature of the offence is such that the words, although calculated to bring the administration of justice into disrepute, may have little or no such effect in fact."

37 If that is an accurate definition of the offence, then, apart entirely from s. 2(b) of the Charter, the constitutionality of the offence would be subject to a serious challenge as being in contravention of s. 7.

38 With respect, I find nothing in the authorities to support the conclusion that there is some assumption that the words which are the subject matter of the charge will bring the court into contempt or lower its authority, or that a person could be convicted under the present law where the words complained of could have little or no effect on the administration of justice. I do not regard the offence of contempt of court as being an offence of absolute liability.

39 It must be observed that in the cases of *Gray* and *Glanzer*, both supra, to which my colleagues referred, counsel conceded that the conduct of their clients did in fact constitute a contempt of court, and the court was not called upon in either of those cases to consider in detail the essential elements of the offence. In any event, if that were the previous state of the law and the offence of contempt of court had such a far reach, it is not the law today.

40 As Lord Morris of Borth-y-Gest stated in *A.G. v. Times Newspapers Ltd.*, [1974] A.C. 273, [1973] 3 W.L.R. 298, [1973] 3 All E.R. 54 at 66-67 (H.L.) :

Various types of behaviour which in the past have been brought to the notice of courts as involving "contempt" have furnished illustrations of circumstances which have been regarded by courts as requiring condemnation. A study of decided cases helps to show the attitude of courts at different times and a certain pattern emerges. I doubt whether it is either desirable or possible to frame any exact or comprehensive definition or to formulate any precise classifications.

Nevertheless the cases illustrate certain general principles as to what is or is not permissible and courts have as a rule found no difficulty in deciding whether a complaint is or is not well founded ... A court would not be likely to listen to a complaint that lacked substance. *Indeed when the Divisional Court referred to the question whether words complained of would "create a serious risk that the course of justice may be interfered with" or when Lord Denning MR said that "there must appear to be a real and substantial danger of prejudice to the trial of the case or to the settlement of it" useful reminders were given of the fact that "contempt" is criminal conduct ... A court will therefore only find "contempt" where the risk of prejudice is serious or real or substantial. If a court is in doubt whether conduct complained of amounts to "contempt" the complaint will fail.* [Emphasis added.]

And in the same case Lord Reid stated at p. 60:

The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. *Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.* [Emphasis added.]

Mens rea

- 41 The offence of contempt of court "by scandalizing the court", not being an offence of absolute liability, requires a mens rea.
- 42 In *Re Ouellet*, supra, Hugessen A.C.J.S.C. stated the following at pp. 91-92:

Let me say at once that in the circumstances of the present case I think that the defence of misinterpretation or lack of intention to scandalize the Court, if made out, would be a good one. I recognize that there are many cases holding that where the contempt is of a nature to prejudice a pending suit and lessen the right to a fair trial it is not the intention of the contemner but rather the effect of his words which should be considered and it is easy to see why this should be so. In a case such as this, however, where the contempt is one of scandalizing the Court and bringing the whole administration of justice into disrepute, I feel that other considerations should apply. Criticism in good faith of the actions of Courts and Judges cannot and must not be made the subject of contempt proceedings (*Ambard v. A.G. Trinidad and Tobago* [supra]; *R. v. Gray* [supra]), and it seems to me therefore that *mens rea* is clearly an important element in the offence.

(See also *Perera v. R.*, [1951] A.C. 482 at 487-88 (P.C.) ; *McLeod v. St. Aubyn*, [1899] A.C. 549 at 561-62 (P.C.) [St. Vincent].)

- 43 It is also to be observed that at common law a publication which amounted to a criminal contempt of court "by scandalizing the court" could also be proceeded with on a charge of seditious libel. Although in *Boucher v. R.*, [1951] S.C.R. 265, 11 C.R. 85, 99 C.C.C. 1, [1951] 2 D.L.R. 369 [Que.], the court was divided on the interpretation to be given to the meaning of "a seditious intention", as defined in s. 133 of the 1927 Criminal Code (the predecessor to s. 60 of the present Criminal Code), Cartwright J. outlined the common law position as follows at p. 57:

It is not necessary to adopt everything that was said by Wilmot J. in his opinion in *Almon's case*, Wilm. 243, 97 E.R. 94, which, although never delivered as a judgment of the Court, has been quoted and accepted as a high authority in many subsequent judgments, but the following passage from p. 259 appears to me to be relevant: "The constitution has provided very apt and proper remedies for correcting and rectifying the involuntary mistakes of Judges, and for punishing and removing them for any voluntary perversions of justice. But if their authority is to be trampled upon by pamphleteers and newswriters, and the people are to be told that the power, given to the Judges for their protection, is prostituted to their destruction, the Court may retain its power some little time, but I am sure it will instantly lose all its authority; and the power of the Court will not long survive the authority of it."

Continuing at p. 58:

It cannot be successfully argued that because a matter appears to be a criminal contempt of Court it may not also be a seditious libel. Section 15 of the *Code* recognizes that an act or omission may constitute several different offences and this was true also at common law (*vide, e.g., Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 378; *Reg. v. King*, [1897] 1 Q.B. 214).

To briefly summarize my conclusions, I am of opinion that an intention to bring the administration of justice into hatred or contempt or to excite disaffection against it is a seditious intention; that an intention in good faith to point out errors or defects in the administration of justice is not a seditious intention and that it is the right of every citizen to criticize freely and vigorously the proceedings of the Courts of justice, the decisions of the Judges, and the verdicts of juries.

I think that in the case at bar, and in the case of every charge of publishing a seditious libel, where the gravamen of the charge is the alleged intention to bring the administration of justice into hatred and contempt, the question to be left to the jury is whether the real intention of the person charged was to vilify the administration of justice, destroy public confidence therein and to bring it into contempt; or whether the publication, however vigorously worded, was honestly intended to purify the administration of justice by pointing out, with a view to their remedy, errors or defects which the accused honestly believed to exist. As in all cases tried by a jury, there is a preliminary question for the Court whether there is any evidence on which a jury could reasonably find the existence of the guilty intention. If in the Court's opinion there is such evidence the case should be left to the jury, who after being instructed as to what is and what is not a guilty intention should be reminded that if they are in doubt as to the true intention of the accused it is their duty to acquit him.

44 In my respectful opinion, the mens rea required as an essential element of proof in a case of contempt of court by scandalizing the court is analogous to that set forth in *Boucher*.

Justification or excuse

45 Much was said during the argument as to whether truth was a defence to the offence charged. However, it was conceded by counsel for the appellant that the appellant at trial did not seek to prove the truth of the impugned statement made by him, and thus in that sense the issue is academic. I propose to deal briefly with it, since it is important in determining the constitutionality of the offence to consider it in its entirety.

46 In my opinion, truth is a defence to a charge of contempt of court by scandalizing the court. I think the issue is accurately summarized in the Australian Law Reform Commission's discussion paper 26, Contempt and the Media (1988), referred to in the judgment of my brother Cory, which concludes as follows:

Finally, there is authority in the cases to the effect that in the course of trying a scandalising case, a court will exonerate the accused unless it finds the allegedly scandalising remarks to be "unjustified", "unwarrantable" or "baseless" ... this element in scandalising law operates to protect the accused against being convicted where it is plain that his or her allegations have a clear and genuine basis in fact. [Emphasis added.]

47 It is further to be observed that in *Re Duncan*, supra, in considering the allegation of contempt of court made against Mr. Duncan, the court entertained his defence of truth and, in convicting him, stated at p. 45:

The members of the Court now available, omitting Mr. Justice Locke, have no doubt that what was said by Mr. Duncan on November 18, 1957, was deliberate and that there is no basis in fact or law for his statements.

48 Thus, where the words spoken are capable of proof of the truth, it must be open to an accused person to have the opportunity of proving the truth. It would be contrary to public policy to deprive an accused person of the opportunity to prove the truth of what he said which, if true, could, in some cases, advance the administration of justice rather than bringing it into disrepute. Furthermore, to deny truth as a defence would be contrary to the principles of fundamental justice.

49 And, as is the case for all criminal offences, in the end the Crown must prove the case beyond a reasonable doubt.

50 In my respectful opinion, the offence of contempt of court, as I have defined it, would not contravene s. 7 of the Charter.

Freedom of speech

51 The Charter has declared the fundamental freedoms heretofore developed by the common law courts, including freedom of opinion and expression, to be fundamental freedoms. The range or scope of these freedoms is to be defined by the courts.

52 In *Ref. re Pub. Service Employee Rel. Act, Lab. Rel. Act and Police Officers' Collective Bargaining Act*, [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577, 51 Alta. L.R. (2d) 97, 87 C.L.L.C. 14,021, 38 D.L.R. (4th) 161, (sub nom. *Alta. Union of Prov. Employees v. Alta. (A.G.)*) 28 C.R.R. 305, 78 A.R. 1, (sub nom. *Ref. re Compulsory Arbitration*), 74 N.R. 99, McIntyre J. had for consideration the range or scope of the right of freedom of association, but what was stated by him is apposite to the resolution of the range or scope of freedom of opinion and expression within which the right of freedom of speech is now encompassed. McIntyre J. stated as follows at pp. 393-94:

It is clear that the importance of freedom of association was recognized by Canadian law prior to the *Charter*. It is equally clear that prior to the *Charter* a provincial Legislature or Parliament acting within its jurisdiction could regulate and control strikes and collective bargaining. The *Charter* has reaffirmed the historical importance of freedom of association and guaranteed it as an independent right. The courts must now define the range or scope of this right and its relation to other rights, both those grounded in the *Charter* and those existing at law without *Charter* protection.

In approaching this task, it must be recognized that the *Charter* should receive a broad and generous construction consistent with its general purpose (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155). In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, this Court dealt in some detail with the considerations which should govern an inquiry into the meaning of the rights and freedoms guaranteed by the *Charter*. At p. 344, the Chief Justice, speaking for the majority, said:

This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. *At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.*

(Emphasis added.)

It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society. [Emphasis added.]

53 In *Ont. Pub. Service Employees' Union v. Ont. (A.G.)*, [1987] 2 S.C.R. 2, 87 C.L.L.C. 14,037, 41 D.L.R. (4th) 1, 23 O.A.C. 161, 77 N.R. 321, Dickson C.J.C. reviewed the pre-Charter status of freedom of speech as follows at pp. 382-84:

In oral argument, primary reliance was placed upon a passage from this Court's unanimous judgment in *Fraser*, at pp. 462-63:

... 'freedom of speech' is a deep-rooted value in our democratic system of government. It is a principle of our common law constitution inherited from the United Kingdom by virtue of the preamble to the *Constitution Act*, 1867.

This principle was recently reaffirmed in *Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd.* [supra], where McIntyre, J., speaking for a unanimous Court, held at p. 584:

Prior to the adoption of the *Charter*, freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status.

Both of these passages manifest a clear recognition that freedom of speech and expression is a fundamental animating value in the Canadian constitutional system.

It must not be forgotten, however, that no single value, no matter how exalted, can bear the full burden of upholding a democratic system of government. Underlying our constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which may sometimes conflict. It is for that reason that the passage in Fraser upon which the appellants rely so heavily is followed immediately by these words, at p. 463 :

But [freedom of speech] is not an absolute value. Probably no values are absolute. All important values must be qualified, and balanced against, other important, and often competing values. This process of definition, qualification and balancing is as much required with respect to the value of 'freedom of speech' as it is for other values .

The *Fraser* case, which of course raised issues similar to those in the present appeal, stands for the proposition then, that the freedom of expression of public servants is a fundamental value but that certain reasonable abridgements, motivated by other competing values, may validly be authorized by a legislature. The relevant considerations in evaluating the reasonableness of the limitations are set out in *Fraser* ...

I would add only that nothing I have said should be taken to predetermine the relevant analysis in any potential challenge to the *Act* launched under the *Canadian Charter of Rights and Freedoms*. [Emphasis added.]

54 Of recent date, this court considered freedom of expression under the Charter in *R. v. Zundel* (1987), 58 O.R. (2d) 129, 56 C.R. (3d) 1, 31 C.C.C. (3d) 97, 35 D.L.R. (4th) 338, 29 C.R.R. 349, 18 O.A.C. 161, where the following comment appears at p. 147:

Freedom of expression must necessarily have regard to the corresponding rights and freedoms of other persons. It contemplates the existence of a social order in which other persons must not be denied similar rights. A simplistic example, which is often given, is that a person is not at liberty to shout "fire!" in a crowded theatre.

As Dickson C.J.C. stated when delivering the judgment of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 at p. 418, 18 D.L.R. (4th) 321 at p. 354, [1985] 1 S.C.R. 295 :

Freedom means that, *subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*, no one is to be forced to act in a way contrary to his beliefs or his conscience.

(Emphasis added.) (See also his dicta to the same effect at p. 425 C.C.C., p. 361 D.L.R.) In that case Chief Justice Dickson was, of course, addressing his remarks to the limits of the fundamental freedom of religion under s. 2(a) of the Charter but his remarks are, in our opinion, apposite for "freedom of expression".

In this appeal it is not necessary to give an all-embracing definition of "freedom of expression", but merely to decide whether "spreading false news" within s. 177 of the Code is encompassed within that fundamental freedom.

When considering the interpretation of the Charter, it is important to bear in mind the admonition of Chief Justice Dickson in *Hunter et al. v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 at p. 106, 11 D.L.R. (4th) 641 at p. 650, 2 C.P.R. (3d) 1 at p. 10, [1984] 2 S.C.R. 145 at p. 156, that the proper approach to the definition of the rights and freedoms guaranteed by the Charter is to guarantee one: "Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines."

The Constitutionality of Contempt of Court

55 As has been observed, the majority of this court are of the opinion that the right of free speech protects one who could otherwise be guilty of the branch of the criminal offence of contempt of court in issue in this appeal, and thus the offence is now unconstitutional.

56 It is clear that the fundamental freedoms now enshrined in the law by the Charter, of which freedom of speech is one, are not frozen as of the date of the Charter, and must be capable of development and adaptation. However, in determining the range or scope of freedom of speech, one must consider, as stated above, "constitutional tradition, and the history, traditions, and underlying philosophies of our society". Fundamental to our constitutional tradition and the underlying philosophies of our society is respect for the rule of law, which is reflected in the preamble to the Charter itself, which states in part: "Whereas Canada is founded upon ... the rule of law ...".

57 As has been noted, even prior to the Charter the courts in Canada may be said to have given freedom of speech a constitutional status and, as is the case throughout the Commonwealth, have stressed the paramount importance of freedom of expression in a free and democratic society. However, it has never heretofore been held in Canada, or elsewhere in the Commonwealth, that freedom of speech is an absolute freedom, and that one who is guilty of this branch of contempt of court, in the manner that I have defined it, was merely exercising the right of free speech and therefore immunized from process. Although it had always been recognized that freedom of speech should not be limited to any greater extent than is necessary, it did not protect those whose conduct constituted "real", "serious", or "substantial" prejudice to the administration of justice.

58 Although earlier precedent defining the range or scope of freedom of speech is not decisive, earlier precedent, in my respectful opinion, should not be ignored in determining the range or scope of freedom of speech now declared to be a fundamental freedom by the Charter.

59 It is also clear from the authorities referred to above that since the enactment of the Charter the fundamental freedoms referred to in s. 2 have not been viewed as being absolute. That issue was thoroughly canvassed by this court in *R. v. Zundel*, supra, which has been previously referred to, and which is summarized in the following portion of the judgment at pp. 150-51:

The *Canadian Bill of Rights*, R.S.C. 1970, App. III, recognizes in s. 1(d) that freedom of speech has existed and shall continue to exist. The preamble acknowledges the supremacy of God, and the dignity and worth of the human person, and asserts that freedom can only be founded upon respect for moral and spiritual values and the rule of law. This would in turn confirm that freedom of expression which is guaranteed under the Charter is not absolute.

More recently in *Re Fraser and Public Service Staff Relations Board* (1985), 23 D.L.R. (4th) 122, [1985] 2 S.C.R. 455, 19 C.R.R. 152, in considering the extent to which a public servant could openly criticize government policy, Dickson C.J.C. stated at p. 131 D.L.R., pp. 467-8 S.C.R.:

First, our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.

. . . .

On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults.

When determining the limits of freedom of expression, a distinction must be drawn at the outset between "rights" and "freedoms". A "right" is defined positively as what one can do. A "freedom", on the other hand, is defined by determining first the area which is regulated. The freedom is then what exists in the unregulated area — a sphere of activity within which all acts are permissible. It is a residual area in which all acts are free of specific legal regulation and the individual is free to choose. The regulated area will include restrictions for purposes of decency and public order, and specifically with respect to the freedom of expression, prohibitions concerning criminal libel and sedition. [Emphasis added.]

60 In holding that the offence with which the appellant was charged was unconstitutional, my colleagues Houlden, Goodman and Cory have drawn on American precedent in preference to the long-standing precedent and tradition in Canada and elsewhere in the Commonwealth.

61 The relevant provision of the American Constitution is the First Amendment, which provides in part "Congress shall make no law ... abridging freedom of speech, or of the press". Notwithstanding the absolute language in which the amendment is couched, a literal interpretation of the amendment has never commanded the majority of the Supreme Court of the United States. In an article by W. Van Alsdyne, "[A Graphic Review of the Free Speech Clause](#)" (1982), 70 Calif. L. Rev. 107, the author, in dealing with the manner in which the literal interpretation of the First Amendment has been considered by the Supreme Court of the United States, states [at p. 113](#):

Primarily it ["the literal interpretation"] has failed against the pressures of irresistible counterexamples, rationalized by an uncertain early history. An "irresistible counterexample" is an instance that is plainly within the literal prohibition of the amendment, but that one is nonetheless unwilling to defend. The necessary consequence is to concede that there must be some degree of moderation contemplated by the first amendment despite first impressions to the contrary.

And at pp. 117-18 the author further states:

The Supreme Court has treated speech deemed "obscene", for instance, as not within "the" freedom of speech absolutely protected by the first amendment. Rather, the case law neither absolutely protects obscene speech nor even requires any first amendment compelled justification for its criminalization. And in general, the same holds true for ordinary criminal solicitation, as it once did (although no longer does) for libel, "fighting words," and "commercial speech."

62 In *R. v. Zundel*, supra, after a review of some of the American authorities, the court commented as follows at p. 155:

Accordingly, American constitutional cases support the position that freedom of speech is not an absolute freedom, and that there are certain well-defined and limited classes of speech such as the obscene or libellous, or knowingly false statements, which are not constitutionally protected because any slight social value as a step to truth that they may entail, is clearly outweighed by the social interest in order and morality.

63 My colleagues Houlden, Goodman and Cory have distinguished between statements made in the face of the court, or with respect to cases actually pending in the courts or yet to be tried, and statements which relate to cases that have already been tried or to the administration of justice generally. Although apparently upholding the constitutionality of the offence of contempt of court if committed in the face of the court, and I assume if made with respect to pending litigation, they hold the present law with respect to statements made not in the face of the court, or not relating to pending litigation, to be unconstitutional.

64 In other words, as I understand it, if the words complained of are stated in court while the judge is still sitting in court, my colleagues would hold the offence to be constitutional, but if the words were stated after the judge had delivered his judgment

and withdrawn from the courtroom, and the statement was made to the press or to the public in his absence, the offence becomes unconstitutional. The result of the majority ruling is that in this jurisdiction there is at present no limit to what is permissible with respect to comments made which are intended to interfere seriously with the administration of justice and the rule of law unless the comment is made in the face of the court, or would interfere with the fair trial of pending proceedings. With respect, I see no basis for such a distinction.

65 The submission that such a distinction should be made was rejected in *N.Z. (Solicitor Gen.) v. Radio Avon Ltd.*, supra, at pp. 232-33:

For ourselves, we can see no good reason to draw any distinction, as Mr. Palmer suggested we should, between publications tending to prejudice the fair trial of particular cases actually pending in the courts and publications tending to lower the authority of judges by imputations of impartiality. No such distinction appears to have been drawn by Lord Russell. As regards both types of contempt he simply used the word "calculated", in the one case "calculated to bring a Court or a judge of the Court into contempt, or to lower his authority" and in the other "calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts". More recently, Lord Diplock in *Attorney-General v Times Newspapers Ltd.* [supra], expressed his own analysis of the purposes of the law of contempt and the nature of conduct amounting to a contempt in the following way:

The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these requirements or to undermine the public confidence that they will be observed is contempt of court ([1974] AC 273, 309).

Contempt by "scandalising" the court is, of course, conduct which, in Lord Diplock's words, is calculated to undermine the public confidence in the proper functioning of the courts. It is to be noted that Lord Diplock, like Lord Russell, makes no distinction between one form of contempt and another from the point of view of the intent of the defendant. In the light of the approval given in *Ambard v Attorney-General* to Lord Russell's definition we doubt whether it would in any event be open to this court to introduce a special requirement of mens rea into this one branch of the law of contempt. *We would not in any event be prepared to do so as we think that the public interest in the administration of justice is so important that it justifies the attitude which has been taken by the English courts.* [Emphasis added.]

66 As has already been noted in *Re Duncan*, supra, no such distinction was made, and, although the court was dealing with an allegation of bias in the face of the court, the Supreme Court of Canada adopted the same test as is applicable to words spoken out of the face of the court in determining whether the contempt of court in that case had been made out.

67 Nor is such a distinction made in the European Convention on Human Rights. The right to free expression in art. 10(1) of the European Convention is subject to art. 10(2), which states:

2. The exercise of these freedoms ... may be subject to such ... restrictions or penalties as are prescribed by law and are necessary in a democratic society ...*for maintaining the authority and impartiality of the judiciary.* [Emphasis added.]

68 It is to be noted that the European Convention on Human Rights recognizes that freedom of expression must be subject to the need in a democratic society for maintaining the authority and impartiality of the judiciary. That is the very basis upon which the offence of contempt of court with which we are dealing is founded.

69 Furthermore, I do not read the judgment of the European Court of Human Rights in *Sunday Times v. U.K.* (1979), 2 E.H.R.R. 245, as holding the offence of contempt of court to be in contravention of the European Convention. Indeed, as I

read the judgment, the court merely held that the publication in question did not undermine the authority and impartiality of the judiciary. That, I think, is made clear from the following passage of that judgment which appears at p. 279:

Nevertheless, the proposed *Sunday Times* article was couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a court could arrive; although it analysed in detail evidence against Distillers, it also summarised arguments in their favour and closed with the words: "There appears to be no neat set of answers. ..." In the Court's opinion, the effect of the article, if published, would therefore have varied from reader to reader. *Accordingly, even to the extent that the article might have led some readers to form an opinion on the negligence issue, this would not have had adverse consequences for the "authority of the judiciary", especially since, as noted above, there had been a nationwide campaign in the meantime.* [Emphasis added.]

70 There is precedent for the distinction in the American jurisprudence, which my colleagues have drawn upon. The basis for the distinction can be gleaned from the judgment of Black J., writing on behalf of the majority of the United States Supreme Court, in *Bridges v. Calif.; Times-Mirror Co. v. Calif. S.C. for Los Angeles*, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941), when he stated as follows at p. 197:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. *And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.* [Emphasis added.]

71 But, with respect, the criminal offence of contempt of court with which we are dealing is not for the purpose of "preserving the dignity of the bench", as the many cases to which I have referred demonstrate, and, with respect, I think has been misinterpreted in the American jurisprudence. It is apparent in reading American jurisprudence that the constitutional tradition and the philosophy underlying the manner in which justice is administered in the United States is different in many ways from that in Canada and throughout the Commonwealth. I need not dwell on those many differences.

72 On this issue the matter was summarized in *N.Z. (Solicitor Gen.) v. Radio Avon Ltd.*, supra, at p. 234, as follows:

We have not overlooked the submissions which Mr. Palmer made to us based upon various cases decided in the United States of America. We do not propose to refer to those cases in detail. One of them is a decision of the Supreme Court of the United States in *Wood v Georgia* 370 US 375 (1962). The test adopted was that "The danger must not be remote or even probable; it must immediately imperil" (*ibid*, 385). *The American courts appear to have directed their attention to the existence of a clear and present danger of a court being influenced, intimidated, impeded, embarrassed or obstructed in the administration of justice. English law, on the other hand, has also attached great importance to the need to preserve public confidence in the administration of justice generally. This court should not depart from that attitude subject, of course, in the type of contempt now under consideration, to the public right of fair comment and criticism, and to the possible defence of justification earlier referred to in this judgment.* [Emphasis added.]

73 In a similar vein the comment by Frankfurter J. in *Pennekamp v. Fla.*, 328 U.S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946), is, I think, very apt at pp. 1043-44:

"Trial by newspaper," like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country. Its absence in England, at least its narrow confinement there, furnishes an illuminating commentary. *It will hardly be claimed that the press is less free in England than in the United States. Nor will any informed person deny that the administration of criminal justice is more effective there than here.* This is so despite the commonly accepted view that English standards of criminal justice are more civilized, or, at the least, that recognized standards of fair conduct in the prosecution of crime are better observed.

Thus, "the third degree" is not unjustly called "the American method." *This is not the occasion to enlarge upon the reasons for the greater effectiveness of English criminal justice but it may be confidently asserted that it is more effective partly*

because its standards are so civilized. There are those who will resent such a statement as praise of another country and dispraise of one's own. *What it really means is that one covets for his own country a quality of public conduct not surpassed elsewhere*. [Emphasis added.]

74 In Canada, the administration of justice is patterned on but not identical to that of the United Kingdom and other Commonwealth countries. With respect to my learned colleagues, I prefer to follow these more civilized standards.

75 Having regard to our constitutional tradition, our history and our underlying philosophy of a free and democratic society founded upon the rule of law, I do not think that the offence of contempt of court with which the appellant was charged, as I have defined it, is an abridgment of the right of the right of free speech. In my opinion, the offence is not unconstitutional, and one who would be otherwise guilty of that offence cannot be said to be merely exercising a right of free speech and be immunized from process.

76 It is to be noted that, save for the distinction made between publications relating to cases actually pending in court and others which seriously interfere with the administration of justice, which distinction I have rejected, the test that I have applied as to the manner in which the guilt of one charged with contempt of court must be determined is not dissimilar to the test applied in the American cases. A similar view was expressed in *Gallagher v. Durack*, *supra*, when that court concluded as follows at p. 55:

There is no reason to reconsider these principles in the light of the American authorities, which are, of course, decided on constitutional provisions which have no counterpart in Australia, and which in any case lay down rules not dissimilar to those of the common law.

77 It is not without significance that this appeal was argued on the premise that the statement complained of did not relate to any pending case. It is a matter of record, however, that the appellant on behalf of his client proceeded to appeal from the judgment of Zuker Prov. J. and that such appeal was dismissed.

78 Because I have held that contempt of court is not an abridgment of the right to free speech, it is unnecessary to consider whether, if that were so, the constitutionality of the offence could be preserved by s. 1 of the Charter. In that respect, I find helpful the further comment in the Calif. L. Rev. article, where the learned author states as follows at p. 116:

It is noteworthy, however, that there is still no balancing or weighing of circumstances so far as the first amendment is concerned, whichever side of the line particular speech may lie. If it is within "the" freedom of speech, as we have already noted, it is absolutely protected. If it is not within "the" freedom of speech, the first amendment (by its own terms) does not affect it at all. *Correspondingly, the first amendment imposes no special burden on Congress to justify laws abridging utterances not within "the" freedom of speech. The amendment is not directed to those utterances; it demands nothing of laws presuming to abridge such speech. Accordingly, it is inappropriate to require that any sort of "clear and present danger" be proved in respect to such speech for the very same reason that, on the other side of the line, it remains utterly irrelevant for government to try to prove some sort of "clear and present danger" to defend an abridgment*. [Emphasis added.]

The Merits of the Appeal

79 Since, in my opinion, the offence with which the appellant was charged is constitutional, there remains to be considered whether the conviction can stand. The circumstances which gave rise to this prosecution were fully set forth in the judgment of my brothers and need not be reproduced by me.

80 The learned trial judge found that the offence was constitutional, with which conclusion I agree. He also found that the appellant had the necessary mens rea, and demonstrated "an intention to vilify, not to correct" and intended to bring the administration of justice into disrepute. As has been observed, the appellant did not seek to prove the truth of the statement made by him. However, in my respectful opinion, what was lacking in this record was proof of the actus reus.

81 It was essential for the Crown to prove that the statement made by the appellant was calculated to bring the administration of justice into disrepute. That is the *actus reus* of this offence. The mere fact that the words are capable of bringing the administration of justice into disrepute does not suffice. What must be shown is that, by reason of the statement made by the appellant, there was a serious risk that the administration of justice would be interfered with. The risk of prejudice must be serious, real or substantial.

82 How is that to be determined? In my opinion, the manner in which that issue is to be resolved is analogous to the manner in which that issue is dealt with in s. 24(2) of the Charter, which has comparable language. Section 24 of the Charter reads as follows:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

83 Lamer J., in determining whether the admission of evidence would bring the administration of justice into disrepute under s. 24(2), adopted the following test in *R. v. Collins*, [1987] 1 S.C.R. 265 at 282, 56 C.R. (3d) 193, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 28 C.R.R. 122, 74 N.R. 276 :

The approach I adopt may be put figuratively in terms of the reasonable person test proposed by Professor Yves-Marie Morissette in his article "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms* : What to Do and What Not to Do" (1984), 29 *McGill L.J.* 521, at p. 538. In applying s. 24(2), he suggested that the relevant question is: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?" The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.

84 A reasonable person would know that the appellant was acting as a solicitor for the plaintiff in an action, and the action was dismissed because the appellant had failed to bring the action within the time prescribed by law, and that the statement was made on behalf of a disgruntled litigant by a disgruntled solicitor who had identified himself with his client.

85 The suggestion that there was some overall conspiracy between all the judiciary in this province and the police to deny a fair trial to the appellant's client, and indeed to all those engaged in litigation where the police were involved, is so preposterous that no right-thinking member of society would take it seriously.

86 I do not think that a reasonable person with knowledge of the facts would give any greater heed to what the appellant was stating than would be given to what is stated by those who attend every Sunday in Hyde Park, London, England, and who mount their soap-boxes and give vent to their complaints.

87 And as is noted in *Gallagher v. Durack*, supra, at p. 55, "in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or a judge". I think that this is such a case.

88 With respect, I think it would give too much dignity to the appellant's statement to categorize it as one which would seriously threaten the administration of justice in this province and in this country.

89 However, in view of the majority judgment in this appeal, I cannot let the matter stand there. In holding that the appellant was merely exercising the right of free speech, the majority would appear to have immunized him from all process, including disciplinary action by the law society of this province.

90 As a member of the bar of this province, the appellant's statement was disgraceful and, as described by the intervenant Criminal Lawyers' Association, a gross breach of professional responsibility. The comments made by him were unique as

coming from a member of the bar, and under those circumstances it was quite understandable that a charge of contempt of court would be laid against him. But, in my opinion, although I find the appellant not guilty of the offence charged, he is not free from any disciplinary action which the law society may choose to institute against him.

91 Unlike Ontario, where disciplinary action for professional misconduct or conduct unbecoming a member of the bar is left to be dealt with by the law society of this province, in most states of the United States disciplinary proceedings against members of the bar for such misconduct are dealt with by the courts. American jurisprudence holds that freedom of speech does not protect a member of the bar from disciplinary proceedings for professional misconduct.

92 This issue was considered in *Re Sawyer*, 360 U.S. 622, 3 L. Ed. 2d 1473, 79 S. Ct. 1376 (1959). In that case the solicitor was subjected to disciplinary proceedings by reason of out-of-court statements made with respect to proceedings in which she was engaged as counsel. The court divided on the interpretation to be given to comments made by the solicitor. The majority were of the view that the statements made by the solicitor were directed only as to the state of the law and not to the administration of justice. Stewart J., although with the majority in dismissing the complaint, added the following word of caution as to the effect to be given to the majority judgment, when he stated at p. 1388:

If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. *He who would follow that calling must conform to those standards.*

Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. [Emphasis added.]

93 Those in dissent took a different view of the words spoken.

94 Frankfurter J., with the concurrence of three of his colleagues, posed the issue at p. 1398:

The problem raised by this case — is the particular conduct in which this petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law? — cannot be disposed of by general observations about freedom of speech. Of course, the free play of the human mind is an indispensable prerequisite of a free society. And freedom of thought is meaningless without freedom of expression. But the two great Justices to whom we mostly owe the shaping of the constitutional protection of freedom of speech, Mr. Justice Holmes and Mr. Justice Brandeis, did not erect freedom of speech into a dogma of absolute validity nor enforce it to doctrinaire limits. Time, place and circumstances determine the constitutional protection of utterance. The First Amendment and the Fourteenth Amendment, insofar as it protects freedom of speech, are no exception to the law of life enunciated by Ecclesiastes: "For everything there is a season, and a time for every purpose under heaven." And one of the instances specifically enumerated by the Preacher controls our situation: "[A] time to keep silence, and a time to speak." Eccles. 3:1, 7.

And he continued at p. 1399:

It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press, and express to them his grievances against the conduct of the trial and the judge. *"Legal trials," said this Court, "are not like elections, to be won through the use of the meeting-hall, the radio, and the newspapers."* ...

Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. *But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court-room into which he walks to plead his case is a travesty, that the procedures and reviews*

established to protect his client from such conduct are a sham. "We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion." *Re Howell*, 10 N.J. 139, 142, 89 A.2d 652, 653 (concurring opinion). No matter how narrowly conceived this role may be, it has been betrayed by a lawyer who has engaged in the kind of conduct here found by the Hawaii court. Certainly this Court, the supreme tribunal charged with maintaining the rule of law, should be the last place in which these attacks on the fairness and integrity of a judge and the conduct of a trial should find constitutional sanction . [Emphasis added.]

95 Following *Sawyer* , supra, the United States District Court of the state of Louisiana in *Spencer v. Dixon*, 290 F. Supp. 531 (1968), after reviewing many of the Supreme Court of the United States' judgments on freedom of speech, referred to by my colleagues, also concluded that freedom of speech did not protect a member of the bar from disciplinary action brought in the state court. In doing so, they stated, in part, as follows at p. 537:

Complainant puts at issue the right of the Louisiana Legislature to authorize its courts fairly to control pleadings and require that judicial proceedings be conducted by its Bar in an orderly, dignified, and unretracing manner. The history and development of contempt proceedings in our courts do not suggest a restrictive interpretation of contempt powers to the illogical extent urged by complainant. *Indeed, if such were the case, all courts would be powerless to enforce orderly sanctions for such misconduct by members of the Bar who might be brazen or foolish enough to "spill their guts", on the least provocation, against the judiciary, which, as noted, is entitled to at least decent respect from the lawyers who practice in our courts* . [Emphasis added.]

96 In my opinion, although the appellant is not guilty of the offence charged, he is not free from disciplinary action if the law society of this province should choose to take proceedings against him.

97 In the result, therefore, I would allow the appeal, set aside the conviction and direct an acquittal, but solely on the grounds that the offence charged was not made out.

Houlden J.A.:

98 I have had the benefit of reading the judgment of Cory J.A. Like him, I would allow the appeal, set aside the conviction and dismiss the Crown's motion. However, as I differ from him slightly in my conclusions, I will endeavour to state succinctly my own reasons for allowing the appeal.

99 The contempt alleged in the notice of motion was that the appellant's statements were calculated to scandalize the court and to bring the administration of justice into disrepute. There was no allegation that they had in fact interfered with the administration of justice, nor that they had in any way actually interfered with the judgment rendered by Zuker Prov. J. [*Dowson v. Chisholm* (1985), 16 Admin. L.R. 169 (Ont. Prov. Ct.)]. Rather, the allegation was that they had brought the administration of justice generally into disrepute.

100 In *McLeod v. St. Aubyn*, [1899] A.C. 549 (P.C.) [St. Vincent], a case involving an alleged contempt with respect to the Acting Chief Justice of the island of St. Vincent, Lord Morris, delivering the judgment of the Privy Council, pointed out (at p. 561) that committals for contempt are ordinarily in cases where: (i) some contempt has been committed in the face of the court; and (ii) comments have been made on cases pending in the courts. In these situations there is, of course, a real and significant danger to the fair administration of justice. Lord Morris went on to point out that in addition to these two forms of contempt there is a third one. Of the third form of contempt he said:

However, there can be no doubt that there is a third head of contempt of Court by the publication of scandalous matter of the Court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read and Huggonson*, 2 Atk. 471 . He says, "One Kind of contempt is scandalising the Court itself". The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism.

It is a summary process, and should be used only from a sense of duty and under the pressure of public necessity, for there can be no landmarks pointing out the boundaries in all cases. Committals for contempt of Court by scandalising the Court itself have been obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them.

It is this third form of contempt with which we are concerned in this case. This form of contempt is sometimes called "indirect" or "constructive contempt": see Clare Beckton, "Freedom of Expression (S. 2(b))", in Tarnopolsky and Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (1982), at p. 109.

101 Lord Morris's judgment was rendered in July 1899. The form of contempt which he believed had become obsolete in England was shortly to receive new life. In March 1900 an application was made in *R. v. Gray*, [1900] 2 Q.B. 36 (Div. Ct.), to a Divisional Court of the Queen's Bench Division to commit the editor of a Birmingham newspaper for writing and publishing a scurrilous personal attack on Darling J. The article did not deal with pending litigation; it dealt with the conduct of the learned judge in a case in which a conviction had been recorded and sentence passed. Counsel for the editor conceded that a contempt of court had been committed. Lord Russell of Killowen C.J., who delivered the judgment of the Divisional Court, defined the offence of contempt of court as follows (at p. 40):

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.C. characterised as "scandalising a Court or a judge." (*In re Read and Huggonson*, (1742) 2 Atk. 291, 469.) That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen.

Although Lord Russell of Killowen C.J. did not refer to the Privy Council's judgment in *McLeod v. St. Aubyn*, supra, it was referred to by the reporter of *R. v. Gray* in a footnote at the end of the case. In the course of his note, the reporter summed up the effect of *R. v. Gray* in this paragraph [pp. 42-43]:

The present case of *Reg. v. Gray* is reported as shewing that in this country the Court will still, where the circumstances demand its action, exercise its jurisdiction to punish, on summary process, the contempt of "scandalizing the Court," although no contempt has been committed ex facie of the court, or in respect of a case pending.

102 In "Contempt of Court and the Press" (1900), 16 L.Q. Rev. 292, Arthur E. Hughes reviewed the cases preceding *R. v. Gray* and concluded (at p. 296) that up until that decision there had been no case where there had been a conviction for contempt "unaccompanied by circumstances showing an interference with the administration of the law in an actual case *pending* in the Courts" (emphasis added). In the *Gray* case, as has been noted, there was no interference with pending litigation, and in addition counsel for the respondent conceded that the article constituted contempt. Hughes was of the opinion that *R. v. Gray* represented a departure from earlier law, and, since the case was not argued, he submitted that it should not be followed. From his examination of the authorities preceding *R. v. Gray*, Hughes was of the view (at p. 300) that contempt should be "rigidly confined to conduct which tends to obstruct or prejudice the due administration of justice in a case pending in the Courts".

103 The law stated in *R. v. Gray* concerning the offence of contempt by scandalizing the court appears to be the present law in Australia (see *Gallagher v. Durack* (1983), 45 A.L.R. 53 (H.C.)), and in New Zealand (see *N.Z. (Solicitor Gen.) v. Radio Avon Ltd.*, [1978] 1 N.Z.L.R. 225 (C.A.)). It is not, however, the law in the United States. In *Bridges v. Calif.; Times-Mirror Co. v. Calif. S.C. for Los Angeles*, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941), all the members of the Supreme Court of the United States, including the dissenting judges, were agreed that there is no such offence in the United States (see p. 273

and p. 287). To constitute contempt in the United States, the conduct complained of must relate to pending legal proceedings. In England there have been no convictions for scandalizing the court for almost 60 years: see Clive Walker, "Scandalising in the Eighties" (1985), 101 L.Q. Rev. 359.

104 The leading case in Canada on the offence of scandalizing the court is *Re Duncan*, [1958] S.C.R. 41, 11 D.L.R. (2d) 616. In that case, the Supreme Court of Canada approved the judgment of Lord Russell of Killowen C.J. in *R. v. Gray*, supra. Kerwin C.J.C., who delivered the unanimous judgment of the court, said (at p. 44):

It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray*, that judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category which Lord Chancellor Hardwicke had as early as 1742 characterized as "scandalising a Court or a Judge".

It should be noted, however, that the contempt in the *Duncan* case was committed in the face of the court, and the quotation from 8 Hals. (3d) 5 which was approved by the court as succinctly stating the law dealt with contempt in the face of the court, not with contempt by scandalizing the court.

105 A more apposite Canadian case for the present one is, in my opinion, the decision of McRuer C.J.H.C. in *R. v. Glanzer*, [1963] 2 O.R. 30, [1963] 1 C.C.C. 364, 38 D.L.R. (2d) 402 (H.C.). In that case, the Attorney General of Ontario moved for a writ of attachment against the respondents for contempt committed by them in publishing a monthly magazine containing scandalous and scurrilous references to certain County Court Judges, accusing those judges of partiality, perverting justice and breaching their oaths of office. The article did not deal with pending cases but with decisions of the judges in decided cases. As in *R. v. Gray*, supra, counsel conceded that the respondent was guilty of contempt. McRuer C.J.H.C., after referring to cases such as *R. v. Gray* and *McLeod v. St. Aubyn*, supra, said (at p. 370):

For at least 200 years it has been the law of England, as it is today the law of Canada, that scandalous and scurrilous abuse of a Judge in his judicial work is a contempt of Court, not because of the injury done to the Judge, nor for the purpose of vindicating his character, nor for the purpose of taking vengeance on the perpetrator of the scandal, but for the purpose of preserving respect for the administration of justice in the Queen's Courts.

106 During the past 30 years there have been a number of prosecutions in Canada for contempt by scandalizing the court: see *R. v. Glanzer*, supra; *R. v. Murphy*, 6 C.R.N.S. 353, [1969] 4 C.C.C. 147, 4 D.L.R. (3d) 289, (sub nom. *R. v. Murphy; Ex parte N.B. (A.G.)*) 1 N.B.R. (2d) 297 (C.A.); *Anger v. Borowski*, [1971] 3 W.W.R. 434, (sub nom. *Re Borowski*) 3 C.C.C. (2d) 402, 19 D.L.R. (3d) 537 (Man. Q.B.); *Re Ouellet; R. v. Atlantic Sugar Refineries Co.* (1976), 36 C.R.N.S. 296, 32 C.C.C. (2d) 149, 72 D.L.R. (3d) 95 (C.A. Que.). As the editors of Borrie and Lowe's *The Law of Contempt*, 2nd ed. (1983), observe (at p. 247), "In England, scandalising the court has virtually fallen into desuetude whereas in Canada it has not." The cases I have referred to and the statement by Borrie and Lowe are all, it should be noted, pre-Charter.

107 The offence of scandalizing the court traditionally encompasses two forms of conduct: (a) scurrilous abuse of a court, or of a judge not in his personal capacity but as a judge: see *R. v. Gray*, supra, and *Re Ouellet*, supra; and (b) attacks upon the integrity or impartiality of a judge or court: see *R. v. New Statesman (Editor); Ex parte D.P.P.* (1928), 44 T.L.R. 301 (Div. Ct.). Borrie and Lowe at p. 229 suggest that there may be a third form, namely, "publications that are thought to lower the repute of a judge or court". It is, of course, the second form of conduct which concerns us in this case.

108 The Criminal Code, R.S.C. 1970, c. C-34, does not contain an offence of contempt of court. Section 8 of the Code, which abolishes liability for common law offences, preserves the power, jurisdiction and authority of the court to punish for contempt: see *R. v. Clement*, [1981] 2 S.C.R. 468, 23 C.R. (3d) 193, [1981] 6 W.W.R. 735, 23 R.F.L. (2d) 225, 61 C.C.C. (2d) 449, 127 D.L.R. (3d) 419, 10 Man. R. (2d) 92, 38 N.R. 302; and *R. v. Vermette*, [1987] 1 S.C.R. 577, 57 C.R. (3d) 340, [1987] 4 W.W.R. 595, 52 Alta. L.R. (2d) 97, 32 C.C.C. (3d) 519, 38 D.L.R. (4th) 419, 77 A.R. 372, 74 N.R. 221. I do not think there can be any doubt that prior to the enactment of the Charter the statements made by the appellant would have been sufficient

to support a conviction for the common law offence of contempt by scandalizing the court, and if it were not for the Charter I would dismiss the appeal. The crucial issue is whether the Charter has effected a change in this branch of the law of contempt.

109 Before turning to an examination of the Charter, I would like to make reference to some of the legal writings and law reform commission reports that have commented on the offence of scandalizing the court. In his article "Scandalising in the Eighties", Clive Walker, after a careful review of the nature of the offence and the reasons for and against its retention, concluded as follows (at pp. 383-84):

In the light of the foregoing arguments, the archaic offence of scandalising the court should be abolished. It is to be hoped that repeal will encourage comment concerning the legal domain, since this is of far greater public advantage than scandalising ever could be in terms of acting as:

... an instrument of reform, as an irreplaceable check on abuse of power, as a creative source of new ideas, as a vital level of adaption, and as a dynamic instrument of, and a pre-requisite for, an achievement of justice ...

Similarly the Australian Law Reform Commission in its discussion paper 26, "Contempt and the Media" (March 1986), arrived at this provisional conclusion (para. 196, p. 146):

The Commission's provisional view is that the arguments put forward in support of the existing law of scandalising are inadequate at the present day to justify the significant inhibition which it imposes on freedom of speech and publication. The proper choice lies between abolition (so far as constitutional limitations permit) and substantial curtailment of the scope of the offence. The first of these is provisionally offered as the preferred option.

And on the same page, in para. 197, the commission stated:

The chief basis of the Commission's provisional preference for abolishing the law of scandalising is its belief that the system of administration of justice is capable of standing on its feet without the aid of special protection against criticism and disparagement, and that ultimately the existence of any "special treatment" for the judiciary within the law is likely to have a counter-productive effect on the judiciary's reputation and status within the community.

110 M. David Lepofsky in his book *Open Justice* (1985), forcefully contends (at p. 302) that, having regard to the provisions of s. 2(b) of the Charter, there is no scope for the offence of scandalization except where there exists "a wide-spread virtually subversive scheme to disable Canadian courts through a barrage of fraudulent claims of judicial impropriety". As will be seen, this is very close to what Mr. Doherty submitted to us on behalf of the Criminal Lawyers' Association.

111 There have been two reports of law reform bodies in England dealing with the offence. The Report of the Committee on Contempt of Court (December 1974), commonly called the "Phillimore Report", was of the view that the offence should be retained but not as part of the law of contempt. In para. 162 of the report, the committee stated:

At one stage we considered whether such conduct should be subject to penal sanctions at all. It was argued that any judge who was attacked would have the protection of the law of defamation, and that no further protection is necessary. We have concluded, however, that some restraints are still required, for two reasons. First, this branch of the law of contempt is concerned with the protection of the administration of justice, and especially the preservation of public confidence in its honesty and impartiality; it is only incidentally, if at all, concerned with the personal reputations of judges. Moreover, some damaging attacks, for example upon an unspecified group of judges, may not be capable of being made the subject of libel proceedings at all. Secondly, judges commonly feel constrained by their position not to take action in reply to criticism, and they have no proper forum in which to do so such as other public figures may have. These considerations lead us to the conclusion that there is need for an effective remedy, both in England and Wales, and in Scotland, against imputations of improper or corrupt judicial conduct.

112 The committee recommended (para. 164) that this branch of the law of contempt be replaced by "a new and strictly defined criminal offence". The offence would be constituted "by the publication, in whatever form, of matter imputing improper or

1987 CarswellOnt 124, [1987] O.J. No. 1052, 24 O.A.C. 81, 39 C.C.C. (3d) 1...

corrupt judicial conduct with the intention of impairing confidence in the administration of justice". Criticism, even if scurrilous, would be punishable only if it met these two requirements while the offence would be "triable only on indictment".

113 The second report is the report of the Law Commission on Offences Relating to Interference with the Course of Justice (November 1979). It accepted the recommendation of the Phillimore Committee for the creation of a new offence but narrowed the definition proposed by the Phillimore Committee. The commission felt that "improper judicial conduct" was too broad. It recommended that (para. 3.70):

... it should be an offence to publish or distribute false matter, with intent that it be taken as true and knowing it to be false or being reckless whether it is false, when it imputes corrupt judicial conduct to any judge, tribunal or member of a tribunal.

A prosecution could be instituted only with the consent of the Attorney General, and could be tried summarily or by indictment.

114 In Canada, the federal Law Reform Commission issued in March 1982 its report 17, on Contempt of Court (1982). The commission recommended the creation of a new offence called "affront to judicial authority", to replace contempt by scandalizing the court. The offence could be committed in two ways: (a) by affronting judicial authority by any conduct calculated to insult a court; or (b) by attacking the independence, impartiality or integrity of a court or of the judiciary. The offence would be triable summarily or by indictment, but not by the judge who was the subject of the affront or the attack, and the written consent of the Attorney General would be required to institute proceedings. With this background, I turn now to the Charter. Section 2(b) provides:

2. Everyone has the following fundamental freedoms: ...

(b) freedom of thought, belief, opinion and expression, including freedom of the express and other media of communication ...

Montgomery J. found that the appellant's statements constituted a vitriolic, unmitigated attack upon Zuker Prov. J. He also found that they were made with intent to vilify, that they were a blatant attack on all judges of all courts in Canada, and that they implied bias on the part of all judge. Notwithstanding these findings, there is no doubt that what was said by the appellant was an "expression" within the meaning of s. 2(b).

115 In *R. v. Zundel* (1987), 58 O.R. (2d) 129, 56 C.R. (3d) 1, 31 C.C.C. (3d) 97, 35 D.L.R. (4th) 338, 29 C.R.R. 349, 18 O.A.C. 161, we held that freedom of expression is not absolute. In determining the limits of the freedom, the court observed that it is necessary to first determine the regulated area; the freedom is then what exists in the unregulated area. The court did not find it necessary to define the limits of the unregulated area where freedom of expression is supreme. It held that the offence created by s. 177 of the Code of spreading falsehoods knowingly was the antithesis of seeking truth through the free exchange of ideas. In finding that the conduct covered by s. 177 did not fall within the unregulated area, the court said (at pp. 155-56):

It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self-fulfilment. In our opinion an offence falling within the ambit of s. 177 lies within the permissibly regulated area which is not constitutionally protected. It does not come within the residue which comprises freedom of expression guaranteed by s. 2(b) of the Charter.

116 The determination of whether statements that may constitute contempt by scandalizing the court fall within the regulated or unregulated area is a difficult one. As the Supreme Court of Canada pointed out in *Retail, Wholesale & Dept. Store Union, Loc. 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 71 N.R. 83, per McIntyre J. at p. 583 [S.C.R.]:

The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

Before conduct is placed in the regulated area, I believe that a court should be satisfied that it is clearly antithetical to the freedom conferred by s. 2(b); the regulated area must, if freedom of expression is to have meaning, be very narrow in scope. Expression of opinion about the conduct of judges or courts after a case has been decided, no matter how vitriolic, scurrilous or vilifying,

is not, in my judgment, antithetical to the freedom of expression conferred by s. 2(b) of the Charter, and hence should not be placed in the regulated area. I am not to be taken as suggesting that "freedom of expression" would preclude a civil action for defamation by the judge, but only that it would preclude proceedings for committal for contempt of court.

117 As John Stuart Mill points out in "Utilitarianism" and "On Liberty", in the Utilitarians (1962), at p. 491, there is value not only in the right expression of opinion but also in the wrong:

If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

The inclusion of contempt by scandalizing the court in the regulated area could lead to orthodoxy, and orthodoxy, in my opinion, is neither essential nor desirable for the proper functioning of our judicial system. Courts and judges should be subject to criticism, no matter how extreme; they will function better as a result of it.

118 Since the statements made by the appellant are protected by s. 2(b) of the Charter, it is necessary to turn to s. 1 of the Charter to see if the law proscribing contempt by scandalizing the court is a reasonable limit demonstrably justifiable in a free and democratic society. For s. 1 to be applicable, the limit must be "prescribed by law". Ms. Codina argued that the law as to scandalizing the court was too vague and uncertain to be such a limit. With respect, I do not agree. This branch of the law has been clearly defined by both English and Canadian courts. A person would have no difficulty in ascertaining the law and regulating his conduct accordingly: see *R. v. Cohn* (1984), 48 O.R. (2d) 65, 42 C.R. (3d) 1, 15 C.C.C. (3d) 150 at 163-64, 13 D.L.R. (4th) 680, 10 C.R.R. 142, 4 O.A.C. 293 (C.A.). The law of contempt of court by scandalizing the court is therefore a limit prescribed by law.

119 The onus of proving that the law of contempt by scandalizing the court is a reasonable limit under s. 1 is, of course, upon the Crown. This is not a case, however, where evidence is required, the elements of the s. 1 analysis being "obvious or self-evident": *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 65 N.R. 87 .

120 The criteria for the application of s. 1 have been clearly defined by Dickson C.J.C. in *R. v. Oakes* at pp. 138-40. First, the objective of the prescribed law must relate to concerns which are pressing and substantial and which are of sufficient importance to warrant overriding the constitutionally-protected freedom. The objective of this branch of the law is perhaps best summed up in Borrie and Lowe's *The Law of Contempt* at p. 226:

The necessity for this branch of contempt lies in the idea that without well-regulated laws a civilised community cannot survive. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute.

In my opinion, this objective is of sufficient importance to satisfy the first condition of *R. v. Oakes* for the application of s. 1.

121 Second, once a sufficiently significant objective has been identified, the party having the onus must show that the means chosen to protect that objective are reasonable and demonstrably justified. This involves a "proportionality test". There are three components of this test: (a) the means adopted must be rationally connected to the objective; (b) the means adopted should go no further than is required to achieve the objective; and (c) there must be a proportionality between the effect of the means adopted and the objective.

122 It is the second component of the proportionality test which causes me concern in this case. The present law assumes that, if any act is done or writing is published calculated to bring the court or a judge of a court into contempt or to lower his authority, then it is necessary to curtail freedom of expression and to penalize the offender. Mr. Doherty submitted that this went a great deal further than was required to achieve the objective of the prescribed law. With respect, I agree with this submission.

123 Freedom of speech and expression were well-recognized rights in Canada prior to the *Charter*. In *Retail, Wholesale & Dept. Store Union, Loc. 580 v. Dolphin Delivery Ltd.*, supra, at p. 586, McIntyre J. noted with approval the following passage from Hogg, Constitutional Law of Canada, 2nd ed. (1985), at p. 713:

Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the Charter of Rights.

The freedom guaranteed by s. 2(b) of the Charter should not be limited to any greater extent than is absolutely essential. As Lord Morris of Borth-y-Gest said in *A.G. v. Times Newspapers Ltd.*, [1947] A.C. 273, [1973] 3 W.L.R. 298, [1973] 3 All E.R. 54 (H.L.):

But as the purpose and existence of courts of law is to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitations on free speech or free discussion or free criticism beyond those which are absolutely necessary.

In my judgment, the restraint imposed by the existing law of contempt by scandalizing the court is not proportionate to the objective sought to be attained.

124 Mr. Doherty did not ask that we should hold that because of the Charter there was no longer any offence of contempt by scandalizing the court. He was content that the offence should continue to exist, but only where it could be shown that the impugned conduct posed a real and substantial risk to the fair and effective administration of justice. He derived this result from three sources:

125 (1) dicta in certain cases which have used somewhat similar words in connection with contempt. The most relevant of these, I believe, are *A.G. v. Times Newspapers Ltd.*, supra, and *N.Z. (Solicitor Gen.) v. Radio Avon Ltd.*, supra. In the *Times Newspapers* case, the House of Lords was concerned with an alleged contempt in pending court proceedings. In the course of his speech, Lord Reid said (at p. 60):

The law on this subject [contempt of court] is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be a *real prejudice to the administration of justice*. [Emphasis added.]

And Lord Morris of Borth-y-Gest said (at p. 67):

A court will therefore only find "contempt" where the risk of prejudice is *serious or real or substantial*. If a court is in doubt whether conduct complained of amounts to "contempt" the complaint will fail. [Emphasis added.]

126 *N.Z. (Solicitor Gen.) v. Radio Avon Ltd.*, supra, is a decision of the New Zealand Court of Appeal dealing with contempt by scandalizing the court. In that case, a radio station broadcast a news item attributing impropriety and lack of judicial integrity to a Supreme Court judge. The radio station and its news editor were convicted of contempt. They appealed. The appeal by the radio station was dismissed; the appeal by the editor was allowed. Richmond P., who delivered the judgment of the court, said (at p. 234):

Even so, we accept Mr. Palmer's submission that in the present case the appellants ought not to have been convicted of contempt unless the facts established beyond reasonable doubt that there was a *real risk*, as opposed to a remote possibility, that the broadcast item would undermine public confidence in the administration of justice. [Emphasis added.]

127 (2) the test used in contempt cases in the United States. As has been noted, the United States does not have an offence of contempt by scandalizing the court; however, in contempt charges where the contempt is alleged to have occurred with respect

to a pending case, the American courts apply a "clear and present danger" doctrine. In *Bridges v. Calif.*, *supra*, at p. 263, Black J. summed up the American position in this passage:

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

128 In *Pennekamp v. Fla.*, 328 U.S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946), decided some six years after *Bridges v. Calif.*, Reed J., delivering the decision of the majority of the Supreme Court of the United States, said ([at p. 1032](#)):

Whether the threat to the impartial and orderly administration of justice must be a clear and present or a grave and immediate danger, a real and substantial threat, one which is close and direct or one which disturbs the court's sense of fairness depends upon a choice of words. Under any one of the phrases, reviewing courts are brought in cases of this type to appraise the comment on a balance between the desirability of free discussion and the necessity for fair adjudication, free from interruption of its processes.

129 (3) the decision of the European Court of Human Rights in *Sunday Times v. U.K.* (1979), 2 E.H.R.R. 245. In effect, this case reversed the decision of the House of Lords in *A.G. v. Times Newspapers*, *supra*, by holding that an injunction restraining publication of an article in the Sunday Times on the ground that it would constitute contempt of court would violate art. 10 of the European Convention on Human Rights, 1950, which confers the right to freedom of expression. Article 10(2) of the Convention is similar to s. 1 of the Charter in that it makes the exercise of the right to freedom of expression subject to such restrictions as are prescribed by law and are necessary in a democratic society, *inter alia*, "for maintaining the authority and impartiality of the judiciary". At pp. 277-78 of the judgment of the majority, the court said:

It must now be decided whether the "interference" complained of corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", whether the reasons given by the national authorities to justify it are "relevant and sufficient under Article 10(2)". [Emphasis added.]

130 Although Mr. Doherty's submission for a re-definition of the offence of scandalizing the court is attractive, I do not think it can be justified under the Charter. In my view, the offence of scandalizing the court, even as re-defined by Mr. Doherty, is not a reasonable limit prescribed by law and demonstrably justifiable in a free and democratic society. As I have pointed out, in the United States, a free and democratic society, there is no such offence; and in England, also a free and democratic society, there have been no successful prosecutions for almost 60 years. In my judgment, the offence is not needed to protect either our Canadian judiciary or our courts.

131 I feel confident that our judiciary and our courts are strong enough to withstand criticism after a case has been decided, no matter how outrageous or scurrilous that criticism may be. I feel equally confident that the Canadian citizenry are not so gullible that they will lose faith and confidence in our judicial system because of such criticism. If the way in which judges and courts conduct their business commands respect, then they will receive respect, regardless of any abusive criticism that may be directed towards them. I would adopt the words of Lord Morris of Borth-y-Gest in *McLeod v. St. Aubyn*, *supra*, at p. 561, that "when a trial has taken place and the case is over, the judge or the jury are given over to criticism".

132 I appreciate that by the very nature of their office judges and courts cannot respond to criticism of what they have done. I do not believe, however, that this is sufficient justification for putting courts and judges in a different position from other public bodies, such as Parliament, provincial legislatures, municipal governments and the police. Accordingly, I would hold that the offence of scandalizing the court is inconsistent with the provisions of the Charter, and hence, by virtue of s. 52(1) of the Constitution Act, 1982, is no longer of any force and effect. With respect, I do not agree with Cory J.A. that there may still be some scope for the offence. In my opinion, there is no longer any scope for its operation.

Goodman J.A.:

133 I have read the reasons for judgment herein of my brothers Cory and Houlden J.J.A. I state at the outset that I agree with their conclusion that the appeal should be allowed. I deem it advisable, however, to make some additional comments on several of the issues argued on the appeal.

134 The offence charged is that of contempt of court. That offence is a common law offence which is preserved by the provision of s. 8 of the Criminal Code of Canada. That offence can be committed in a variety of ways, both in the face of the court and outside the court. I need not go into detail with respect to the various ways in which the offence can be committed. It is sufficient to state that in the present case it is alleged that the offence was one committed by the uttering of words outside of the court.

135 The notice of motion by which the Attorney General for the province of Ontario commenced the contempt proceedings against the appellant stated that he would be moving "for an order finding Harry Kopyto, the respondent, guilty of the offence of contempt of court". It further stated that a statement of the offence was set out in Sched. A of the notice of motion. Schedule A set forth the statements made by the appellant herein, which have been set forth in the reasons of my brother Cory, and alleged that such statements were published in the *Globe and Mail* newspaper "and that such statements were calculated to scandalize the court and to bring the administration of justice into disrepute and that the said Harry Kopyto did hereby commit the criminal offence of contempt of court". It should be emphasized that "scandalizing the court" or "bringing a court or the administration of justice into disrepute" are not offences preserved by s. 8 of the Code. The commission of acts or the publication of utterances calculated to have that effect are the means whereby the offence of contempt of court may be committed: see *R. v. Gray*, [1980] 2 Q.B. 86 (Div. Ct.), per Lord Russell of Killowen C.J. It is the offence of contempt which is preserved. "Scandalizing the court", which is a way of bringing the administration of justice into disrepute, is simply one of many ways in which the common law offence of contempt of court can be committed.

136 It must be noted that, heretofore, to prove the offence of contempt committed in this manner, it was not necessary to prove that the administration of justice had in fact been brought into disrepute. It was sufficient if the acts done or the words published were calculated to do so. The word "calculated" has been defined to mean "likely or intended": see Black's Law Dictionary, revised 4th ed. (1968), at p. 255. The courts, in considering this offence, have proceeded on the assumption that allegations of bias or improper motives on the part of the judiciary or the uttering of other scurrilous remarks will bring the administration of justice into disrepute and thus constitute the commission of the offence, without further proof that the reputation of the courts has been lowered in the community and the fair and effective administration of justice has been adversely affected.

137 See *R. v. Gray*, *supra*, and *Ambard v. Trinidad & Tobago (A.G.)*, [1936] A.G. 322 at 335, [1936] All E.R. 704 (P.C.) [Trinidad & Tobago], where Lord Atkin said

... provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are ... not ... not attempting to impair the administration of justice, they are immune.

138 I have no doubt that, prior to the date upon which the Canadian Charter of Rights and Freedoms came into force, the remarks of the appellant taken as a whole constituted the offence of contempt, in that they consisted of words intended or, at the very least, likely to bring the courts and judges thereof into disrepute.

139 I take that view although I would characterize the nature of the appellant's remarks in a somewhat different manner than that of the learned trial judge. It was his opinion that the first part of the appellant's statement was a "vitriolic, unmitigated attack on the trial judge". He disbelieved the evidence of the appellant that he did not intend to attack the character or integrity of the small claims court judge to whose decision reference was made in that part of his published statement. He had the benefit of hearing and observing the appellant, and no issue can be taken with that finding. In my opinion, however, it is open to this court to construe and interpret the words having regard to the circumstances in which they were uttered and that construction and interpretation does not depend upon the credibility of the appellant. There is no dispute as to the finding of the actual words uttered, or the circumstances in which they were uttered.

140 The words under consideration were:

This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it.

141 These words referred to a decision of Zuker Prov. J., given in Toronto small claims court, wherein he dismissed an action for damages by the appellant's client against two R.C.M.P. officers [*Dowson v. Chisholm* (1985), 16 Admin. L.R. 169 (Ont. Prov. Ct.)]. One of the grounds for dismissal of the action was that it had not been commenced within the six-month limitation period provided by s. 11 of the Public Authorities Protection Act, R.S.O. 1980, c. 406. The limitation period provided by the section related to actions instituted against any person for an act done in pursuance or execution of any statutory or other public duty or authority. Zuker Prov. J. concluded [at p. 174 (Admin. L.R.)], "I am satisfied that the defendants were exercising a public duty within the terms of that statute", and, further [at p. 176 (Admin. L.R.)]:

The writing of the letters was authorized. This is not in dispute. At all relevant times the defendants were exercising their statutory and authorized duties. I find on the facts on [sic] this case that the defendants acted within the scope of their duty and without malice towards this plaintiff which I must emphasize.

It is clear from the reasons that the plaintiff had submitted in that case that the police officers had committed unlawful acts in the alleged performance of their duties and accordingly could not be deemed to have acted in pursuance of their statutory duty, and the limitation defence provided by s. 11 was not available to them. The learned Provincial Judge found that the unlawful acts in question had been authorized by the superior officers of the defendants, who were accordingly entitled to the benefit of the s. 11 limitation provision.

142 The appellant's words were obviously an expression of his opinion that a principle of law which enables a police officer to rely on the fact that he was exercising his statutory or public duty in performing an unlawful act on the ground that he was following the instructions of a superior officer is wrong. In my view it is not reasonable to characterize the words used by the appellant as a personal attack on the character and integrity of the Provincial Judge. The words used constitute an intemperate, vitriolic and undiplomatic criticism of a court decision. The mode of expression is unworthy of a member of the bar. Nonetheless it constitutes no more than an expression by the appellant of an unfavourable opinion with respect to a court decision. This appeal, it should be noted, was argued by all parties on the basis that for all practical purposes no appeal was pending from Zuker Prov. J.'s decision and, although subsequent events have indicated that that was a false premise, I deal with it on that basis.

143 Notwithstanding the vile and crude language used by the appellant in expressing his opinion, in my opinion it cannot be said that no other reasonable person, whether layman or lawyer, could have a similar opinion. If such opinion was expressed by any such person in a respectful, albeit firm, manner, I have no doubt that it would not have constituted contempt of court even before the Charter came into effect. Lord Russell of Killowen C.J. said in *R. v. Gray*, supra, at p. 40:

Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court.

In my view, the expression of an opinion which may be lawfully expressed in mild, polite, temperate or scholarly language does not become unlawful simply because it is expressed in crude, vulgar, impolite or acerbic words.

144 The words used by the appellant in the remainder of the appellant's remarks set forth in the reasons of my brother Cory fall into a somewhat different category. Whether one regards these words as "a blatant attack on all judges of all courts", as found by the trial judge, or as an allegation of "systemic bias", as suggested by the appellant, it is clearly the type of statement calculated to bring the administration of justice into disrepute. The word "warp" is defined to mean "make, become crooked or perverted, bias, change from straight or right or natural state": see Oxford Illustrated Dictionary (1970 ed.).

145 In my opinion, the circumstances in which the remarks were made and the context in which the word was used indicate that the word "warp" was used to allege bias on the part of the courts and not dishonesty. The dividing line between what is an assertion of fact and what is an expression of opinion is often not too clear. An opinion is a belief based on grounds short of proof. The grounds usually are facts which may or may not be accurate, and indeed the so-called facts which form the grounds for the

basis of an opinion may be, in reality, the opinion of some other person presented as a fact. In the present case counsel for the appellant conceded that the remarks as an assertion of fact could not be proven to be true. In my view the proper characterization of the remarks is that they represent no more than an expression of opinion on the part of the appellant, although stated in the form of an assertion of fact. It seems to me that, insofar as protection under the Charter is concerned, an expression of opinion honestly and sincerely held, however unreasonable it may be, falls into a different and more protected category than a statement asserting facts which are untrue to the knowledge of the person making same or are recklessly made by him.

146 As previously indicated, I am of the opinion that the expression by the appellant of his opinion that the courts of this country are biased in favour of the police, as opposed to other members of the public, was intended or was likely to bring the administration of justice into disrepute, and accordingly constituted the offence of contempt of court by scandalizing the court prior to the coming into force of the provisions of the Charter.

147 I am, however, in complete agreement with my brothers Cory and Houlden, for the reasons stated by them, that the words of the appellant are "protected" by the freedom of expression clause set out in s. 2(b) of the Charter. That is particularly so because the expression in issue is that of an opinion found by the trial judge to be sincerely held by the appellant.

148 The next question to be decided is whether the offence of contempt by scandalizing the court, in the sense of uttering words which are calculated to bring the administration of justice into disrepute, constitutes a reasonable limitation on the freedoms set forth in s. 2(b) of the Charter. The nature of the offence is such that the words, although calculated to bring the administration of justice into disrepute, may have little or no such effect in fact. As previously indicated, the mere allegation of bias on the part of the courts may constitute the offence. I agree with my brother Cory that, to the extent that the offence of contempt by scandalizing the court merely requires proof that a statement is calculated to bring the court into contempt or to lower its authority, it does not meet the proportionality test set forth by the Supreme Court of Canada in *R. v. Oakes*, [1986] S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 14 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87, and accordingly is not a reasonable limitation prescribed by law as required by s. 1 of the Charter.

149 The offence alleged in the case at bar was that of contempt by making statements calculated to bring the court into disrepute. The notice of motion did not allege that the statements created any danger, whether present or future, to the fair and effective administration of justice, or that they brought the administration of justice into disrepute. No evidence was led to prove such facts. In my opinion an offence allegedly committed in the manner set forth in the notice of motion does not impose a reasonable limitation on the right of freedom of opinion and expression provided by s. 2(b) of the Charter. Accordingly, the conviction must be set aside.

150 My brothers Cory and Houlden are in agreement that the appeal must be allowed and the conviction set aside, and that the common law offence of contempt by scandalizing the court as presently defined was a valid offence. They disagree, however, as to its continued existence in the future. It is the view of my brother Cory that the courts or the legislature may modify the definition of the offence to meet the requirement of the Charter. It is the conclusion of my brother Houlden that the offence of contempt by scandalizing the court is inconsistent with the provisions of the Charter and there is no longer any scope for its operation.

151 It is not necessary for the resolution of the case at bar to determine whether the offence of contempt by scandalizing the court may continue to exist in a modified form in the future. Nevertheless, in view of the opinions expressed by my brothers, I propose to deal with the matter.

152 Although the existence of an offence of contempt of court by making a statement out of court calculated to bring the administration of justice into disrepute, without more, does not constitute a reasonable limitation of the rights of freedom of expression and opinion, within the meaning of s. 1 of the Charter, that does not mean that the offence of contempt of court by statements made out of court has itself become constitutionally invalid. Prior to the enactment of the Charter it was an offence of contempt of court to utter words calculated to bring the court into contempt, to lower its authority or to bring the administration of justice into disrepute. The same words which were calculated to achieve those purposes might in fact achieve those purposes and go even further and create a real or significant and immediate or imminent danger to the fair and effective administration

of justice. In the United States there is no offence of contempt by scandalizing the court unless comments have been made with reference to a case pending before a court. Where comment has been made in a case pending before the court, the court does not have power to punish for contempt for such comment unless there is no doubt that the utterances involved are a serious and imminent threat to the administration of justice: *Craig v. Harney*, 331 U.S. 367, 91 L. Ed. 1546, 67 S. Ct. 1249 (1947). In that case a newspaper editorial had described the conduct of a judge as, inter alia, "high handed" and a "travesty of justice". Douglas J., who delivered the majority opinion of the court, said at p. 1255:

This was strong language, intemperate language, and, we assume, an unfair criticism ... The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

See also *Pennekamp v. Fla.*, 328 U.S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946). The United States authorities make it clear that, in balancing the right of freedom of expression and freedom of the press against the maintenance of order, the broadest of protection is to be given such rights, and they are to be limited by the offence of contempt of court only when the utterances constitute a clear and present danger to the administration of justice and where they have been made with reference to a case pending before the court.

153 As I have previously stated, and as stated by my brothers Cory and Houlden, contempt of court by utterances calculated to bring the administration of justice into disrepute, standing alone, fails to meet the proportionality test set forth in *R. v. Oakes*, *supra*. In my opinion, even if the offence was restricted to cases where it was shown that in fact the utterances had brought the administration of justice into disrepute, it would not meet the proportionality test. Almost any intemperate or vitriolic remark, no matter from whom it emanates and no matter how unreasonable the opinion expressed or facts asserted, will bring the administration of justice into disrepute with one or more members of the public. In *R. v. Collins*, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193, [1987] 3 W.W.R. 699, 13 B.C.L.R. (2d) 1, 33 C.C.C. (3d) 1, 28 C.R.R. 122, 74 N.R. 276, Lamer J. said at p. 281, in dealing with the provisions of s. 24(2) of the Charter:

The concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large.

He then went on to adopt the reasonable person test proposed by Professor Yves-Marie Morissette in his article "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms* : What to Do and What Not to Do" (1984), 29 McGill L.J. 521, at p. 538, where it is suggested that the relevant question to be asked it:

Would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?

Lamer J. stated at p. 282:

The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.

154 In my opinion that test is also appropriate in determining whether utterances have brought the administration of justice into disrepute, that is:

Would the utterances bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case?

155 Unless, however, the fact that justice has been brought into disrepute results in a clear, significant and imminent or present danger to the fair and effective administration of justice, it does not justify the creation or maintenance of such an offence as a limitation on the rights of freedoms of opinion and expression. It does not meet the proportionality test.

156 I am of the further opinion that, where the utterances made are assertions of fact known to be false or made recklessly without such knowledge but not caring whether they are true or false, or where the utterances consist of an assertion of opinion not sincerely held, and such utterances bring the administration of justice into disrepute and result in a clear and significant and imminent or present danger to the fair and effective administration of justice, they will constitute the commission of contempt of court. As the conflict is at this point one of balancing the rights of freedom of expression and opinion against a clear and present danger to the maintenance of law and order, it meets the test of proportionality. I am of the opinion that the offence is not limited to utterances made with reference to cases still before the courts. The important question is whether the utterances create a real, significant and present or imminent danger to the fair and effective administration of justice. In each case it will be a question of fact for the court to decide having regard to all the circumstances. The fact that the utterances are made with respect to a case still before the court may be a very important and telling circumstance in proving that a real and imminent danger has resulted, but it will not necessarily be conclusive. On the other hand, it may be that the utterances will create a real and present danger although they are not made with reference to a case before the court.

157 In considering the circumstances relevant to the offence, it should be noted that the mere fact that vitriolic, intemperate language is used which is calculated to bring the administration of justice into disrepute does not in itself raise a presumption that a clear and present or imminent danger has been created. A temperate, polite utterance asserting a falsehood with respect to facts or opinion not sincerely held may be much more effective in creating such danger. A vitriolic attack on a court or a judge or judges thereof emanating from a person of no standing in the community or from a person of ill repute may have little or no effect upon the reputation of the court and represent no danger to the fair administration of justice. A temperate utterance made in polite words but nevertheless asserting facts known to be false which are calculated to bring the administration of justice into disrepute and emanating from a person of good reputation of high standing in the community, be he a lawyer, doctor, newspaper editor, politician, mechanic or tradesman, may result in a real danger to the fair and effective administration of justice.

158 The social, economic and political conditions existing at the time the utterances in question are made may be important circumstances to be considered. In every case it will be a question of fact for the court to determine, on the basis of the nature and content of the utterances, the source of the utterances and any other relevant circumstances, whether the utterances have created a real and imminent or present danger to the fair and effective administration of justice.

159 In *R. v. Cohn* (1984) 48 O.R. (2d) 65, 42 C.R. (3d) 1, 15 C.C.C. (3d) 150, 13 D.L.R. (4th) 680, 10 C.R.R. 142, 4 O.A.C. 293, this court said at pp. 176-77:

In setting forth these rights [the principles of fundamental justice] it must be borne in mind, however, ... that some limitation on such rights ... may be justified. Where such circumstances exist, the limitations sought to be imposed will have to be considered in the light of the provisions of s. 1 of the Charter. Simply put, it is a matter of the common law continuing to evolve as it has for centuries but henceforth, in Canada, it must evolve within the framework provided by the Charter to safeguard individual rights. Each case will have to be decided on its own particular facts after applying proper legal principles.

160 That case was concerned with the offence of contempt in the face of the court. The case at bar is concerned with contempt outside of the court, but the same principle is applicable. In my opinion the application of the Charter to the common law now places a limitation on freedom of expression and opinion as they relate to the administration of justice from utterances or statements which consist of assertions of facts which are false and are known to be false by the person making the assertion, or are recklessly made by such person. It also places such limitation on those freedoms where the utterances consist of an expression of an opinion which is not honestly and sincerely held. That limitation, and consequently the offence of contempt, is constitutionally valid, however, only where the utterance or statement is found to result in a clear, significant and imminent or present danger to the fair and effective administration of justice. In that case it meets the test of proportionality and becomes a reasonable limitation prescribed by law which can be demonstrably justified in a free and democratic society. The limitation, and consequently the offence of contempt, will not be constitutionally valid where such utterances are calculated to bring the administration of justice into disrepute, even if it proven that they in fact do, unless the clear and present danger test is also met.

161 I agree with the statement of my brother Houlden that our judiciary and courts are strong enough to withstand criticism after a case has been decided, not matter how outrageous or scurrilous that criticism may be. That reflects the present state of affairs having regard to the circumstances which exist in Canada today. It would require an extreme combination of unusual circumstances at the present time to suffice to convince a court that utterances or statements constitute a real significant and imminent or present danger to the fair and effective administration of justice. The utterances with which the court is concerned in the present case, having regard to all the circumstances, fall far short of meeting the test. Nevertheless, in my opinion, the offence of contempt for utterances and statements made outside of the court remains a constitutionally valid offence, subject to strict proof of the fulfillment of the prescribed conditions necessary for the commission thereof.

Cory J.A.:

162 Harry Kopyto was convicted of contempt of court by scandalizing the court. This appeal is brought from that conviction.

Factual Background

163 For a number of years the appellant acted as the lawyer for his friend, Mr. Dowson. Mr. Dowson was from 1961 to 1972 the Executive Secretary and subsequently Chairman of the League for Socialist Action. Allegations have been made that the R.C.M.P. had investigated the activities of the league and Mr. Dowson in an improper manner.

164 The appellant, on behalf of Dowson, brought an action for defamation. The alleged defamation was contained in a summary of the R.C.M.P. investigation of the league that was read by the Attorney General in the legislature. The claim was struck down by the Federal Court of Appeal [*Dowson v. R. (1981)*, 124 D.L.R. (3d) 260, (*sub nom. Dowson v. Can.*) 37 N.R. 127] and leave to appeal to the Supreme Court of Canada was refused [124 D.L.R. (3d) 260n, 39 N.R. 560].

165 The appellant, again on behalf of Dowson, also sought to have criminal charges brought against members of the R.C.M.P. for purportedly forging letters during their investigation of the league. The legal proceedings involving these charges also had a long and unsuccessful history.

166 On 11th May 1982 the appellant, still acting for Dowson, instituted civil proceedings in the Small Claims Court against members of the R.C.M.P. The allegation was made that the defendants had conspired to injure Dowson and had made injurious false statements about him. This action too gave rise to a number of well-publicized proceedings. Eventually a truncated version of the case came before Zuker Prov. J. The decision was reserved. On 12th December 1985 carefully-considered reasons were delivered by Zuker Prov. J. [*Dowson v. Chisholm (1985)*, 16 Admin. L.R. 169 (Ont. Prov. Ct.)]. He dismissed the plaintiff's claim, in part on the grounds that the action was not brought within the statutorily-prescribed limitation period.

167 Following the release of the reasons a reporter from the Globe and Mail called the appellant seeking his comments on the judgment. The appellant indicated that he would call the reporter back after he had read the reasons. On the next day, 17th December 1985, the appellant called the reporter. He gave a long statement, portions of which were included in an article published in the Globe and Mail on 18th December 1985 and form the subject matter of the charge against him.

168 The appellant admitted that the Globe and Mail quoted him correctly. The quotations read as follows:

This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it.

Dr. Dowson and I have lost faith in the judicial system to render justice.

We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you'd think they were put together with Krazy Glue.

The Decision at Trial on the Charge of Contempt of Court

169 The learned trial judge gave careful, complete and detailed reasons for his conclusion that the appellant was guilty of the offence of contempt of court by scandalizing the court. He observed that there was no doubt about the appellant's sincerity or the bona fides of his desire to correct what the appellant perceived to be a social injustice. He rejected the appellant's contention that the remarks had referred to "systemic bias" and that they had not been intended to malign Zuker Prov. J. He found the appellant's statements to be "a vitriolic, unmitigated attack on the trial judge" and, as well, "a blatant attack on all judges of all courts". The appellant's words, he observed, went far beyond criticism and demonstrated an intention to vilify.

170 The trial judge also concluded that the offence of scandalizing the court did not constitute an infringement of s. 2(b) of the Canadian Charter of Rights and Freedoms, which guarantees freedom of expression. Furthermore, he determined that, even if the offence did constitute an infringement of s. 2(b), it was a justifiable limitation under s. 1 of the Charter.

171 It is significant to observe that the Crown did not allege any intended or foreseeable interference with the administration of justice except insofar as it was alleged that the statement brought the overall administration of justice into disrepute. Further, it was not suggested by the Crown that the appellant's comments were calculated to interfere with the conduct of a specific case presently before the court, or a particular case pending before the courts.

Issues to be Considered

172 A consideration of the following issues is essential to the resolution of this appeal:

173 1. Do the words of the appellant fall within the purview of s. 8 of the Criminal Code so as to constitute contempt of court by scandalizing the court, as that offence has been known at common law?

174 2. Are the words of the appellant "protected" by the freedom of expression clause set out in s. 2(b) of the Charter?

175 3. If the words of the appellant are protected by s. 2(b) of the Charter, does the offence of contempt of court by scandalizing the court constitute a constitutionally permissible limit on that protection?

1. Do the words of the appellant fall within the purview of s. 8 of the Criminal Code so as to constitute contempt of court by scandalizing the court, as that offence has been known at common law?

The Origins of the Offence

176 Section 8 of the Criminal Code provides:

8. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 662.1

(a) of an offence at common law,

(b) of an offence under an Act of Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before the 1st day of April 1955, to impose punishment for contempt of court.

177 The common law offence of contempt of court is thus preserved by s. 8. There are two types of conduct which come within the scope of the criminal contempt. First, there is contempt in the face of the court. This type of offence encompasses any word spoken or act done in or in the precinct of the court which obstructs or interferes with the due administration of justice or is calculated to do so. It would include assaults committed in the court, insults to the court made in the presence of the court, interruption of court proceedings, and a refusal of a witness to be sworn or, after being sworn, refusal to answer. Secondly,

the offence may be committed by acts which are committed outside the court. Contempt not in the face of the court includes words spoken or published or acts done which are intended to interfere or are likely to interfere with the fair administration of justice. Examples of that type of contempt are publications which are intended or are likely to prejudice the fair trial or conduct of a criminal or civil proceeding or publications which scandalize or otherwise lower the authority of the court, and acts which would obstruct persons having duties to discharge in a court of justice: see *R. v. Cohn* (1984), 48 O.R. (2d) 65, 42 C.R. (3d) 1, 15 C.C.C. (3d) 150 at 156, 13 D.L.R. (4th) 680, 10 C.R.R. 142, 4 O.A.C. 293 (C.A.).

178 *R. v. Gray*, [1900] 2 Q.B. 86 (Div. Ct.) , was the first case to hold that it is a criminal offence to bring the administration of justice into disrepute by scandalizing the court, that is to say, by performing an act or uttering words that are calculated to bring a court into contempt or lower its authority. In that case Lord Russell of Killowen C.J. defined the offence, at p. 40, in the following words:

Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.C. characterised as "scandalising a Court or a judge." That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of Court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is personal scurrilous abuse of a judge as a judge.

179 The principle thus enunciated in *R. v. Gray* , supra, was adopted by the Supreme Court of Canada in *Re Duncan*, [1958] S.C.R. 41, 11 D.L.R. (2d) 616 . The Supreme Court was there dealing with statements made in court by Mr. Duncan, who had objected to one of the justices sitting on the appeal which he was about to argue. The act complained of might have been categorized as one of contempt in the face of the court. Nonetheless, Kerwin C.J.C. cited with approval and quoted from *R. v. Gray* . At p. 44 of Kerwin C.J.C.'s reasons the following appears:

It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray* , that judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category which Lord Chancellor Hardwicke had as early as 1742 characterized as "scandalising a Court or a judge". The matter is put succinctly in the 3rd edition of Halsbury, vol. 8 (1954), at p. 5:

The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in its presence and at a time when it is actually sitting ... It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, but because there is imposed upon the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice.

180 In *R. v. Glanzer*, [1963] 2 O.R. 30, [1963] 1 C.C.C. 364, 38 D.L.R. (2d) 402 (H.C.) , McRuer C.J.H.C. also cited with approval the same excerpt from *R. v. Gray* , supra.

181 The Supreme Court of Canada's recognition of the offence of scandalizing the court is of course binding upon the courts of this province. However, it must be observed that many legal writers and judges of other jurisdictions have been vehement in their criticism of the principle: see, for example, A. Hughes, "Contempt of Court and the Press" (1900), 16 L.Q. Rev. 292; Borrie and Lowe, *The Law of Contempt*, 2nd ed. (1983), c. 8, at p. 244; Australian Law Reform Commission, issue paper 4, *Reform of Contempt Law* (1984); C. Walker, "Scandalising in the Eighties" (1985), 101 L.Q. Rev. 359.

182 The legal writers argue that the basic assumption embodied in the offence of scandalizing the court, namely, that public confidence in the administration of justice would be undermined by comments that tend to lower the authority of the court, is highly speculative. The writers contend that an intelligent and sophisticated public should evaluate the merits of the comments, rather than the judiciary, which in effect acts as both prosecutor and judge. The commentators take the position that the courts, like other public institutions, should be open to lively and trenchant criticism. The courts, they say, do not need and should not have special rules for their protection.

183 In *Bridges v. Calif. Times-Mirror Co. v. Calif. S.C. for Los Angeles*, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941), Frankfurter J. of the United States Supreme Court, dissenting in part, referred to the offence of contempt by scandalizing the court as English "foolishness" [p. 216 (L. Ed.)]. He considered criticism of the courts, however unrestrained, made after a decision has been rendered to be an exercise of the right of free discussion and free speech.

184 Despite the harsh criticism, the offence has continued to exist in this province. Equally clearly, the statement of the appellant would constitute the basis of his conviction for that offence prior to the passage of the Charter. The words of the appellant were calculated to bring Zuker Prov. J. into disrepute. Further, the statement that all courts of the country are warped, that is to say, perverted, in favour of the police was calculated to bring all courts into disrepute.

185 In his very fair, able and persuasive argument, counsel for the intervenant Criminal Lawyers' Association expressed his disapproval of the appellant's statements and conceded that his action was a gross breach of professional responsibility. His assessment was correct. The statement was in the poorest possible taste. It was no more than the whining of an unhappy loser. It was unreasonable, unprofessional and unworthy of even the most marginal and most recent member of the profession. It was, in a word, disgraceful. Nonetheless, the advent of the Charter of Rights makes it necessary to review the offence of scandalizing the court in order to ensure that it meets the requisite constitutional standards. The comment, which was no more than the puerile manifestation of petulant pique, nevertheless represented the expression of a sincerely-held belief on a matter of public interest. It is not necessary for the purposes of this case to elaborate at length on what constitutes a matter of public interest. The appellant's comment concerned the functioning and operation of a public institution, specifically, the courts. It was thus a comment on a matter of public interest. As a result, it is necessary to consider whether the statement is protected by s. 2(b) of the Charter.

2. Are the words of the appellant "protected" by the freedom of expression clause set out in s. 2(b) of the Charter?

186 *R. v. Gray*, supra, set forth the principle which guided the courts in their approach to the offence of scandalizing the court. With the passage of the Charter, that approach may no longer be appropriate.

187 How should the ambit of the protection afforded by s. 2(b) of the Charter be determined? First, it is important to note that the rights granted by the Charter were not frozen at the moment of its enactment; the Charter does more than recognize and declare pre-existing rights. The Supreme Court of Canada has on several occasions emphasized that the rights and freedoms contained in the Charter must be ascertained without undue reliance on the pre-Charter view of those rights and freedoms. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81, Dickson J. (as he then was) put it in this way at p. 423:

It is not necessary to reopen the issue of the meaning of freedom of religion under the *Canadian Bill of Rights*, because whatever the situation under that document, it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore, the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter.

188 In *R. v. Therens*, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 32 M.V.R. 153, 18 C.C.C. (3d) 481 at 500-501, 18 D.L.R. (4th) 665, 13 C.R.R. 193, 40 Sask. R. 122, 59 N.R. 22 , Le Dain J. similarly stated:

In my opinion, the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the Charter was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the court. As Dickson J. (as he then was) said in *Hunter et al. v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 at p. 105, 11 D.L.R. (4th) 641 at p. 649, [1984] 2 S.C.R. 145 at 155 : "The task of expounding a constitution is crucially different from that of construing a statute."

189 In *Law Soc. of Upper Can. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481 at 488, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169 , Estey J. wrote:

Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the court.

190 Thus it is apparent that freedom of expression may now be broader and less restricted than it was prior to the passage of the Charter.

191 In *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87 , the Supreme Court of Canada indicated that in considering the application of the Charter the courts should approach the issue in two steps. First, consideration must be given to the purpose of a particular section of the Charter in order to determine the content or scope of the particular right or freedom without reference to competing values or other considerations. If it is determined that the particular right or freedom has been infringed, then the analysis must shift to s. 1 of the Charter: this is the second step. In considering s. 1 of the Charter, the courts must in most instances weigh competing values in order to determine which will prevail. It is in the context of s. 1 that the court should consider such factors as the reasonableness of a limitation on a right.

192 Dickson C.J.C., at p. 344 [C.C.C.], outlined the procedure in these words:

The appropriate stage for invoking the rational connection test, however, is under s. 1 of the Charter. This consideration did not arise under the *Canadian Bill of Rights* because of the absence of an equivalent to s. 1. At the Court of Appeal level in the present case, Martin J.A. sought to combine the analysis of ss. 11(d) and 1 to overcome the limitations of the *Canadian Bill of Rights* jurisprudence. To my mind, it is highly desirable to keep ss. 1 and 11(d) analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the *Charter* to date: see *R. v. Big M Drug Mart Ltd.* [supra]; *Hunter et al. v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 S.C.R. 145 ; *Law Society of Upper Canada v. Skapinker* [supra].

193 This two-step approach has been applied in *Re Ont. Film & Video Appreciation Soc. and Ont. Bd. of Censors* (1984), 45 O.R. (2d) 80, 38 C.R. (3d) 271, 5 D.L.R. (4th) 766, 7 C.R.R. 129, 2 O.A.C. 388 , affirming 41 O.R. (2d) 583, 34 C.R. (3d) 73, 147 D.L.R. (3d) 58, 5 C.R.R. 373 , leave to appeal to S.C.C. granted [noted 41 C.R. (3d) xxix, 3 O.A.C. 318, 55 N.R. 318] and in other cases.

194 Considering now the purpose of s. 2(b), it is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful, language may be the necessary touchstone to fire the interest and imagination of the public to the need for reform and to suggest the manner in which that reform may be achieved.

195 The concept of free and uninhibited speech permeates all truly democratic societies. Caustic and biting debate is, for example, often the hallmark of election campaigns, Parliamentary debates and campaigns for the establishment of new public institutions or the reform of existing practices and institutions. The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas. The very lifeblood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened.

196 History has repeatedly demonstrated that the first step taken by totalitarian regimes is to muzzle the media and then the individual in order to prevent the dissemination of views and opinions that may be contrary to those of the government. The vital importance of freedom of expression cannot be over-emphasized. It is important in this context to note that s. 2(b) of the Charter is framed in absolute terms, which distinguishes it, for example, from s. 8 of the Charter, which guarantees the qualified right to be secure from 'unreasonable' search. The rights entrenched in s. 2(b) should therefore be restricted only in the clearest of circumstances.

197 The courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens but also for the resolution of disputes between the citizen and the state in all its manifestations. The more complex society becomes, the greater is the resultant frustration imposed on citizens by that complexity, and the more important becomes the function of the courts. As a result of their importance the courts are bound to be the subject of comment and criticism. Not all will be sweetly reasoned. An unsuccessful litigant may well make comments after the decision is rendered that are not felicitously worded. Some criticism may be well-founded, some suggestions for change worth adopting. But the courts are not fragile flowers that will wither in the hot heat of controversy. Rules of evidence, methods of procedure and means of review and appeal exist that go far to establishing a fair and equitable rule of law. The courts have functioned well and effectively in difficult times. They are well-regarded in the community because they merit respect. They need not fear criticism, nor need they seek to sustain unnecessary barriers to complaints about their operations or decisions.

198 The vital and fundamental importance of freedom of expression was recognized by the Supreme Court of Canada in *Retail, Wholesale & Dept. Store Union, Loc. 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, [1987] 1 W.W.R. 577, 9 B.C.L.R. (2d) 273, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002, 33 D.L.R. (4th) 174, 25 C.R.R. 321, 71 N.R. 83. McIntyre J., speaking for the court, emphasized the importance of freedom of expression, and quoted at p. 583 [S.C.R.] a most persuasive passage written by John Stuart Mill:

Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica: A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1664), and as well John Stuart Mill, "On Liberty" in *On Liberty and considerations on Representative Governments* (Oxford 1946), at p. 14:

If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

And, after stating that "All silencing of discussion is an assumption of infallibility", he said, at p. 16:

Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature of this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

199 In *R. v. Zundel* (1987), 58 O.R. (2d) 129, 56 C.R. (3d) 1, 31 C.C.C. (3d) 97, 35 D.L.R. (4th) 338, 29 C.R.R. 349, 18 O.A.C. 161, this court considered the effect of s. 2(b) of the Charter on s. 177 of the Criminal Code. In the particular circumstances of that case it was not found to be necessary to consider s. 1 of the Charter in order to resolve the issue. This court determined that the free speech which is guaranteed in absolute terms by s. 2(b) is not an unqualified right, but rather is a freedom that must be defined by first determining the area in which regulation is permissible. The freedom was held to be that which exists in the unregulated area. At pp. 118-19 it was said:

The regulated area will include restrictions for purposes of decency and public order, and specifically with respect to the freedom of expression, prohibitions concerning criminal libel and sedition.

And at p. 123:

Accordingly, American constitutional cases support the position that freedom of speech is not an absolute freedom, and that there are certain well-defined and limited classes of speech such as the obscene or libelous, or knowingly false statements, which are not constitutionally protected because any slight social value as a step to truth that they may entail, is clearly outweighed by the social interest in order and morality.

200 The court held that s. 177 of the Criminal Code prohibited speech that is within the permissively-regulated area and is therefore not constitutionally protected. The conclusion was framed in this way at p. 23:

Spreading falsehoods knowingly is the antithesis of seeking truth through the free exchange of ideas. It would appear to have no social or moral value which would merit constitutional protection. Nor would it aid the working of parliamentary democracy or further self-fulfilment.

201 While the court stated in the first passage quoted above that the regulated area includes restrictions for purposes of public order, the scope of such restrictions must necessarily be narrowly construed. This view is supported by the court's reference with approval to the decision of the Supreme Court of the United States in *Garrison v. La.*, 379 U.S. 64, 13 L. Ed. 2d 125, 85 S. Ct. 209 (1964). There, Brennan J., delivering the opinion of the court, stated at pp. 73-75:

Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, *Defamation of Public Offenders and Candidates*, 49 Col L Rev 875, 893 (1949). Moreover, "[i]n the case of charges against a popular political figure ... it may be almost impossible to show freedom from ill-will or selfish political moves." Id., at 893, n. 90 ...

*For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 US, at 270 ... [Emphasis added.]*

202 Unlike the statements made in *Zundel*, supra, the words spoken by the appellant in this case were not deliberate falsehoods. The statement thus fell within the description of protected speech referred to by Brennan J.

203 In my view, statements of a sincerely-held belief on a matter of public interest, even if intemperately worded, so long as they are not obscene or criminally libelous, should, as a general rule, come within the protection afforded by s. 2(b) of the Charter. It would, I think, be unfortunate if freedom of expression on matters of public interest so vital to a free and democratic society was to be unduly restricted. The constitutional guarantee should be given a broad and liberal interpretation. The comment of the appellant came within the ambit of that protection. This, I believe, must be the conclusion, whether the two-step procedure described in *R. v. Oakes*, supra, is followed or the approach to s. 2(b) set forth in *R. v. Zundel* is adopted.

204 It remains to be determined whether the offence of contempt by scandalizing the court is a constitutionally permissible limit on the protection afforded the appellant's words.

3. If the words are "protected" by s. 2(b) of the Charter, does the offence of contempt by scandalizing the court constitute a constitutionally permissible limit on that protection?

205 It is incumbent upon the Crown to establish, on a balance of probabilities, that the limitation on freedom of expression imposed by the offence of scandalizing the court meets the requirement of s. 1 of the Charter. That section reads:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

206 A s. 1 analysis can usefully be divided into three parts: first, is the limit a reasonable limit? Second, is the limit prescribed by law? Third, can the limit be demonstrably justified in a free and democratic society?

207 There are a number of reasons why, in my view, the Crown has not met the onus which rests upon it. It may be helpful first to consider the third part of a s. 1 analysis set out above, that is, the status of the offence in other free and democratic jurisdictions.

I. The United States

208 In the United States the administration of justice has survived and thrived without recognizing the offence of scandalizing the court. The position adopted by the United States Supreme Court is that contempt of court cannot be found unless the prosecution establishes that the words or statement in question constitute a real and imminent danger to the administration of justice. A review of some of the leading decisions of the Supreme Court of the United States cases may prove to be useful. However, during the course of the survey it must be remembered that the Constitution of the United States does not contain a section that is comparable to s. 1 of our Charter. Their cases are therefore of somewhat limited assistance in a s. 1 analysis. Nonetheless they are helpful not only because they illustrate the manner in which United States courts have balanced freedom of expression with the state interest in the proper administration of justice but also for the harsh criticism that has been expressed of the use of contempt of court and other proceedings to restrict comments about judges and the judicial system.

209 In the United States a distinction is drawn between direct and indirect contempt. Direct contempt involves actions performed or words spoken in the presence of the court. It can include inappropriate language used in materials filed with the court. Indirect contempt involves actions performed or words spoken outside the court. There is no question that the First Amendment to the United States Constitution, which guarantees free speech, is *not* violated when a person is punished for direct contempt.

210 In *Bridges v. Calif.*, supra, two parties had been convicted of contempt of court. The first convictions were those of the publisher and managing editor of the Los Angeles Times, and were based on the publication of three editorials in that newspaper. The other party convicted of contempt of court was Bridges, who at the relevant time was an officer of a union affiliated with the Congress of Industrial Organizations. He had published, in several newspapers in California, a telegram that he had sent to the Secretary of Labor. The telegram was sharply critical of a judge's decision in a case involving a dispute between his union and one affiliated with the American Federation of Labor. The telegram was published while a motion for a new trial was pending.

211 Black J. wrote on behalf of the majority of the United States Supreme Court. Following the court's earlier decision in *Schenk v. U.S.*, 249 U.S. 47, 63 L. Ed. 470, 39 S. Ct. 247 (1919), he stated, at p. 193, that the state could curtail freedom of expression only where "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils". He stated that these evils must be substantial and summarized his position in these words at p. 194:

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

212 At p. 197, Black J. dismissed the argument that the substantive evil of engendering "disrespect for the judiciary" could justify convictions for contempt of court:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

213 While Black J. stated that in some circumstances statements that posed a threat to the fair administration of justice would justify a conviction for contempt, he concluded that neither the editorials nor the publication of the telegram actually posed such a threat. The convictions for contempt of court were set aside.

214 It is, I think, significant to the case at bar that both the majority and minority opinions expressed the view that criticism of the courts made *after* the decision had been rendered fell within the ambit of constitutionally-protected free speech under the First Amendment. Black J. at pp. 198-99 stated that "such criticism after the final disposition of the proceedings would clearly have been privileged". Frankfurter J., for the minority, stated at p. 212: "... comment after the imposition of sentence ... criticism *however unrestrained* of its severity or leniency or disparity ... is an exercise of the right of free discussion."

215 In *Pennekamp v. Fla.*, 328 U.S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946), the court was concerned with the publication of criticism of the courts in a major newspaper. The associate editor and corporate publisher of the Miami Herald were convicted of contempt as a result of the publication of two editorials and a cartoon in the paper, which referred to several pending cases.

216 Once again the court spoke of the necessity of demonstrating a clear and present danger before such comments should be punished. Reed J., for the majority, quoted from *Bridges*, supra, at p. 1031:

The evil consequences of comment must be "extremely serious and the degree of imminence extremely high before utterances can be punished".

217 The majority found that the editorials and cartoon lacked the "solidity of evidence" which would be required for a court to conclude that they created a clear and present danger to the administration of justice.

218 Frankfurter J. gave concurring reasons and, as in *Bridges*, his view of the permissible scope of criticism of cases that are no longer pending is significant. At p. 1048 he stated:

Inaccurate and even false comment on litigation no longer pending may not be dealt with by punishing for contempt as a means of assuring the just exercise of the judicial process.

219 Murphy J. also wrote short concurring reasons. He emphasized the broad scope of criticism that is permissible under the First Amendment of the United States Constitution. He stated at pp. 1048-49:

That freedom [of the press] covers something more than the right to approve and condone insofar as the judiciary and the judicial process are concerned. It also includes the right to criticize and disparage, even though the terms be vitriolic, scurrilous or erroneous. To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. That situation is not even remotely present in this case.

220 *Craig v. Harney*, 331 U.S. 367, 91 L. Ed. 1546, 67 S. Ct. 1249 (1947), involved the conviction of a publisher, an editorial writer and a news reporter for constructive criminal contempt. The paper had published stories, regarding the outcome of a particular case, which contained certain inaccuracies. An editorial had also been published which was sharply critical of the trial judge, referring to his actions during the trial as having been "high handed" and a "travesty of justice".

221 Douglas J., writing for the majority, stated that the convictions could stand only if the stories and the editorial created "a clear and present danger" to the administration of justice. Although Douglas J. recognized at p. 1255 that the editorials used "strong language, intemperate language and, we assume, an unfair criticism", he nevertheless stressed the stringent requirements of the "clear and present danger" test. He stated at p. 1255:

The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.

222 He concluded that the stories and editorials did not constitute a threat or menace to the integrity of the trial.

223 The court also held that a concern merely for preserving the dignity of the courts did not justify the punishment for contempt. The court concluded, at p. 1255, that the conviction could not stand even though the editorial "might well have a tendency to lower the standing of the judge in the public eye".

224 *Wood v. Ga.*, 370 U.S. 375, 8 L. Ed. 2d 569, 82 S. Ct. 1364 (1962), was concerned with the conviction of a sheriff on three counts of contempt. The sheriff had issued a news release which was very critical of a judge's charge to the grand jury. In another letter the sheriff had suggested that the charge was false and asserted that the entity responsible for vote-buying was the Democratic Executive Committee. The citations for contempt to the sheriff alleged that his statements "created ... a clear, present and imminent danger to the investigation being conducted ... and ... to the proper administration of justice".

225 Warren C.J., writing for the majority, indicated the balancing of principles that was required for resolution of the case at p. 1365:

... the scope of the constitutional protection to be enjoyed by persons when the publication of their thoughts and opinions is alleged to be in conflict with the fair administration of justice in state courts.

He further stated at p. 1369:

We start with the premise that the right of courts to conduct their business in an untrammelled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions.

226 Warren C.J. reiterated that the "clear and present danger" test was an appropriate standard by which to determine the constitutionality of contempt convictions. An examination of the record led him to the conclusion that such a danger did not exist and the convictions were set aside.

227 *Garrison v. La.*, supra, was concerned with the conviction for criminal defamation of the District Attorney of a Louisiana parish. The District Attorney had made uncomplimentary remarks about eight judges of the Criminal District Court of the parish. He told a press conference that he attributed the large backlog of pending criminal cases to the inefficiency, laziness and excessive vacations of the judges. He accused them of hampering his efforts to enforce the vice laws by refusing to authorize sufficient funding to cover the expenses of undercover investigations. He stated [quoted at p. 66]: "This raises interesting questions about the racketeer influences on our eight vacation-minded judges." Brennan J., writing for the majority, confirmed the importance of debate about public affairs and the performance and fitness of public officials. He stated at pp. 74-75:

... speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Continuing at p. 77:

The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.

228 These cases would seem to indicate that in the United States criticism of the courts, even if it is framed in excessive and vitriolic language and even if it offends the dignity of the courts, is constitutionally-protected free speech unless it is found to constitute a clear and present danger to the administration of justice. The protection afforded to free speech is wide indeed. The vital importance of the principle has repeatedly been stressed and emphasized.

II. Australia

229 In *Gallagher v. Durack* (1983), 45 A.L.R. 53 (H.C.), the appellant was charged with contempt and found guilty of making a statement which would tend to cause a lowering of confidence in the court's authority and integrity. The applicant was sentenced to three months' imprisonment. Although the offence of scandalizing the court was upheld by the majority, a very powerful dissent was written by Murphy J. He put his position in these words at p. 58:

In 1920 Isaacs and Rich JJ in this court declared: "Modern conditions have ... rendered obsolete in England the summary procedure of the court for that species of contempt which consists in 'scandalizing it'" (*Bell v Stewart* (1920) 28 CLR 419 at 428-9). They stated that the occasions for using it would be "exceptional" because the contempt involved: "is primarily abuse only from which the good sense of the community is ordinarily a sufficient safeguard, and such contempt not touching any pending proceeding, its effect on the administration of justice must generally be remote" (at 429).

Continuing at p. 59:

... the law of criminal contempt in scandalizing the courts is so vague and general that it is an oppressive limitation on free speech. No free society should accept such censorship. The absence of a constitutional guarantee does not mean that Australia should accept judicial inroads upon freedom of speech which are not found necessary or desirable in other countries. At stake is not merely the freedom of one person; it is the freedom of everyone to comment rightly or wrongly on the decisions of the courts in a way that does not constitute a clear and present danger to the administration of justice.

III. New Zealand

230 In *N.Z. (Solicitor Gen.) v. Radio Avon Ltd.*, [1978] 1 N.Z.L.R. 225 (C.A.), upon a motion by the Solicitor General charging that a news item was a contempt of court, the Supreme Court found that the news item had implied that the judge

had improperly dealt with a criminal charge in private when it should have been heard in public, and further implied that there was something wrong about the decision. The court held that the purpose of the offence of contempt of court is to protect the administration of justice, not the dignity of the judges. It was said that the law should be used sparingly and only from a sense of duty and public necessity, and that there must be a real risk, as opposed to a remote possibility, that the actions complained of would undermine public confidence in the administration of justice. The court held that the newspaper article constituted contempt of court by scandalizing the court.

231 It must be observed that neither New Zealand or Australia has a constitutional protection for free speech. This fact must be taken into consideration when cases from those jurisdictions are considered.

IV. United Kingdom

232 Although *R. v. Gray*, supra, set forth the governing principle pertaining to this offence, it is, I think, important to note that there have been no convictions for this offence in England for the past 60 years. Furthermore, cases from the United Kingdom are replete with admonitions that the court's jurisdiction in contempt cases should be exercised with great restraint. These facts are particularly significant given that, like Australia and New Zealand, the United Kingdom does not have a constitutionally-protected guarantee of freedom of expression. For example, in *A.G. v. Times Newspapers Ltd.*, [1974] A.C. 273, [1973] 3 W.L.R. 298, [1973] 3 All E.R. 54, reversing [1973] 1 Q.B. 710, [1973] 2 W.L.R. 452, [1973] 1 All E.R. 815 (H.L.), Lord Reid stated at p. 60:

Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.

In *Ambard v Attorney-General for Trinidad and Tobago* Lord Atkin said:

But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

I think that these words have an application beyond the particular type of contempt in that case.

V. The Position Taken on the Issue By The European Court of Human Rights

233 The European Court of Human Rights considered the issue in *Sunday Times v. U.K.* (1979), 2 E.H.R.R. 245. A weekly newspaper, the Sunday Times, began a series of articles with the aim of assisting the parents of "thalidomide children" to obtain a more generous settlement of their actions. One article proposed a deal with the history of the testing, manufacture and marketing of the drug. The Attorney General obtained an injunction restraining publication of the article on the ground that it would constitute a contempt of court. The injunction had been granted in the High Court, rescinded by the Court of Appeal but restored by the House of Lords.

234 The publisher, editor and a group of journalists at the newspaper filed an application with the European Commission on Human Rights claiming that the injunction infringed their right to freedom of expression guaranteed by the European Convention on Human Rights. The commission concluded that there had been a breach, and referred the case to the court.

235 The court held that the interference with the applicants' freedom of expression was not justified under art. 10(2), which permits such restrictions on freedom of expression "as are prescribed by law and are necessary in a democratic society ... for maintaining the authority ... of the judiciary". The court decided that, although the injunction was prescribed by law and was for the purpose of maintaining the authority of the judiciary, the restriction was not justified by a "pressing social need" and

could not therefore be regarded as "necessary" within the meaning of art. 10(2). Accordingly, it was found that there had been a violation of art. 10, which guarantees the right to freedom of expression subject to the restriction set out in art. 10(2).

236 The following conclusions were drawn in the judgment at pp. 277-79:

It must now be decided whether the "interference" complained of corresponded to a "pressing social need", whether it was "proportionate to the legitimate aim pursued", whether the reasons given by the national authorities to justify it are "relevant and sufficient under Article 10(2)". In this connection, the Court has examined the subject matter of the injunction, then the state of the thalidomide case at the relevant time and, finally, the circumstances surrounding that case and the grant of the injunction ...

The speeches in the House of Lords emphasized above all the concern that the processes of the law may be brought into disrespect and the functions of the courts usurped either if the public is led to form an opinion on the subject-matter of litigation before adjudication by the courts or if the parties to litigation have to undergo "trial by newspaper". Such concern is in itself "relevant" to the maintenance of the "authority of the judiciary" as that expression is understood by the Court (see para. 55 above). If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in the courts. Again, it cannot be excluded that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the settlement of legal disputes.

Nevertheless, the proposed *Sunday Times* article was couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a court could arrive; although it analysed in detail evidence against Distillers, it also summarised arguments in their favour and closed with the words: "There appears to be no neat set of answers. ..." In the Court's opinion, the effect of the article, if published, would therefore have varied from reader to reader. Accordingly, even to the extent that the article might have led some readers to form an opinion on the negligence issue, this would not have had adverse consequences for the "authority of the judiciary", especially since, as noted above, there had been a nationwide campaign in the meantime.

237 Thus, like courts in other jurisdictions, the European Court of Human Rights has stressed the paramount importance of freedom of expression in a free and democratic society, and has limited the scope of the restrictions imposed on the freedom.

238 It may be helpful to summarize what appears to be the approach to the offence of scandalizing the court in other jurisdictions.

239 The United Kingdom, although recognizing the existence of the offence, has not registered a conviction for over 60 years. Australia and New Zealand, which recognize the offence, do not have a constitution which guarantees the right of freedom of expression. The European Court of Human Rights has stressed the importance of freedom of expression and limited the scope of the restrictions on that freedom. That United States Supreme Court does not recognize the offence and has found some most intemperate criticisms of the courts and judges to be protected by the constitutional right to free speech. Comments on trials which have been completed have been found almost invariably to come within the protection of the First Amendment.

240 It would seem that, in those free and democratic societies that have either a constitution or a convention which protects freedom of expression, the offence of scandalizing the court, that is to say, to punish as a crime acts done or oral statements made that would tend to bring the courts or the administration of justice into disrepute, would not be accepted as a reasonable limit on freedom of expression. It follows that the experience of other free and democratic jurisdictions which possess a constitutional guarantee of freedom of expression does not support the argument that the offence constitutes a permissible limit on that protection.

241 It will now be helpful to consider the first aspect of a s. 1 analysis suggested above, that is, whether the offence of contempt of court by scandalizing the court is, as presently defined, a reasonable limit on freedom of expression. In *R. v. Oakes*, *supra*, the Supreme Court of Canada set forth the criteria that were to be considered in determining whether the impugned

legislation was a reasonable limit on the particular freedom or right granted by the Charter. Dickson C.J.C., at p. 348 [C.C.C.], outlined the criteria in this way:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"; *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 430 C.C.C., p. 366 D.L.R., p. 352 S.C.R. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*. Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

242 It was conceded by counsel for the intervenant, and I am satisfied, that the first criterion was met, in that the objective of protecting the administration of justice was of sufficient importance to warrant overriding a constitutionally-protected right or freedom. However, in my view, the second criterion has not been satisfied. Without requiring any proof of the matter, the offence *assumes* that the words which are the subject matter of the charge will bring the court into contempt or lower its authority. This I take to be an unwarranted and questionable assumption, and it leads me to conclude that the offence has not been "carefully designed to achieve the objective in question". By undertaking the proceedings, the prosecution must be taken as alleging that the words spoken by the accused which were "calculated to bring the administration of justice into disrepute" will in fact have such an effect. If this is not the basis of the charge, then the measure adopted is arbitrary, unfair or based upon irrational considerations. If the essence of the charge is, as it must be, that the words spoken do bring the court into contempt, then it would not be unreasonable to require the prosecution to prove that this is in fact the effect of those words. This requirement is lacking in the offence of scandalizing the court as it is presently known.

243 It may be helpful in considering this issue to recall that, when dealing with contempt cases arising out of statements made pertaining to cases that are pending or under consideration, the courts have *always* required proof that the statements constituted a serious danger to the administration of justice. That is to say that the Crown must show that such statements put the function of the courts in serious question. In *A.G. v. Times Newspapers Ltd.*, *supra*, Lord Denning M.R. in the Court of Appeal (reversed in the result by the House of Lords) stated at pp. 821-22:

I regard it as of the first importance that the law which I have just stated should be maintained in its full integrity. We must not allow "trial by newspaper" or "trial by television" or trial by any medium other than the courts of law. But, in so stating the law, I would emphasize that it applies only "when litigation is pending and is actively in suit before the court". To which I would add that there must appear to be "*a real and substantial danger of prejudice*" to the trial of the case or to the settlement of it. [Emphasis added.]

244 This was essentially the test laid down by the European court later in that same case. That requirement should also be an essential condition of the offence of scandalizing the court, as it would go some distance towards ensuring that the offence "impairs 'as little as possible' the right or freedom in question". In the absence of such a requirement the limitation imposed by the offence cannot meet the proportionality test as it is both arbitrary and irrational, based as it is on the unproved assumption

that the comment will lower the authority of the court. I am confident that the public, if not the media, will take into account the source of the comment before deciding that the court should be regarded with contempt or its authority lowered.

245 Furthermore, there is some question as to what mens rea is required to prove the offence of scandalizing the court. It has been said that the words themselves can constitute the offence. Yet it would seem reasonable to require the Crown to prove that the accused either intended to cause disrepute to the administration of justice or was reckless as to whether that disrepute would follow in spite of the reasonable foreseeability of that result from the words used. Anything less would also seem to be contrary to the proportionality test, as it applies too arbitrary a standard.

246 In light of the conclusion that the offence of scandalizing the court is not a reasonable limitation on freedom of expression, it is not necessary to consider whether the offence is prescribed by law as required by s. 1 of the Charter. If it had been, I would have concluded that *R. v. Cohn*, *supra*, makes it clear that it is.

Conclusion

247 I am of the view that the offence of contempt by scandalizing the court does not constitute or impose a reasonable limitation upon the guaranteed right of freedom of expression provided by s. 2(b) of the Charter. As the words spoken by the appellant are protected by s. 2(b) and the offence of scandalizing the court is not a constitutionally permissible limit on that protection, the conviction must be set aside.

Can Such an Offence Meet the Requirements of the Charter?

248 The decision in this case should not be taken as a conclusion that the offence cannot exist. It is in effect a common law offence that, as presently defined, cannot meet the constitutional requirements of the Charter, and not an offence created by statute. The courts created the offence, and thus the courts, as well as the legislature, might modify it to meet the requirements of the Charter. For example, if the Crown were to prove that an act was done or words were spoken with the intent to cause disrepute to its administration of justice, or with reckless disregard as to whether disrepute would follow in spite of the reasonable foreseeability that such a result would follow from the act done or words used, and that the evil consequences flowing from the act or words were extremely serious, and as well demonstrated the extreme imminence of those evil consequences, so that the apprehended danger to the administration of justice was shown to be real, substantial and immediate, then the act or words could be punishable as a criminal offence in order to ensure the functioning of the judicial process.

249 In the words of the American cases, the prosecution would be required to demonstrate a clear and present danger to the administration of justice. Anything less would not seem to meet the requirements of the Charter. There can be no doubt that the suggested requirements would place a very heavy and difficult onus upon the Crown; however, that is clearly appropriate when due regard is given to the vital importance of freedom of expression in a democratic society. Nonetheless, if the Crown could validly establish that the words, even if spoken subsequent to the completion of litigation, really did constitute such a substantial and imminent danger that the courts could not function, then in such a situation it would be appropriate that the person making a statement with such demonstrated dire, if difficult-to-imagine, consequences should be subject to criminal sanctions.

Additional Issues Raised by the Appellant

250 Although they are unnecessary to the disposition of this case, two other issues which were raised during the course of the submissions should be dealt with.

251 The first of these is the appellant's contention that the offence of scandalizing the court is invalid as it contravenes s. 15 of the Charter. That section provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

252 It was suggested that the offence contravenes s. 15 on the grounds that only lawyers appear to have been charged with the offence. The Crown was not required to respond to this argument. There is no merit in that contention. The trial judge specifically found there was no bad faith on the part of the Crown in singling out the appellant for prosecution. He was not treated differently from anyone else, and the fact that he was a lawyer was of no consequence or significance to the Crown in undertaking the prosecution.

253 Secondly, there was a submission that the conviction should be set aside on the grounds that the trial judge refused to permit evidence to be given as to the "truth" of the statement made by the appellant. The trial judge held that truth could not be a defence to the charge.

254 There has been a great deal of debate as to whether or not truth should be a defence to a charge of scandalizing the court. In 1974 the Phillimore Committee studied the issue in Britain and concluded that truth alone should not be a defence. However, it was of the opinion that, with respect to comments made for the public benefit, the defence of truth should be available.

255 The Law Commission of England did not accept the public benefit requirement referred to by the Phillimore Committee. The commission stated in its report *Offences Relating to Interference with the Course of Justice* (1979), at p. 68:

A true allegation of judicial corruption should not in our view be penalized in any circumstances.

256 The commission was of the opinion that the offence should be found to be committed only if the defendant either knew that the statement was false or was reckless whether it was false and intended the statement to be taken as true.

257 The Australian Law Reform Commission's discussion paper 26, *Contempt and the Media* (1986), has carefully listed the arguments in favour of refusing truth as a defence, at pp. 135-36, in these words:

The primary argument against admitting a defence of justification in scandalising cases is that the court trying the case might become embroiled in an investigation of the merits of the allegedly scandalising remarks. Where these remarks related to the conduct of a particular judge or bench of judges in particular legal proceedings, the merits of the decisions in those proceedings would come up for re-trial. This would be embarrassing and distasteful for the court, as also would be the task of determining whether an allegation of judicial bias or other misconduct relating to a series of cases was well-founded ... A related problem is that frequently the task of establishing whether an allegedly scandalising allegation is or is not true is virtually impossible, simply because the allegation is of a vague and general nature. To allow a defence of justification in such circumstances is to open up possibilities of prolonged and ultimately inconclusive factual investigation. Finally, there is authority in the cases to the effect that in the course of trying a scandalising case, a court will exonerate the accused unless it finds the allegedly scandalising remarks to be "unjustified", "unwarrantable" or "baseless" ... this element in scandalising law operates to protect the accused against being convicted where it is plain that his or her allegations have a clear and genuine basis in fact.

258 The Australian commission then considered the arguments in favour of allowing the defence of truth. The principal basis for allowing such a defence was that true allegations of judicial misconduct should not be punished, and that persons in possession of such evidence of such misconduct should not be dissuaded from revealing it publicly.

259 The Law Reform Commission of Canada has given two varying opinions. At one stage they recommended that truth should be available as a defence with respect to words spoken in the public interest. Upon receiving further submissions, the commission reversed itself and gave the opinion that to allow such a defence would be to permit "judicial guerilla warfare".

260 It would seem that historically the defence of truth has not been available to a charge of scandalizing the court. There have been extensive criticisms of this position. Nevertheless there has been and continues to be a vigorous debate on the issue.

261 I think the criticisms are in some circumstances well founded. For example, let us assume that the statement giving rise to the charge of scandalizing the court was that a judge had taken a bribe. In such a situation it would seem to me to be repugnant to a sense of justice and fairness to refuse to permit the defence of truth to be put forward. However, having said that, it would seem that the defence of truth has no real bearing in light of the facts of this case, and it is not appropriate to attempt to resolve the issue at this time.

Disposition

262 In the result, I would allow the appeal and set aside the conviction and direct an acquittal of the appellant.

Appeal allowed; acquittal substituted.

TAB 12

COURT OF APPEAL FOR ONTARIO

CITATION: Shah v. LG Chem Ltd., 2018 ONCA 819
DATE: 20181012
DOCKET: C64559

Rouleau, Roberts and Fairburn JJ.A.

BETWEEN

Khurram Shah and Alpina Holdings Inc.

Plaintiffs (Appellants)

and

LG Chem Ltd., LG Chem America, Inc., Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., Sanyo Electric Co., Ltd., Sanyo North America Corporation, Sanyo Energy (U.S.A.) Corporation, Sony Corporation, Sony Energy Devices Corporation, Sony Electronics Inc., Sony of Canada Ltd., Samsung SDI Co., Ltd, Samsung SDI America, Inc., Samsung Electronics Canada Inc., Hitachi, Ltd., Hitachi Maxell, Ltd., Maxell Corporation of America, Maxell Canada, GS Yuasa Corporation, NEC Corporation, NEC Tokin Corporation, NEC Canada, Toshiba Corporation, Toshiba America Electronic Components, Inc., and Toshiba of Canada Limited

Defendants (Respondents)

Reidar Mogerman, Jean-Marc Leclerc and Bridget Moran, for the appellants

John F. Rook, Q.C., Christiaan A. Jordaan and Emrys Davis, for the respondents Panasonic Corporation, Panasonic Corporation of North America, Panasonic Canada Inc., Sanyo Electric Co., Ltd., Sanyo North America Corporation and Sanyo Energy (U.S.A.) Corporation

J. Kevin Wright and Todd Shikaze, for the respondents Hitachi Maxell, Ltd. and Maxell Corporation of America

Laura F. Cooper and Vera Toppings, for the respondents Toshiba Corporation, Toshiba America Electronic Components, Inc. and Toshiba of Canada Limited

Maureen Littlejohn, for the respondents LG Chem. Ltd. and LG Chem America, Inc.

Heard: May 7, 2018

On appeal from the order of the Divisional Court (Justices Frances P. Kiteley, Ian V.B. Nordheimer, and William M. LeMay), dated April 26, 2017, with reasons reported at 2017 ONSC 2586, varying the order of Justice Paul M. Perell of the Superior Court of Justice, dated October 5, 2015, with reasons reported at 2015 ONSC 6148.

By the Court:

A. OVERVIEW

[1] The appellants are representative plaintiffs in a certified class action. They sued the defendant manufacturers and suppliers on the basis that they conspired to raise, maintain, fix and/or stabilize the price of lithium-ion batteries (“LIBs”) sold in Canada between January 2000 and December 2011 (“the conspiracy period”). Their collusion is said to have impacted the entire LIB market by triggering an increase in the price for all LIBs and lithium-ion products (“LIB products”) during the conspiracy period, beyond what the free-market would naturally produce. Accordingly, the conspiracy is alleged to have impacted all purchasers, those whose LIBs originated from the defendants (the “non-umbrella purchasers”) and those whose LIBs originated from non-defendants (the “umbrella purchasers”).

[2] The appellants sought to have multiple causes of action certified under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, including unlawful means

conspiracy and a statutory cause of action under s. 36 of the *Competition Act*, R.S.C., 1985, c. C-34, for breach of s. 45 of the Act (the “statutory claim”). The certification judge refused to certify the unlawful means conspiracy claim but certified the statutory claim, although only in relation to the non-umbrella purchasers. The certification judge provided several reasons for excluding the umbrella purchasers from the class pursuing relief in respect of the certified statutory claim, including that the defendants would be exposed to indeterminate liability if the claim by umbrella purchasers were allowed to proceed.

[3] The appellants sought leave to appeal the certification judge’s decision to the Divisional Court. The Divisional Court granted leave to appeal on only two issues: (a) whether the certification judge erred in denying certification of the appellants’ unlawful means conspiracy claim; and (b) whether the certification judge erred in removing the umbrella purchasers from class membership: *Shah v. LG Chem., Ltd.*, 2016 ONSC 4670, at para. 46. The Divisional Court found error on the first point, resulting in the certification of the unlawful means conspiracy claim, but no error on the second point, agreeing with the certification judge’s concern over indeterminate liability.

[4] The Divisional Court also expressed the view that the appellants had failed to: (a) plead the requisite elements of the claims relating to the umbrella purchasers; (b) establish common issues for the umbrella purchasers; and (c) propose a separate representative plaintiff for the umbrella purchasers.

Accordingly, the Divisional Court upheld the certification judge's decision, refusing to certify the claims by umbrella purchasers.

[5] The appellants were granted leave to appeal from the Divisional Court decision. We note that not all of the defendants are participating on this appeal because some of them have settled the claims against them.¹ In these reasons, we will use the term "defendants" to refer to the defendants named in the Fresh as Amended Statement of Claim (the "statement of claim") and the term "respondents" to refer to only those defendants who are participating on this appeal.

[6] The issues for resolution in this court relate only to the umbrella purchaser claims - their statutory claim and their unlawful means conspiracy claim. The appellants argue that the Divisional Court erred in concluding that:

- (a) it is plain and obvious that the umbrella purchaser claims do not disclose a cause of action under s. 5(1)(a) of the *Class Proceedings Act* because,
 - (i) the respondents would be exposed to indeterminate liability; and

¹ It appears that only the Panasonic, Sanyo, Hitachi and Toshiba defendants remain involved in the action. The Certification Order states that the action was stayed, discontinued or dismissed against: Hitachi, Ltd.; Maxell Canada; NEC Canada, Inc.; NEC Corporation; NEC Tokin Corporation; Samsung Electronics Canada Inc.; GS Yuasa Corporation. As well, at the hearing of the appeal, the appellants' counsel informed the court that the claims against the NEC, Samsung and Sony defendants have also settled. Materials have been filed but the settlements have not yet been approved. We were informed at the outset of legal argument that the LG defendants have also settled, and the fact of the settlement has been disclosed to the court but no further materials have been filed.

- (ii) the requisite elements of the claims have not been properly pleaded;
- (b) the umbrella purchaser claims do not raise common issues within the meaning of s. 5(1)(c) of the *Class Proceedings Act*, and
- (c) a separate representative plaintiff for the umbrella purchasers would be required under s. 5(1)(e) of the *Class Proceedings Act*.

[7] The respondents add that, even if the appellants succeed on these issues, this court should conclude that a class proceeding is not the preferable procedure for resolving issues related to the umbrella purchasers.

[8] For the reasons that follow, we conclude that:

- (a) the principle of indeterminate liability does not apply to either the statutory claim or the unlawful means conspiracy claim;
- (b) the claims were properly pleaded;
- (c) with the exception of the quantification of damages for the umbrella purchasers, the issues can be resolved on a common basis;
- (d) a separate representative plaintiff is not required for the umbrella class; and
- (e) a class proceeding is the preferable procedure for resolving the issues in common.

[9] Accordingly, we would allow the appeal.

B. GENERAL BACKGROUND FACTS

(1) Claims Against the Defendants

[10] The claims against the defendants relate to the sale of LIBs and LIB products. LIBs are a form of rechargeable battery. They provide a source of energy to goods, devices and machines, but their most common use is in notebook computers and cellular phones.

[11] The statement of claim is brought on behalf of “all persons in Canada who, at least as early as January 1, 2000 and continuing until at least December 31, 2011 ... purchased [LIBs] ... and/or [LIB products]” (emphasis added). As the proposed class includes all those who bought LIBs and LIB products during the stated period, it includes those who bought LIBs (or LIB products containing LIBs) produced by the defendants as well as those produced by non-defendants. Accordingly, the proposed class includes the umbrella purchasers.

[12] The statement of claim alleges that the defendants and unnamed co-conspirators engaged in “illegal and secretive meetings and made agreements relating to the prices, market share divisions and production levels for lithium batteries.” The claim asserts that the defendants and unnamed co-conspirators conspired to “enhance unreasonably the prices of [LIBs] and/or to lessen unduly competition in the production, manufacture, sale and/or supply of [LIBs] in North

America and elsewhere.” The conspiracy is said to have moderated the downward pressure on the prices of LIBs and LIB products.

[13] The allegations include, but are not limited to, the following factual assertions about the defendants’ behaviour:

- they had illicit meetings beginning in 2000;
- they agreed upon floor pricing;
- they conspired to allocate volumes of sales and reduce production, manufacture and supply;
- they used “code words” to communicate pricing;
- they agreed not to forward “sensitive e-mails”;
- they had discussions about avoiding trails of correspondence and erasing correspondence; and
- they submitted collusive, non-competitive and rigged bids.

[14] The pleadings specifically allege that the co-conspirators “were aware of and intended” that the alleged conspiracy would “result in increased prices for [LIBs] and [LIB products]”. Further, the pleadings suggest that the co-conspirators’ “unlawful acts” were directed at the “proposed class”, and that the defendants knew that those acts “were likely to cause injury to the Plaintiffs and other members of the proposed class”.

[15] The defendants are said to have controlled the majority of the LIB market in Canada during the conspiracy period. For instance, in 2008, the defendants

controlled about 70 percent of the international LIB market. By 2011, they controlled about 75 percent of that same market. Their market share was even higher in Canada. The appellants maintain that because the alleged cartel held so much of the market share, the increase in the cartel's prices caused non-conspirators to also raise their prices. This is referred to as an "umbrella" effect, about which we will have more to say shortly.

(2) Umbrella Purchaser Claims in Canada

[16] Liability to umbrella purchasers is a contested issue as demonstrated by the back and forth between courts in Ontario and British Columbia.

[17] Following the certification judge's decision in this case, the umbrella purchaser issue came before the British Columbia Supreme Court in *Godfrey v. Sony Corp.*, 2016 BCSC 844 ("Godfrey BCSC"), where that court rejected the reasoning of the certification judge in this case and certified the umbrella claim.

[18] The Divisional Court in this case then addressed the *Godfrey BCSC* judgment, and specifically rejected that court's reasons in relation to indeterminate liability.

[19] The British Columbia Court of Appeal then considered and rejected the Divisional Court's reasoning relating to the indeterminate liability point: *Godfrey v. Sony Corporation*, 2017 BCCA 302, 1 B.C.L.R. (6th) 319 ("Godfrey BCCA").

Then leave to appeal to the Supreme Court of Canada was granted in *Godfrey*: [2017] S.C.C.A. No. 408. That appeal is yet to be heard.

C. ANALYSIS

(1) Overview

[20] Section 5 of the *Class Proceedings Act* contains the criteria for certifying class actions. The portions of s. 5(1) that are relevant to this appeal follow:

- 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or the notice of application discloses a cause of action; ...
 - (c) the claims or defences of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues;
 - (e) there is a representative plaintiff ...

[21] This language indicates that the court “shall” certify a class proceeding if the requirements of s. 5(1) have been satisfied. The onus is on the representative plaintiff(s) to show why the certification criteria have been met.

[22] The certification stage is not intended to test the merits of the claim or inquire into whether the claim is likely to succeed at the trial of the common issues: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 16; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R.

477, at para. 102. Rather, in assessing whether the requirements of s. 5(1) have been met, the court will determine whether there is any basis in fact establishing the certification requirements, not whether there is any basis in fact “for the claim itself”: *Hollick*, at para. 25; *Pro-Sys*, at para. 100.

[23] We will address the relevant certification criteria in turn.

(2) Section 5(1)(a): Do the Pleadings Disclose a Cause of Action?

(a) Plain and Obvious Test

[24] Section 5(1)(a) of the *Class Proceedings Act* requires that the certification judge ask whether, assuming the pleaded facts to be true, it is “plain and obvious” that a claim does not exist or, to put it another way, whether the claim has no reasonable prospect of success: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17, 22; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.), at p. 679; *Cloud v. Canada (Attorney General)* (2005), 73 O.R. (3d) 401 (C.A.), at para. 41; *Hollick*, at para. 25.

(b) The Divisional Court’s Reasons

[25] The non-umbrella purchasers have two certified claims: their statutory claim and their claim for unlawful means conspiracy. In excluding the umbrella purchasers from those claims, the Divisional Court agreed with the certification judge that to allow the umbrella purchasers, who did not purchase LIBs or LIB

products containing LIBs originating from the defendants, to proceed would expose the respondents to indeterminate liability.²

[26] The appellants contended before the Divisional Court, and continue to contend in this court, that the principle of indeterminate liability does not apply to claims involving an intentional component. They say indeterminate liability - which is a relevant consideration in assessing whether a *prima facie* duty of care in the negligence context is negated by residual policy considerations - is not relevant to the statutory claim or the unlawful means conspiracy claim.

[27] The Divisional Court rejected the appellants' indeterminate liability argument. While acknowledging that there are some situations where negligence concepts may not apply to intentional torts,³ the Divisional Court saw no reason why claims for conspiracy should not be assessed for indeterminacy. The court concluded that this was particularly so, given that the claims in this case are for pure economic loss and advanced on behalf of a large, and currently unknown number of people: *Imperial Tobacco*, at para. 100; *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at para. 62.

² Although the certification judge gave four reasons for why the umbrella purchasers' claims should not be certified, the Divisional Court only agreed with the reasoning related to indeterminate liability. The respondents do not object to the Divisional Court's rejection of the other three reasons given by the certification judge in support of his decision refusing to certify the umbrella purchasers' claims. Consistent with the parties' approach on appeal, we only address the question of indeterminacy and whether it justifies removing the umbrella purchasers from the claims.

³ The Divisional Court acknowledged that reasonable foreseeability does not apply to the intentional tort of battery: *Bettel v. Yim* (1978), 88 D.L.R. (3d) 543 (Ont. Co. Ct.).

[28] The court found that to allow the umbrella class to proceed with their proposed claims would be to expose the defendants to indeterminate liability because the defendants had no control over: (a) the non-defendant manufacturers' conduct; or (b) the volume of LIBs and LIB products that the non-defendants chose to produce and sell. In addition, the court noted that the respondents had no dealings with the umbrella purchasers and would not know how many such purchasers they may be liable to. Accordingly, the court concluded that the umbrella purchasers' claims did not satisfy the s. 5(1)(a) criterion.

(c) Indeterminate Liability: The Statutory Claim

(i) Interpretation of ss. 36 and 45 of the *Competition Act*

[29] The statutory cause of action arises from s. 36(1) of the *Competition Act*, which allows for the recovery of damages that result from, among other things, conduct that is contrary to the provisions of Part VI of the *Act*. Section 36(1) reads:

36(1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, ...

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct ... an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section. [Emphasis added.]

[30] The appellants contend that the acts listed in the statement of claim constitute a conspiracy within the meaning of s. 45(1) of the *Competition Act*, which falls within Part VI of the *Competition Act*, “Offences in Relation to Competition”. That provision was amended during the conspiracy period by the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, s. 410, but the core elements for the s. 45 offence remained the same. For the purposes of this appeal, the salient portions of the two versions read:

Pre-Amendment

45 (1) Every one who conspires ... with another person

...

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture ... or supply of a product, ... or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both. ...

(2.2) For greater certainty, in establishing that a conspiracy ... is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy ... but it is not necessary to prove that the parties intended that the conspiracy ... have an effect set out in subsection (1). [Emphasis added.]

Post-Amendment

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires ...

(a) to fix, maintain, increase or control the price for the supply of the product; ...

or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$25 million, or to both. [Emphasis added.]

[31] We turn now to the interpretation of these sections, remembering the guiding rule on statutory interpretation that “the words of an Act are to 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”:

Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

(ii) Plain Meaning

[32] The appellants assert that the Divisional Court was wrong to superimpose the principle of indeterminate liability upon the clear language of ss. 36 and 45.

[33] On its face, s. 36(1) confers a private right of action to “[a]ny person who has suffered loss or damage” arising from “conduct that is contrary to”, in this

case, s. 45 of the *Competition Act*. The language is broad and inclusive.

Conspicuously absent from s. 36(1) is any restriction on who can claim losses.

[34] On a plain reading, if the umbrella purchasers can prove loss resulting from a proven conspiracy under s. 45, s. 36(1) grants those purchasers a statutory means by which to recover those losses. Taking the language at face value, the umbrella purchasers' right of recovery is limited only by their ability to demonstrate two things: (1) that the respondents conspired within the meaning of s. 45; and (2) that the losses or damages suffered by the appellants resulted from that conspiracy.

[35] Thus, a plain reading of ss. 36 and 45 supports the appellants' position. Admittedly, however, the plain meaning is not the end of the matter. We turn next to the purpose of the *Competition Act*.

(iii) Purpose of the *Competition Act*

[36] Section 1.1 of the *Competition Act* sets out its purpose, including the desire to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy", as well as providing consumers with "competitive prices and product choices."

[37] Various authorities have extended the purpose of the *Competition Act* beyond what is set out in s. 1.1, including reference to the Act's promotion of compensation and deterrence: *Infineon Technologies AG v. Option*

consommateurs, 2013 SCC 59, [2013] 3 S.C.R. 600, at para. 111; *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, at paras. 24-27; *Pro-Sys*, at paras. 46-49. Moreover, the “overall objective” of the *Competition Act*, has been described as serving to promote “vigorous and fair competition throughout Canada”: *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 256-257.

[38] It seems self-evident that when clandestine agreements between competitors are made to increase prices and lessen competition, ones that result in actual harm to consumers, that the purposes of the *Competition Act* are thwarted. Conspiracies among competitors to fix prices and lessen competition are the very antithesis of the *Competition Act’s* objective of promoting competition. Undoubtedly, where there is a wider berth for liability, the greater the availability of compensation for harm flowing from prohibited conduct, the greater the deterrent effect flowing from the award of damages, and the greater the protection for a strong, vibrant and healthy economy. In our view, interpreting s. 36(1) in a way that includes all those who have suffered losses as a result of a conspiracy – both umbrella and non-umbrella purchasers – accords with the purposes of the *Competition Act*.

(iv) Relevant Legal Norms

[39] The respondents urge the court to apply a contextual approach, one that draws from the legal norms that inform the setting within which s. 36(1) resides. They maintain that the Divisional Court correctly took that broader context into account when applying the principle of indeterminate liability to s. 36(1) of the *Competition Act*, thereby placing the statutory provision beyond the reach of umbrella purchasers.

[40] In making that argument, the respondents point to two cases in which negligence principles have been applied to statutory claims in the past: *Taylor v. 1103919 Alberta Ltd.*, 2015 ABCA 201, 19 Alta. L.R. (6th); *Haughton v. Burden*, [2001] O.J. No. 4704 (S.C.). The *Taylor* judgment involves the principle of remoteness being applied to a statutory claim under the *Land Titles Act*, R.S.A. 2000, c. L-44. The *Haughton* judgment involves that same principle being applied to a statutory claim under the *Liquor Licence Act*, R.S.O. 1990, c. L.19. The respondents suggest that because remoteness has been applied to statutory claims, then indeterminate liability should apply to s. 36 of the *Competition Act*.

[41] The appellants, on the other hand, urge this court to find that the principle of indeterminate liability has no application outside of the negligence context. They maintain that indeterminate liability is a concept that resides only within the second prong of the *Anns/Cooper* test, a test that is designed to ascertain

whether a duty of care exists in the negligence context: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K. H.L.); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. At a minimum, they say the principle of indeterminate liability cannot be applied to claims that are rooted in intentional conduct, like claims of conspiracy.

[42] The respondents answer the appellants' submission by saying that s. 36 creates liability for entirely non-intentional conduct that can be proven on a negligence standard, such as "deceptive telemarketing" and "deceptive notice of winning a prize".

[43] It is important to remember what is and what is not at issue on this appeal. We need not decide whether negligence concepts, such as indeterminate liability, can never apply outside of the negligence context, whether indeterminate liability can never apply to a claim that requires proof of intention, or whether indeterminate liability might apply to non-conspiracy rooted claims under Part VI of the *Competition Act*. Nor do we have to decide whether statutory claims are impermeable to negligence principles. Rather, we need only decide a narrow question: does the principle of indeterminate liability apply to the statutory claim under s. 36 for recovery arising from conspiratorial conduct under s. 45?

[44] Turning to that question, we agree with the respondents that the court is obliged to consider the context within which the provision resides: ATCO Gas &

Pipelines Ltd. v. Alberta (Energy & Utilities Board), 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 48. Indeed, to give life to its meaning, the court is required to look to the purpose of the provision and to the “relevant legal norms” amplifying it: *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 31. (See also: *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 43; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), at s. 2.9.) However, while we agree those interpretative principles must be applied, we disagree with the way the respondents say they apply in this context.

[45] It is helpful to review how the concept of indeterminate liability comes into play in the negligence context. In that context, a court will apply the *Anns/Cooper* test in assessing whether the defendant owes a duty of care to the plaintiff. At the first stage of the test, the court considers proximity and foreseeability. If the court concludes the defendant owes a *prima facie* duty of care to the plaintiff, it will go on at the second stage of the test to consider whether residual policy concerns, such as indeterminate liability, negate the imposition of a duty of care. In *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at para. 43, the majority described what is meant by indeterminate liability:

Indeterminate liability is liability of a specific character, not of a specific amount. In particular, indeterminate liability should not be confused with significant liability.... Certain activities — like flying commercial aircraft, manufacturing pharmaceutical drugs, or

auditing a large corporation — may well give rise to significant liability..... [T]he liability arising from these “high risk” undertakings may only be characterized as “indeterminate” if the scope of such liability is impossible to ascertain (Black’s Law Dictionary (10th ed. 2014), sub verbo “indeterminate”). In other words, liability is truly “indeterminate” if “the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy — are insufficient to resolve the question”.... More specifically, there are three pertinent aspects to so-called “indeterminacy” in these cases: (1) value indeterminacy (“liability in an indeterminate amount”); (2) temporal indeterminacy (“liability . . . for an indeterminate time”); and (3) claimant indeterminacy (“liability . . . to an indeterminate class”.... [Citations omitted.]

[46] The second stage of the *Anns/Cooper* test comes down to a “normative” assessment of “whether it would be better, for reasons relating to legal or doctrinal order, or reasons arising from other societal concerns, not to recognize a duty of care in a given case”: *Livent*, at para. 40. A court may decline to recognize a *prima facie* duty of care on the basis of indeterminate liability, although indeterminate liability is merely a policy consideration, not a policy veto, and rarely should a concern for indeterminate liability persist if a proper proximity and foreseeability analysis is done at stage one of the *Anns/Cooper* test: *Livent*, at paras. 42, 45.

[47] In our view, normative concerns about indeterminate liability do not apply in the context of the statutory claim in this case because, when it comes to a claim under s. 36 for loss or damage resulting from a conspiracy under s. 45 of

the *Competition Act*, the normative concerns have already been taken care of by Parliament. In other words, concerns that might otherwise drive the application of the principle of indeterminate liability disappear in the face of the exacting statutory provisions.

[48] All claims under s. 36 require the plaintiff to establish that he or she “suffered loss or damage as a result of … conduct that is contrary to any provision of Part VI”. He or she may only recover “loss or damage proved to have been suffered” as a result of that conduct.

[49] When the alleged conduct is a conspiracy under s. 45, the plaintiff must start by proving the defendant actually conspired to engage in anti-competitive conduct. The essence of conspiracy under s. 45 is an agreement – a meeting of the minds – to do one of the things enumerated in that provision. Here, the defendants are alleged to have agreed to fix prices, unlawful conduct under the former s. 45(1)(b) and the current s. 45(1)(a). They are also alleged to have agreed to “unduly” lessen competition in the production, manufacture, sale and/or supply of LIBs, unlawful conduct under s. 45(1)(c) of the former provision. This conduct is said to have resulted in increased prices. The pleadings suggest that the defendants directed their conduct at the proposed class (including umbrella purchasers), knowing and intending that the proposed class was likely to be injured.

[50] Although the *actus reus* under s. 45 changed slightly when the provision was amended, it remained focused on whether the alleged conspirator was part of an agreement and whether that agreement was to do something that is prohibited by virtue of s. 45. The *mens rea* contained in s. 45 has both subjective and objective components. The subjective component requires that the defendant intend to agree, with knowledge of the terms of that agreement. The objective component requires that the defendant objectively intend to achieve the prohibited end, in this case, increasing the price of LIBs and lessening, unduly, competition: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 659-60; *Watson v. Bank of America Corp.*, 2015 BCCA 362, 79 B.C.L.R. (5th) 1, at paras. 74-76; *R. c. Proulx*, 2016 QCCA 1425, [2016] Q.J. No. 11393, at para. 20.

[51] The respondents argue that because a plaintiff does not have to prove that an alleged conspirator's conduct is specifically directed at harming that plaintiff, indeterminate liability remains a concern in the context of the statutory claim. We reject the argument that indeterminate liability should be imported into the interpretation of the provisions for that reason. Even though s. 45 does not require proof that the conspirator was directing his or her actions at a specific plaintiff, it contains significant internal constraints. Section 45 limits the reach of liability to those who, at a minimum, specifically intend to agree upon anti-competitive conduct. When combined with s. 36(1), requiring proof of actual loss

or damages arising from the conspiracy, concerns regarding overbroad liability evaporate.

(v) Conclusion

[52] On our interpretation of ss. 36 and 45, Parliament did not intend that the principle of indeterminate liability would apply to claims under s. 36 for recovery of damages arising from conspiratorial conduct caught by s. 45. The combined operation of ss. 36 and 45 of the *Competition Act* do all of the necessary work in terms of limiting liability. Thus, it is not plain and obvious that the umbrella purchasers' statutory claim has no reasonable prospect of success.

(d) Indeterminate Liability: The Tort of Unlawful Means Conspiracy

[53] The Divisional Court certified the claim in unlawful means conspiracy for the non-umbrella group. The appellants maintain that the umbrella purchasers should not be excluded from that claim. We agree.

[54] The tort of unlawful means conspiracy requires that:

- the defendants' conduct was unlawful;
- the defendants' conduct was directed at the plaintiffs "alone or together with others";
- the defendants knew that, in the circumstances, injury to the plaintiff was "likely", or "should have known that injury to the plaintiff would ensue"; and

- actual injury resulted: see *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-472; *Pro-Sys*, at para. 80.

[55] The elements of unlawful means conspiracy contain stronger inherent limitations than those contained within the *Competition Act*. By requiring that the conduct be directed at the plaintiffs, the tort of unlawful means conspiracy contains a more difficult hurdle than a claim under s. 36 of the *Competition Act*. Indeed, in arguing that the statutory claim is subject to the principle of indeterminacy, the respondents rely upon that difference to suggest that the tort of unlawful means conspiracy has indeterminate liability already built into it. As the respondents submit, “[i]n the tort context, the requirement of intention erects an inherent limit to the potential liability commensurate with the defendant’s culpability. ... As a result, indeterminate liability is already excluded by the proximity that the tort requires through the ‘directed at’ element.”

[56] We agree that the intentional component of the unlawful means conspiracy tort eliminates any concern for indeterminate liability. The requirement for the plaintiffs to prove that the defendants’ conduct was directed at them, and that the defendants knew or should have known that injury was likely, creates an inherent limit on potential liability, one that the respondents acknowledge and that we agree is “commensurate with the defendant’s culpability”.

[57] Accordingly, we also conclude that the principle of indeterminate liability does not apply to the tort of unlawful means conspiracy.

(e) Alternative: There is No Concern for Indeterminate Liability

[58] Even if the principle of indeterminate liability is relevant to the statutory claim or the unlawful means conspiracy claim, we would not conclude the umbrella purchasers' claims fail on the basis of indeterminate liability.

[59] As for the statutory claim, we agree with *Godfrey BCCA*, at paras. 229-34, that concerns over indeterminate liability are mitigated by the limitations set out in ss. 36 and 45 of the *Competition Act*. The requirement of proving intentional wrongdoing, in accordance with the fault requirements under s. 45, combined with the need under s. 36 for the plaintiff to demonstrate loss resulting from that intentional wrongdoing, serves to limit any concerns about overly broad liability. We have already reviewed those statutory limitations. If the principle of indeterminate liability does apply in this context, those limitations serve to carefully circumscribe liability. As the court noted in *Godfrey, BCCA*, at para. 232, and as supported by our previous analysis: “the tort of civil conspiracy provides even stronger built-in limitations controlling the scope of liability than those inherent in the *Competition Act*”.

[60] Even though the addition of umbrella purchasers would increase the plaintiff base and the potential damages to be paid, it is important not to confuse indeterminate liability with significant liability: *Livent*, at para. 43. Certain activities, like conspiring to fix prices for batteries that are in high demand for

contemporary society, may well come with significant liability. Although the addition of umbrella claimants would add additional exposure, that exposure would be in relation to specific products and limited by a defined class and a defined class period. It would not be limitless exposure.

[61] We do not agree with the respondents' assertion that they had "no control" over the actions of the non-defendants and so there is an indeterminacy problem. The Divisional Court addressed the "no control" point in its reasons. It concluded that the situation in this case was similar to the situation in *Imperial Tobacco*, where the Supreme Court concluded that the prospect of indeterminate liability was fatal to the tobacco companies' claims of negligent misrepresentation against the federal government. The Supreme Court held that indeterminacy was a problem because, insofar as the claims were based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes: *Imperial Tobacco*, at para. 99.

[62] Like *Imperial Tobacco*, the Divisional Court concluded in this case that the defendants had "no control over the actions of non-defendant manufacturers". In particular, they had no control over whether the non-defendant manufacturers chose to match the prices of the defendants and they had no control over the volume of sales by the non-defendant manufacturers.

[63] The “no control” argument fails to account for the manner in which the claim has been pleaded and the very essence of an umbrella purchaser claim: the umbrella effect.

[64] As for the manner in which the claim has been pleaded, the plaintiffs specifically allege that the defendants intentionally directed their conduct at the proposed class – a class that includes umbrella purchasers – and knew that their conduct was likely to cause injury to that class. Taking those pleadings as true, as we must at this stage, we would not agree that the defendants had no control over the non-defendants. The point is that they had control over the market and their intention was to move that market: *Godfrey BCCA*, at paras. 238-39.

[65] The umbrella effect must be taken into account at the certification stage. The theory of liability rests on the defendants’ alleged cartel activity, creating what the certification judge described in this case as “supra-competitive prices that enable non-cartel members to set their prices higher than they otherwise would have under normal conditions of competition”: *Shah v. LG Chem, Ltd.*, 2015 ONSC 6148, at para. 159. If their claims are ultimately proven, the umbrella purchasers are financial victims of the defendants because of the “umbrella pricing effects”, a phenomenon that is described in the following passage:

Umbrella effects typically arise when price increases lead to a diversion of demand to substitute products. Because successful cartels typically reduce quantities and increase prices, this diversion leads to a

substitution away from the cartels' products toward substitute products produced by cartel outsiders. [T]he increased demand for substitutes typically leads to higher prices for the substitute products. Such price increases are called umbrella effects and may arise either in the same relevant market – for example, in cases where a cartel covers less than 100 percent of the firms in that market – or in neighboring markets.

(See Roman Inderst, Frank P. Maier-Rigaud & Ulrich Shwalbe, "Umbrella Effects" (2014) 10:3 J. Competition L. & Econ. 739 at p. 740.)

[66] As the pleadings allege that the defendants were aware of and intended that the conspiracy would result in the increase in prices of LIBs and LIB products, the increase in prices across the market were intended and foreseen. Accordingly, including the umbrella purchasers would not make the respondents liable for unforeseen damages.

[67] The respondents also argue that allowing umbrella purchasers to claim relief under s. 36 could result in "economic ripples downstream" of the umbrella purchasers, causing further concern for indeterminate liability. They give the example of purchasers of services that rely upon LIB products, who could claim that they paid more for their services because their service provider paid more for the LIB products. That is not this case. The pleadings are specifically limited to those who purchased LIBs and LIB products during the conspiracy period.

[68] In summary, even if indeterminate liability is relevant, the umbrella purchaser claims do not fail s. 5(1)(a) on the basis of indeterminate liability.

(f) Are the pleadings sufficient?**(i) The Divisional Court's Reasons**

[69] While recognizing that the decision on indeterminate liability was sufficient to dispose of the umbrella purchaser claims, the Divisional Court went on to consider other difficulties with certifying them. Among other things, the court found there was a pleadings problem:

While that conclusion [with respect to indeterminate liability] would be sufficient to address the second issue on which leave to appeal was granted, I believe two other points should be made, because they also undermine the argument for including the Umbrella Purchasers within the class. First and foremost is the fact that, as the respondents point out, the appellants have failed to plead the requisite elements of the claim that could be advanced for the Umbrella Purchasers. It seems to me that, at a minimum, that claim would require a pleading that:

- (a) the respondents conspired to fix prices for LIBs and LIB products;
- (b) that the respondents fixed those prices at a level higher than they otherwise would have been, if the conspiracy had not been engaged in;
- (c) that prices so fixed by the respondents allowed the non-defendant manufacturers to charge higher prices;
- (d) that the non-defendant manufacturers did, in fact, charge higher prices, and;

- (e) that the non-defendant manufacturers charged higher prices as a direct result of the opportunity created by the respondents.

On the most generous reading of the Fresh as Amended Consolidated Statement of Claim, only the first two facts are pleaded. None of the other requisite facts are pleaded either directly, indirectly, expressly or implicitly. The failure to plead the requisite facts in support of a claim is fatal: *Copland v. Commodore Business Machines Ltd., Rules of Civil Procedure*, r. 25.06(1).

(ii) Sufficiency of the Pleadings

[70] The respondents argue that the pleadings are deficient because they do not assert a causal link between the defendants' alleged price fixing and the allegedly inflated prices charged by non-defendant LIB manufacturers. In essence, the respondents' position is that, as suggested by the Divisional Court, a specific plea that "the non-defendant manufacturers charged higher prices as a direct result of the opportunity created by the respondents" was required.

[71] The respondents also maintain that a pleading of generalized market effects is not sufficient and that a causal link to harm must be specifically pleaded. In support of this submission, the respondents rely on fraud on the market cases such as *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, [2010] O.J. No. 1057, and *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (Gen. Div.), for the proposition that a causal link is required and reliance cannot be presumed.

[72] We disagree.

[73] The pleadings in the present case allege, in effect, that:

- i. the defendants conspired to unduly lessen competition and enhance the prices of LIBs and LIB products, contrary to Part VI of the *Competition Act*;
- ii. the conspiracy was directed towards the proposed class members and the defendants knew it was likely to cause injury to the proposed class members, rendering the defendants liable for the tort of civil conspiracy;
- iii. LIB and LIB product prices were fixed at artificially inflated levels as a result of the conspiracy;
- iv. members of the proposed class paid more for LIBs and LIB products than they would have, absent the conspiracy.

[74] Although the pleading is somewhat lacking in particulars, specifically with respect to the claim that umbrella purchasers were harmed by the conspiracy, a generous approach must be taken when assessing the adequacy of the pleadings at this stage: *Imperial Tobacco*, at para. 21.

[75] Though umbrella purchasers are not explicitly mentioned, they did not need to be. The allegation of damage at para. 76(c) of the statement of claim is broad enough to encompass the harm caused to umbrella purchasers. That paragraph reads as follows:

76. The Plaintiffs and other members of the proposed class have suffered damages as a result of the conspiracy alleged herein. The Defendants' conspiracy had the following effects, among others: ...

- (c) the Plaintiffs and other members of the proposed class paid more for lithium batteries and lithium battery products than they would have paid in the absence of the conspiracy.

[76] Reading the statement of claim as a whole, it is clear that the appellants allege that non-defendant manufacturers and suppliers raised their prices as result of the defendants' conspiracy. In our view, that is sufficient for the purpose of certification and it is not fatal that the pleading does not expressly link the effects of the conspiracy to the pricing decisions of non-defendants.

[77] Finally, the respondents' reliance on case law in the securities class action context, in which courts have rejected the presumption of reliance created by the "fraud on the market" theory, is, in our view, misplaced. These cases have no application to cases such as the present. In fraud on the market cases, it cannot be assumed that all members of the class made their purchase in reliance on the misrepresentations by the defendants. If their purchase was not made as a result of the misrepresentation, the misrepresentation did not cause any damages. In contrast, where price fixing is alleged to have occurred, all purchasers suffered damages.

[78] In conclusion, the pleadings are sufficient to meet the s. 5(1)(a) requirement.

(3) Section 5(1)(c): Do the claims raise common issues?

[79] In light of our conclusion on the s. 5(1)(a) requirement, we must consider whether the other requirements for certification are met with respect to the umbrella purchaser claims. We turn first to the common issues requirement.

[80] The certified common issues as a result of the Divisional Court's decision were, to paraphrase: (a) whether the defendants breached s. 45 of the *Competition Act*, giving rise to liability pursuant to s. 36 of the *Competition Act*, and whether the class members suffered damage as a result; and (b) whether the defendants are liable in tort for the conspiracy to fix prices of LIBs, and associated issues with respect to the duration and effects of the conspiracy and the defendants' efforts to conceal the conspiracy. With respect to damages, the common issue certified was whether damages for the class could be determined on an aggregate basis and, if so, the amount owing to the class. The court also certified the question of whether the costs of the investigation should be assessed on a global basis under s. 36 of the *Competition Act* and, if so, in what amount.

[81] In its brief reasons, the Divisional Court expressed the concern that no common issues had been proposed respecting the claims advanced by the umbrella purchasers. In our view, this concern can be addressed quite simply. The proposed class included both the non-umbrella and umbrella purchasers. As

a result, the common issues proposed were, in essence, the same. Any specific issues relating to umbrella purchasers were, in effect, subsumed in the common issues proposed and accepted for the non-umbrella purchasers.

[82] In their submissions before this court, the respondents, however, focused on the adequacy of the expert evidence underlying the appellants' assertion of commonality. Specifically, the respondents submit that the appellants have not advanced a plausible methodology by which harm to the umbrella purchasers can be proven, and quantified, on a basis that is common to the rest of the class. As we will explain, we disagree with the first part of this submission. In our assessment, there is some basis in fact that harm to the class can be established in common. However, we are not satisfied that the umbrella purchasers' damages can be quantified on a common basis. For that reason, a subclass must be created for the non-umbrella purchasers. We turn now to these issues.

(i) Class-wide harm

[83] Where, as here, expert evidence is relied upon to provide some basis in fact, it must offer a plausible methodology with a realistic prospect of establishing loss on a class-wide basis: *Pro-Sys*, at para. 118. In our view, the appellants' expert, Dr. Reutter, offered such a methodology.

[84] According Dr. Reutter, if the alleged collusion occurred, all members of the proposed class would have been impacted by such collusion. This conclusion is rooted in a two-pronged approach to establishing harm to the class.

[85] First, Dr. Reutter identified four economic conditions present in the LIB market: a lack of economic substitutes, a commodity-like product, a concentrated market, and barriers to entry. In his view, assuming the alleged collusion occurred, these market conditions indicate that the alleged conspiracy would have resulted in higher prices for LIB products across the market.

[86] With respect to the market concentration factor, Dr. Reutter noted that the respondents represented over 70 percent of global LIB sales during the conspiracy period. He described that, during the conspiracy period, the LIB market was bifurcated between “high quality” defendant manufacturers in Japan and Korea, and lower quality manufacturers in China. In his view, economic theory indicates that, to the extent that non-defendant Chinese manufacturers participated in the “high quality” market with the defendants, these non-defendants also would have charged higher prices due to the reduced competition caused by the alleged conspiracy.

[87] The second part of Dr. Reutter’s approach to establishing class-wide harm is the creation of a supply and demand curve. In his opinion, based on the economic conditions described above, the LIB market is characterized by a

typical supply and demand relationship. Accordingly, if the price of LIBs increased, the supply curve for LIB products would shift upwards and a new equilibrium would be established at a higher price across the industry. Dr. Reutter therefore concluded that the respondents “are likely to have had an impact on the market price of all LIBs, and all Lithium Battery Products, sold globally and in Canada.”

[88] The respondents argue that Dr. Reutter’s evidence does not go far enough to establish that there is some basis in fact that harm to the class can be established on a common basis. They submit that the economic market conditions identified by Dr. Reutter would only permit conspirators to increase their own prices. Those conditions do not establish that the respondents had the ability to control the pricing decisions of other market participants. Further, on cross-examination, Dr. Reutter admitted that the response of non-defendant manufacturers to an alleged price increase would depend on individual decisions made by each manufacturer. He acknowledged that non-defendants might match their competitors’ increased prices, or they might lower or maintain their existing prices to increase market share. However, in the respondents’ submission, nowhere in Dr. Reutter’s report does he explain how the independent pricing decisions of non-defendants can be determined in common with the defendants, without conducting individual inquiries.

[89] In addition, the respondents liken the deficiencies in Dr. Reutter's evidence to those identified in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2017 BCSC 2357, [2017] B.C.J. No. 2635. They submit that, like the expert evidence in *Ewert*, Dr. Reutter's report demands an assumption that the econometric model proposed to determine harm to the non-umbrella purchasers can be applied to umbrella purchasers, without providing any methodology for doing so. In *Ewert*, the court also expressed concern about the availability of the data required to implement the expert's proposed methodology.

[90] Finally, the respondents put forward expert evidence to the effect that any method to determine a potential impact of the alleged conspiracy on non-defendant prices would necessarily be different than the assessment of an impact on the respondents' prices. This is due to the additional causal question of whether non-defendants increased their prices in reaction to the alleged collusion. As such, the question of harm to the class requires, in the respondents' view, an individualized analysis and the question cannot be determined in common.

[91] We acknowledge that Dr. Reutter's methodology of proving harm does not expressly mention umbrella purchasers and that it is short on detail. The majority of his report focuses on the quantification of damages for the class rather than the threshold question of establishing harm.

[92] Nonetheless, we are satisfied that Dr. Reutter has presented a theory and a methodology that offers a realistic prospect of establishing loss on a class-wide basis. In addition to Dr. Reutter's two-pronged approach to establishing harm to the class, Dr. Reutter proposes using regression analysis to prove that all members of the class, including umbrella purchasers, suffered harm. Although his regression analysis was designed to quantify damages, it offers insight as to whether the non-defendants in fact adopted higher prices as a result of the alleged collusion. For example, Dr. Reutter appears to be able to infer, from the stable market shares of the defendants and non-defendants during the conspiracy period, that non-defendants were not pricing to gain market share, which was the possible reaction suggested by the respondents' expert as an alternative to charging a higher, allegedly colluded price.

[93] We also note that the majority of the data Dr. Reutter identifies as necessary for implementing his proposed methodology of proving class-wide harm appears to be available through public documents or the discovery process. Thus, in our view, *Ewert* is distinguishable.

[94] In *Ewert*, the court declined to certify any of the claims advanced by the class, which included indirect and umbrella purchasers. The focus of the court's analysis was on the expert's failure to inquire into whether the data required to implement his proposed common methodology was available. These deficiencies are not present in Dr. Reutter's report. Dr. Reutter does not rely on unnamed

sources of data and the majority of the data he identifies as necessary for implementing his proposed methodology of proving class-wide harm appears to be readily available in specified industry reports and government resources.

[95] Dr. Reutter expects that the data relevant to other parts of his methodology, which appears to mainly consist of the respondents' transaction data, will be made available during the discovery process. As noted in *Ewert*, a plaintiff's expert is not expected to have access to the defendants' internal documents prior to discovery, and it can generally be assumed that defendant companies will produce sales and financial data: para. 48.

[96] We are also satisfied that, although short on detail about the harm to umbrella purchasers, Dr. Reutter's report sufficiently speaks to that question. In that way, this case is also distinguishable from *Ewert*.

[97] The judge in *Ewert* noted that the expert report did not address how harm to the umbrella purchasers could be shown. In other words, the proposed methodology was designed to show harm only to the non-umbrella purchasers. In our view, Dr. Reutter's report does not suffer from this deficiency. As we have explained, regardless of whether he expressly refers to the umbrella purchasers, Dr. Reutter's opinion is that his proposed method will show that the alleged conspiracy increased the prices of LIBs and LIB products across the market, causing harm to the class as a whole. The language used in Dr. Reutter's report

refers to the market-wide characteristics of the LIB market, which indicate, in conjunction with a typical supply and demand curve, that the equilibrium price of all LIBs would have been higher as a result of the conspiracy.

[98] The fact that the respondents' expert disagrees with Dr. Reutter that class-wide harm can be established on a common basis is of no moment at this point in the litigation. At the certification stage, the court is not required to resolve conflicting evidence: *Pro-Sys*, at paras. 102, 126. In fact, at this stage, the court is not equipped to engage in such an analysis: *Cloud*, at para. 50. The resolution of the disparities in the expert evidence is a matter for the trial judge, who will have the benefit of a full record at the trial of the common issues: *Pro-Sys*, at para. 126.

[99] Ultimately, it may be shown that Dr. Reutter's methodology is not capable of proving harm to the umbrella purchasers. The comments of the Supreme Court in *Pro-Sys*, at para. 105, which refer to the British Columbia class proceedings legislation but apply equally to the Ontario *Class Proceedings Act*, are apposite here:

I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the CPA is

the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[100] These comments were echoed by this court in *Cloud*, where the court highlights, in the context of its preferable procedure analysis at para. 90, the “great flexibility” of process provided by the *Class Proceedings Act*. As the action unfolds, where it appears that the certification requirements cease to be met, the court may, pursuant to s. 10, amend the certification order, decertify the proceeding, or make any other order considered appropriate.

[101] We acknowledge therefore that issues may arise with respect to the umbrella purchasers when the expert evidence is further developed and tested on the merits at the common issues trial. However, the fact that a question may give rise to nuanced answers as between class members does not defeat commonality: *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, at para. 32; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at para. 44.

[102] Accordingly, we are satisfied that the question of class-wide harm should be certified as a common question.

(ii) Quantification of damages

[103] We turn now to the issue of aggregate damages. Because the courts below excluded the umbrella purchasers from the class, they did not consider

whether aggregate damages for the class, when umbrella purchasers are included, could be certified as a common issue. Counsel gave limited treatment to this issue in their submissions. Based on our review of the statement of claim and the expert reports, we are of the view that, once the umbrella purchasers are included, aggregate damages for the class cannot be certified as a common question. A subclass composed of non-umbrella purchasers will have to be created for the aggregate damage issue.

[104] In order for aggregate damages to be certified as a common question, the appellants must establish that there is a “reasonable likelihood” that the conditions required in s. 24 of the *Class Proceedings Act* for determining aggregate damages would be satisfied if the appellants are otherwise successful at the common issues trial: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 44; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at para. 111.

[105] Section 24 provides:

24 (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[106] Our concern is that both the statement of claim and Dr. Reutter's report appear to quantify the aggregate damages as those that were suffered by the non-umbrella purchasers. Further, neither address how aggregate damages for umbrella purchasers could be quantified.

[107] As set out above, para. 76(c) of the statement of claim pleads damages; namely, that all class members were harmed because they paid more for LIBs and LIB products due to the alleged conspiracy. However, the proposed quantification of those damages is pleaded as follows, at para. 77:

The Plaintiffs assert that their damages, along with those of other members of the proposed class, are capable of being quantified on an aggregate basis as the difference between the amounts actually paid to the Defendants for the lithium batteries and lithium battery products and the amounts which would have been paid in the absence of the conspiracy. [Emphasis added.]

[108] In referring to the amounts "actually paid to the Defendants", the quantification of damages proposed in the statement of claim effectively excludes any overpayment allegedly made by umbrella purchasers who acquired LIBs or LIB products from non-defendants.

[109] On this issue, Dr. Reutter's report is somewhat confusing and of little assistance. The report does not directly address how aggregate damages for

umbrella purchasers could be calculated and the report appears to adopt the same approach to calculating aggregate damages set out in the statement of claim that is, the difference between the amounts actually paid to the defendants for LIBs and LIB products and the amounts that would have been paid in the absence of the conspiracy.

[110] We acknowledge that portions of Dr. Reutter's report suggest that his regression model and the method of estimating overcharges caused by the alleged conspiracy could be used to calculate the aggregate amount of overcharges by both defendant and non-defendant producers of LIBs. For example, at para. 92 of his report, he explains that the "law of one price suggests that the alleged conspiracy would have resulted in an overcharge that impacted both defendant and non-defendant Lithium Battery Products manufacturers by the same amount." Then again at para. 104, he concludes:

The increased price of LIBs and Lithium Battery Products would have been passed through to end users and others in the distribution chain, thus impacting all members of the proposed Class. Further, as described herein, it is my opinion that standard econometric and statistical techniques are available to estimate any overcharges and Class-wide damages.

[111] While the above-noted excerpts suggest that he could calculate aggregate class-wide damage, including the damages suffered by umbrella purchasers, other portions of his report suggest otherwise. At paras. 84 and 85, for example, he states that class-wide damages arise from four different sources. In his

description of these four different sources, damages that might arise as a result of LIB purchases made from non-defendant producers of LIB are not included.

[112] The fact that Dr. Reutter's aggregate damage calculation does not include the damages suffered by purchasers of LIBs manufactured by non-defendants becomes clear from para. 60 of his reply report. There, under the heading calculating class-wide aggregate damages, he states:

The first step in estimating Class-wide damages is to use standard regression analysis to estimate any direct purchaser overcharge in the price of LIBs due to the alleged conspiracy. Once estimated, any overcharge is then applied to the value of LIBs purchased directly from defendants, to yield an estimate of the value of world-wide aggregate damages. [Emphasis added.]

[113] We conclude, therefore, that consistent with the approach taken in the statement of claim, the methodology proposed by Dr. Reutter addresses only the calculation of damages for direct and indirect purchasers of LIBs manufactured by the defendants.

[114] In the absence of any explanation of how damages could be quantified for the class as a whole, it is difficult therefore to say that there is a "reasonable likelihood" that the conditions for s. 24 could be met. For this reason, the question of aggregate damages is not certified as a common issue for the entire class. Dr. Reutter has, however, provided a method offering a reasonable likelihood of being able to determine the aggregate damages suffered by non-umbrella purchasers. This was accepted by the courts below as they certified the

calculation of aggregate damages for the class, which then excluded the umbrella purchasers, as a common issue. As a result, a subclass should be created for non-umbrella purchasers with respect to the aggregate award of damages issue.

[115] The fact that damages cannot be assessed on an aggregate basis for the class as a whole does not mean the action should not proceed as a class proceeding. Furthermore, the question of whether damages can be aggregated is ultimately a question for the common issues trial judge. Failure to certify the question of whether aggregate damages are available for umbrella purchasers does not preclude a trial judge from invoking s. 24 if he or she considers it appropriate once liability has been found: *Pro-Sys*, at para. 134.

[116] Accordingly, the common issues certified are as follows:

- a) Did the Defendants, or any of them, breach s. 45 the *Competition Act* (which is contained in Part VI of the *Competition Act*) giving rise to liability pursuant to s. 36 of the *Competition Act*?
 - i. Between January, 1, 2000 and March 12, 2010, did the Defendants and/or any unnamed co-conspirators conspire, agree or arrange with each other to:
 - A. prevent, limit or lessen, unduly, the manufacture or production of Lithium Batteries; and/or
 - B. enhance unreasonably the price of Lithium Batteries?

- ii. Between March 12, 2010 and December 31, 2011, did the Defendants and/or any unnamed co-conspirators conspire, agree or arrange with each other to:
 - A. fix, maintain, increase or control the price of Lithium Batteries;
 - B. allocate sales, territories, customers or markets for the production or supply of Lithium Batteries; and/or
 - C. fix, maintain, control, prevent, lessen or eliminate the production or supply of Lithium Batteries?
 - iii. Did Class members suffer loss or damage as a result?
- b) Are the Defendants, or any of them, liable in tort for conspiracy to fix prices for Lithium Batteries? In particular:⁴
- i. Did the Defendants and/or any unnamed co-conspirators engage in unlawful conduct (by contravening section 45 of the *Competition Act*)?
 - ii. Was the Defendants' unlawful conduct directed towards Class members?
 - iii. Did the Defendants know, or ought [they] to have known, in the circumstances that injury to Class members was likely to result?
 - iv. Did Class members suffer loss or damage as a result?
- c) Over what period of time did the conspiracy take place?

⁴ The amended certification order following the Divisional Court's decision certifying the unlawful means conspiracy claim was not provided to the court. For the purposes of this appeal, we have assumed that the unlawful means conspiracy issue was certified by the Divisional Court in the form proposed in the Fresh as Amended Notice of Motion, with the necessary modifications to reflect the common issues that were not pursued on the certification motion. Any issues that may arise regarding the proper wording of the certification order are to be addressed by the certification judge.

- d) Over what period of time did the conspiracy affect the price of Lithium Batteries and/or Lithium Battery Products?
- e) Did the Defendants, or any of them, take affirmative or fraudulent steps to conceal the conspiracy?
- f) Can damages of the non-umbrella purchaser subclass be measured on an aggregate basis and, if so, what are the aggregate damages for the subclass?
- g) Should the full costs of the investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on a global basis pursuant to s. 36 of the *Competition Act* and if so, in what amount?

(4) Section 5(1)(e): Is there an appropriate representative plaintiff?

[117] The Divisional Court expressed the concern that there was some potential for conflict to arise between “direct” and umbrella purchasers, and that a separate representative plaintiff would be necessary. At para. 51, the court noted:

The other point is that no common issues were proposed respecting the claims of the Umbrella Purchasers, as required by s. 5(1)(c), nor was there a proposed representative plaintiff for the Umbrella Purchasers. This latter point is of some consequence, since the appellants conceded that the Umbrella Purchasers would have to be a subclass, within the certified class. Given that there would appear to be at least the potential for some conflict to arise between the direct purchasers and the Umbrella Purchasers, a separate representative plaintiff for the Umbrella Purchasers would seem to be necessary. [Emphasis added.]

[118] We assume that the court's reference to "direct" purchasers was in reference to the non-umbrella purchasers. The court did not articulate the nature of any potential conflict between the umbrella and non-umbrella purchasers.

[119] In our view, the umbrella and non-umbrella purchasers have the same interest at the outset, that is, to demonstrate the existence of the conspiracy and the general increase in prices. Although we would create a subclass for non-umbrella purchasers, given that they have advanced the quantification of damages as a common issue, this does not put them in conflict with the umbrella purchasers.

[120] In our assessment, the proposed representative plaintiffs, one direct and one indirect purchaser, remain appropriate at this juncture. There is some basis in fact to find that they can satisfy the requirements of s. 5(1)(e); namely, that they would fairly and adequately represent the class, have produced a workable litigation plan, and are not in conflict with the other class members on the common issues. Although the litigation plan is not included in the materials before the court, the respondents do not appear to take issue with it. As we have explained, we do not, at this point, consider that there is a conflict between the two classes such that a separate representative plaintiff is required. If problems arise at subsequent stages of the proceedings, separate representation can easily be established: *Anderson*, at p. 684.

(5) Section 5(1)(d): Is a class proceeding the preferable procedure?

[121] The respondents submit that a class proceeding is not the preferable procedure for resolving issues related to the umbrella purchasers. Although that issue was not touched on by the Divisional Court, the respondents note that the certification judge, in a brief passage in his reasons, expressed doubt that the umbrella purchasers as a subclass could have satisfied the preferable procedure condition, even assuming that they had a cause of action. The certification judge and the respondents express concern that, if the umbrella purchaser claims are certified, difficult issues with respect to commonality will arise and the action will become unmanageable because loss by the class members cannot be determined on common evidence. The respondents submit that the loss-based questions give rise to excessive individual issues that will overwhelm the common issues and make a class proceeding unmanageable.

[122] We disagree.

[123] The preferable procedure analysis aims to answer two questions: first, whether a class proceeding would be a fair, efficient and manageable method of resolving the claim; and second, whether a class proceeding is preferable, in a comparative sense, to other available procedures: *Hollick*, at para. 28. The inquiry into preferable procedure must be informed by the three principal goals of class proceedings: judicial economy, behaviour modification, and access to

justice: *Hollick*, at para. 27; *A/C Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at paras. 16, 22.

[124] We are satisfied that there is some basis in fact to conclude that a class proceeding is the preferable procedure for resolving the common issues. As already explained, nearly all of the issues are common to all class members, with one exception related to the quantification of damages. In the context of the action as a whole, the resolution of the common issues relating to the respondents' alleged wrongdoing, and the impact of that wrongdoing on the class members, would significantly advance the action: *Cloud*, at para. 76. The fact that individual issues, even a substantial number of individual issues, would remain to be determined after the common issues trial does not preclude certification in these circumstances: *Cloud*, at para. 75; *Hollick*, at para. 30.

[125] There is no reason to conclude, at this juncture, that the proceeding will be unmanageable. The respondents' submission on this point essentially relies on their position that harm to the class cannot be established on a common basis, which we have rejected.

[126] The fact that the resolution of the common issues would significantly advance the action suggests that proceeding as a class action would achieve judicial economy. Furthermore, even with respect to the issue of quantification of damages that has not been certified for umbrella purchasers, Dr. Reutter's report

appears to indicate that there is some overlap in the quantification of damages for the umbrella and non-umbrella purchasers, which would reduce duplication in fact-finding and legal analysis.

D. CONCLUSION

[127] In conclusion, therefore, we allow the appeal. Paragraphs 2, 3, 7 and 8 of the certification order are to be amended to include umbrella purchasers in the class definition and a subclass of non-umbrella purchasers is to be created. Paragraph 8(b) of the certification order is to be amended to provide that the aggregate damages issue is certified as common only with respect to the non-umbrella purchaser subclass. Paragraph 4 has already been amended by the substituted order of the Divisional Court certifying the claim of unlawful means conspiracy. As we have already noted in a footnote above, the substituted certification order was not provided to the court. Any issues that arise with respect to the terms of the certification order as a result of this decision are to be addressed before the certification judge. As agreed by the parties, there will be no order as to costs.

Released: "PR" Oct 12 2018

"Paul Rouleau J.A."
"L.B. Roberts J.A."
"Fairburn J.A."

TAB 13

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

THE CATALYST CAPITAL GROUP INC., <i>et al</i> Plaintiffs	and	WEST FACE CAPITAL INC., <i>et al</i> Defendants	Court File No. CV-17-587463-00CL
ONTARIO SUPERIOR COURT OF JUSTICE			Proceeding commenced at Toronto
BOOK OF AUTHORITIES OF BRUCE LIVESEY (ANTI-SLAPP MOTION)			
<hr/>			
<p>A. Dimitri Lascaris Law Professional Corporation G101-360 Rue Saint-Jacques Montreal, QC H2Y 1P5</p> <p>A. Dimitri Lascaris (LSO #50074A) alexander.lascaris@gmail.com Tel: (514) 941-5991 Fax: (519) 660-7845</p> <p>A.J. Freedman (LSO# 73196R) aj@kaloglianmyers.com Tel: (647)-968-9560 Fax: (647)-243-6620 c/o A. Dimitri Lascaris Law P.C</p> <p>Lawyers for the Defendant, Bruce Livesey</p>			