

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL  
CORPORATION

Plaintiffs

and

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

Defendants

A N D B E T W E N:

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

**BRIEF OF AUTHORITIES OF THE RESPONDING PARTIES (PLAINTIFFS BY  
COUNTERCLAIM)  
WEST FACE CAPITAL INC. AND GREGORY BOLAND**

**(RE: Catalyst Defendants' Partial Anti-SLAPP Motion returnable May 17-21, 2021)  
Volume 1 of 3**

May 12, 2021

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Defendant to the Counterclaim

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Please see para. 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:**  
(paras. 1 to 129)

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

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

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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.**

*Interveners*

**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.

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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.

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

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*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.<sup>1</sup> 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

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<sup>1</sup> 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 plaintiff<sup>2</sup> 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) *Harm Analysis*

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

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

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

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

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

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

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

(b) *Weighing of the Public Interest*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### IV. Application to This Case

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

##### A. *Factual Overview*

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

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

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

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

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

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

...

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

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

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

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

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

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

## B. *Procedural History*

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

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

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

[93] Pointes Protection's appeal was heard together with five other appeals<sup>3</sup> 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

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<sup>3</sup> 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.*

Please see paras. 1-3, 90-92, 96-98, 100, 101, 120-122, 125, 128-130, 132, 134-136, 138-144, 146-150, 163, 164 & 169-174



**SUPREME COURT OF CANADA**

**CITATION:** Bent v. Platnick, 2020 SCC 23

**APPEALS HEARD:** November 12, 2019

**JUDGMENT RENDERED:** September 10, 2020

**DOCKET:** 38374

**BETWEEN:**

**Maia Bent**  
Appellant

and

**Howard Platnick**  
Respondent

**AND BETWEEN:**

**Lerners LLP**  
Appellant

and

**Howard Platnick**  
Respondent

- and -

**British Columbia Civil Liberties Association, Greenpeace Canada, Canadian Constitution Foundation, Ecojustice Canada Society, 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, Canadian Broadcasting Corporation, Barbra Schlifer Commemorative Clinic, 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

**For the majority**

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

**REASONS FOR JUDGMENT:**  
(paras. 1 to 179)

**Côté J.** (Wagner C.J. and Moldaver, Brown and Rowe JJ. concurring)

**DISSENTING REASONS:**  
(paras. 180 to 301)

Abella J. (Karakatsanis, 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*.

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BENT v. PLATNICK

**Maia Bent**

*Appellant*

v.

**Howard Platnick**

*Respondent*

- and -

**Lerners LLP**

*Appellant*

v.

**Howard Platnick**

*Respondent*

and

**British Columbia Civil Liberties Association,  
Greenpeace Canada,  
Canadian Constitution Foundation,  
Ecojustice Canada Society,  
West Coast Legal Education and Action Fund,  
Atira Women's Resource Society,  
B.W.S.S. Battered Women's Support Services Association,  
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Canadian Broadcasting Corporation,  
Barbra Schlifer Commemorative Clinic,  
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*

**Indexed as: Bent v. Platnick**

**2020 SCC 23**

File No.: 38374.

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 — Application of Ontario’s framework for dismissal of strategic lawsuits against public participation (SLAPPs) to defamation claim — Whether defamation claim against lawyer for statements made in email alleging that physician inappropriately altered medical reports should be dismissed under anti-SLAPP legislation — Courts of Justice Act, R.S.O. 1990, c. C-43, s. 137.1.*

*Evidence — Fresh evidence — Motion seeking to adduce fresh evidence filed before Supreme Court of Canada — Whether fresh evidence should be admitted.*

B is a lawyer and partner at an Ontario law firm. She is a member and, at the relevant time, was the president-elect of the Ontario Trial Lawyers Association (“OTLA”). The OTLA is an organization comprised of legal professionals who represent persons injured in motor vehicle accidents. P is a medical doctor who is typically hired through insurance companies to review other medical specialists’ assessments of persons injured in motor vehicle accidents and to prepare a final report with an ultimate assessment of the accident victim’s level of impairment. Following two insurance coverage disputes in which B was acting as counsel for an accident victim, B sent an email to a Listserv (i.e. an email listing) of approximately 670 OTLA members in which she made two statements that specifically mention P by name and allege that, in the context of those disputes, P “altered” doctors’ reports and “changed” a doctor’s decision as to the victim’s level of impairment. B’s email was eventually leaked anonymously by a member of the OTLA and as a result, an article was published in a magazine which reproduced B’s email in its entirety and referred to testimony from B.

P commenced a lawsuit in defamation against both B and her law firm, claiming damages in the amount of \$16.3 million. B filed a motion under s. 137.1 of the *Courts of Justice Act* (“CJA”) to dismiss the lawsuit. The motion judge allowed B’s motion and dismissed P’s defamation proceeding. The Court of Appeal set aside the motion judge’s determination, dismissed B’s motion, and remitted P’s defamation claim to the Superior Court for consideration.

*Held* (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeals should be dismissed.

*Per* Wagner C.J. and Moldaver, **Côté**, Brown and Rowe JJ.: While in *1704604 Ontario Ltd. v. Pointes Protection Assn.*, 2020 SCC 22, the Court recognizes the importance of freedom of expression as the cornerstone of a pluralistic democracy, the right to free expression does not confer a licence to ruin reputations. Thus, in addition to protecting expression on matters of public interest, s. 137.1 of the *CJA* must also ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it. Applying the s. 137.1 framework set out in *Pointes Protection* to these appeals, B's s. 137.1 motion should be dismissed and P's lawsuit in defamation should be allowed to continue. P's claim is one that deserves to be adjudicated on its merits, and is not one that ought to be summarily screened out at this early stage.

First, B has met her threshold burden under s. 137.1(3) as B's email constitutes an expression that relates to a matter of public interest and P's defamation proceeding arises from that expression. B's email is captured by the statutory definition of "expression" found in s. 137.1(2) which contemplates any communication, even if it is non-verbal, and even if it is made privately. The underlying proceeding clearly "arises from" that expression, since B's email is the foundation for P's defamation proceeding. Moreover, B's email raises concerns regarding the truthfulness, reliability, and integrity of medical reports filed on behalf

of insurers in the arbitration process, which, in turn, raises concerns regarding the integrity of the arbitration process itself and the proper administration of justice. Whether B's concerns are valid or not is beside the point at this stage. Further, the email is directed at a not insignificant number of individuals, who have a special interest, as part of their broader mandate as members of the OTLA, to steadfastly represent victims of motor vehicle accidents, a public interest in itself. Therefore, B's email relates to a matter of public interest.

As B has met her burden on the threshold question, the burden shifts to P to show that there are grounds to believe that his defamation proceeding has substantial merit and that B has no valid defence to it under s. 137.1(4)(a) of the *CJA*. A "grounds to believe" standard requires a basis in the record and the law, taking into account the stage of the litigation, to support these findings. This means that any single basis in the record and the law will be sufficient as long as it is legally tenable and reasonably capable of belief.

P has discharged his burden under s. 137.1(4)(a)(i) and shown that there are grounds to believe that his defamation proceeding has substantial merit. Defamation is governed by a well-articulated test requiring that three criteria be met and all three of these criteria are easily satisfied in the present case: the words complained of were published, as B wrote an email and sent it to 670 OTLA members; the words complained of explicitly refer to P; and the words complained of

were defamatory, since an allegation of professional misconduct would tend to lower P's reputation in the eyes of a reasonable person.

P has also discharged his burden under s. 137.1(4)(a)(ii) and shown that there are grounds to believe that B has no valid defence to his defamation proceeding. In other words, there is a basis in the record and the law, taking into account the stage of the proceedings, to support a finding that the defences B has put in play do not tend to weigh more in her favour.

First, there are grounds to believe that B's defence of justification is not valid. To succeed on the defence of justification at trial, the burden is on the defendant to prove the substantial truth of the "sting", or main thrust, of the defamation. Applied to the facts of this case, the "sting" of B's email is an allegation of professional misconduct. In effect, B's two allegations are constituent parts of the same sting of professional misconduct and the truth of just one will be insufficient for the defence to succeed because B's two allegations are connected and inseverable. Thus, regardless of whether B's first allegation of P altering a report is true, if B's second allegation that P "changed" a doctor's decision is not substantially true, then this is sufficient to foreclose her defence of justification under s. 137.1(4)(a)(ii). In the present case, there is a basis in the record and the law to support a finding that the allegation that P "changed the doctor's decision" is not substantially true, and that therefore the defence of justification cannot be considered to weigh more in favour of B such that it may be considered "valid" under s. 137.1(4)(a)(ii).

Second, there are grounds to believe that B's defence of qualified privilege is not valid. An occasion of qualified privilege exists if a person making a communication has an interest or duty to publish the information in issue to the person to whom it is published and the recipient has a corresponding interest or duty to receive it. However, the privilege is qualified in the sense that it can be defeated. This can occur particularly in two situations: where the speaker was reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded. In the present case, even assuming without deciding the issue that qualified privilege does attach to the occasion upon which B's email was sent, there is a basis in the record and the law to support a finding that the scope of B's privilege was exceeded and that the defence therefore does not tend to weigh more in her favour. This is because the specific references made to P may not have been necessary to the discharge of the duty giving rise to the privilege. In other words, B could have communicated her concerns regarding the alteration of medical reports without naming P specifically. Further, the Listserv's express prohibition on even potentially defamatory remarks suggests that the OTLA acknowledges that the posting of even potentially defamatory material is not necessary (or even relevant) to the duty encompassed within the particular occasion. Lastly, the record reveals a lack of investigation or reasonable due diligence by B prior to making her serious allegations. B took no investigative steps at all to corroborate an allegation of professional misconduct, and instead, relied on her recollection of a specific phrase, from a specific report, by a specific person, concerning a specific event, that had taken place three years earlier, without attempting to communicate with P or consulting her own

notes. In light of the heightened expectation of reasonable due diligence that the Court has historically imposed on lawyers, B's privilege may be defeated simply on the ground that she was indifferent or reckless as to the truth of her defamatory statements. Thus, even assuming that qualified privilege attaches to the occasion upon which B's communication was made, there are grounds to believe that the defence is not valid under s. 137.1(4)(a)(ii) because it may be defeated by virtue of B having exceeded the scope of the privilege, and perhaps even by her reckless disregard for the truth (i.e. malice).

Finally, the public interest hurdle at s. 137.1(4)(b) is the crux of the s. 137.1 analysis. P must show on a balance of probabilities that the harm likely to be or have been suffered as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. First, the harm to P here is extensive and quite serious. Not only does it include significant monetary harm that is more than just a bald assertion, but reputational harm is also eminently relevant to the harm inquiry, even if it is not quantifiable at this stage, and it is only amplified when one considers professional reputation. Second, P's harm was suffered as a result of B's expression. B can be held liable for harm that may have resulted from the subsequent leak and/or reproduction of her email in the magazine because republication was reasonably foreseeable to B and/or authorized by B, expressly or impliedly. Even if B cannot be held liable for republication, causation is not an all-or-nothing proposition, and there is a sufficient causal link between the initial email publication and harm suffered by

P. No definitive determination of harm or causation is required at this stage. Therefore, the harm likely to be or have been suffered by P as a result of B's expression lies close to the high end of the spectrum and, correspondingly, so too does the public interest in allowing his defamation proceeding to continue.

In determining the public interest in protecting B's expression, it must be considered that she made a personal attack against P, which cast doubt on his professional competence, integrity, and reputation, without ever having met him and without any investigation into her allegations against him. Indeed, there will be less of a public interest in protecting a statement that contains gratuitous personal attacks and the motivation behind the expression will be relevant to the inquiry. The chilling effect on future expression and the broader or collateral effects on other expressions on matters of public interest must also be considered. Permitting P's defamation claim to proceed will deter others not from speaking out against unfair and biased practices, but from unnecessarily singling out an individual in a way that is extraneous or peripheral to the public interest, and from making defamatory remarks against an individual without first substantiating, or attempting to substantiate, the veracity of their allegations. In this way, rather than disincentivizing people from speaking out against unfair and biased practices, it will incentivize them to act with reasonable due diligence. Thus, when considered as a whole, the public interest in protecting B's expression lies somewhere in the middle of the spectrum: while B's specific references to P fall at the low end of the protection-deserving spectrum, her

email interpreted broadly as pertaining to the administration of justice in Ontario falls closer to the high end.

P has established on a balance of probabilities that the harm likely to be or have been suffered as a result of B's expression is sufficiently serious that the public interest in permitting his defamation proceeding to continue outweighs the public interest in protecting B's expression. In light of the open-ended nature of s. 137.1(4)(b), courts have the power to scrutinize what is really going on in the particular case before them. On its face, this is not a case in which one party is vindictively or strategically silencing another party; it is a case in which one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication. This is not the type of case that comes within the legislature's contemplation of one deserving to be summarily dismissed at an early stage, nor does it come within the language of the statute requiring such a dismissal.

Moreover, P's motion to adduce fresh evidence pursuant to s. 62(3) of the *Supreme Court Act* should be allowed in part. This case is a transitional one: the considerable uncertainty surrounding s. 137.1 motions — due to a lack of judicial guidance with respect to both the test for withstanding a s. 137.1 motion, as well as the nature or comprehensiveness of the evidence required on a such a motion — militates in favour of granting the motion to adduce fresh evidence in part based on the test from *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

*Per Abella, Karakatsanis, Martin and Kasirer JJ. (dissenting):* The appeal should be allowed and P's defamation action should be dismissed under s. 137.1 of Ontario's *Courts of Justice Act*. There is no dispute that P's defamation action was based on expression that relates to a matter of public interest, as B's email addressed questions of significance to the administration of justice, particularly the independence, accuracy and impartiality of experts and third-party assessment companies retained by insurers. Section 137.1(3) is therefore satisfied and P's defamation proceeding must presumptively be dismissed. Pursuant to s. 137.1(4), however, P's proceeding may continue if he satisfies a judge that the following three criteria are met: there are grounds to believe that his case has substantial merit, B has no valid defence to the proceeding, and the likely harm suffered by him is serious enough that it outweighs the public interest in protecting B's expression. Here, B has a valid defence of qualified privilege and is therefore entitled to the relief mandated by s. 137.1(3), namely the dismissal of P's defamation action.

A defence is valid if it has a real prospect of success, meaning that it must be legally tenable, supported by evidence that is reasonably capable of belief, and have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the person being sued. The burden of showing that the defence can be said to have no real prospect of success is on the plaintiff. The defence of qualified privilege applies where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding

interest or duty to receive it. Qualified privilege can however be defeated if the communication exceeded the purpose of the privilege or if the communication was predominantly motivated by malice. A defendant will exceed the purpose of the privilege if the information communicated is not reasonably appropriate, that is, relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege. The question is not whether the statements were strictly necessary. A necessity-based approach would have dangerous and restrictive implications for the defence of qualified privilege. It would effectively exclude from the defence statements containing specific examples of misconduct, since statements like that can almost always be stripped of detail and reconstructed with the unnecessary examples they previously contained. Qualified privilege exists to acknowledge the benefit of expression which is relevant to protecting the public interest, including protecting the public from the perpetuation of wrongdoing or injustice. Generic accounts of misconduct, which do not refer to specific persons, do not require the protection of qualified privilege. The defence is, necessarily, engaged only when someone is identified.

The conclusion that B sent her email in circumstances protected by qualified privilege is supported by evidence that is reasonably capable of belief and sufficiently compelling to give the defence the necessary likelihood of success. As president-elect of the Ontario Trial Lawyers Association (“OTLA”), B had a clear duty to inform its members about selective and misleading expert reports which disadvantage the very individuals they advocate for and represent, as well as a duty to

advise OTLA members of ways to protect their clients' interests against unfair practices by experts and assessment companies. B also had a professional duty as a lawyer to participate in improving the administration of justice and to share best practices. Members of the OTLA Listserv — all plaintiff-side personal injury lawyers — unquestionably had a reciprocal duty as well as an interest in receiving B's communication. Being alerted to questionable conduct by experts and assessment companies — and advised of ways to guard against such conduct — was of professional significance to them and especially to their clients. B or her colleagues did not waive their professional obligation to exchange such information by joining a Listserv. B's communication, therefore, was made by a person with a professional interest and duty to share the information with her colleagues, who had a corresponding interest and duty to receive it. This supports the conclusion that her defence of qualified privilege has a real prospect of success based on both the facts and the law. It is also hard to see how B could have exceeded the bounds of her duty to inform OTLA members of selective and misleading expert reports, by identifying an expert who she reasonably believed to have engaged in precisely that conduct. It was clearly relevant and reasonably appropriate for B, in fulfilling her duty to protect her colleagues and their clients, to identify P, a frequently-retained expert in whose cases it had proven to be especially important to obtain full disclosure of the insurer's files. It would defeat the purpose of qualified privilege to withhold the defence from B because she chose to identify P by name.

Further, B sent her email while she was president-elect of the OTLA through a Listserv restricted to members of the OTLA who practiced plaintiff-side personal injury law. Members of the Listserv were bound by a wide-ranging undertaking to keep the information strictly confidential. As lawyers, Listserv members were also required by the *Rules of Professional Conduct* to strictly and scrupulously fulfill their undertakings. There was no reason for B to expect that Listserv members would breach these undertakings and, in so doing, breach their professional obligations. There is also nothing in the record to support a finding of malice against B, either due to recklessness or on any other basis. Additionally, the motion judge concluded that there was no evidence to reasonably support the inference that B acted with malice in publishing her email, a conclusion fully supported by the record, and this conclusion is entitled to deference.

In this case, protecting B's expression on matters of public interest outweighs the harm to P's reputation. Any harm resulting from the leak of B's email was caused by unforeseen and unforeseeable communication by others, not by B sending the email to its intended audience of lawyers on the Listserv. B's email addressed matters of critical importance to the administration of justice and there is a broader public interest in protecting B's expression, as permitting a defamation suit to proceed would produce a considerable chilling effect.

P's motion to admit fresh evidence should be dismissed. Most of the material he seeks to admit is clearly irrelevant and inadmissible. What is left are two

unsworn letters sent by email between counsel in a related matter. The emails relate to issues that were, from the day P brought his defamation action, live and in serious dispute but unchallenged and unexplored by him, and were rejected as fresh evidence four years ago by the motion judge. Admitting the emails would require the Court to overturn the exercise of discretion by the motion judge, ignore P's demonstrable lack of due diligence, and accept unsworn, untested, hearsay evidence, all to obtain information that would not, in any event, have affected the result of B's dismissal hearing. Such an outcome would not only frustrate the purposes of s. 137.1, it would inexplicably depart from the Court's jurisprudence on the admission of fresh evidence.

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By Côté J.

**Applied:** *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22; **referred to:** *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *People ex rel. Karlin v. Culkan*, 162 N.E. 487 (N.Y. 1928); *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R.P. v. R.C.*, 2011 SCC 65, [2011] 3 S.C.R. 819; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *R. v. Warsing*, [1998] 3 S.C.R. 579; *Platnick v. Bent (No. 2)*, 2016 ONSC 7474; *Kuczera (Re)*, 2018 ONCA 322, 58

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By Abella J. (dissenting)

*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3; *Adam v. Ward*, [1917] A.C. 309; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182; *MacDonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669; *Burwash v. Williams*, 2014 ONSC 6828; *Daggitt v. Campbell*, 2016 ONSC 2742, 131 O.R. (3d) 423; *Douglas v. Tucker*, [1952] 1 S.C.R. 275; *Netupsky v. Craig*, [1973] S.C.R. 55; *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311; *Merit Consultants*

*International Ltd. v. Chandler*, 2014 BCCA 121, 60 B.C.L.R. (5th) 214; *Wang v. British Columbia Medical Assn.*, 2014 BCCA 162, 57 B.C.L.R. (5th) 217; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726; *Chohan v. Cadsky*, 2009 ABCA 334, 464 A.R. 57; *Laufer v. Bucklaschuk* (1999), 145 Man. R. (2d) 1; *Board of Trustees of the City of Saint John Employee Pension Plan v. Ferguson*, 2008 NBCA 24, 328 N.B.R. (2d) 319; *Cush v. Dillon*, [2011] HCA 30, 243 C.L.R. 298; *Birchwood Homes Limited v. Robertson*, [2003] EWHC 293; *Tsatsi v. College of Physicians and Surgeons of Saskatchewan*, 2018 SKCA 53; *Foulidis v. Baker*, 2014 ONCA 529, 323 O.A.C. 258; *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Jerome v. Anderson*, [1964] S.C.R. 291; *Hodgson v. Canadian Newspapers Co.* (2000), 49 O.R. (3d) 161; *Smith v. Cross*, 2009 BCCA 529, 99 B.C.L.R. (4th) 214; *Martin v. Lavigne*, 2011 BCCA 104, 17 B.C.L.R. (5th) 132; *Cimolai v. Hall*, 2007 BCCA 225, 240 B.C.A.C. 53; *Davies & Davies Ltd. v. Kott*, [1979] 2 S.C.R. 686; *Korach v. Moore* (1991), 1 O.R. (3d) 275; *Wells v. Sears*, 2007 NLCA 21, 264 Nfld. & P.E.I.R. 171; *Horrocks v. Lowe*, [1975] A.C. 135; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269; *Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666; *Platnick v. Bent (No. 2)*, 2016 ONSC 7474; *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423; *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *Bukshtynov v. McMaster University*, 2019

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*Howard Winkler and Eryn Pond*, for the appellant Maia Bent.

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*Timothy S. B. Danson and Marjan Delavar*, for the respondent.

*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.

*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.

*Sean A. Moreman and Katarina Germani*, for the intervener the Canadian Broadcasting Corporation.

*Joanna Birenbaum* and *Alicja Putch*, for the intervener the Barbra Schlifer Commemorative Clinic.

*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 Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

CÔTÉ J. —

I. Introduction

[1] Freedom of expression and its relationship to the protection of reputation has been subject to an assiduous and judicious balancing over the course of this Court’s jurisprudential history. While in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, this Court recognizes the importance of freedom of expression as the cornerstone of a pluralistic democracy, this Court has also recognized that freedom of expression is not absolute — “[o]ne limitation on free expression is the law of defamation, which protects a person’s reputation from

unjustified assault”: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 2, per McLachlin C.J. Indeed, “the right to free expression does not confer a licence to ruin reputations”: para. 58. That is because this Court has likened reputation to a “plant of tender growth [whose] blossom, once lost, is not easily restored”: *People ex rel. Karlin v. Culkin*, 162 N.E. 487 (N.Y. 1928), at p. 492, per Cardozo J., cited by Cory J. in *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 92. Values, therefore, are not without countervailing considerations.

[2] In these appeals, the Court must apply the framework set out in *Pointes Protection* in order to determine whether the respondent’s defamation claim against the appellants 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”). In effect, this Court must consider the delicate equilibrium between two fundamental values in a democratic society, freedom of expression and the protection of reputation, vis-à-vis the *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23.

[3] For the reasons that follow, I would dismiss the appeals before this Court, and accordingly, I would dismiss the s. 137.1 motion and allow the respondent’s lawsuit in defamation to continue. While the appellant Maia Bent (“Ms. Bent”) successfully meets her threshold burden under s. 137.1(3), the respondent, Dr. Howard Platnick (“Dr. Platnick”), successfully clears both the merits-based

hurdle and the public interest hurdle under s. 137.1(4)(a) and s. 137.1(4)(b), respectively.

[4] Furthermore, and in order to avoid any misunderstanding, it is important to mention at the outset that a s. 137.1 motion is unequivocally not a determinative adjudication of the merits of a claim: *Pointes Protection*, at paras. 37, 50, 52 and 71. Instead, the implication of the findings that I set out herein is simple: Dr. Platnick deserves to have his day in court to potentially vindicate his reputation — “a fundamental value in its own right in a democracy”: para. 81. At trial, judicial powers of inquiry are broader, *viva voce* evidence can be given, and ultimate assessments of credibility can be made. Nothing in these reasons can, or should, be taken as prejudging the merits of Dr. Platnick’s underlying defamation claim either in fact or in law. Simply put, my resolution of this s. 137.1 motion means only that Dr. Platnick’s claim is one that deserves to be adjudicated on the merits, and is not one that ought to be summarily screened out at this early stage.

## II. Background

### A. *Factual Overview*

[5] The appellant Ms. Bent is a lawyer and partner at the law firm Lerner LLP (“Lerner”), which is also an appellant before this Court. Ms. Bent is a member and, at the relevant time, was the president-elect of the Ontario Trial Lawyers Association (“OTLA”). The OTLA is an organization comprised of lawyers,

law clerks, and law students who represent persons injured in motor vehicle accidents; it consists of approximately 1,600 members.

[6] The respondent, Dr. Platnick, is a medical doctor of general practice who worked as a family physician from 1988 to 2011. Since 1991, he has typically been hired through insurance companies to review other medical specialists' assessments of persons injured in motor vehicle accidents and to prepare a final report with an ultimate assessment himself — as in this case.

[7] Dr. Platnick has commenced a lawsuit against Ms. Bent and Lerner alleging defamation and damages in the amount of \$16.3 million. That is the underlying proceeding at issue here, which Ms. Bent is asking this Court to dismiss pursuant to s. 137.1 of the *CJA*.

[8] Of critical importance to these appeals, the following email — sent by Ms. Bent to a Listserv (i.e. an email listing, the parameters of which I explain in detail later in these reasons) of approximately 670 OTLA members — is the basis for Dr. Platnick's defamation action:

Subject: Sibley Alters Doctors' Reports  
Date: November 10, 2014<sup>1</sup>

...

Dear Colleagues,

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<sup>1</sup> Dunphy J. of the Ontario Superior Court referred to the date of the email as November 14, 2014, in his reasons: 2016 ONSC 7340, 136 O.R. (3d) 339. The correct date is November 10, 2014.

I am involved in an [a]rbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multi-disciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.

He also testified that he never participated in any “consensus meeting” and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

This was NOT the only report that had been altered. We obtained copies of all the doctor[s’] file[s] and drafts and there was a paper trail from Sibley where they rewrote the doctors’ reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.

This was all produced before the arbitration but for some reason the other lawyer didn’t appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.

I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor’s and Sibley’s files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor’s decision from a marked to a moderate impairment. [Emphasis added.]

(A.R., vol. III, at pp. 31-32)

[9] As is clear on its face, Ms. Bent made two statements in her email that specifically mention Dr. Platnick by name. Each of them refers to a different factual matrix, but makes a similar allegation that Dr. Platnick “altered” reports. The first refers to what I will call the “Carpenter Matter”. The second pertains to a different

matter, which I will refer to as the “Dua Matter”. I set out the relevant factual predicate for each matter below.

(1) Carpenter Matter, November 2014

[10] In November 2014, Ms. Bent was acting as counsel in an arbitration with respect to an insurance coverage dispute. The crux of that dispute depended on whether Ms. Bent’s client — Dr. Carpenter, who had been injured in a motor vehicle accident — had suffered a “catastrophic impairment”. A “catastrophic impairment” is a technical designation which would have entitled Dr. Carpenter to enhanced medical and other benefits from her insurer. The determination of such a designation is made on the basis of the criteria and guidelines set out in, or incorporated into, the *Statutory Accident Benefits Schedule — Effective September 1, 2010*, O. Reg. 34/10, s. 1 (“SABS”), under the *Insurance Act*, R.S.O. 1990, c. I.8.

[11] To assess whether Dr. Carpenter should be given a catastrophic impairment designation, the insurer arranged for a series of independent medical examinations by various medical professionals through an assessment company named Sibley & Associates (“Sibley”).<sup>2</sup> While the medical professionals who perform such examinations have considerable expertise in their respective fields of practice, they have varying levels of understanding and expertise with regard to the SABS regime. Here, none of the medical experts were from or practised in Ontario, and the record reveals that they were not familiar with Ontario’s SABS regime and its

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<sup>2</sup> Sibley & Associates has also been referred to as Sibley SLR and SLR Assessments.

criteria and classifications for catastrophic impairment designations. They were nonetheless retained to conduct their own medical assessments of Dr. Carpenter and to forward those assessments to Sibley.

[12] Sibley also retained Dr. Platnick as a “lead physician” in order to prepare a final report for it that would make an ultimate determination of whether Dr. Carpenter warranted a catastrophic impairment designation. Dr. Platnick, an Ontario physician who had previously acted in this role on numerous occasions, had expertise with regard to the *SABS* — an Ontario regulation — and its classifications and calculations relating to catastrophic impairment designations.

[13] Accordingly, Dr. Platnick’s report on Dr. Carpenter’s catastrophic impairment assessment was to be based on the applicable criteria in the *SABS*. Because it was not Dr. Platnick’s role to examine Dr. Carpenter himself, nor did he do so, his report was based on the data from the team of medical experts retained by Sibley who had actually conducted the individual medical assessments of Dr. Carpenter. As mentioned above, those medical experts forwarded their assessments *to* Sibley, since they had been retained *by* Sibley — they did not correspond with Dr. Platnick. In turn, Sibley provided those medical assessments and expert reports to Dr. Platnick so that he could prepare his ultimate report to send to Sibley.

[14] The contents of Dr. Platnick’s report are important to these appeals. He titled his report “Catastrophic Impairment Determination” and began it with the

following sentence written in bold: “My calculations detailed below incorporate and consider the findings of all assessors on this CAT [Catastrophic] Assessment Team” (A.R., vol. IV, at p. 187). Dr. Platnick’s five-page report examined the various criteria in the *SABS* that were relevant to Dr. Carpenter’s catastrophic impairment assessment, making extensive reference to the medical assessments done by the specialists retained by Sibley and periodically stating *his own* conclusions under the various criteria: indeed, Dr. Platnick used the words “I would conclude that” or “I was not able to identify” (p. 189 (emphasis added)). On the final page of the report, under the heading “Impairment Calculation”, Dr. Platnick wrote that “I complete the following calculation” and then that, based on that calculation, “I would conclude” that Dr. Carpenter “does not meet the catastrophic level based upon the *SABS* and utilizing the OCF-19 Form”: p. 191 (emphasis added). Crucial to this case is the fact that, after setting forth his conclusion, Dr. Platnick wrote that “[i]t is the consensus conclusion of this assessment that [Dr. Carpenter] does not achieve the catastrophic impairment rating as outlined in the *SABS*”: p. 191 (emphasis added).

[15] Dr. Platnick sent his report to Sibley, as he was meant to do. Attached to the back of the report was an acknowledgment page, which had a place for the signatures of the four specialists who had assessed Dr. Carpenter to acknowledge that Dr. Platnick’s report reflected the “consensus conclusion of this assessment”: p. 192. Dr. Platnick sent the report to Sibley without any signatures. As mentioned above, the medical experts who had assessed Dr. Carpenter had been retained by Sibley and

were not in contact with Dr. Platnick at any point. In the normal course of events, Sibley was supposed to obtain those signatures.

[16] Sibley did not obtain any signatures and, instead, provided the insurer and Ms. Bent with a document entitled “Catastrophic Determination Executive Summary”: pp. 180-85. The document was identical to Dr. Platnick’s report, but did not affix the acknowledgement page and had a different title page. In due course, Ms. Bent received a copy of Dr. Platnick’s original report with the unsigned acknowledgement page, as well as the individual assessments conducted by the specialists.

[17] On November 6, 2014, at the arbitration hearing before the Financial Services Commission of Ontario, testimony was given by Dr. King, one of the medical experts retained by Sibley who had conducted the neurological assessment of Dr. Carpenter. Of relevance, Dr. King testified on cross-examination that portions of his final assessment report had been omitted, without his knowledge or consent, from Dr. Platnick’s final report, that he had not seen or signed Dr. Platnick’s final report, and that he had never been “part of [a] consensus opinion”: A.R., vol. V, at p. 35.

[18] On November 7, 2014, the arbitration involving Dr. Carpenter was settled. The terms of the settlement involved Dr. Carpenter receiving a catastrophic impairment designation, a reinstatement of benefits, and payments of past medical and rehabilitative expenses with interest. The insurer also agreed to indemnify Dr. Carpenter in full for fees and disbursements.

[19] On November 10, 2014, Ms. Bent sent the alleged defamatory email through the OTLA Listserv. The foregoing factual context is particularly crucial to the following allegation made by Ms. Bent in her email:

[Dr. King] also testified that he never participated in any “consensus meeting” and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

(2) Dua Matter, November 2011

[20] As I mentioned above, Ms. Bent’s email of November 10, 2014 to the OTLA Listserv also made reference to another matter, which had taken place in November 2011, three years before she sent the email.

[21] In that matter, much like the Carpenter Matter, Dr. Platnick had been retained to write a final “Catastrophic Determination” report on whether a victim of a motor vehicle accident should be given a catastrophic impairment designation.

[22] Dr. Varinder Dua was one of the medical specialists retained to conduct an assessment of the victim. As with the Carpenter Matter, Dr. Platnick’s ultimate report was to be informed by Dr. Dua’s assessment. Dr. Dua’s report found that “[o]verall, [victim] ha[d] Moderate impairment (Class 4)” and accordingly that a catastrophic impairment designation was warranted: A.R., vol. V, at p. 214.

[23] I note here that it has been pointed out to this Court, and it is not disputed, that “*Moderate* Impairment” carries a rating of “Class 3”, which does *not* constitute a catastrophic impairment designation. A “Class 4” rating corresponds to a “*Marked* Impairment” and *does* constitute a catastrophic impairment designation. Therefore, Dr. Dua’s assessment of “Moderate impairment (Class 4)” was, by definition, internally contradictory.

[24] Dr. Dua issued a *second* version of the report in which she changed the *SABS* classification to “Moderate impairment (Class 3)”, which meant that a catastrophic impairment designation was *not* warranted. Even though the second report was prepared after the initial report, Dr. Dua gave it the same date as her first report.

[25] Importantly, Dr. Platnick’s final report stated that “Dr. Dua rated [victim] overall at moderate impairment (Class 3)”, which meant that a catastrophic impairment designation was not warranted: A.R., vol. V, at p. 219. In this sense, Dr. Platnick’s final report appeared to be consistent with the conclusion in Dr. Dua’s second report, and it made no reference to the existence of the first version of the report.

[26] Ms. Bent, who was acting in the matter on behalf of the victim, was served only with a copy of Dr. Dua’s first report and Dr. Platnick’s final report, which Ms. Bent believed to display a discrepancy. She had no reason to know of a second version of Dr. Dua’s report and did not take steps to investigate the discrepancy.

[27] The parties do not dispute that Dr. Platnick communicated with Dr. Dua after she submitted her first report. The parties also do not dispute that Dr. Dua prepared a second version of the report after Dr. Platnick spoke with her. What is in dispute is what caused Dr. Dua to change her assessment and prepare a second report. Dr. Platnick argues that, at the behest of the insurance assessment company (known as the “vendor company”), which was seeking clarification, he pointed out the internal inconsistency to Dr. Dua, and Dr. Dua did not so much change her assessment as clarify what she had really meant, of her own volition. According to Ms. Bent, however, Dr. Platnick “changed the doctor’s decision from a marked to a moderate impairment” through inappropriate persuasion or otherwise.

[28] The foregoing took place in November 2011 and provides an important factual context in considering the following excerpt from Ms. Bent’s November 2014 email making reference to that incident:

This is not an isolated example as I had another file where Dr. Platnick changed the doctor’s decision from a marked to a moderate impairment.

(3) Leak and Republication

[29] Although Ms. Bent’s email was sent only to the OTLA Listserv, the email was eventually leaked anonymously by a member of the OTLA despite a confidentiality undertaking required by the Listserv.

[30] As a result, on December 29, 2014, an article was published in *Insurance Business Canada* magazine, which reproduced Ms. Bent's email in its entirety. The article was titled "Medical files 'routinely altered' to suit insurers, claims FAIR", and in reproducing Ms. Bent's email in full, referred to "testimony from Maia L. Bent, a partner at the law firm of Lerner's": A.R., vol. XI, at pp. 28-30.

[31] Dr. Platnick served KMI Publishing and Events Ltd. ("KMI"), the owners of *Insurance Business Canada*, with a libel notice on January 22, 2015. That claim is not at issue before this Court, but nonetheless shares part of its factual matrix with this case insofar as the issue of republication is concerned.

(4) Proceeding Against the Appellants

[32] After his requests to Ms. Bent for an apology went unanswered, Dr. Platnick commenced a lawsuit in defamation against both Ms. Bent and Lerner's on January 27, 2015.

[33] After having filed a Statement of Defence, Ms. Bent filed a motion under s. 137.1 of the *CJA* to dismiss Dr. Platnick's lawsuit in defamation against her. Lerner's also filed a Statement of Defence, but it did not file, for its own part, a s. 137.1 motion. However, as the Court of Appeal explained, it is understood that if Ms. Bent's motion succeeds, then the action should also be dismissed against Lerner's. The merits of Ms. Bent's s. 137.1 motion are before this Court.

B. *Procedural History*

- (1) Ontario Superior Court of Justice (Dunphy J.), 2016 ONSC 7340, 136 O.R. (3d) 339

[34] The motion judge, Dunphy J. of the Ontario Superior Court, allowed Ms. Bent's s. 137.1 motion and dismissed Dr. Platnick's defamation proceeding.

[35] Dunphy J. found that the email communication in question related to a matter of public interest within the meaning of s. 137.1(3) but that Dr. Platnick had been unable to discharge his burden under s. 137.1(4): paras. 61-79.

[36] While Dunphy J. declined to determine whether Dr. Platnick's claim had substantial merit under s. 137.1(4)(a)(i), he found under s. 137.1(4)(a)(ii) that there was "credible and compelling" evidence that Ms. Bent's defences of justification and qualified privilege were "reasonably likely... [to] succeed": paras. 93-118. Dunphy J. added that he was not satisfied that the public interest in permitting Dr. Platnick's defamation suit to proceed outweighed the public interest in protecting Ms. Bent's expression under s. 137.1(4)(b): paras. 119-35.

- (2) Court of Appeal for Ontario (Doherty, Brown and Huscroft JJ.A.), 2018 ONCA 687, 426 D.L.R. (4th) 60

[37] Doherty J.A., writing for a unanimous Court of Appeal, set aside the motion judge's determination, dismissed Ms. Bent's s. 137.1 motion, and remitted Dr. Platnick's defamation claim to the Superior Court for consideration: para. 127.

[38] Doherty J.A. agreed with the motion judge's assessment under s. 137.1(3) that the email communication related to a matter of public interest. However, he found that the motion judge had erred in his assessment of both s. 137.1(4)(a) and s. 137.1(4)(b): para. 4.

[39] With respect to substantial merit, Doherty J.A. had "no difficulty concluding that there [were] reasonable grounds to believe" that Dr. Platnick's claim had substantial merit under s. 137.1(4)(a)(i), as Ms. Bent's "defence to the claim is not that her comments were not potentially defamatory, but rather that they were true or protected by privilege": paras. 53-54. With respect to s. 137.1(4)(a)(ii), Doherty J.A. found that there were grounds to believe that neither defence would succeed and concluded that Dr. Platnick had met his burden of demonstrating "no valid defence": paras. 56-93. More specifically, Doherty J.A. found that the defence of justification was not valid because the sting, or the main thrust, of the two statements was not substantially true and that the defence of qualified privilege was not valid because the second statement either "was made maliciously or with reckless disregard for the truth, or because it was not appropriate to the legitimate purpose of the occasion attracting the privilege": paras. 73, 84 and 90. Finally, the Court of Appeal was satisfied that the potential harm to Dr. Platnick outweighed the public

interest in protecting Ms. Bent’s expression because this case bore none of the indicia of a SLAPP<sup>3</sup> and because there was sufficient harm attributable to the initial publication irrespective of republication: paras. 95-110.

C. *Motion to Adduce Fresh Evidence*

[40] Prior to the hearing of these appeals, Dr. Platnick sought this Court’s leave to adduce fresh evidence pursuant to s. 62(3) of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and Rule 47 of the *Rules of the Supreme Court of Canada*, SOR/2002-156. The motion was deferred to the panel hearing the appeals. Dr. Platnick’s motion contained the following evidence for which he sought admission for this Court’s consideration in these appeals.

[41] Exhibit B (the “Dua Letter”) is a letter from Dr. Dua bolstering Dr. Platnick’s evidence that the allegation that he “changed” her report is false: *Motion to Adduce Fresh Evidence*, at pp. 37-38. Specifically, Dr. Dua explains in her letter that Dr. Platnick called her to identify areas of concern that “required clarification”: p. 37. She says that she “corrected the typographical error from ‘Class 4’ to ‘Class 3’” of her own accord and that “at no time did Dr. Platnick pressure me to change my report. Nor did he conduct himself in any inappropriate fashion”: pp. 37-38 (emphasis in original). Dr. Dua states pointedly that “[t]o suggest that Dr. Platnick changed my report is simply untrue. Further, to characterize the

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<sup>3</sup> Strategic Lawsuit Against Public Participation.

events in question as an attempt by Dr. Platnick to manipulate the evidence is also completely inaccurate”: p. 38.

[42] Exhibit G contains excerpts from an examination for discovery of Dr. King in a parallel proceeding in which Dr. King admitted that he had been mistaken when he said that parts of his report had been removed without his knowledge and consent in the Carpenter Matter.

[43] Exhibit H is Dr. Platnick’s pleadings in a parallel litigation between him and Dr. Carpenter.

[44] Exhibit K is Dr. Platnick’s proposed Amended Statement of Claim for the underlying proceeding in this case.

[45] Exhibit L is an excerpt from KMI’s Statement of Defence in the parallel defamation proceeding commenced by Dr. Platnick against KMI. Approximately one week after Ms. Bent’s cross-examination on this s. 137.1 motion, KMI delivered its Statement of Defence, in which it pleaded that prior to publishing an article that reproduced Ms. Bent’s email of November 10, 2014, it had interviewed Ms. Bent, who had authorized republication.

[46] Exhibits N and R (the “KMI Letters”) are letters from counsel for the KMI defendants to Dr. Platnick’s counsel attesting to a telephone conversation that took place between Ms. Bent and Donald Horne, the Associate Editor of *Insurance*

*Business Canada* magazine, after the leak regarding a potential interview for publication. In those letters, the following information is stipulated by KMI: (i) “Ms. Bent did not object to or have any concerns” about the republication of her email; (ii) Ms. Bent did not discourage the republication, nor did she inform KMI that her email had been published on a private OTLA Listserv and that any leak was a serious professional and ethical breach of the terms and conditions of that Listserv; (iii) had KMI been aware of the aforesaid, it would not have proceeded with the republication; (iv) since Ms. Bent raised no objections or concerns, KMI believed it could proceed with the republication: Motion to Adduce Fresh Evidence, at p. 156.

[47] Prior to the hearing of these appeals, Dr. Platnick also sought leave to update his fresh evidence motion. In particular, he sought leave to adduce evidence that the parallel Carpenter litigation had been abandoned by Dr. Carpenter with no costs against him. Since Dr. Platnick’s initial motion to adduce fresh evidence was deferred to the panel hearing the appeals, the decision whether to allow Dr. Platnick to update that fresh evidence was also deferred to the panel hearing the appeals.

### III. Analysis

[48] In order to properly assess Ms. Bent’s s. 137.1 motion, it is first necessary to evaluate Dr. Platnick’s motion to adduce fresh evidence. Indeed, the determination of the latter impacts the evidentiary record that ultimately informs the analysis of the s. 137.1 motion. Although I would admit part of Dr. Platnick’s fresh evidence, it is important to clarify that, just as a s. 137.1 motion is not a determinative adjudication

of the merits of a claim, my determination on admissibility or exclusion here does not bear on the evidence's ultimate admissibility at trial — in other words, my conclusions with respect to Dr. Platnick's motion to adduce fresh evidence are limited to considering admissibility in the context of this s. 137.1 motion.

A. *Motion to Adduce Fresh Evidence*

[49] This Court has relied on and affirmed the test from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775, as the proper test for assessing the admissibility of fresh evidence on appeal: see *R.P. v. R.C.*, 2011 SCC 65, [2011] 3 S.C.R. 819, at para. 50; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 107; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616, at paras. 43-44; *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44; *R. v. Warsing*, [1998] 3 S.C.R. 579.

[50] For fresh evidence to be admitted, the *Palmer* test requires consideration of the following four factors:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . . .
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and

- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [p. 775]

[51] In *Pointes Protection*, this Court expressly contemplates the “potentiality of future evidence arising”: para. 37. This is based on the expedited nature of s. 137.1 motions, which are required to be heard in a statutorily imposed short time frame. That is exemplified in this case, where Dr. Platnick had to submit his evidentiary record within 25 days after the notice of motion was filed. In this sense, as recognized in *Pointes Protection*, s. 137.1 motions are unlike summary judgment motions, where parties are expected to put their best foot forward; in other words, on a s. 137.1 motion, it is acknowledged that parties are under a mandated time constraint and are consequently limited in the evidentiary record they can put forward.

[52] This does *not*, however, give parties *carte blanche* to file motions to adduce fresh evidence. *Palmer* must be adhered to, and for this reason, as I note below, I would not admit all of the fresh evidence. It is important to note here, however, that this case is a transitional one: the considerable uncertainty surrounding s. 137.1 motions — due to a lack of judicial guidance with respect to both the test for withstanding a s. 137.1 motion, as well as the nature or comprehensiveness of the evidence required on a such a motion — militates in favour of granting this particular motion to adduce fresh evidence in part.

[53] Accordingly, I would admit both the Dua Letter (Exhibit B) and the KMI Letters (Exhibits N and R), and I would decline to admit the rest of the evidence that

Dr. Platnick included with his motion. Below, I briefly explain why I would specifically admit the Dua Letter and the KMI Letters in light of *Palmer*. I find that the other evidence is either not relevant to the decisive issues in these appeals or is non-probative; therefore, I need not elaborate any further on its exclusion.

(1) Due Diligence

[54] The Dua Letter could not have been adduced at an earlier time and is not being submitted now as a result of a lack of due diligence. Dr. Platnick's evidentiary record was filed in May 2016. The Dua Letter is dated November 15, 2017 and was received on November 20, 2017, well after the initial hearing on the motion, and five months after the oral argument at the Court of Appeal. Further, Dr. Platnick's affidavit (dated May 20, 2016) concerning the s. 137.1 motion demonstrates his due diligence in trying to obtain this evidence earlier. According to that affidavit, Dr. Dua did not respond to his telephone messages until May 17, 2016. While this allowed Dr. Platnick to enter Dr. Dua's final report in the record at the eleventh hour, it was an insufficient amount of time to obtain a letter from Dr. Dua herself akin to the one submitted to this Court.

[55] Likewise, the KMI Letters could not have been adduced at an earlier time and are not being submitted now as a result of a lack of due diligence. The Letters were exchanged well after the hearing of the s. 137.1 motion which took place on June 27, 2016 — indeed, the Letters from KMI are dated August 30, 2016, and September 20, 2016. Of course, the admissibility of the Letters does not depend

merely on when they came into Dr. Platnick's possession, but rather, depends on whether they could have been obtained prior to the hearing as a result of due diligence. In my view, they could not have been, for the reasons I explain below.

[56] In her Statement of Defence, Ms. Bent denied having ever given an interview to KMI's magazine. Thus, Dr. Platnick had no foundation for cross-examining her further on the subject on June 6, 2016. Following Ms. Bent's cross-examination, however, KMI filed its Statement of Defence on June 13, 2016, in which it stipulated that Ms. Bent had in fact given an interview to its magazine in some capacity. With this newly conflicting evidence, Dr. Platnick pursued the matter further through prompt correspondence with KMI (i.e. due diligence). It was that correspondence that finally gave rise to the KMI Letters.

[57] This state of affairs belies the motion judge's concluding observation that Dr. Platnick offered no "reasonable explanation for the failure to place" the KMI Letters "before the court prior to conducting his cross-examination of Ms. Bent": *Platnick v. Bent (No. 2)*, 2016 ONSC 7474, at para. 71 (CanLII). This constitutes an error in principle on the part of the motion judge.

[58] Although Dr. Platnick did not mention the reference to the interview in KMI's Statement of Defence at the hearing before the motion judge on June 27, 2016, the record reveals that Dr. Platnick's counsel was out of the country from June 19 until June 25, 2016, and had asked *repeatedly* for an adjournment of the hearing on account of his unavailability on those crucial dates immediately in advance of the

hearing (as well as on other grounds): see *Platnick v. Bent (No. 2)*, at paras. 3 and 6; Motion to Adduce Fresh Evidence, at pp. 22-23. Thus, I am not willing to hold this against Dr. Platnick.

[59] Dr. Platnick had only 25 days to put forward his record, yet the motion judge faulted him for not adducing this evidence earlier because, according to the judge, Dr. Platnick “knew a ‘showdown’ was imminent when the plaintiff announced [an] intention to bring summary judgment proceedings in January”: *Platnick v. Bent (No. 2)*, at para. 40. I note immediately that the motion judge erred here, as it was Ms. Bent, the defendant, who announced an intention to bring a summary judgment motion. Regardless, the point is still not valid. A summary judgment motion involves due process and procedural protections on which Dr. Platnick may have relied, and which are unavailable on s. 137.1 motions. This Court makes it clear in *Pointes Protection* that s. 137.1 motions do not have the evidentiary protections associated with summary judgment motions. Moreover, the motion judge’s evidentiary expectation was commensurate with requiring information that might only have been able to be elicited through examinations for discovery, such as Rule 31.10 motions (discovery of non-parties) or Rule 30.10 motions (production from non-parties) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, but examinations for discovery are also necessarily unavailable on expedited s. 137.1 motions.

[60] To the extent that the motion judge’s findings were inconsistent with the foregoing, then they were in error. It must not be forgotten that the due diligence

factor specifically is “not a rigid one” (*Kuczera (Re)*, 2018 ONCA 322, 58 C.B.R. (6th) 227, at para. 16) and has been held to be a “practical concept” (*Calaheson v. Gift Lake Metis Settlement*, 2016 ABCA 185, 38 Alta. L.R. (6th) 30, at para. 14) that is “context sensitive” (*R. v. 1275729 Ontario Inc.* (2005), 205 O.A.C. 359, at para. 29; see also *Elliott v. Sagl*, 2019 ONSC 2490, at paras. 36-38 (CanLII); D. J. M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at pp. 10-19 to 10-21). As I discussed above, Dr. Platnick had to assemble his motion record within 25 days at a time when there was significant ambiguity surrounding s. 137.1 motions due to a lack of judicial guidance on the standard that must be met, as well as the nature or comprehensiveness of the record that must be filed, in order to withstand such a motion. This factors into my assessment.

[61] In light of the above, I am of the view that both the Dua Letter and the KMI Letters could not have been adduced at an earlier time and are not being adduced now as a result of a lack of due diligence.

(2) Relevance

[62] All three Letters are eminently relevant to the case at bar.

[63] The Dua Letter bears directly upon the defence of justification and whether that defence is valid. It also bears on whether Ms. Bent was reckless as to the allegation she made, insofar as it speaks to her failure to investigate an incident that had occurred three years earlier. This bears on Ms. Bent’s defence of qualified

privilege. Accordingly, the Dua Letter is directly relevant to the s. 137.1(4)(a)(ii) inquiry.

[64] Similarly, the KMI Letters bear directly upon the defence of qualified privilege and whether that defence is undermined by the fact that Ms. Bent authorized the republication of her allegations. Further, the KMI Letters bear on whether Ms. Bent can properly be held liable for the harm caused by republication by virtue of its foreseeability or her authorization, under the harm analysis required by s. 137.1(4)(b).

(3) Credibility

[65] The Letters are reasonably capable of belief and sufficient for consideration at what is a preliminary screening of Dr. Platnick's claim. This does not preclude Ms. Bent, however, from testing this evidence at trial, for example through cross-examination, as the ultimate determination of credibility is deferred to trial on a s. 137.1 motion: *Pointes Protection*, at para. 52.

[66] This Court has agreed with the proposition that, on a motion to adduce fresh evidence, an assessment of credibility is to be carried out against the whole background of the case and is not restricted to the motion itself; in other words, evidence may be credible in the sense that it is reasonably capable of belief when viewed in the context of other evidence relevant to that issue: *R. v. Stolar*, [1988] 1

S.C.R. 480; *Warsing*, at para. 52; *R. v. Moucho*, 2019 ONSC 3463, 53 M.V.R. (7th) 131, at para. 36.

[67] That is the case here, as the Dua Letter and the KMI Letters bolster a pre-existing predicate of facts, rather than raise the risk of manufacturing a new predicate not previously under consideration. More specifically, what I mean is that the Dua Letter confirms Dr. Platnick’s narrative that he never “changed” Dr. Dua’s report but only communicated with Dr. Dua to point out the internal discrepancy in her report. Likewise, the KMI Letters help to confirm Dr. Platnick’s allegation that Ms. Bent gave an interview to *Insurance Business Canada* and thereby authorized republication.

[68] Lastly, “there is nothing to indicate that [this evidence] is not reasonably capable of belief, even though it was prepared at the respondent’s request”: *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, at para. 43.

(4) Probative Value

[69] If believed, the Letters could reasonably, when taken with the other evidence adduced, be expected to have affected the result. This is clear as they all relate directly to, and even contradict, the motion judge’s findings. Further, they bolster the evidentiary record, such that the “basis in the record and the law” that Dr. Platnick must establish in order to succeed against a s. 137.1 motion becomes sufficiently legally tenable and reasonably capable of belief.

[70] For example, the Dua Letter is highly probative. The motion judge characterized Dr. Platnick’s call to Dr. Dua as an inappropriate “intervention” (Sup. Ct. reasons, at paras. 44 and 111), saying that Dr. Platnick “succeeded in persuading [Dr. Dua] to produce an amended ‘final’ report” (para. 22 (emphasis added)). Therefore, the motion judge found that Ms. Bent’s allegation that Dr. Platnick had “changed” Dr. Dua’s decision from a marked impairment to a moderate one was substantially true and that the defence of justification was valid under s. 137.1(4)(a)(ii). However, the Dua Letter directly contradicts this finding: Dr. Dua says that Dr. Platnick called her seeking “clarification” and that she advised him that she had made a “typographical error”. In fact, Dr. Dua expressly states that Dr. Platnick did not “pressure” her, “[n]or did he conduct himself in any inappropriate fashion”. While the motion judge had the different reports before him, they showed only that *a* change had in fact been made. However, the reports did not indicate *why* Dr. Dua had changed her assessment. The Dua Letter illuminates *why* — while the motion judge characterized Dr. Platnick’s actions as improper persuasion, the Dua Letter, written by the person who was supposedly the victim of that persuasion, says exactly the opposite. Thus, the Dua Letter, if believed, is highly probative regarding whether Dr. Platnick will be able to meet his burden of showing that there are grounds to believe that Ms. Bent’s defence of justification is not valid.

[71] Likewise, the KMI Letters are highly probative. The motion judge found that Dr. Platnick’s allegation that Ms. Bent had given an interview “was supported by no evidence whatsoever and appears on its face to be manifestly untrue”: Sup. Ct.

reasons, at paras. 24-25. This was based on Ms. Bent’s Statement of Defence, in which she “denie[d] providing an interview to *Insurance Business [Canada]* in respect of the Confidential Communication and/or authorizing the publication of the Confidential Communication to Donald Horne for an article”: A.R., vol. II, at p. 22. The KMI Letters directly contradict this evidence and bolster the allegation that republication was either implicitly authorized by Ms. Bent or was reasonably foreseeable to her. Given this point, she could properly be held liable for republication. This is dispositive of the issues of whether Ms. Bent’s defence of qualified privilege is undermined, rendering the defence not “valid”, for the purposes of s. 137.1(4)(a)(ii), and of whether the harm suffered by Dr. Platnick was suffered “as a result” of Ms. Bent’s expression under s. 137.1(4)(b).

(5) Conclusion on the Motion to Adduce Fresh Evidence

[72] Before concluding, I hasten to clarify that the motion judge’s assessment of Dr. Platnick’s fresh evidence in *Platnick v. Bent (No. 2)* (his decision addressing the admissibility of some of this evidence) is not entitled to deference here. Quite simply, the motion judge decided the motion for fresh evidence on the basis of an incorrect understanding of the nature of a s. 137.1 motion, as explained by this Court in *Pointes Protection*. Accordingly, to the extent that his assessment of the evidence was dependent on an incorrect understanding of s. 137.1, it is not entitled to deference. Even if it were, however, as I indicated above, his assessment was, with respect, in error.

[73] Thus, for all the foregoing reasons, I would admit the Dua Letter and the KMI Letters, as all of them satisfy the *Palmer* criteria for granting a motion to adduce fresh evidence. I will discuss these pieces of evidence at greater length in the reasons that follow.

B. *Section 137.1 Motion*

[74] Section 137.1 of the *CJA* is intended “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”: *Pointes Protection*, at para. 16. However, in addition to protecting expression on matters of public interest, s. 137.1 must also “ensur[e] that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it”: para. 46. Applying the framework that this Court unanimously adopts in *Pointes Protection*, I ultimately reach the same conclusion as the Court of Appeal for Ontario: Ms. Bent’s s. 137.1 motion should be dismissed and Dr. Platnick’s defamation claim should be allowed to proceed.

[75] The relevant portions of s. 137.1 are reproduced for convenience 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.

[76] As I explain in *Pointes Protection*, at para. 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 [*Anti-Slapp Advisory Panel: Report to the Attorney General*] 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.

[77] A motion judge's determination on a s. 137.1 motion will typically be entitled to deference upon appeal, absent reviewable error. Here, the motion judge's initial determination of Ms. Bent's s. 137.1 motion is entitled to no deference. This is on account of the fact that the motion judge committed three broad errors: he applied the wrong legal test on a s. 137.1 motion, misconstrued the law on defamation and its

defences, and misapprehended the evidence. Accordingly, as in *Pointes Protection*, I proceed on a standard of correctness unless the motion judge’s findings are not tainted by such errors: para. 97; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8 and 36.

(1) Section 137.1(3) — Threshold Burden

[78] Ms. Bent’s email communication constitutes an expression that relates to a matter of public interest, and Dr. Platnick’s defamation proceeding arises from that expression. Therefore, I am in agreement with the motion judge and the Court of Appeal that Ms. Bent has met her threshold burden under s. 137.1(3).

[79] First, Ms. Bent’s email is captured by the statutory definition of “expression” found in s. 137.1(2): “[i]n 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”. As I say in *Pointes Protection*, this is an “expansiv[e]” definition: para. 25. Section 137.1(2) contemplates *any* communication, even if it is *non-verbal*, and even if it is made *privately*. Ms. Bent’s email falls within this statutory definition.

[80] Second, the underlying proceeding clearly “arises from” that expression, since Ms. Bent’s email is the foundation for Dr. Platnick’s defamation proceeding. As in *Pointes Protection*, there is a “clear nexus” here between the proceeding and the expression: para. 102.

[81] The only real question for consideration is whether Ms. Bent's email relates to a matter of public interest. Here, I am of the view that it does. As stated in *Pointes Protection*, this Court favours a "broad and liberal interpretation" of public interest: para. 26.

[82] In a narrow sense, Ms. Bent's email is ostensibly about potential professional misconduct in insurance arbitrations and about ensuring that her OTLA colleagues "get the assessor's and Sibley's files".

[83] In a broader sense, however, Ms. Bent's email raises concerns regarding the truthfulness, reliability, and integrity of medical reports filed on behalf of insurers in the arbitration process. In turn, her email raises concerns regarding the integrity of the arbitration process itself and the proper administration of justice writ large. Further, the email is directed at a not insignificant number of individuals, who, more importantly, have a special interest in exactly that, as part of their broader mandate as members of the OTLA to steadfastly represent victims of motor vehicle accidents, a public interest in itself.

[84] Whether Ms. Bent's allegations or concerns are valid or not is beside the point, as "there is no qualitative assessment of the expression at this stage": *Pointes Protection*, at para. 28. In effect, an expression may very well be defamatory in tort, yet still relate to a matter of public interest for the purposes of s. 137.1(3).

[85] Therefore, I am satisfied on a balance of probabilities that Ms. Bent’s email constitutes an expression that relates to a matter of public interest and that Dr. Platnick’s defamation proceeding arises from that expression.

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

[86] Since Ms. Bent has met her burden on the threshold question, the burden now shifts to Dr. Platnick to show that there are grounds to believe that his defamation proceeding has substantial merit and that Ms. Bent has no valid defence to it.

[87] In *Pointes Protection*, this Court clarifies the fact that unlike s. 137.1(3), which requires a showing on a balance of probabilities, s. 137.1(4)(a) expressly contemplates a “grounds to believe” standard instead: para. 35. This requires a basis in the record and the law — taking into account the stage of the litigation — for finding that the underlying proceeding has substantial merit and that there is no valid defence: para. 39.

[88] I elaborate here that, in effect, this means that *any* basis in the record and the law will be sufficient. By definition, “a basis” will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. But the “crux of the inquiry” is found, after all, in s. 137.1(4)(b), which also

serves as a “robust backstop” for protecting freedom of expression: *Pointes Protection*, at paras. 48 and 53.

[89] The motion judge did not have the benefit of this Court’s reasons in *Pointes Protection*, and therefore erred in law by imposing on Dr. Platnick a higher standard of “compelling and credible information” in his s. 137.1(4)(a)(ii) analysis of whether there was no valid defence: Sup. Ct. reasons, at para. 3. As I mentioned above, the motion judge’s determinations are therefore not entitled to deference.

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

[90] In *Pointes Protection*, this Court defined “substantial merit” as 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”: para. 49.

[91] I am of the view that Dr. Platnick’s defamation proceeding has substantial merit.

[92] Defamation is governed by a well-articulated test requiring that three criteria be met:

1. The words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;

2. The words complained of referred to the plaintiff; and

3. The impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

(See *Torstar*, at para. 28; see also P.A. Downard, *The Law of Libel in Canada* (4th ed. 2018), at §1.2 to 1.14.)

[93] All three of these criteria are easily satisfied in the case at bar.

[94] First, the words complained of were published. Ms. Bent wrote an email and sent it to 670 OTLA members. Further, the words were arguably *re*published (in a legal sense) when *Insurance Business Canada* published its article containing Ms. Bent's email. I acknowledge that republication is a wholly separate issue. In order to give that issue its due weight, it is more appropriate to discuss republication at a point where it is more dispositive of a critical issue; accordingly, I will discuss *re*publication comprehensively when I assess the harm suffered by Dr. Platnick under s. 137.1(4)(b). Here, however, it is unnecessary to discuss republication, as an initial publication is sufficient to make out a defamation claim. And that is so in light of Ms. Bent's email.

[95] Second, the words complained of explicitly refer to Dr. Platnick. As I highlighted in the factual overview earlier, Dr. Platnick is specifically mentioned three times by name in Ms. Bent's email. For convenience, I reproduce the statements

in question below, as they are the statements that serve as the foundation for Dr. Platnick's proceeding and these appeals:

He also testified that he never participated in any "consensus meeting" and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

This is not an isolated example as I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment.

[96] Lastly, the words complained of were defamatory, in the sense that they would tend to lower Dr. Platnick's reputation in the eyes of a reasonable person. Here, there is evidence of actual reputational damage to Dr. Platnick, which is not even necessary at this stage, given that "actual harm to reputation is not required to establish defamation"; instead, there must be "a realistic threat that the statement, in its full context, would reduce a reasonable person's opinion of the plaintiff": *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 78. Further, the "plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability": *Torstar*, at para. 28.

[97] Ms. Bent's words cast aspersions on Dr. Platnick and allege professional misconduct on his part — she does not seem to dispute this. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 118, this Court remarked specifically on the "particular significance reputation has for a lawyer", noting that it is of "paramount importance" and "the cornerstone of a lawyer's professional life". I see no principled reason why the legal profession is more deserving of reputational

protection than the medical profession, as they are both comprised of professionals who rely on their individual expertise to succeed. Indeed, in *Botiuk*, at para. 92, this Court suggested as much: “It should be recognized that these observations [regarding the legal profession] will be equally applicable to other professions and callings.” Thus, Ms. Bent’s allegations of *professional* misconduct must be taken especially seriously. By all accounts, an allegation of professional misconduct would tend to lower Dr. Platnick’s reputation in the eyes of a reasonable person.

[98] This is buttressed even further by evidence that within weeks of the impugned email, Dr. Platnick was receiving “mass cancellations”: A.R., vol. VI, at p. 15. He alleges a direct financial impact of \$578,949 as a result, and has filed an accountant’s report supporting that figure, which was generated in light of his previous earnings and the “blacklist” process that occurred after the publication of the defamatory words: p. 17. As I mentioned above, specific proof of harm is not necessary to establish a defamation claim, so I leave a more extensive analysis of the harm suffered by Dr. Platnick for consideration under s. 137.1(4)(b) where it is better suited, as the inquiry there depends on whether the harm is sufficiently serious to allow the proceeding to continue.

[99] For now, the foregoing is sufficient to show that the third criterion for a defamation claim is met: the impugned words were defamatory in the sense that they would tend to lower Dr. Platnick’s reputation in the eyes of a reasonable person.

[100] Ultimately, Dr. Platnick’s claim quite clearly satisfies the three criteria for making out a claim for defamation. His claim is 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. Thus, there are grounds to believe that Dr. Platnick’s defamation claim has substantial merit under s. 137.1(4)(a)(i).

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

[101] Section 137.1(4)(a)(ii) requires Dr. Platnick to show that there are “grounds to believe” that Ms. Bent has “no valid defence” to his defamation proceeding. As this Court states in *Pointes Protection*, at para. 60, this inquiry “[m]irror[s]” the one under s. 137.1(4)(a)(i): in other words, Dr. Platnick must show that there are grounds to believe that Ms. Bent’s defences have “no real prospect of success”. In effect, “substantial merit” and “no valid defence” are “constituent parts of an overall assessment of the prospect of success of the underlying claim”: para. 59.

[102] This makes sense because it reflects how defamation actions, like the one here, are typically litigated. At trial, the plaintiff must first make a *prima facie* showing of defamation. This is what “substantial merit” captures: *Pointes Protection*, at para. 59. The burden then shifts to the defendant to advance a defence to escape liability: *Torstar*, at paras. 28-29. This is what “no valid defence” captures: *Pointes Protection*, at para. 59.

[103] Accordingly, as this Court sets out in *Pointes Protection*, at para. 56, s. 137.1(4)(a)(ii) “operates as a *de facto* burden-shifting provision”: the defendant must *first* put in play the defences it intends to present, and then the burden effectively shifts to the plaintiff, who bears the statutory burden. This calls for an assessment of whether there are “grounds to believe” that Ms. Bent has “no valid defence”. Dr. Platnick is, in effect, required to show that there is *a* basis in the record and the law — taking into account the stage of the proceeding — to support a finding that the defences Ms. Bent has put in play do not tend to weigh *more* in her favour. The logical syllogism is clear: (i) Dr. Platnick must show that there are grounds to believe that Ms. Bent’s defences have no real prospect of success (*Pointes Protection*, at para. 60); (ii) this requires a showing that there are grounds to believe that the defences do not tend to weigh more in favour of Ms. Bent (para. 49); (iii) in light of the definition of “grounds to believe”, this means that there must be a basis in the record and the law — taking into account the stage of the proceeding — to support a finding that the defences do not tend to weigh more in favour of Ms. Bent (para. 39).

[104] Ms. Bent has appropriately “put in play” the defences of justification and qualified privilege through her Statement of Defence: *Pointes Protection*, at paras. 56-57. I acknowledge that she also raised the defences of responsible communication and fair comment in her Statement of Defence. However, she seems to have since abandoned those defences, as they were not argued before this Court. Accordingly, I will consider only the defences of justification and qualified privilege that Ms. Bent has put in play, which I also take to be her two strongest defences.

[105] I am of the view that there are grounds to believe that neither of these defences is valid. In other words, I am of the view that there is *a* basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the defences do not tend to weigh *more* in favour of Ms. Bent, acknowledging that the burden is on Dr. Platnick to make this showing.

[106] I proceed below to analyze the defences of justification and qualified privilege, respectively, and to discuss why there are grounds to believe that they are not valid. Before doing so, I wish to make clear that any conclusion I reach or finding I make concerning Ms. Bent's defences is expressly limited to this s. 137.1 motion.

(i) Justification

[107] Once a *prima facie* showing of defamation has been made, the words complained of are presumed to be false: *Torstar*, at para. 28. To succeed on the defence of justification, “a defendant must adduce evidence showing that the statement was substantially true”: para. 33. The burden on the defendant is to prove the substantial truth of the “‘sting’, or main thrust, of the defamation”: Downard, at §1.6 (footnote omitted). In other words, “[t]he defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true”: Downard, at §6.4.

[108] Of particular importance here is the fact that partial truth is not a defence. If a material part of the justification defence fails, the defence fails altogether:

R. E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)), at pp. 10-88 to 10-90 (“*Brown on Defamation*”). However, a defendant may justify only part of a libel “if that part is severable and distinct from the rest”: p. 10-89 (footnote omitted). This depends on the allegation being separate and self-contained rather than an “ingredient or part of a connected whole”: p. 10-90 (footnote omitted).

[109] Applied to the facts of this case, the “sting” of the words is an allegation of professional misconduct. In her email, Ms. Bent essentially alleges that Dr. Platnick either misrepresented or altered the opinions of other medical experts with a view to depriving a claimant of a catastrophic impairment classification to which he or she was entitled. In effect, she alleges dishonesty and serious professional misconduct. As mentioned above, Ms. Bent appears to accept that this is the “sting”, or “innuendo”, of the words in her email. Therefore, she would have to lead evidence that the allegation of professional misconduct is substantially true in order for her defence of justification to succeed at trial. Here, on a s. 137.1 motion, Dr. Platnick must show that there are grounds to believe that Ms. Bent has no real prospect of success in making that showing.

[110] In effect, then, the truth of just one of Ms. Bent’s statements will be insufficient for the defence to succeed. For example, even if her first allegation that Dr. Platnick misrepresented a medical consensus is true, Ms. Bent would still have to prove the truth of her second statement, that Dr. Platnick “changed” a doctor’s

decision. This is so because, in my view, there are grounds to believe that the statements are not severable, but instead are constituent parts of the same sting of professional misconduct.

[111] This is borne out not only by common sense inference but by Ms. Bent’s own words. Indeed, Ms. Bent herself connected both statements, thereby arguably making them one single allegation of professional misconduct against Dr. Platnick. In her email, after the first statement, Ms. Bent wrote that “[t]his was NOT the only report that had been altered” and then, immediately prior to the second statement, wrote that “[t]his is not an isolated example as . . .”. On its face, the aforementioned language inherently connects the first allegation to the second allegation as constituent parts of an overall allegation of professional misconduct. As Ms. Bent’s own words make clear, she was in fact seeking to demonstrate a pattern of broader professional misconduct by Dr. Platnick. Ms. Bent herself connected the two statements, making them inseverable.

[112] Thus, I need not consider whether Ms. Bent’s first allegation regarding the misrepresentation of a consensus is true (despite potentially convincing argument by Dr. Platnick that it was not),<sup>4</sup> because I am satisfied that there is a basis in the

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<sup>4</sup> Dr. Platnick has provided this Court with evidence that the term “consensus” is a misnomer because the requirement to obtain a “consensus” and the signatures of the medical assessors is a vestige of an antiquated statutory regime that was legislatively repealed in 2006. The current *SABS* regime no longer requires a consensus, and Ms. Bent — being the president-elect of the OTLA and familiar with the *SABS* — would have known that Dr. Platnick was not actually misrepresenting the existence of a medical consensus. In fact, it might have been plainly understood that no medical consensus on *SABS* classification could have possibly existed given the unfamiliarity of the four medical assessors from Nova Scotia with Ontario’s *SABS* regime (one of the medical assessors even stated that the *SABS* criteria he was mandated to use were “outdated” and not “appropriate”): A.R., vol. V, at p.

record and the law to support a finding that the two statements are connected and that Ms. Bent's second allegation that Dr. Platnick "changed the doctor's decision from a marked to a moderate impairment" is not substantially true; this is sufficient to foreclose her defence of justification under s. 137.1(4)(a)(ii).

[113] While not argued by either of the parties, and accordingly, the Court lacks any submissions on this point, s. 22 of the *Libel and Slander Act*, R.S.O. 1990, c. L. 12 appears to have modified the common law rule regarding partial justification.<sup>5</sup> Setting aside concerns that this was not argued by either of the parties here, even if this provision were at issue, there would nonetheless be a basis in the record and the law to support a finding that the lack of truth behind the second allegation independently caused material injury to Dr. Platnick's reputation. First, the allegation that Dr. Platnick "changed" a doctor's decision might be seen as qualitatively more injurious than the allegation that Dr. Platnick misrepresented a purported consensus. Second, as I noted above, in light of the fact that Ms. Bent linked the two allegations together in her email, the allegations might be seen as part and parcel of a single charge — that there was a pattern of professional misconduct — rather than as two "distinct" charges.

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182. Thus, there are grounds to believe that Ms. Bent's statement that Dr. Platnick misrepresented a medical consensus is not substantially true.

<sup>5</sup> Section 22 of the *Libel and Slander Act* provides that "[i]n an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges".

[114] I proceed to explain why there is a basis in the record and the law to support a finding that the allegation that Dr. Platnick “changed the doctor’s decision” is not substantially true, and that therefore the defence of justification cannot be considered to weigh more in favour of Ms. Bent such that it may be considered “valid” under s. 137.1(4)(a)(ii).

[115] First of all, I am in agreement with Doherty J.A. of the Court of Appeal, who aptly noted that Ms. Bent’s allegation that Dr. Platnick “changed” Dr. Dua’s decision can be interpreted in “at least two ways”: para. 75. First, it can be read as an allegation that Dr. Platnick *physically* changed the report, which is effectively tantamount to an allegation of fraud. Second, it can be read as an allegation that Dr. Platnick “*misrepresented* another doctor’s opinion as to the level of impairment that that doctor had found”: para. 75 (emphasis added). I add a third way that it might be read: as the motion judge found, the allegation that Dr. Platnick “changed” Dr. Dua’s decision might be interpreted as an allegation of improperly “*persuading*” Dr. Dua to change her decision in accordance with the “economic interest” of Dr. Platnick’s “client”: Sup. Ct. reasons, at para. 22.<sup>6</sup>

[116] I am of the view that there is *a* basis in the record and the law to support a finding that the defence of justification has no real prospect of success under any of

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<sup>6</sup> The motion judge referred to Dr. Platnick’s “client” in making this argument. It is unclear whether the motion judge was referring to the vendor company or the insurer, which are different companies. While the insurer has an economic interest in a non-catastrophic impairment designation, the vendor company has no such economic interest, as it is not a party to an insurance arbitration. Dr. Platnick is retained by the vendor company, not by the insurer. Further, the company might be more appropriately characterized as Dr. Platnick’s employer rather than as his “client”. It is therefore unclear whether the motion judge’s characterization is accurate in any sense, which evidences a misapprehension of the evidence that I hope to clarify by means of this footnote.

these interpretations. The evidentiary record before this Court provides a legally tenable basis for what happened that is reasonably capable of belief. Dr. Dua's initial report contained a classification of "Moderate impairment (Class 4)". As I remarked in the factual overview, this is internally inconsistent, as a "*Moderate Impairment*" is associated with a "Class 3" rating and a "Class 4" rating is associated with a "*Marked Impairment*". As she was meant to do, Dr. Dua sent her report to the vendor company. The vendor company contacted Dr. Platnick and asked him to talk with Dr. Dua, as "the vendor company was concerned by what appeared to be an internal inconsistency, if not contradiction": A.R., vol. VI, at p. 66. In fact, this was not the only issue with Dr. Dua's first report, as she had also assessed the victim based on a physical impairment even though she was supposed to base her assessment solely on a psychological or psychiatric impairment. According to Dr. Platnick, he asked Dr. Dua "to clarify the apparent inconsistency/contradiction discussed above" and "Dr. Dua was free to reach any conclusion she felt appropriate": p. 68. As stated in the factual overview above, the second, and final, version of Dr. Dua's report contained a classification of "Moderate impairment (Class 3)" following the conversation with Dr. Platnick. This report informed the final report that Dr. Platnick submitted to the vendor company as well, which was consistent with Dr. Dua's second version.

[117] This existing basis in the record is considerably strengthened, and even confirmed, by the Dua Letter, in which Dr. Dua says that Dr. Platnick called her and "identified three areas of concern for which he required clarification". Dr. Dua states

that she “inadvertently typed ‘Class 4’, when the *AMA Guides* designate ‘moderate impairment’ as Class 3”. She calls this a “typographical error” and says that she advised Dr. Platnick that she had “meant ‘Class 3’”: Motion to Adduce Fresh Evidence, at p. 37. Dr. Dua then “expressly confirm[s] that at no time did Dr. Platnick pressure” her to change her report: p. 38. Further, she adds that “[t]o suggest that Dr. Platnick changed my report is simply untrue”. As stated above, at paras. 48 and 65, I acknowledge that the Dua Letter is untested, in the sense that, for example, Dr. Dua has not been subject to cross-examination. Accordingly, this evidence might very well be contradicted at a trial on the merits of Dr. Platnick’s claim. Indeed, the ultimate assessment of this evidence’s credibility is deferred to a stage later than the one here: *Pointes Protection*, at para. 52. For the purposes of this s. 137.1 motion, the Dua Letter supplements the evidentiary record that pre-existed it, such that there is a sufficient basis in the evidentiary record to support a finding that Ms. Bent’s statement is not substantially true.

[118] Thus, as the foregoing demonstrates, there is *a* basis in the evidentiary record to support a finding that the allegation that “Dr. Platnick changed [a] doctor’s decision” is not substantially true. That basis is legally tenable and supported by evidence that is reasonably capable of belief: *Pointes Protection*, at para. 50. Indeed, Ms. Bent does not allege here that Dr. Platnick *physically* changed Dr. Dua’s report, and the above discussion makes clear that Dr. Platnick also did not *misrepresent* Dr. Dua’s report, nor did he improperly *persuade* her. In effect, there are grounds to

believe that Ms. Bent's allegation of professional misconduct is not substantially true. For this reason, the defence of justification is not valid under s. 137.1(4)(a)(ii).

[119] The motion judge erred in concluding otherwise. In finding that there was "compelling and credible evidence" that the defence of justification was "reasonably likely to succeed", the motion judge pointed to the fact that it was still important for Ms. Bent to alert her colleagues to the need to fully review medical files, and to the fact that Dr. Platnick should have disclosed that Dr. Dua had provided him a second version of the report: Sup. Ct. reasons, at para. 112. In addition to the fact that the motion judge employed the wrong legal test at the s. 137.1(4)(a)(ii) stage, the motion judge's assessment had no bearing on the defence of justification properly understood. On this point, I am in agreement with the Court of Appeal for Ontario, which found that neither of the issues adverted to by the motion judge had anything to do with whether Ms. Bent was justified in alleging specifically that Dr. Platnick had "changed" a doctor's decision: paras. 81-83.

[120] In conclusion, I find that there are grounds to believe that Ms. Bent's defence of justification has no real prospect of success. As I established above, she would in fact have to justify *both* of the statements she made, as both would appear to make up constituent parts of the "sting", which is that Dr. Platnick is guilty of professional misconduct. As I noted, there are grounds to believe that the statements are not severable, not only in light of a common sense inference that ties them to a single sting, but also in light of Ms. Bent's express language connecting them. Insofar

as there is a basis in the record to support a finding that Ms. Bent’s second statement — that Dr. Platnick “changed [another] doctor’s decision from a marked to a moderate impairment” — is not substantially true, and in light of my conclusion that such a basis exists, then the defence of justification is foreclosed *at this stage*. It must be borne in mind here that “grounds to believe” simply requires *a* (single) basis in the record and the law to support this finding. The Dua Letter provides such a basis in addition to the evidentiary record that existed prior to that letter.

(ii) Qualified Privilege

[121] An occasion of qualified privilege exists if a person making a communication has “an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published” *and* the recipient has “a corresponding interest or duty to receive it”: Downard, at §9.6 (footnote omitted). Importantly, “[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself”: *Hill*, at para. 143; *Botiuk*, at para. 78. Where the occasion is shown to be privileged, “the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff”: *Hill*, at para. 144; *Botiuk*, at para. 79. However, the privilege is *qualified* in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken; or where the scope of the

occasion of privilege was exceeded (Downard, at §1.9; see also *Hill*, at paras. 145-47; *Botiuk*, at paras. 79-80).

[122] For this reason, a precise characterization of the “occasion” is essential, as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused.

[123] Here, there is a spectrum of possible characterizations for the occasion to which the privilege might attach. For instance, the language in Ms. Bent’s email indicates a potentially limited scope: “I wanted to alert you, my colleagues, to always get the assessor’s and Sibley’s files.” However, Ms. Bent has argued for a broader scope of privilege, indicating that she was “educating fellow plaintiff side personal injury lawyers about the need to obtain full documentary disclosure and advocating for MVA victims and the integrity of the automobile insurance dispute process by highlighting particular instances where insurer assessors have not provided independent and unbiased opinions”: A.R., vol. III, at p. 4. For its part, the OTLA Listserv itself limits the occasion insofar as its “Undertaking and Indemnity” Agreement (“Listserv Agreement”) limits what OTLA members have an interest or duty to send or receive. The use of the OTLA Listserv is “restricted to issues arising on ongoing files in relation to existing or contemplated litigation and for the purpose of obtaining counsel, advice and assistance in connection therewith”: A.R., vol. IV, at p. 48 (emphasis added). With respect to my colleague, it is important to consider this

*entire* excerpt in order to contextualize what “issues arising on ongoing files” must *relate to* in order for a communication to come within the expressly contemplated use of the Listserv: *contra*, para. 227.

[124] A question arises as to whether privilege even attaches to the occasion upon which Ms. Bent’s communication on the Listserv was made. Indeed, “the threshold for privilege remains high”: *Torstar*, at para. 37. Privilege is “grounded” not in “free expression values but in the social utility of protecting particular communicative occasions from civil liability”: para. 94. There are reasons to doubt that there is a compelling social interest in privileging all communications on a professional Listserv whose use is expressly “restricted to issues arising on ongoing files in relation to existing or contemplated litigation and for the purpose of obtaining counsel, advice and assistance in connection therewith”, and which includes an express prohibition against making even *potentially* defamatory remarks.<sup>7</sup>

[125] Nonetheless, I am willing to assume *arguendo* that qualified privilege does attach to the occasion here because, regardless of how the occasion is defined, there are grounds to believe that the privilege will be defeated and that the defence of qualified privilege is not valid under s. 137.1(4)(a)(ii). In particular, I am satisfied that there is a basis in the record and the law to support a finding that the scope of

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<sup>7</sup> At trial, a judge or jury might reasonably come to the conclusion that privilege does attach to the occasion upon which Ms. Bent’s communication was made. However, it is not necessary to decide this point on this s. 137.1 motion, so I do not endeavour to do so, and therefore I do not foreclose either conclusion.

Ms. Bent's privilege was exceeded and that the defence therefore does not tend to weigh *more* in her favour.

[126] I reiterate that the foregoing conclusion and any of the findings that I make concerning Ms. Bent's defences, including the ones that follow, are expressly limited to this s. 137.1 motion. None of my findings or conclusions should be interpreted as prejudging the merits of Ms. Bent's defences at trial. Indeed, it must not be forgotten that my assessment is tempered by the "grounds to believe" standard expressly imposed by s. 137.1(4)(a)(ii). Bearing this in mind, I turn now to an assessment of Ms. Bent's defence of qualified privilege and whether the scope of that privilege may have been exceeded, thereby defeating the defence, in the context of a s. 137.1 motion.

[127] At the outset, I note that my colleague is of the view that Ms. Bent has a valid defence of qualified privilege. With respect, as I explain further below, many of the points raised by my colleague may be more appropriately directed at the defence of justification. Nonetheless, I address her arguments here in the context of the defence of qualified privilege, as she does.

[128] Qualified privilege may be defeated "when the limits of the duty or interest have been exceeded": *Hill*, at para. 146; *Botiuk*, at para. 80. This is the case when the information communicated in a statement is not relevant to the discharge of the duty or the exercise of the right giving rise to the privilege, or when the information is not reasonably appropriate to the legitimate purposes of the occasion:

Downard, at §9.91; *Botiuk*, at para. 80; *Hill*, at paras. 146-47; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726 (C.A.), at para. 18.

[129] First, I am satisfied that there is a basis in the record and the law to support a finding that the specific references made to Dr. Platnick were not necessary to the discharge of the duty giving rise to the privilege. In *Hill*, this Court focused on the language used by the defendant and found that it was “neither necessary nor appropriate”; the scope of the privilege was therefore exceeded: para. 156. Likewise, in *Botiuk*, this Court found that the scope of the privilege was exceeded because it was “unnecessary to defame Botiuk” by means of specific “libellous references” to him: para. 85. In other words, the plaintiff did not need to be named. Here, there is a basis in the record and the law to support a finding that Ms. Bent could have communicated her concerns regarding alterations to medical reports by insurers without naming Dr. Platnick specifically. If her goal was to alert her OTLA colleagues to “always get the assessor’s and Sibley’s files”, then one may wonder if it was necessary to single out Dr. Platnick by name, especially in such a way as to accuse him of professional dishonesty and misconduct. A finding could be made that the libelous references to Dr. Platnick were “neither necessary nor appropriate” to the duty or interest giving rise to the privilege. The Court of Appeal found likewise, writing that “the allegation could reasonably be seen as a gratuitous and inaccurate attack on Dr. Platnick’s character”: para. 92.

[130] My colleague comes to a contrary conclusion because she argues that the test is relevance, not necessity: para. 231. With great respect to my colleague, relevance is a *necessary* condition for a statement to be privileged, but not a *sufficient* one: *Hill*, at para. 146, citing *Adam v. Ward*, [1917] A.C. 309 (H.L.). The Court could not have been clearer in *Hill* and *Botiuk*: the scope of the privilege was exceeded because the comments in question were “neither necessary nor appropriate” and because the comments were “unnecessary”. Evidently, if a comment is not *necessary* to the discharge of the duty giving rise to the privilege, then the scope of the privilege has been exceeded: see *Rubin v. Ross*, 2013 SKCA 21, 409 Sask. R. 202, at para. 61 (leave to appeal refused, [2013] 3 S.C.R. x). While “[t]he defence is, necessarily, engaged only when someone is identified” (Abella J.’s reasons, at para. 238), it is precisely for this reason that a court asks whether it was *necessary* to the occasion attracting the privilege to identify that person. As I explained above, here there is a basis in the record and the law to support a finding that it may not have been necessary. After all, the occasion attracting the privilege may have been to “always get the assessor’s and Sibley’s files” (see Ms. Bent’s email; see also her Statement of Defence), not “that there was a doctor somewhere in Ontario whose reports they ought to distrust” (see Abella J.’s reasons, at para. 237).

[131] In addition, there is a basis in the record and the law to support a finding that Ms. Bent’s argument that the occasion of qualified privileged was not exceeded in light of the Listserv Agreement’s confidentiality clause, echoed by my colleague (at paras. 240-42), does not tend to weigh *more* in her favour. It is true that the

Listserv Agreement, which is signed by all members of the OTLA Listserv, contains a confidentiality clause requiring all Listserv information to be kept “strictly confidential”: A.R., vol. IV, at p. 48. However, there is a basis in the record and the law to support a few responses to such a defence. First, the confidentiality clause does not apply at large; rather, read in context, it applies to the expressed and restricted use of the Listserv itself — “litigation privilege”. Second, the Listserv Agreement contains an express “**PROHIBITION AGAINST DEFAMATORY MATERIAL**” (emphasis in original) that stipulates that members “will not send, re-send or disseminate any material that is or may be defamatory or otherwise actionable” (emphasis added). Accordingly, a finding could be made that Ms. Bent therefore breached the terms of the Listserv Agreement by making her defamatory communication, and that she cannot thereby also rely on a confidentiality clause found in the very agreement that she herself might be found to have breached. Thus, even though the Listserv Agreement contains a confidentiality clause, that clause must be read in the context of the use of the Listserv itself for the purposes of assessing the scope of the privilege; it might be found that the clause cannot apply to an expressly prohibited purpose. Third, the existence of the confidentiality clause may have no bearing on whether Ms. Bent’s specific references to Dr. Platnick were necessary to the occasion giving rise to the privilege: indeed, the Listserv’s express prohibition on even *potentially* defamatory remarks may suggest that the OTLA acknowledges that the posting of even *potentially* defamatory material is not necessary (or even *relevant*) to the duty encompassed within the particular occasion.

[132] Lastly, the record reveals a lack of investigation or reasonable due diligence by Ms. Bent prior to making her serious allegations. This Court’s reasons in *Hill* are *à propos*: there, this Court wrote that “[a]s an experienced lawyer, [the defendant] ought to have taken steps to confirm the allegations that were being made . . . before launching such a serious attack on [the plaintiff’s] professional integrity”: para. 155. Thus, “[a]s a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated”: para. 155. This case may be considered analogous. Ms. Bent is an experienced lawyer, and it seems that she took no investigative steps at all to corroborate what was, in effect, an allegation of professional misconduct, and arguably tantamount to an allegation of fraud. Instead, she relied on her recollection of events that had occurred three years earlier, without attempting to communicate with Dr. Platnick or Dr. Dua and without even consulting her own notes and records: A.R., vol. XIII, at p. 6. This was a serious allegation, and this Court would be remiss, in assessing the defence of qualified privilege, in failing to take into account the seriousness of such an allegation.

[133] My colleague remarks that Ms. Bent held a “reasonable belief” that did not need to be “supplement[ed]”: para. 239. This implies not only that Ms. Bent did not have to take *any* investigative steps whatsoever, but that she did not even need to *attempt* to do so. Respectfully, I must disagree. There is a basis in the record and the law to support a finding that Ms. Bent’s belief, regarding a specific phrase, from a specific report, by a specific person, concerning a specific event, that had taken place

three years earlier, was *per se* unreasonable without *any* investigation being made to determine its veracity or to refresh her recollection. There is a basis in the record and the law to support a finding that Ms. Bent’s subjectively held belief is of no matter here — the law is manifestly clear that courts will strictly scrutinize a lawyer’s conduct because lawyers are “duty-bound to take reasonable steps to investigate”: *Botiuk*, at paras. 99 and 103; *Hill*, at para. 155; Downard, at §9.62; see the Law Society of Ontario’s *Rules of Professional Conduct*, rr. 3.1-1, 7.2-1, 7.2-4 and 7.5-1.

[134] Further, the truth of Ms. Bent’s allegations, and her “reasonable belief” in them, is an argument best directed at the defence of justification; it is *irrelevant* to the question of whether the comments exceeded the scope of any privilege: *contra*, Abella J.’s reasons, at paras. 232, 236 and 239. In any event, even given the information available to Ms. Bent at the time — and setting aside the fact that she was “duty-bound” to reasonably investigate the veracity of her defamatory allegations — there is a basis in the record and the law to support a finding that even her *belief* that Dr. Platnick had “changed the doctor’s decision” was not a reasonable one. I acknowledge that, at the time, Ms. Bent had only Dr. Dua’s first report, which contained a classification of “Moderate impairment (Class 4)”, and Dr. Platnick’s final report, which contained a classification of “Moderate impairment (Class 3)”, and that she had “no reason” to “suspect that *anything* had happened between” Dr. Dua and Dr. Platnick: Abella J.’s reasons, at para. 248 (emphasis in original). However, there were a number of inferences available to Ms. Bent based on the information she had: Dr. Platnick or Dr. Dua might have made a mistake, for example, or a

typographical error. Instead, Ms. Bent cast professional aspersions upon Dr. Platnick despite never having spoken to or met him. Thus, there are grounds to believe — even considering the imperfect information available to Ms. Bent at the time and without considering any duty to take steps to verify the allegation — that Ms. Bent’s belief may not have been a reasonable one. It is no defence to depend on her *belief* in the truth of her first allegation in order to establish a *belief* in the truth of her second allegation: *contra*, Abella J.’s reasons, at paras. 236 and 249. This would turn the defence of justification (to which my colleague’s argument is, respectfully, better suited) on its head.

[135] In light of the foregoing, and even assuming *arguendo* that Ms. Bent’s communication was protected under an occasion of qualified privilege, there is a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the scope of any qualified privilege was exceeded in this case. That basis is legally tenable and supported by evidence reasonably capable of belief, such that the defence cannot be said to weigh *more* in favour of Ms. Bent. Thus, there are grounds to believe that the defence of qualified privilege is not “valid”.

[136] I add that malice is an alternative way to defeat the defence of qualified privilege. Malice is not limited to an actual, express motive to speak dishonestly. Instead, it can be established by “reckless disregard for the truth”: *Hill*, at para. 145; *Botiuk*, at para. 79. Notably, an ostensibly honestly held belief may still be spoken recklessly and the privilege defeated if the belief was “arrived at without reasonable

grounds”: Downard, at §9.60 and 9.61. “The more serious the allegation in issue, the more weight a court will give to a failure by the defendant to verify it prior to publication as evidence of malice, in the sense of indifference to the truth”: §9.74 (footnote omitted). This is particularly true of lawyers, who are “more closely scrutinized” than a layperson: *Botiuk*, at para. 98. Lawyers are “duty-bound” to undertake a “reasonable investigation as to the correctness” of a defamatory statement, and “actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer”: paras. 98-99, 103.

[137] With the foregoing in mind, I point out again that Ms. Bent is a lawyer who made a very serious allegation of *professional* misconduct against Dr. Platnick. I call it a serious allegation in the sense that this Court has previously recognized that a person’s *professional* reputation is deserving of special protection: *Hill*, at para. 118; *Botiuk*, at para. 92. It seems that Ms. Bent’s email was sent without any investigation, even in the simplest sense of communicating with Dr. Platnick or checking her own records and files from a case that had taken place three years earlier: C.A. reasons, at para. 92; A.R., vol. XIII, at p. 6. In fact, Ms. Bent had never spoken to or met Dr. Platnick, yet she alleged that he had falsified a report simply because she had received two reports with an apparent discrepancy between them. There is a basis in the evidentiary record to support a finding that in reality, Ms. Bent was not in any position to know what had gone on between Dr. Dua and Dr. Platnick. My colleague seems to agree when she notes that “there was no reason for [Ms. Bent] to suspect that *anything* had happened between [Dr. Dua and Dr. Platnick]”: Abella J.’s reasons,

at para. 248. If that is the case, then it is unclear what might have grounded Ms. Bent's serious allegation that Dr. Platnick "changed the doctor's decision". The record reveals that Ms. Bent's email was hastily sent within three days of the conclusion of the Carpenter Matter, and that no time urgency has been indicated which might have encumbered a minimal good faith effort to substantiate the veracity of her allegations. Thus, in light of the heightened expectation of reasonable due diligence that this Court has historically imposed on lawyers, Ms. Bent's privilege may be defeated simply on the ground that she was indifferent or reckless as to the truth of her defamatory statements.

[138] In any case, I conclude that, even assuming that qualified privilege attaches to the occasion upon which Ms. Bent's communication was made, there are grounds to believe that the defence is not valid under s. 137.1(4)(a)(ii) because it may be defeated by virtue of Ms. Bent having exceeded the scope of the privilege, and perhaps even by her reckless disregard for the truth (i.e. malice). My colleague would summarily dismiss Dr. Platnick's claim on this prong, definitively foreclosing even the opportunity for him to vindicate his reputation at a trial where ultimate assessments of credibility can be made and the aforementioned evidence can be properly tested. Instead, my colleague chooses to accept Ms. Bent's evidence over Dr. Platnick's at this early stage. With respect, this is not what is called for on a s. 137.1 motion. As this Court makes clear in *Pointes Protection*, Dr. Platnick needs to have established only a basis in the record and the law, taking into account the stage of the litigation, to support a finding that Ms. Bent's defences do not weigh

*more* in her favour. For the purposes of this motion, and for the reasons explained above, I am satisfied that there is such a basis here.

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

[139] Section 137.1(4)(b) is the “crux” or “core” of the s. 137.1 analysis: *Pointes Protection*, at paras. 61-62. Indeed, 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.”: *Pointes Protection*, at para. 81.

[140] In particular, s. 137.1(4)(b) requires the plaintiff to show that

the harm likely to be or have been suffered by the [plaintiff] as a result of the [defendant]’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[141] In other words, Dr. Platnick must show on a balance of probabilities that he “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”: *Pointes Protection*, at para. 82 (emphasis in original).

(a) *Harm Allegedly Suffered and Public Interest in Permitting the Proceeding to Continue*

[142] As a prerequisite to the weighing exercise contemplated by s. 137.1(4)(b), Dr. Platnick must make two primary showings: (i) the existence of harm and (ii) the fact that the harm was suffered *as a result* of Ms. Bent’s expression: *Pointes Protection*, at para. 68.

[143] First, is there harm likely to be or have been suffered by Dr. Platnick?

[144] General damages are presumed in defamations actions, and this alone is sufficient to constitute harm: *Pointes Protection*, at para. 71; *Torstar*, at para. 28. However, the magnitude of the harm will be important in assessing whether the harm is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *Pointes Protection*, at para. 70. General damages in the nominal sense will ordinarily not be sufficient for this purpose.

[145] I am of the view, and only for the purposes of deciding this s. 137.1 motion, that the harm here is extensive and quite serious, as Dr. Platnick has put into evidence an estimate of significant monetary harm that is more than just a bald

assertion: *Pointes Protection*, at para. 71. The motion judge erred when he characterized the harm to Dr. Platnick as “quite general and imprecise”: Sup. Ct. reasons, at para. 121. Dr. Platnick has estimated a direct financial impact of \$578,949 and has supported this figure with a copy of a report prepared by an accountant. This number was not simply one derived out of thin air. Dr. Platnick has put into the evidentiary record that he typically had between 20 and 30 insurers’ examinations booked per week and approximately 100 assessments booked per month. He has shown that after Ms. Bent’s November 2014 email, he had only 35 assessments booked in December 2014 and only 11 in January 2015. He states that he was informed by vendor companies he had been placed on a “blacklist” by insurance companies. As a result, his practice incurred “mass cancellations” with “entire days cancelled by multiple vendors”, which “had never occurred” in his 20 years of practice: A.R., vol. VI, at p. 15. Eventually, out of the 40 or so insurance companies in Ontario, all but one ceased using his services. Thus, in light of the foregoing, and the fact that neither a “definitive determination of harm” nor a “fully developed damages brief” is required, I am of the view that Dr. Platnick has sufficiently demonstrated the existence of substantial monetary harm supported by the evidentiary record here for the purposes of s. 137.1(4)(b): *Pointes Protection*, at para. 71.

[146] In addition, reputational harm is eminently relevant to the harm inquiry under s. 137.1(4)(b). Indeed, “reputation is one of the most valuable assets a person or a business can possess”: *Pointes Protection*, at para. 69 (citing “agreement” with the words of the Attorney General of Ontario at the legislation’s second reading). This

Court's jurisprudence has repeatedly emphasized the weighty importance that reputation ought to be given. Certainly, "[a] good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws": *Hill*, at para. 107; see also *Botiuk*, at paras. 91-92.

[147] The import of reputation is only amplified when one considers professional reputation. In *Hill*, this Court remarked specifically on the "particular significance reputation has for a lawyer", noting that it is the "cornerstone of a lawyer's professional life". As I mentioned earlier in these reasons, I see no principled reason to draw a distinction between lawyers and other professionals, such as doctors, when it comes to the protection of reputation. Both the legal profession and medical profession are comprised of professionals who rely on their individual expertise to succeed within their respective professions. This was expressly contemplated in *Botiuk*, where this Court wrote that "[i]t should be recognized that these observations [regarding the legal profession] will be equally applicable to other professions and callings".

[148] Thus, not only must the monetary harm pleaded by Dr. Platnick be considered in determining whether the harm is sufficiently serious, but so too must the reputational harm to Dr. Platnick's professional reputation be considered, even if it is not quantifiable at this stage: *Pointes Protection*, at para. 71. Indeed, the damaging effects that a defamatory remark may have on a plaintiff's "position and

standing” in the professional community exacerbate the harm suffered as a result: Downard, at §14.10; see also *Young v. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680 (C.A.); *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401. As “[t]he purpose of the general damages award is to compensate the plaintiff for loss of reputation and injury to the plaintiff’s feelings, to console the plaintiff, and to vindicate the plaintiff so that the plaintiff’s reputation may be re-established” (Downard, at §14.2 (footnote omitted)), the record supports the inference that Dr. Platnick’s general damages are significant, rather than merely nominal.

[149] Beyond harm to his professional reputation, Dr. Platnick has also explained that he has suffered humiliation, shame, disgrace, and embarrassment that have left him anxious, nervous, and sleep-deprived, all of which has had a devastating impact on his marriage and his relationship with his four children. These “intangible and subjective elements” factor into the assessment of the harm suffered by a plaintiff: *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, at p. 111 (C.A.); see also Downard, at §14.12 (observing that “injured feelings or the psychological impact” of defamation are relevant to the assessment of damages). It must be recalled that for the purposes of s. 137.1(4)(b), harm need not be monetized, as both “monetary harm or non-monetary harm can be relevant to demonstrating” the existence of harm: *Pointes Protection*, at paras. 68-71.

[150] Ultimately, the question here relates to the *existence* of harm, not to whether that harm was justifiably inflicted or suffered. Once the existence of harm is

established, the next question depends on whether that harm was suffered *as a result* of the defendant's expression. The animating purpose of s. 137.1(4)(b) must not be forgotten: the point is for the plaintiff to show that they have a legitimate impetus for bringing their lawsuit, by virtue of a legitimate harm that they seek to remedy, in order to alleviate the apprehension that they are using litigation as a tool to quell expression and silence the defendant. That is not so in the case at bar.

[151] I therefore turn to the next question — whether the harm was suffered *as a result* of the expression: *Pointes Protection*, at para. 68. In this case, the answer to this question actually depends on the answer to two contingent sub-questions: (1) whether Ms. Bent can be held liable for harm that may have resulted from the subsequent leak and/or reproduction of her email — i.e. republication; and, if not, (2) whether sufficiently serious harm was caused by Ms. Bent's initial email, or whether the harm suffered is *solely* attributable to the subsequent republication of the email. Indeed, my colleague supports the motion judge's position that the "bulk of the harm . . . occurred because of the *leak* of the email": para. 256 (emphasis in original). The answer to the first sub-question is crucial to the resolution of the second sub-question: if the first is answered in the affirmative, and Ms. Bent *can* be held liable for the leak and/or reproduction of her email, then there is no need to distinguish the harm due to republication from the harm due to the initial publication, since Ms. Bent will be liable for all of it. Accordingly, I begin below by answering the first sub-question as to whether Ms. Bent can be held liable for republication in

the context of the “harm analysis” under s. 137.1(4)(b): *Pointes Protection*, at paras. 68-72.

[152] A defendant can be liable for each republication of their initial publication in at least three situations: (i) if the defendant has authorized the republication; (ii) if the republication is the “natural and probable consequence” of the defendant’s initial publication; and (iii) if the republication was foreseen or reasonably foreseeable by the defendant (Downard, §5.36).

[153] Here, to be clear, the republication in issue consists of both the leak of Ms. Bent’s email and the publication of the article in *Insurance Business Canada* that reproduced the email in its entirety. The question is whether Ms. Bent can be held liable for such republication and the harm that resulted from it.

[154] I am of the view that, for the purposes of s. 137.1(4)(b), and only for those purposes, Ms. Bent can be held liable for republication. It must be remembered that “no definitive determination of harm or causation is required” at the s. 137.1(4)(b) stage: *Pointes Protection*, at para. 71. Instead, the plaintiff must simply provide evidence for the court “to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link”: para. 71.

[155] Here, republication was at least reasonably foreseeable to Ms. Bent. The statements she published are tantamount to an allegation of fraud, which bears directly on Dr. Platnick’s professional competence and reputation. Accepting the

common sense inference that there was “a very active rumour mill” (A.R., vol. VI, at p. 7) in the insurance industry, and in light of the nature of Ms. Bent’s serious allegations, I am of the view that it was reasonably foreseeable that the email sent by the OTLA’s president-elect to several hundred people involved in acting for claimants injured in motor vehicle accidents would “rapidly find a much broader audience”: C.A. reasons, at para. 107. Indeed, that is exactly what happened.

[156] My colleague, like the motion judge, relies on the confidentiality clause in the Listserv Agreement to defend that any leak of Ms. Bent’s email was not foreseeable. After all, according to Ms. Bent, the members of the Listserv had agreed that communications on the Listserv were to be kept “strictly confidential”. I addressed this argument earlier in these reasons in discussing the defence of qualified privilege. For the purposes of deciding this motion only, I am of the view that Ms. Bent may not be able to rely on a term of a Listserv Agreement that she herself appears to have expressly breached by communicating a defamatory remark in contravention of that Agreement. Further, the confidentiality clause must be read in the context of the entire Listserv Agreement, which circumscribes its use: see generally *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57. The confidentiality clause cannot be read to protect defamatory communications prohibitively made. In any case, however, even if it is assumed that the leak of her email was not foreseeable due to the confidentiality clause, it seems that Ms. Bent was in fact fully aware of the leak when she spoke to *Insurance*

*Business Canada* regarding the article that reproduced her email. This leads me to my next point.

[157] I also find, solely for the purposes of deciding this motion, that the KMI Letters evidence Ms. Bent’s implied, or even express, authorization to republish her email. Indeed, “[a]uthorization may be inferred” when a defendant speaks to a reporter and fails to impose limitations on the use of their words: Downard, at §5.14; *Brown on Defamation*, at pp. 7-61 to 7-70. Here, the KMI Letters indicate that Ms. Bent had a telephone conversation with the Associate Editor of *Insurance Business Canada* before the magazine published its article containing her email.<sup>8</sup> During that conversation, Ms. Bent did “not object to or have any concerns” about republication, nor did she draw the Associate Editor’s attention to the fact that any leak from the OTLA Listserv was a serious professional and ethical breach of the Listserv’s terms and conditions. KMI attests that had Ms. Bent objected or made it clear that the email had been sent confidentially, it would not have proceeded with republication. I am of the view that this is sufficient in itself to hold Ms. Bent liable for republication for the purposes of s. 137.1(4)(b).

[158] I say “for the purposes of s. 137.1(4)(b)” because, as I have often emphasized in these reasons, my findings should not be taken as prejudging the merits of the underlying proceeding, and specifically here, the issue of republication.

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<sup>8</sup> The motion judge found that Dr. Platnick’s allegation that Ms. Bent gave an interview “was supported by no evidence whatsoever and appears on its face to be manifestly untrue”: Sup. Ct. reasons, at paras. 24-25. While he did not have the KMI Letters before him, to the extent that his s. 137.1(4)(b) analysis depended on that finding, it cannot be given deference.

Whether Ms. Bent ought ultimately to be held liable for republication is a question I do not purport to decide. Simply, in the context of this s. 137.1 motion, I am satisfied that consideration of the harm due to republication attributable to Ms. Bent is warranted under s. 137.1(4)(b) given the evidence put before this Court. Again, whether that evidence is ultimately accepted or believed at trial, after *viva voce* evidence is given, for example, is an entirely separate query that I do not purport to decide here, nor should these reasons be interpreted as definitively deciding the question of republication or harm.

[159] Regardless of the foregoing, “[c]ausation is not, however, an all-or-nothing proposition”: *Pointes Protection*, at para. 72. In effect, even if one accepts my colleague’s conclusion that Ms. Bent cannot be held liable for republication (at para. 259), and ergo the causal link between Ms. Bent’s email and some elements of the harm suffered by Dr. Platnick is tenuous, there is nonetheless a sufficient causal link under s. 137.1(4)(b) between the initial publication and other elements of the harm suffered by Dr. Platnick (see *Pointes Protection*, at para. 72). That harm is sufficiently serious on its own to establish a weighty public interest in permitting the proceeding to continue. The motion judge was also in error to find otherwise: Sup. Ct. reasons, at paras. 121-26.

[160] Indeed, Ms. Bent’s email was sent on November 10, 2014, and republication did not occur until December 29. It is reasonable to draw an inference of likelihood with respect to Dr. Platnick suffering substantial harm during those

49 days. For example, well before any republication, and within just a week or two of Ms. Bent sending her email, Dr. Platnick’s insurance work began to dry up as the blacklisting process began. Indeed, “[t]he temporal connection suggests a causal connection”: C.A. reasons, at para. 106. Additionally, common sense allows for the reasonable inference that, in light of the gravity of professional misconduct allegations, insurance companies would “distance themselves from the expert against whom those allegations were made”: para. 106. I reiterate that “no definitive determination of harm or causation is required” at this stage: *Pointes Protection*, para. 71.

[161] Further, the reputational considerations and harm discussed earlier in these reasons apply equally here. In other words, the initial publication itself may have inflicted professional reputational harm on Dr. Platnick. The email was disseminated to 670 plaintiff-side personal injury lawyers whom Dr. Platnick, in the course of his work, would inevitably have to encounter and interact with. Although the majority of Dr. Platnick’s work came from insurers, he had also worked on behalf of plaintiff-side firms in the past (including Lerner on multiple occasions); Ms. Bent’s email and the implications of her allegations foreclosed that opportunity from arising in the future. That Ms. Bent held the post of president-elect of the OTLA and sent her email in that capacity may only have magnified the reputational harm suffered by Dr. Platnick: see Downard, at §14.13. Thus, contrary to the motion judge’s position, supported by my colleague, that the “bulk of the harm . . . occurred because of the *leak* of the email”, the email alone may have compromised

Dr. Platnick’s professional reputation. As I have emphasized, such harm has to be taken seriously by this Court.

[162] In conclusion, as the foregoing demonstrates, the harm likely to be or have been suffered by Dr. Platnick as a result of Ms. Bent’s expression lies close to the high end of the spectrum and, correspondingly, so too does the public interest in allowing his defamation proceeding to continue.

(b) *Public Interest in Protecting the Expression*

[163] In *Pointes Protection*, this Court finds that the public interest in protecting an expression can be determined by reference to the core values that underlie s. 2(b) of the *Canadian 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: para. 77. That said, in *Hill*, this Court noted that “defamatory statements are very tenuously related to the core values which underlie s. 2(b)”: para. 106. In consistent fashion, this Court finds in *Pointes Protection* that there will be less of a public interest in protecting a statement that contains “gratuitous personal attacks” and that the “motivation behind” the expression will be relevant to the inquiry: paras. 74-75 (emphasis omitted).

[164] Accordingly, in determining the public interest in protecting Ms. Bent’s expression, I need to consider the fact that she made a personal attack against Dr. Platnick, which cast doubt on his professional competence, integrity, and

reputation. The personal attack was launched by Ms. Bent even though she and Dr. Platnick had never met or had a single discussion. It bears on my analysis that Ms. Bent never reached out to Dr. Platnick to confront him or to investigate her allegations against him.

[165] Quite importantly, *Pointes Protection* also calls for consideration of the “chilling effect on future expression” and the “broader or collateral effects on other expressions on matters of public interest”: para. 80 (emphasis omitted); see also Abella J.’s reasons, at para. 262, with regard to the “considerable chilling effect” of permitting Dr. Platnick’s defamation lawsuit to proceed. Indeed, Ms. Bent has argued that if Dr. Platnick’s defamation proceeding is allowed to continue, it would “not only stifle” her own speech, but “also potentially deter others from speaking out against unfair and biased practices in the insurance industry and the difficulties encountered by seriously injured persons claiming the payment of benefits from their insurance companies”: A.R., vol. III, at p. 29.

[166] I agree with my colleague that this concern, if valid, would weigh in favour of the public interest in protecting the expression. To be sure, I do not deny that s. 137.1(4)(b) is intended to specifically protect expression that may bear on the integrity of the administration of justice. This is confirmed by the legislative history that animated s. 137.1 as a whole.

[167] However, with great respect to my colleague, she does not consider a crucial element of Ms. Bent’s expression. Permitting Dr. Platnick’s defamation claim

to proceed will deter others not from speaking out against unfair and biased practices, as my colleague argues, but from unnecessarily singling out an individual in a way that is extraneous or peripheral to the public interest. It will also deter others from making defamatory remarks against an individual without first substantiating, or *attempting* to substantiate, the veracity of their allegations. In this way, rather than *disincentivizing* people from speaking out against unfair and biased practices, it will *incentivize* them to act with reasonable due diligence and to tailor their expression so as to avoid needlessly defaming an individual who depends on their reputation for their livelihood.

[168] In my humble opinion, this is the appropriate balance, at the unique stage of a s. 137.1 motion, between freedom of expression and reputational considerations, which this Court has historically strived to optimize: good reputation “reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights”, and the protection of reputation “must be carefully balanced against the equally important right of freedom of expression” (*Hill*, at paras. 120-21).

[169] Thus, while Ms. Bent’s specific references to Dr. Platnick fall at the low end of the protection-deserving spectrum, her email interpreted broadly as pertaining to the administration of justice in Ontario falls closer to the high end. In conclusion then, I am of the view that, when considered as a whole, the public interest in protecting Ms. Bent’s expression lies somewhere in the middle of the spectrum.

(c) *Weighing of the Public Interest*

[170] As a reason to dismiss Dr. Platnick’s proceeding under the weighing exercise, my colleague references Dr. Platnick’s *other* lawsuits against *non*-parties to this action, as well as the quantum of damages Dr. Platnick has alleged, as apparent evidence of a “‘punitive or retributory purpose’ which is the hallmark of a classic SLAPP suit”: paras. 183, 185, 207 and 263.

[171] This line of reasoning by my colleague is, respectfully, unmoored from a proper s. 137.1(4)(b) analysis. This Court in *Pointes Protection* squarely rejects any inquiry into the hallmarks of a SLAPP: “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” (para. 79). Respectfully, my colleague’s references to the mere quantum of damages Dr. Platnick claims (at para. 263) cannot serve as a stand-alone proxy for finding that his lawsuit is motivated by a punitive or retributory purpose. As I discussed above, Dr. Platnick has supported his claim of significant harm — he is a successful, highly paid doctor, and Ms. Bent’s allegations go to the heart of his professional reputation. There is simply no basis for inferring that Dr. Platnick’s lawsuit is motivated by a punitive or retributory purpose based on the amount of damages sought from Ms. Bent. As to Dr. Platnick’s *other* lawsuits and the *aggregate* damages alleged (Abella J.’s reasons, at paras. 183, 185 and 207), they are irrelevant to the inquiry on *this* motion, as there is no evidence that those lawsuits are abusive, frivolous, or vexatious. Accordingly, there is no basis to impute a punitive or retributory purpose to Dr. Platnick.

[172] In light of the open-ended nature of s. 137.1(4)(b), courts have the power to “scrutinize what is really going on in the particular case before them”: *Pointes Protection*, at para. 81. On its face, this is not a case in which one party is vindictively or strategically silencing another party; it is a case in which one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication. This is not the type of case that comes within the legislature’s contemplation of one deserving to be summarily dismissed at an early stage, nor does it come within the language of the statute requiring such a dismissal.

[173] As I have discussed, the harm likely to be or have been suffered by Dr. Platnick lies closer to the high 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 Ms. Bent’s expression lies somewhere between the low and high ends of the spectrum.

[174] Thus, I am satisfied that Dr. Platnick has established on a balance of probabilities that the harm likely to be or have been suffered as a result of Ms. Bent’s expression is sufficiently serious that the public interest in permitting his defamation proceeding to continue outweighs the public interest in protecting Ms. Bent’s expression.

(4) Conclusion on the Section 137.1 Motion

[175] As these reasons have established, while Ms. Bent successfully meets her threshold burden under s. 137.1(3), Dr. Platnick successfully clears both the merits-based hurdle and the public interest hurdle under s. 137.1(4)(a) and s. 137.1(4)(b), respectively. For these reasons, I would dismiss Ms. Bent’s s. 137.1 motion and allow Dr. Platnick’s lawsuit in defamation against Ms. Bent and Lerner to proceed to trial.

[176] I hasten to reiterate here that a s. 137.1 motion is plainly not a determinative adjudication of the merits of a claim: *Pointes Protection*, at paras. 37, 50, 52 and 71. Nothing in these reasons can, or should, be taken as prejudging the merits of the action. Simply put, Dr. Platnick’s claim is one that deserves a trial on the merits, and is not one that ought to be summarily screened out at this early stage.

#### IV. Conclusion

[177] The motion to adduce fresh evidence is allowed in part without costs.

[178] The appeals are dismissed.

[179] With regard to costs, as I said in *Pointes Protection*, the legislature expressly contemplated a costs regime for s. 137.1 motions. Indeed, s. 137.1(8) sets out a default rule that when a s. 137.1 motion is dismissed, neither party shall be awarded costs, unless a judge determines that “such an award is appropriate in the circumstances”. Here, no such award would be appropriate: I do not take Ms. Bent’s s. 137.1 motion to be an instance of frivolous motion practice to delay Dr. Platnick’s

defamation claim against her; rather, Ms. Bent's use of s. 137.1 — especially given the substantial uncertainty due to the lack of judicial guidance at the time of serving the motion — was a *bona fide* use of this new mechanism. I would award no costs.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

ABELLA J. —

[180] Maia Bent is a lawyer who represents accident victims in disputes against insurance companies. In two such disputes, Ms. Bent's clients sought benefits from their insurers for injuries sustained in motor vehicle accidents. The insurance companies hired medical experts to evaluate Ms. Bent's clients. They also retained a general practitioner, Dr. Howard Platnick, to summarize the results of the evaluations. Dr. Platnick prepared summary reports which were forwarded to Ms. Bent. His summaries concluded that Ms. Bent's clients were not entitled to the benefits they sought.

[181] Ms. Bent obtained the original reports of the medical experts who evaluated her clients and on which Dr. Platnick based his summaries. In both cases, Ms. Bent discovered significant discrepancies between Dr. Platnick's reports and those of the experts whose findings he purported to summarize. Some of the experts had concluded that Ms. Bent's clients were sufficiently impaired to qualify for the benefits they were seeking. Dr. Platnick's summaries attributed the opposite

conclusion to them and omitted findings from their reports that were favourable to Ms. Bent's clients.

[182] After both cases were resolved with the insurance companies, Ms. Bent sent a confidential internal email to members of the Ontario Trial Lawyers Association (OTLA), an organization of legal professionals who represent the interests of accident victims in automobile insurance disputes. The OTLA has raised concerns in various forums about biases in insurer medical examination reports. Ms. Bent is a former president of the OTLA and, at the time she sent the email, was the organization's president-elect.

[183] In her email, Ms. Bent described her experiences in the two cases involving Dr. Platnick, and advised her colleagues to routinely obtain the original expert reports and other supplementary disclosure in disputes with insurance companies. Her email was leaked to a wider audience. Dr. Platnick filed defamation suits against her and several other parties for almost \$50 million in damages. Ms. Bent brought a motion to dismiss his action against her under s. 137.1 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[184] The motion judge, Dunphy J., found for Ms. Bent (2016 ONSC 7340, 136 O.R. (3d) 339). He concluded, among other things, that she had a valid defence of qualified privilege to the defamation action; that there was no evidence that she bore "any responsibility for the subsequent and unanticipated republication of the email to a broader audience"; and that the public interest in protecting her

communication outweighed the public interest in allowing Dr. Platnick’s lawsuit to continue. The Court of Appeal disagreed with these conclusions and reinstated Dr. Platnick’s defamation action (2018 ONCA 687, 426 D.L.R. (4th) 60).

[185] I would allow the appeals. Dr. Platnick’s lawsuit — and the exorbitant amount of damages he is seeking — is precisely the kind of claim that has the effect of stifling expression on matters of public interest. Allowing his proceeding against Ms. Bent to continue would undermine the very purposes for which s. 137.1 was enacted.

#### Background

[186] Ms. Bent was called to the Bar in 1998 and is currently a lawyer at Lerner LLP. She acts for plaintiffs in personal injury actions.

[187] Dr. Platnick is a general practitioner who has been retained as an expert in several insurance disputes, mostly on behalf of insurance companies.

[188] Dr. Platnick and Ms. Bent were involved in two insurance proceedings. In the first, Ms. Bent acted for a client with serious physical health problems who had made “several suicide attempts”. Her client claimed to have been “catastrophically impaired” during a motor vehicle accident. Victims who are catastrophically impaired are entitled to enhanced compensation from insurers based on criteria and guidelines

in the *Statutory Accident Benefits Schedule — Effective September 1, 2010*, O. Reg. 34/10, s. 1 (under the *Insurance Act*, R.S.O. 1990, c. I.8).

[189] A single finding of catastrophic impairment by a physician is sufficient for an insurer to accept the claim.

[190] Ms. Bent filed a claim with her client’s insurer for enhanced benefits. The insurer retained several experts, including Dr. Platnick, to provide opinions on whether Ms. Bent’s client was catastrophically impaired. Some of the experts clinically evaluated Ms. Bent’s client. Dr. Platnick did not. His role was to summarize the findings of the other experts and, based on those findings, to provide his opinion on whether the criteria for catastrophic impairment had been met.

[191] One of the experts who clinically evaluated Ms. Bent’s client, Dr. Varinder Dua, concluded that the client “ha[d] sustained a catastrophic impairment”. She set out her findings in a report which the insurer forwarded to Ms. Bent.

[192] The insurer delayed in finalizing a decision on the catastrophic impairment claim. Ms. Bent protested, emphasizing her client’s serious physical and mental health condition and noting that Dr. Dua had already made the catastrophic impairment finding necessary for the insurer to accept her client’s claim. The delay persisted, prompting Ms. Bent to file a complaint with the Financial Services Commission of Ontario.

[193] A week later, the insurer accepted the catastrophic impairment claim, consistent with Dr. Dua's evaluation.

[194] One month after the insurer accepted the catastrophic impairment claim, because the complaint of delay was still outstanding, the Financial Services Commission of Ontario sent Ms. Bent a report prepared by Dr. Platnick for the insurer. Ms. Bent had not previously seen or been given Dr. Platnick's report.

[195] In his report, Dr. Platnick concluded that Ms. Bent's client did not meet the criteria for catastrophic impairment. Of particular note was Dr. Platnick's summary of Dr. Dua's report. Contrary to the conclusion in the report by Dr. Dua sent to Ms. Bent by the insurer, Dr. Platnick stated that Dr. Dua had not found the degree of impairment necessary for a catastrophic impairment designation. Other findings in Dr. Dua's report favourable to Ms. Bent's client were also omitted in Dr. Platnick's summary. At no point in the summary did Dr. Platnick indicate that he had talked to Dr. Dua, or suggest that Dr. Dua had prepared a subsequent report to the one she originally submitted to the insurer.

[196] In the second insurance proceeding in which Ms. Bent and Dr. Platnick were involved, Ms. Bent's client, Dr. Laura Carpenter, claimed insurance benefits on the basis of catastrophic impairment. To evaluate the claim, the insurer retained an assessment company (Sibley & Associates), which in turn hired Dr. Platnick and other experts. The other experts hired by Sibley clinically examined Dr. Carpenter. Dr. Platnick did not. His role was to review and summarize the clinical assessments

prepared by the other experts and, based on those reports, to provide his opinion on whether Dr. Carpenter met the criteria for catastrophic impairment.

[197] After the clinical evaluations of Dr. Carpenter by the experts were complete, Ms. Bent received two reports from the insurer prepared by Dr. Platnick: a “Catastrophic Impairment Determination” report and a “Catastrophic Determination Executive Summary” report.

[198] In these reports, Dr. Platnick stated that Ms. Bent’s client did not meet the criteria for catastrophic impairment. He described this finding as a “consensus conclusion” of four experts who had examined Dr. Carpenter, stating:

It is the consensus conclusion of this assessment that [Dr. Carpenter] does not achieve the catastrophic impairment rating as outlined in the SABS . . . .

[199] After receiving Dr. Platnick’s reports, Ms. Bent obtained an order from the arbitrator presiding over the insurance proceeding, requiring disclosure of Sibley’s entire file. As a result, she received the original reports prepared by the medical experts who had examined and evaluated Dr. Carpenter, as well as correspondence between Sibley and those experts.

[200] The additional disclosure revealed that three of the four experts who Dr. Platnick had said were part of a “consensus conclusion”, had originally concluded that Dr. Carpenter was catastrophically impaired or made findings consistent with that

conclusion. The fourth said that Ms. Bent's client did not meet the criteria for catastrophic impairment. At the time Dr. Platnick submitted his summary report, the medical experts remained divided and no "consensus conclusion" existed among them about whether Dr. Carpenter was catastrophically impaired. Dr. Platnick's summary reports, however, did not include either the conclusions of the experts who were of the view that Dr. Carpenter had suffered catastrophic impairment, or other findings in their reports favourable to Ms. Bent's client.

[201] The additional disclosure obtained by Ms. Bent also included communications between Sibley and the medical experts who had clinically evaluated Dr. Carpenter. These documents exposed efforts to have the experts revise their reports and, in some cases, their conclusions, as to catastrophic impairment:

- Sibley sent an email to the psychiatrist on the assessment team, Dr. Mark Rubens, asking him to sign on to Dr. Platnick's summary report and the conclusion that Dr. Carpenter was not catastrophically impaired. Dr. Rubens refused, noting that Sibley was asking him to "sign a 'consensus statement' in which 'consensus' is quite clearly and explicitly contradicted", and describing the request as "profoundly offensive and insulting".
- Sibley sent an email to the psychologist on the assessment team, Dr. Myles Genest, suggesting that he delete certain references to Sibley's role in the assessment process and revise his answer to a question about Dr. Carpenter's

employment capacity. To “maintain independence” and to avoid “compromis[ing] the integrity” of the assessment, Dr. Genest refused to make the suggested changes. Sibley sent a follow-up email providing Dr. Genest with “samples from Dr. Platnick” for the purposes of “complet[ing] an addendum” to his report. Dr. Genest refused to make these additions. When provided with Dr. Platnick’s summary report, Dr. Genest told Sibley that he did not agree with Dr. Platnick’s conclusion that “there is no catastrophic impairment resulting from the collision”.

- A third doctor who had initially concluded that Dr. Carpenter’s degree of impairment was sufficient for a catastrophic impairment designation, was sent “revisions” to his original report. After receiving these revisions from Sibley, he revised his report, removed the relevant finding of impairment, and agreed to defer to the conclusion of the “lead physician”, Dr. Platnick.

[202] The matter proceeded to arbitration. The insurer, relying on Dr. Platnick’s reports, argued that Dr. Carpenter was not catastrophically impaired. Dr. David King, a neurologist who was one of the four experts Dr. Platnick said was part of the “consensus conclusion”, testified at the arbitration. He revealed that he had not participated in any consensus on whether Dr. Carpenter met the criteria for catastrophic impairment; that he had never seen Dr. Platnick’s report; and that portions of his own report had been omitted without his knowledge or consent.

[203] Later that same day, the insurer settled with Dr. Carpenter on generous terms, agreeing that she had been catastrophically impaired. The insurer also agreed to full payment of insurance benefits on an enhanced basis retroactively with interest and to fully indemnify Dr. Carpenter for her legal fees and disbursements. Ms. Bent described these terms as “virtually impossible to get on a settlement”.

[204] After the claim was settled, Ms. Bent sent a confidential email through a “Listserv” comprised exclusively of plaintiff-side personal injury lawyers who were members of the Ontario Trial Lawyers Association. These lawyers had all signed an undertaking to maintain the confidentiality of all information circulated on the Listserv:

**CONFIDENTIALITY**

I undertake to keep all LISTSERV information, opinions, and comments strictly confidential from all others, including OTLA members who are not LISTSERV Members, including my law firm partners, associates and staff.

I understand that other members of the OTLA rely on my undertaking to fellow members to maintain confidential[ity] in their decision to use the LISTSERVs.

[205] Ms. Bent’s email said:

Dear Colleagues,

I am involved in an Arbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multi-disciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important

sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.

He also testified that he never participated in any “consensus meeting” and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.

This was NOT the only report that had been altered. We obtained copies of all the doctor[s’] file[s] and drafts and there was a paper trail from Sibley where they rewrote the doctors’ reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.

This was all produced before the arbitration but for some reason the other lawyer didn’t appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.

I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor’s and Sibley’s files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor’s decision from a marked to a moderate impairment.

[206] Ms. Bent’s email was leaked from the Listserv and reached an advocacy group. It then found its way to a journalist at the “Insurance Business” magazine. The magazine published the email as part of a broader article about medical files being altered to suit insurers.

[207] Dr. Platnick sued, among others, the magazine, the magazine’s editor, the magazine’s associate editor, Ms. Bent, and Ms. Bent’s law firm, Lerner LLP, for

defamation. He claimed damages in the amount of \$16.3 million in each lawsuit, for a total of close to \$50 million.

[208] In his statement of claim in the action against Ms. Bent, Dr. Platnick alleged that she had inaccurately accused him of professional misconduct. He claimed that in the case involving Dr. Dua, he was accurately summarizing a second, follow-up report in which Dr. Dua had changed her conclusion on catastrophic impairment after a conversation with Dr. Platnick. In Dr. Carpenter’s case, Dr. Platnick claimed that he used the term “consensus conclusion” with the expectation that such a consensus would emerge after the completion of his report. That was why he said he had attached an acknowledgement page with spaces for the signatures that Sibley was to obtain.

[209] Fifteen months after Dr. Platnick filed his statement of claim, Ms. Bent brought a motion under s. 137.1 of Ontario’s *Courts of Justice Act* to dismiss the action. Section 137.1 allows for the expeditious dismissal of proceedings which arise from expression on a matter of public interest.

[210] The motion judge, Dunphy J., agreed with Ms. Bent. He concluded that:

- Ms. Bent’s email addressed matters of “considerable importance to the administration of justice” and was sent to “underscore to other plaintiff-side lawyers the importance of obtaining production of the entire file in order to scrutinize expert reports”;

- There was a clear “public interest in educating OTLA members about the risk of relying upon selective ‘executive summary’ reports that omit evidence favourable to claimants and potentially make misleading and false claims of being consensus reports”;
- Ms. Bent “reported fairly and accurately on the facts reasonably known to her”;
- There was no evidence to reasonably support the inference that Ms. Bent acted with malice in publishing the email;
- There was “no evidence to suggest that Ms. Bent bears any responsibility for the subsequent and unanticipated republication of the email to a broader audience”.

[211] Based on these findings, the motion judge held, among other things, that Ms. Bent had a valid defence of qualified privilege against the defamation claim, and that the public interest in protecting her expression outweighed the public interest in allowing Dr. Platnick’s claim to continue.

[212] The Court of Appeal allowed the appeal and reinstated Dr. Platnick’s action. The court held that a “reasonable trier” could find that the defence of qualified

privilege was invalid on the basis that Ms. Bent acted inappropriately or maliciously in writing that Dr. Platnick had previously “changed [a] doctor’s decision”. The court also disagreed with the motion judge’s conclusion on the public interest weighing test and his related finding that Ms. Bent could not reasonably have anticipated the dissemination of the email outside the Listserv.

### Analysis

[213] The issue in these appeals is whether Dr. Platnick’s defamation action should be dismissed under s. 137.1 of Ontario’s *Courts of Justice Act*.

[214] Section 137.1 provides a mechanism for the pre-trial dismissal of lawsuits that unduly limit expression on matters of public interest (*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at para. 17). The goal of the legislation is to ensure that freedom of expression on matters of public interest is liberated from an aspic of fear over the costs and uncertainty of defending against a lawsuit (see Ministry of the Attorney General, *Anti-Slapp Advisory Panel: Report to the Attorney General* (2010), at pp. 8-10; see also Michaelin Scott and Chris Tollefson, “Strategic Lawsuits Against Public Participation: The British Columbia Experience” (2010), 19 *RECIEL* 45, at p. 45; Hilary Young, “Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs” (2013), 46 *U.B.C. L. Rev.* 529, at p. 562).

[215] This goal is expressly identified in the legislation:

**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.

(See also *Pointes Protection*, at para. 12.)

[216] These purposes are achieved by directing, through accelerated timelines,<sup>9</sup> the expedited dismissal of proceedings which “aris[e] from” expression that relates to a matter of public interest:

**137.1**

...

(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.

...

**137.3** An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal.

[217] There is no dispute that Dr. Platnick’s defamation action was based on expression that relates to a matter of public interest. The target of Dr. Platnick’s

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<sup>9</sup> These timelines are set out in s. 137.2.

lawsuit was Ms. Bent's email to her OTLA colleagues, which addressed questions of significance to the administration of justice, particularly the independence, accuracy and impartiality of experts and third-party assessment companies retained by insurers. Section 137.1(3) is therefore satisfied and Dr. Platnick's defamation proceeding must presumptively be dismissed.

[218] Pursuant to s. 137.1(4), however, Dr. Platnick's proceeding may continue if he satisfies a judge that there are grounds to believe that his case has substantial merit, that Ms. Bent has no valid defence to the proceeding, *and* that the likely harm suffered by him is serious enough that it outweighs the public interest in protecting Ms. Bent's expression:

### 137.1

...

(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.

[219] Only if all three criteria are met by Dr. Platnick, is his proceeding allowed to continue.

[220] In my respectful view, Ms. Bent has a “valid” defence of qualified privilege and is therefore entitled to the relief mandated by s. 137.1(3), namely the dismissal of Dr. Platnick’s defamation action. Given this conclusion, it is unnecessary to consider whether she also has a valid defence of justification.

[221] In *Pointes Protection*, this Court clarified that a defence is “valid” if it has a “real prospect of success” (para. 60). To have a “real prospect of success”, a defence must be legally tenable, supported by evidence that is reasonably capable of belief, and have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the person being sued (paras. 49-50 and 59-60). Dr. Platnick has the burden of showing that there is a sufficiently cogent basis in the record and the law to conclude “that the defence, or defences, put in play . . . can be said to have no real prospect of success” (para. 59).

[222] The defence of qualified privilege applies “where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it” (*Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 143; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 78, both quoting *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334). The focus is on the circumstances in which the communication was made. Qualified privilege can be lost if the communication exceeds the legitimate purposes of the privilege, or if the speaker was predominantly motivated by malice (*Botiuk*, at paras.

79-80). The focus at this stage is on the content of the communication, and on the conduct and motives of the speaker.

[223] In this case, the conclusion that Ms. Bent sent her email in circumstances protected by qualified privilege, is supported by evidence that is reasonably capable of belief and sufficiently compelling to give the defence the necessary likelihood of success (*Pointes Protection*, at paras. 59-60). Dr. Platnick has not provided a sufficient basis in the record and the law that shows otherwise. Ms. Bent was the incoming president of the OTLA, an organization whose members advocate for the fair treatment of accident victims in the insurance system and routinely act for them in legal disputes against insurers. As president-elect, Ms. Bent had a clear duty to inform OTLA members about selective and misleading expert reports which disadvantage the very individuals they advocate for and represent. The OTLA has raised concerns about this problem in public forums and consultations. Ms. Bent also had a duty to advise OTLA members of ways to protect their clients' interests against unfair practices by experts and assessment companies. These matters went to the heart of the OTLA's mandate — and, as a result, to Ms. Bent's role as president-elect.

[224] At the time Ms. Bent sent her email, there had already been significant public controversy over the neutrality of experts retained by insurance companies. Although all experts have a duty to act independently and impartially (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182, at para. 10), concerns have been raised for many years about experts and assessors who produce

selective or misleading reports that “may be the determining factor” in resolving a claim for insurance benefits (*MacDonald v. Sun Life Assurance Company of Canada*, 2006 CanLII 41669 (Ont. S.C.J.), at para. 100; see also paras. 101-3; *Burwash v. Williams*, 2014 ONSC 6828, at paras. 25-29 (CanLII); *Daggitt v. Campbell*, 2016 ONSC 2742, 131 O.R. (3d) 423, at paras. 27-30).

[225] Cunningham A.C.J. summarized the problem as follows in the Ministry of Finance’s *Ontario Automobile Insurance Dispute Resolution System Review: Final Report* (2014):

The problem is obvious. An expert retained by an insurer who supports claimants is unlikely to be retained again. [p. 23]

[226] These concerns came to the fore in the two insurance proceedings involving Ms. Bent and Dr. Platnick. Not only did Ms. Bent have a duty to share such concerns as the president-elect of the OTLA, she had a professional duty as a lawyer to participate in improving the administration of justice and to share best practices (see Law Society of Ontario’s *Rules of Professional Conduct*, rr. 2.1-2 and 5.6-1). It was arguably consistent with this duty for her to flag conduct by experts that had been the source of considerable public concern and controversy in her area of practice.

[227] Members of the OTLA Listserv — all plaintiff-side personal injury lawyers — unquestionably had a reciprocal duty as well as an interest in receiving Ms. Bent’s communication. Being alerted to questionable conduct by experts and

assessment companies — and advised of ways to guard against such conduct — was of professional significance to them and especially to their clients. I cannot see how Ms. Bent or her colleagues could possibly have waived their professional obligation to exchange such information by joining a Listserv. Whether Ms. Bent and her colleagues were under a duty to share information does not solely depend on *how* they ultimately chose to communicate. The very terms and conditions of the Listserv, moreover, clarify that it was a confidential forum participated in precisely to “obtai[n] counsel, advice and assistance” on issues arising on their files.

[228] Ms. Bent’s communication, therefore, was made by a person with a professional interest and duty to share the information with her colleagues, who had a corresponding interest and duty to receive it. This supports the conclusion that her defence of qualified privilege has a “real prospect of success” based on both the facts and the law.

[229] Qualified privilege can, however, be defeated if the communication exceeded the purposes of the privilege or if it can be shown that Ms. Bent was predominantly motivated by malice.

[230] A defendant cannot rely on qualified privilege if the information communicated is “not reasonably appropriate to the legitimate purposes of the occasion” (*Botiuk*, at para. 80; see also *Hill*, at paras. 146-47). A statement cannot be “reasonably appropriate” unless it is “*relevant and pertinent* to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the

privilege” (*Hill*, at para. 146 (emphasis added), citing *Adam v. Ward*, at p. 321). As

Professor Raymond E. Brown has noted:

Courts take a broad view of a connection between the statement and the privileged occasion; it need not be central to the topic or occasion but only relevant.

(*Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)), at p. 13-895; see also *Douglas v. Tucker*, [1952] 1 S.C.R. 275, at p. 286; *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 60-61; *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p. 323; *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121, 60 B.C.L.R. (5th) 214, at para. 30; *Wang v. British Columbia Medical Assn.*, 2014 BCCA 162, 57 B.C.L.R. (5th) 217, at paras. 99-100; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726 (C.A.), at para. 18; *Chohan v. Cadsky*, 2009 ABCA 334, 464 A.R. 57, at paras. 105 and 108; *Laufer v. Bucklaschuk* (1999), 145 Man. R. (2d) 1 (C.A.), at para. 76; *Board of Trustees of the City of Saint John Employee Pension Plan v. Ferguson*, 2008 NBCA 24, 328 N.B.R. (2d) 319, at para. 9; *Cush v. Dillon*, [2011] HCA 30, 243 C.L.R. 298, at paras. 22-23.)

[231] Dr. Platnick argued that Ms. Bent exceeded the limits of qualified privilege because it was not “necessary” for her to identify him by name. The question, however, is whether Ms. Bent’s statements were relevant and “reasonably appropriate” in the circumstances, not whether they were strictly necessary (*Hill*, at para. 147; *Botiuk*, at para. 80). A necessity-based approach would have dangerous and restrictive implications for the defence of qualified privilege. It would effectively exclude from the defence statements containing specific examples of misconduct, since statements like that can almost always be stripped of detail and reconstructed without the “unnecessary” examples they previously contained. Courts, for good reason, do not apply this type of strict editorial scrutiny when evaluating claims of

qualified privilege (Brown, at pp. 13-888 to 13-906). As the British Columbia Court of Appeal magnetically noted, a “person speaking on a privileged occasion should not be regarded as a tightrope walker without a safety net, with the judge waiting underneath with bated breath hoping for a tumble” (*Wang*, at para. 99, quoting *Birchwood Homes Limited v. Robertson*, [2003] EWHC 293 (Q.B.), at para. 27 (BAILII); see also *Tsatsi v. College of Physicians and Surgeons of Saskatchewan*, 2018 SKCA 53, at para. 48 (CanLII)).

[232] In this case, it is hard to see how Ms. Bent could have exceeded the bounds of her duty to inform OTLA members of selective and misleading expert reports, by identifying an expert who she reasonably believed to have engaged in precisely that conduct.

[233] The facts Ms. Bent knew when she identified Dr. Platnick clearly connected him to the selective or misleading practices that Ms. Bent was duty-bound to report to her colleagues, or, for that matter, that her colleagues would have been duty-bound to report to each other, since those facts went to the heart of their ability to do their jobs for their clients. Not only did Dr. Platnick’s reports, on their face, misrepresent the conclusions of the experts who had clinically evaluated Dr. Carpenter, they omitted several findings the experts made in reaching conclusions that were favourable for Dr. Carpenter’s position.

[234] In the Carpenter arbitration, Dr. Platnick produced reports purporting to summarize the findings of the medical experts who evaluated Ms. Bent’s client.

Dr. Platnick concluded that the client was not catastrophically impaired and described this finding as a “consensus conclusion” of the assessment team. The disclosure obtained by Ms. Bent showed that no such consensus existed; the experts, in fact, were divided, and a single finding of catastrophic impairment would have provided sufficient grounds for the insurer to accept Dr. Carpenter’s claim.

[235] Nor was there a disclaimer or other qualifying statement in Dr. Platnick’s report indicating that it was a draft. Moreover, when contacted by Sibley to revisit their findings in light of Dr. Platnick’s report, two of the experts refused to endorse his conclusion or analysis. A third, Dr. King, testified at the arbitration that he had never seen Dr. Platnick’s report and had not played any role in the report’s preparation. This same doctor testified about alterations to his report made without his knowledge or consent.

[236] Dr. Platnick’s conduct in the Carpenter arbitration was consistent with his conduct in the prior proceeding involving Dr. Dua. In a similar context — a catastrophic impairment claim against an insurer which retained experts to conduct an assessment — Dr. Platnick had again produced a report which Ms. Bent reasonably viewed as misrepresenting the conclusions of a medical expert who had examined her client. At the time Ms. Bent sent the email, she only had the copy of Dr. Dua’s report sent to her by the insurer. She had no knowledge of a second, amended report, nor did she have any reason to believe that a second report had been produced. Not only was

there no reference to it in the report by Dr. Platnick, the insurer settled on terms consistent with Dr. Dua's first report.

[237] There is, therefore, solid evidentiary support for Ms. Bent's belief that Dr. Platnick had produced selective and misleading expert reports. Whether this belief was substantially true is the test for justification, a defence which is not the focus of these reasons. It is not the test for qualified privilege, where what matters is whether communicating her belief to members on the OTLA Listserv was relevant and reasonably appropriate in the circumstances. Given the compelling evidence in Ms. Bent's possession, it was clearly relevant and appropriate for her, in fulfilling her duty to protect her colleagues and their clients, to identify Dr. Platnick, a frequently-retained expert in whose cases it had proven to be especially important to obtain full disclosure of the insurer's files. Suggesting to her professional colleagues that there was a doctor somewhere in Ontario whose reports they ought to distrust, would have been a warning without content.

[238] It would defeat the purpose of qualified privilege to withhold the defence from Ms. Bent because she chose to identify Dr. Platnick by name. Qualified privilege exists to acknowledge the benefit of expression which is relevant to protecting the public interest, including protecting the public from the perpetuation of wrongdoing or injustice. Generic accounts of misconduct, which do not refer to specific persons (and are therefore not defamatory in the first place) do not require the protection of qualified privilege. The defence is, necessarily, engaged only when

someone is identified. It is precisely in these circumstances that the shield of qualified privilege is most important, to ensure that communication in the public interest is not inhibited by fear of a potential lawsuit (Brown, at pp. 13-22 to 13-35).

[239] Relying on *Hill* and *Botiuk*, Dr. Platnick also argued that Ms. Bent exceeded the purposes of the privilege by not exercising further investigative diligence before publishing her email. *Hill* and *Botiuk* represent very different circumstances. The defamatory remarks in *Hill* concerned serious allegations of impropriety against senior Crown counsel, delivered on the steps of Osgoode Hall with major media outlets present, before the completion of an ongoing investigation into counsel’s conduct. When the remarks were made, there was little evidentiary support for them. The defamatory remarks in *Botiuk* were included in documents that many of the defendant lawyers endorsed without reading, and that included claims they knew to be untrue. In both cases, the need for further investigation was obvious at the time the remarks were made. Neither *Hill* nor *Botiuk* state that a privileged occasion is exceeded when a lawyer declines to supplement what is *already* a reasonable belief with a further investigation.

[240] Unlike the defendants in *Hill* and *Botiuk*, moreover, Ms. Bent’s communication was sent to a “restricted constituency” (*Foulidis v. Baker*, 2014 ONCA 529, 323 O.A.C. 258, at para. 46). Ms. Bent sent her email while she was president-elect of the OTLA through a Listserv restricted to members of the OTLA who practiced plaintiff-side personal injury law — the precise group of people who

had either a duty or interest in receiving her communication. Members of the Listserv were bound by a wide-ranging undertaking to keep the information “strictly confidential”. The unequivocal undertaking is worth repeating:

### **CONFIDENTIALITY**

I undertake to keep all LISTSERV information, opinions, and comments strictly confidential from all others, including OTLA members who are not LISTSERV Members, including my law firm partners, associates and staff.

I understand that other members of the OTLA rely on my undertaking to fellow members to maintain confidential[ity] in their decision to use the LISTSERVs.

[241] Ms. Bent’s email, moreover, ended with a disclaimer which highlighted that the message contained “legally privileged and confidential information” and that “any review, dissemination, distribution or copying of this communication is prohibited”.

[242] As lawyers, Listserv members were required by the *Rules of Professional Conduct* to “strictly and scrupulously fulfill” their undertakings (r. 5.1-6; see also r. 7.2-11). There was no reason for Ms. Bent to expect that Listserv members would breach these undertakings and, in so doing, breach their professional obligations. Nothing in the undertakings suggests that Listserv members were free to ignore their confidentiality obligations based on their personal views about whether a communication is “potentially defamatory”, or relates to “ongoing files”. Ms. Bent relied, rightly, on her colleagues honouring their professional responsibilities. The

fact that one of them did not, cannot be used to disintegrate the reality that she was complying with her own professional duty to protect her clients and those of her colleagues.

[243] All of this supports Ms. Bent’s defence that she acted in compliance with the purposes of the privilege in that she provided “appropriate information to appropriate people” using an appropriate means of communication (*RTC Engineering*, at para. 18). Neither the record nor the law provides a basis that tends to support Dr. Platnick’s position to the contrary (*Pointes Protection*, at para. 59).

[244] Qualified privilege can also be defeated, however, “if the dominant motive for publishing is actual or express malice” (*Botiuk*, at para. 79). Dr. Platnick argued that Ms. Bent was predominantly motivated by malice. Like the motion judge, I see no merit in this claim.

[245] This Court defined “malice” as follows in *Hill*:

Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes . . . “any indirect motive or ulterior purpose” that conflicts with the sense of duty or the mutual interest which the occasion created . . . . Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.

(para. 145, citing *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1099)

[246] Malice is determined by examining the “state of mind and motives of the defendant at the time of publication” (Brown, at p. 16-27; see also Peter A. Downard, *The Law of Libel in Canada* (4th ed. 2018), at pp. 188-89; *Jerome v. Anderson*, [1964] S.C.R. 291, at p. 299; *Hodgson v. Canadian Newspapers Co.* (2000), 49 O.R. (3d) 161 (C.A.), at para. 35). The inquiry focuses on the subjective attitude of the person making the communication, either towards the target of the communication or towards the truth (see Brown, at pp. 16-3 to 16-10). Malicious motives can include spite or ill-will towards the plaintiff, and acting with knowing or reckless disregard for the truth (*Smith v. Cross*, 2009 BCCA 529, 99 B.C.L.R. (4th) 214, at para. 34). The party alleging malice has the burden of proving it (*Hill*, at para. 144) and it is “not a burden that is easily satisfied” (Brown, at p. 16-204; see also *Martin v. Lavigne*, 2011 BCCA 104, 17 B.C.L.R. (5th) 132, at para. 44; *Cimolai v. Hall*, 2007 BCCA 225, 240 B.C.A.C. 53, at para. 29).

[247] To establish malice through recklessness, “the evidence must be sufficiently strong to transcend a finding of carelessness or negligence and demonstrate an indifference to truth or falsity” and thus “no honest belief in [the] truth” (Downard, at p. 183; see also *Laufer*, at para. 74; *Davies & Davies Ltd. v. Kott*, [1979] 2 S.C.R. 686, at pp. 697-98; *Korach v. Moore* (1991), 1 O.R. (3d) 275 (C.A.), at pp. 278-80; *Wells v. Sears*, 2007 NLCA 21, 264 Nfld. & P.E.I.R. 171, at para. 44; *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at pp. 150-53, per Lord Diplock). It was further explained by Professor Brown as follows:

“Recklessness is . . . not to be confused with mere carelessness, impulsiveness or irrationality”. Courts have drawn “a distinction between honest belief formed by carelessness, impulsiveness or irrationality — which does not amount to actual malice — and a belief based on recklessness, or no belief in its accuracy at all, which does.” [Footnotes omitted; p. 16-114.]

[248] The Court of Appeal held that a “reasonable trier” could conclude that Ms. Bent acted with reckless disregard in mentioning the arbitration involving Dr. Dua, primarily on the basis that she was in “no position to know what had gone on between Dr. Dua and Dr. Platnick”. But there was no reason for her to suspect that *anything* had happened between them. As my colleague notes, Ms. Bent “had no reason to know of a second version of Dr. Dua’s report”. There was no mention of any such document by the person best-placed to draw it to counsel’s attention — Dr. Platnick — who omitted the existence of a second version in his report, along with any mention of his interactions with Dr. Dua. The insurer in Dr. Dua’s case, moreover, settled on terms consistent with Dr. Dua’s *first* report, leaving no reason for Ms. Bent to assume that a follow-up report had been produced with a different conclusion as to catastrophic impairment.

[249] Perhaps most significantly, Ms. Bent only referred to the incident involving Dr. Dua after going through a *second* arbitration, the one involving Dr. Carpenter, in which Dr. Platnick again produced a report which, on its face, misrepresented the catastrophic impairment determinations of the medical experts. There is simply no basis, in these circumstances, to conclude that Ms. Bent acted with carelessness, let alone reckless disregard or indifference to the truth.

[250] The Court of Appeal also emphasized Ms. Bent’s failure to refer to her notes about the case involving Dr. Dua. Ms. Bent, however, fully explained why she had no reason to refer to her notes: she remembered the case clearly because her client was suicidal and there had been significant delay by the insurer. Dr. Dua’s first report supports Ms. Bent’s description about her client’s serious condition. And the Financial Services Commission of Ontario noted that Ms. Bent’s complaint of delay against the insurer was well-founded. There is therefore nothing in the record to support a finding of malice against Ms. Bent, either due to recklessness or on any other basis.

[251] A final point on malice. The motion judge concluded that there was no evidence to reasonably support the inference that Ms. Bent acted with malice in publishing her email, a conclusion fully supported by the record. It was his task to assess the evidence before him and, from his review of the record, to determine the likelihood of Dr. Platnick’s establishing malice at trial. His conclusions are entitled to deference since, as this Court has said, appellate deference is not limited to proceedings involving *viva voce* testimony (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 24-25). “[N]umerous policy reasons” support a deferential stance to first-level decision-makers — including “[l]imiting the [n]umber, [l]ength and [c]ost of [a]ppeals”, a central policy objective underpinning the s. 137.1 regime (paras. 16 and 32; see also *Courts of Justice Act*, s. 137.3; Ministry of the Attorney General, at pp. 5 and 18). Moreover, showing deference to the assessments of a motion judge that involve a review of the record, absent an error of law or palpable and overriding error

of fact, is the approach this Court has endorsed for summary judgment motions (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 81). I see no reason for having a different one for motions under s. 137.1.

[252] Based on the foregoing, Ms. Bent’s defence of qualified privilege has a “real prospect of success”, the standard this Court endorsed in *Pointes Protection*. As a result, Dr. Platnick’s defamation action must be dismissed.

[253] Nonetheless, there are aspects of the weighing test set out in s. 137.1(4)(b) worth exploring in light of my colleague’s conclusion that the weighing exercise favours Dr. Platnick.

[254] Section 137.1(4)(b) states:

(4) A judge shall not dismiss a proceeding under subsection (3) 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.

[255] The first part of the weighing exercise is the harm “likely to be or have been suffered” by the party bringing the proceeding. Harm must have occurred “as a result of” the expression of the party being sued.

[256] Ms. Bent’s email was sent on a confidential Listserv to members of the OTLA. The bulk of the harm alleged by Dr. Platnick, however, occurred because of the *leak* of the email. The answer to whether the harm caused by the leak of the email was “a result of [Ms. Bent’s] expression” depends on whether Ms. Bent could be held legally liable for the leak.

[257] As a general rule, “a person is responsible only for his or her own defamatory publications, and not for their repetition by others” (Brown, at pp. 7-51 to 7-61; see also *Crookes v. Newton*, [2011] 3 S.C.R. 269). There is an exception where the “republication is the natural and probable result of the original publication” (*Breeden v. Black*, [2012] 1 S.C.R. 666, at para. 20, referencing Raymond E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, at pp. 253-54). The reasonable foreseeability of the leak of the email is therefore key.

[258] The Listserv was exclusively comprised of OTLA members all of whom were bound not only by a confidentiality undertaking not to disclose the information, but also by Ontario’s *Rules of Professional Conduct*, which emphasize the importance of lawyers’ abiding by their undertakings. To suggest that Ms. Bent ought to have foreseen that Listserv members — all lawyers — who were bound by a confidentiality undertaking would breach that undertaking in possible violation of their professional obligations, amounts to asserting that a lawyer cannot reasonably expect another lawyer to honour his or her undertaking to protect confidential or privileged information.

[259] This amounts to a presumption of professional misconduct. And, in effect, it suggests that lawyers can be held liable for the professional misconduct of colleagues whom they trusted, on reasonable grounds, to act in accordance with their professional duty to “strictly and scrupulously fulfill” their undertakings to protect confidential information. That, in my respectful view, would rupture the foundation of the expectations lawyers have in their communications with one another on behalf of their respective clients.

[260] Any harm resulting from the leak, therefore, was caused by unforeseen and unforeseeable communication by others, not by Ms. Bent sending the email to its intended audience of lawyers on the Listserv.

[261] The second part of the weighing exercise is the public interest in protecting Ms. Bent’s expression. Ms. Bent’s email addressed matters of critical importance to the administration of justice. Her experience in the two proceedings involving Dr. Platnick illuminated the practices of an expert who frequently acts for insurers and whose summary reports she reasonably believed did not accurately and fully represent the clinical evaluations conducted during the claims assessment process. Communicating this information to members on the OTLA Listserv — and advising them to always obtain full disclosure of insurers’ files — encouraged protective disclosure practices for lawyers and alerted them to be cautious in their dealings with assessors and with insurers’ experts.

[262] There is also a broader public interest in protecting Ms. Bent’s expression. Permitting a \$16.3 million defamation lawsuit to proceed against her in these circumstances would produce a considerable chilling effect. Lawyers — or for that matter any professional — with reasonable grounds to believe they have seen or experienced misconduct, will be significantly inhibited in their ability to communicate that cautionary information to others, even on a confidential basis. There was, as the motion judge identified, evidence that Dr. Platnick’s lawsuit has already had such a chilling effect.

[263] Amplifying the risk of a chilling effect is Dr. Platnick’s excessive claim for damages in the amount of \$16.3 million, a clear reflection of the “punitive or retributory purpose” which is the hallmark of a classic SLAPP suit (*Pointes Protection*, at paras. 78-81). This informs why allowing his proceeding to continue would undermine the public interest by deterring future expression (paras. 80-81).

[264] This is not a question of encouraging the needless defamation of individuals or discouraging reasonable due diligence, as Dr. Platnick claims. It is a question of ensuring that the goals of the legislation are preserved, by protecting individuals from liability for holding others to account when they reasonably believe misconduct has occurred. There is no doubt that reputation should be protected from gratuitous attacks, but sometimes, as in this case, protecting expression on matters of public interest outweighs the harm to individual reputation. If the powerful vision of s. 137.1 set out in *Pointes Protection* is to be given meaningful effect, vindication of

reputation — a value engaged in all defamation cases — cannot be allowed to overwhelm the analysis and goals mandated by the statute.

[265] This brings us finally to Dr. Platnick’s motion to admit fresh evidence.

[266] Dr. Platnick has submitted a package of “fresh evidence” in a 214-page motion record, which includes an assortment of unsworn correspondence, pleadings in related lawsuits, and proposed amendments to those pleadings.

[267] Most of the material is clearly irrelevant and inadmissible.<sup>10</sup> What is left are two unsworn letters sent by email from counsel for the Insurance Business magazine to counsel for Dr. Platnick. In these emails, counsel for the magazine conveys information from the magazine’s then-associate editor, who claims that he interviewed Ms. Bent prior to the magazine’s publishing her confidential communication in an article in its December 29, 2014 issue.

[268] There was no reference to an interview with Ms. Bent in the article.

[269] Dr. Platnick first tried to admit these emails after the hearing of Ms. Bent’s motion to dismiss his lawsuit on the merits and while Dunphy J.’s decision was under reserve. The motion judge refused to admit the evidence, describing the attempt to do so as a “clear abuse of process” (2016 ONSC 7474). The Court of

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<sup>10</sup> The letter from Dr. Dua has no relevance to whether Ms. Bent has a valid defence of qualified privilege.

Appeal noted that “the motion judge’s order involved the exercise of his discretion to control the proceedings before him and [Dr. Platnick] offers no basis upon which this court could properly interfere with the exercise of that discretion”.

[270] Before this Court, Dr. Platnick has renewed his attempt to admit the two emails as fresh evidence. To succeed, he must satisfy each element of the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases . . . .
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [p. 775]

[271] If we admit into the 15-volume appeal record before this Court these 2 unsworn and untested emails, emails relating to issues that were, from the day Dr. Platnick brought his defamation action, live and in serious dispute but unchallenged and unexplored by him, and emails that were rejected as fresh evidence 4 years ago by the motion judge, then we are essentially declaring that the *Palmer* test does not apply in appeals of s. 137.1 motions before our Court. The emails, in my respectful view, are neither “fresh” nor “evidence”.

[272] The first requirement for the admission of fresh evidence under *Palmer* is that due diligence has been demonstrated, that is, whether Dr. Platnick *could have* obtained the emails prior to the hearing before Dunphy J. had he made reasonable efforts (*Palmer*, at p. 775; *R. v. Sipos*, [2014] 2 S.C.R. 423, at para. 29). The question is not, as Dr. Platnick claims, whether the emails were actually in his possession before the hearing.

[273] The unadorned chronology makes clear that no efforts, let alone reasonable ones, were made to get evidence about the disputed interview before the motion hearing. Dr. Platnick started his defamation action on January 27, 2015, 17 months before the hearing of Ms. Bent's motion to dismiss. Dr. Platnick himself put the issue of an interview in play in his statement of claim:

The defendant, Bent gave an interview to the Insurance Business Magazine to bring further attention to the defamatory communication and maximize the harm, injury, embarrassment and humiliation to the plaintiff and his family;

The defendants knew that the Insurance Business Magazine reached a large and particularly important audience for the plaintiff and that the on-line version of its article . . . was still widely accessible . . . .

[274] In her statement of defence, filed on March 31, 2015, Ms. Bent expressly denied giving such an interview:

. . . Ms. Bent denies providing an interview to *Insurance Business Magazine* in respect of the Confidential Communication and/or authorizing the publication of the Confidential Communication to Donald

Horne for an article appearing in the December 29, 2014 issue of *Insurance Business*.

[275] On April 27, 2016, Ms. Bent commenced the process to dismiss Dr. Platnick's action by way of a motion pursuant to s. 137.1. In her supporting affidavit, she once again denied giving an interview to the magazine.

[276] On April 28, 2016, following a scheduling hearing with the motion judge, the parties were given a hearing date and a timetable to file their materials. In none of his numerous objections to the timetable did Dr. Platnick's counsel mention the need for more time to pursue evidence about the existence of an interview.

[277] On June 6, 2016, Ms. Bent was cross-examined on her affidavit. The issue of the interview was not raised by Dr. Platnick's counsel. There is, in fact, no indication that he took steps to obtain relevant information or evidence about it from anyone at the magazine or its representatives in the two months between the filing of Ms. Bent's motion to dismiss and the hearing on June 27, 2016. Nor at any other time before then did he follow up on the obvious conflict in the pleadings about the existence of an interview.

[278] On June 13, 2016, the magazine filed its statement of defence in the related defamation proceeding started by Dr. Platnick for its republication of Ms. Bent's email. The claim was for \$16.3 million in damages. The statement of defence contained two sentences stating that the magazine's associate editor had sought and

obtained Ms. Bent’s permission before publishing her email as part of an article in the magazine.

[279] When the hearing before Dunphy J. took place two weeks later on June 27, 2016, Dr. Platnick did not mention the reference to an interview in the magazine’s statement of defence, let alone request an adjournment to pursue further evidence on that basis.

[280] It was not until July 5 — over three weeks after the magazine filed its statement of defence — that counsel for Dr. Platnick corresponded by email with counsel for the magazine. Two of the emails from these exchanges are the subject of Dr. Platnick’s motion to admit fresh evidence. In them, counsel for the magazine claims that the magazine’s associate editor told him that he sent an email to Ms. Bent attaching the article which referenced Dr. Platnick, and then had a discussion with Ms. Bent in which she acknowledged being the author of the email in the article and voiced no objection to its publication.

[281] On November 8, 2016, over four months after the motion hearing and while the decision was under reserve, Dr. Platnick sought to enter these emails into the record as fresh evidence. The motion judge denied the motion, stating:

The plaintiff had 18 months to pursue that issue before argument of the [s. 137.1](#) motion on its merits on June 27, 2016. The issue of the alleged “interview” given [b]y Ms. Bent and Ms. Bent’s position with respect to it was plainly joined in the pleadings by March 31, 2015. It was also squarely raised in Ms. Bent’s affidavit filed on this motion that that

affidavit was the object of cross-examination . . . . Dr. Platnick’s failure to cross-examine on that issue reflects his own tactical choices but cannot form the basis of a last-minute request to open new avenues for resisting the making of an order under s. 137.1 of the *CJA*. Permitting such a late amendment would substantially frustrate the intent of s. 137.1(6) in my view and ought not to be permitted.

...

The fact of the matter is that (i) *all* of the fresh allegations are matters that were either known or readily discoverable by the plaintiff in the 18 months between his action being commenced and the hearing of the motion to dismiss it; and (ii) all or substantially all of the matters raised in the amended pleadings are addressed in the pleadings already or referenced in the record that was already before me on June 27, 2016. The proposed amendments can form no basis to request argument on the motion to be re-opened or the process to be started afresh.

...

Is it otherwise in the interests of justice that I allow the evidence to be filed at this stage? In my view it is not. To the contrary, allowing these two affidavits to be added to the record of a motion already fully-argued and taken under reserve would be a clear abuse of process. [Emphasis in original.]

(paras. 36, 38 and 72; see also paras. 44-46 (CanLII))

[282] No opportunity was ever taken — or sought — by Dr. Platnick to determine whether Ms. Bent gave either an interview to the magazine or her permission to publish the email. Dr. Platnick was served with Ms. Bent’s motion to dismiss his lawsuit 15 months after filing his statement of claim. In that time, he took no steps to pursue evidence about an interview the existence of which he himself had raised in his pleadings. Even after Ms. Bent filed her motion to dismiss, Dr. Platnick made no efforts to obtain evidence about whether there had been an interview until

well after the conclusion of the hearing of the motion on its merits and then only by way of untested emails.

[283] Dr. Platnick has offered no reasonable explanation for why he did not pursue the contested issue of the existence of an interview.

[284] Dr. Platnick claims that he was only alerted to this issue after reviewing the magazine's statement of defence. But it is hard to see how the magazine's pleading brought something to his attention that he himself had raised in the statement of claim he had filed 15 months earlier. The fact that there are expedited timelines does not explain the absence of any efforts at any time to pursue the issue, or ask for an adjournment to do so.

[285] Dr. Platnick also argued that since Ms. Bent had denied having an interview with the magazine in her statement of defence, he had no reason to cross-examine her about it. But conflicts in the parties' pleadings are precisely the sorts of issues that are meant to be explored in cross-examination.

[286] Finally, Dr. Platnick argued that there was no judicial guidance on interpreting s. 137.1 when he prepared his motion record. But even on a plain reading of the legislation, Dr. Platnick had to be aware that he was required to prove that Ms. Bent had no valid defences and that he had suffered harm as a result of her expression. Given the nearly 1000-page record he submitted for the motion hearing, there is no doubt that Dr. Platnick understood the importance of providing evidence

on these issues. Yet even though he challenged the defences available to Ms. Bent on several grounds, he did not do so on the issue of the existence of an interview, the basis of his seeking to introduce fresh evidence. He clearly regrets his decision to leave this issue unexplored, but as the motion judge noted, “Regrets about arguments not made and evidence not led are part of the life of an advocate . . . . [D]ecisions must be made and hearings must end.”

[287] There is, in short, no evidence of anything approaching due diligence in this case.

[288] The importance of a finding of lack of due diligence varies by context (*Palmer*, at p. 775; Donald J. M. Brown, with the assistance of David Fairlie, *Civil Appeals* (loose-leaf), at pp. 10-19 to 10-21). In the context of a s. 137.1 motion, it seems to me that an approach is necessary that aligns with the purposes of the legislation. The timelines imposed by s. 137.2, the prohibition on amending pleadings without leave in s. 137.1(6), and the direction in s. 137.3 that appeals be heard “as soon as practicable”, are all reflections of the overarching goal of expediting proceedings. These are statutory directions, not inconveniences to be circumvented by the subsequent attempt to admit evidence a party could have discovered through reasonable efforts. It would “undermin[e] the rationale” of the legislative regime if parties could “ignore the obligation to produce evidence of merit before the trial court, and then rely on a fresh evidence application on appeal to defeat summary

dismissal” (*McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375, at para. 21 (CanLII)).

[289] Aggravating this concern in the present case, is the fact that admitting the emails would require the Court to overturn the factual findings of the motion judge. The motion judge exercised his discretion not to admit the evidence on the basis that it was “readily discoverable” well before the motion hearing, and that Dr. Platnick had not offered a “*reasonable* explanation” for failing to place such evidence before the court at least by the time he cross-examined Ms. Bent (emphasis added). The motion judge explained at length why Dr. Platnick had not exercised due diligence in pursuing the emails which he now claims to be critical to resolving these appeals. The motion judge noted, correctly, that the possibility of an interview was “plainly joined in the pleadings” many months before the motion hearing; that Dr. Platnick had taken no steps to pursue evidence about the issue for 18 months; that he had failed to cross-examine on the issue; and that he had not sought leave to file any relevant evidence at the motion hearing even though the magazine had filed its statement of defence 2 weeks before the hearing started.

[290] Disregarding the findings of the motion judge would frustrate the goals of s. 137.1. Allowing parties a perpetual right to try to have previously-rejected evidence admitted will, with respect, encourage more attempts to “broaden the field of combat” on appeal (*Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*,

[2000] 1 S.C.R. 44, at para. 10) — the inverse of the legislature’s intent to ensure expedited proceedings under s. 137.1.

[291] Due diligence protects against dilatory evidence-gathering that interferes with the expeditious and fair resolution of proceedings. Concerns about fairness are heightened when, as here, a party makes no efforts to pursue a relevant issue raised in their own pleadings until *after* they have had the benefit of having their case tested at a hearing.

[292] Like the Court of Appeal, I see no basis for interfering with the motion judge’s exercise of discretion. I would, accordingly, refuse to admit the emails on the basis of lack of due diligence.

[293] The emails, in any event, do not represent “credible” evidence, that is, evidence “reasonably capable of belief”. They are unsworn and untested. In addition, the statements from counsel for the magazine about statements by the magazine’s associate editor, are double hearsay from a party embroiled in a \$16.3 million lawsuit against Dr. Platnick in which his “discussion” with Ms. Bent was a potentially decisive issue.

[294] Controversial, untested evidence on matters “that concern the immediate parties” and purport to “disclose who did what, where, when, how and with what motive or intent” should not be admitted either as fresh evidence, or as evidence,

period. The Court has refused to admit such evidence even where it related only to background legislative facts (*Public School Boards' Assn.*, at para. 16).

[295] The claims about the existence of an “interview”, moreover, are directly contradicted by the evidence properly in the record, and are uncorroborated by any objective evidence. The magazine article itself, for example, does not mention any communication with Ms. Bent, and there is no record of her being interviewed by anyone at the magazine.

[296] Finally, the emails cannot reasonably be expected to have affected the result of Ms. Bent’s motion to dismiss Dr. Platnick’s defamation case. Because they contain untested hearsay, the emails would not have been admissible for the truth of their contents (see *Bukshtynov v. McMaster University*, 2019 ONCA 1027, at paras. 24-25 (CanLII); Graham Underwood and Jonathan Penner, *Electronic Evidence in Canada* (loose-leaf), at pp. 13-13 to 13-16). And, in any event, they address almost none of the issues relevant to qualified privilege. They do not address whether Ms. Bent’s communication was made in circumstances attracting qualified privilege, nor do they assist in resolving whether sending that message to Listserv members was reasonably appropriate in the circumstances. They have negligible probative value in establishing Ms. Bent’s state of mind nearly two months before the republication of her email by the magazine, and are entirely consistent with Ms. Bent’s honest belief in the truth of her comments and the reasonableness of those beliefs.

[297] Even on the narrow issue of republication, the emails do not undermine the “real prospect” that Ms. Bent’s defence of qualified privilege will succeed at trial. At its highest, Dr. Platnick’s argument for how the evidence could be expected to affect the result is this: the emails *might* lead to admissible evidence at trial from the magazine’s associate editor about a possible discussion he had with Ms. Bent; which *might* be accepted by a trier of fact despite minimal corroboration and despite Ms. Bent’s denial of such a discussion; which *might*, depending on the details of the discussion, allow a trier of fact to infer that Ms. Bent implicitly authorized republication; which *might* result in Ms. Bent being held responsible for the content of an article which, in any event, was not published until after most of the harm alleged by Dr. Platnick had occurred. This speculative line of reasoning could not possibly have affected the motion judge’s decision to dismiss Dr. Platnick’s lawsuit.

[298] The admission of fresh evidence on appeal is an “exceptional” step (*R. v. M.(P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 411). The *Palmer* criteria reflect a “broader judicial policy to achieve finality on the factual record at the trial level, with very limited exceptions” (*Public School Boards’ Assn.*, at para. 10; see also *Iroquois Falls Power Corp. v. Ontario Electricity Financial Corp.*, 2016 ONCA 271, 398 D.L.R. (4th) 652, at para. 49). The matters in issue between the parties are supposed to “narrow rather than expand as [a] case proceeds up the appellate ladder” (*Public School Boards’ Assn.*, at para. 10).

[299] Admitting the two emails would do exactly the opposite. It would require the Court to overturn the exercise of discretion by the motion judge, ignore Dr. Platnick's demonstrable lack of due diligence, and accept unsworn, untested, hearsay evidence, all to obtain information that would not, in any event, have affected the result of Ms. Bent's dismissal hearing. Such an outcome, in my respectful view, would not only frustrate the purposes of s. 137.1, it would inexplicably depart from our jurisprudence on the admission of fresh evidence.

[300] I would therefore dismiss the motion to adduce fresh evidence.

[301] I would allow the appeals with costs throughout.

*Appeals dismissed, ABELLA, KARAKATSANIS, MARTIN and KASIRER JJ. dissenting.*

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*Solicitors for the appellant Lerner's LLP: Lax O'Sullivan Lisus Gottlieb, Toronto.*

*Solicitors for the respondent: Danson Recht, 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 West Coast Legal Education and Action Fund, the Atria 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.*

*Solicitor for the intervener the Canadian Broadcasting Corporation: Canadian Broadcasting Corporation, Toronto.*

*Solicitors for the intervener the Barbra Schlifer Commemorative Clinic: Birenbaum Law, Toronto; Torys, 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.*

**COURT OF APPEAL FOR ONTARIO**

**CITATION: Bondfield Construction Company Limited v. The Globe and Mail Inc.,  
2019 ONCA 166  
DATE: 20190304  
DOCKET: C65318**

**Doherty, Pardu and Nordheimer JJ.A.**

**BETWEEN**

**Bondfield Construction Company Limited**

**Responding Party (Appellant)**

**and**

**The Globe and Mail Inc., Phillip Crawley, Sylvia Stead,  
Greg McArthur, Robyn Doolittle and Karen Howlett**

**Moving Parties (Respondents)**

Kevin O'Brien and Karin Sachar, for the appellant

Carlos Martins and Andrew MacDonald, for the respondents

Heard: February 13, 2019

On appeal from the order of Justice E.M. Morgan of the Superior Court of Justice, dated March 28, 2018, with reasons reported at 2018 ONSC 1880, and from the costs order of Justice E.M. Morgan dated May 29, 2018, with reasons reported at 2018 ONSC 3347.

**Doherty J.A.:**

**I. OVERVIEW**

[1] The respondents (referred to collectively as the “Globe”) published a series of articles between September 2015 and February 2016 about the appellant’s (“Bondfield”) successful bid on a \$300 million contract to build a new critical care

facility at St. Michael's Hospital in Toronto ("SMH"). Among other things, the articles addressed the connection between Bondfield and its president John Aquino and Vas Georgiou, a senior executive at SMH who was on the committee that awarded the construction contract to Bondfield. Bondfield sued the Globe for \$125 million, asserting that the Globe's articles falsely alleged a corrupt connection between Mr. Aquino and Mr. Georgiou that had played a role in Bondfield obtaining the contract.

[2] The Globe defended on the basis that the articles were not defamatory but rather focused on Mr. Georgiou's checkered past, and the undisclosed conflict of interest in the bidding process flowing from Mr. Georgiou's and Mr. Aquino's common business interests. The Globe also advanced various defences including fair comment and responsible communication.

[3] The Globe brought a motion under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to dismiss Bondfield's action claiming that the lawsuit was brought to silence the Globe on matters of significant public importance. The motion judge allowed the Globe's motion, dismissed the action and awarded the Globe costs on a substantial indemnity basis fixed at \$500,000.

[4] Bondfield appeals. Bondfield's primary argument rests on the submission that the motion judge misinterpreted the provisions in s. 137.1, and in particular, s. 137.1(4)(a)(ii). Bondfield submits that this court, in a series of decisions

released after the motion judge released his reasons, has interpreted s. 137.1 in a fundamentally different way than did the motion judge. Bondfield argues that on a correct interpretation of s. 137.1, the Globe's motion to dismiss Bondfield's action should have failed.

[5] The Globe accepts that certain passages in the motion judge's reasons are inconsistent with this court's subsequent interpretation of s. 137.1. The Globe argues, however, that the motion judge's application of s. 137.1 to the facts as he found them is consistent with this court's approach. Alternatively, the Globe urges this court to perform its own s. 137.1 analysis. The Globe submits that applying the section as this court has interpreted it leads to the dismissal of Bondfield's action.

## **II. THE MOTION JUDGE'S ANALYSIS**

[6] On the s. 137.1 motion, the Globe had to satisfy the motion judge that the articles in issue related to a matter of public interest (s. 137.1(3)). If the Globe met that onus, the onus shifted to Bondfield to establish three things on the balance of probabilities:

- There were grounds to believe that the claim had "substantial merit" (s. 137.1(4)(a)(i))
- There were grounds to believe that the Globe did not have a "valid defence" (s. 137.1(4)(a)(ii))

- The harm suffered or likely to be suffered by Bondfield as a result of the articles was sufficiently serious that the public interest in allowing the lawsuit to continue outweighed the public interest in protecting the Globe's freedom of expression (s. 137.1(4)(b))

[7] The motion judge described the subject matter of the challenged articles as the operation of the procurement process in respect of the contract to build the critical care facility at SMH. That contract involved the expenditure of a very large amount of public money: para. 34-35. The motion judge characterized the topic as a matter of public interest. The parties accept that finding. The Globe met its onus under s. 137.1(3).

[8] The motion judge then turned to the merits inquiry required under s. 137.1(4)(a). He first considered whether Bondfield had satisfied him that its claim had substantial merit. The motion judge considered the competing interpretations of the articles that had been advanced by Bondfield and the Globe. He said, at para. 42:

[T]he average Globe reader would almost inevitably conclude that Georgiou was a fraudster who undermined the fairness and integrity of the SMH procurement process. The reader would further conclude that Bondfield had won its bid as a result of its relationship and collusion with Georgiou. [Emphasis added.]

[9] The motion judge had little difficulty based on the meaning he ascribed to the articles in concluding that Bondfield had provided grounds to believe that it

could make out the elements of a defamation claim. In other words, there was reason to believe that Bondfield's claim had "substantial merit." Bondfield cleared the hurdle in s. 137.1(4)(a)(i). This aspect of the motion judge's ruling is not challenged on appeal.

[10] The motion judge's analysis of the "no valid defence" requirement in s. 137.1(4)(a)(ii) is in issue on the appeal. The motion judge explained his interpretation of that subsection at para. 46:

What is clear is that there cannot be an arguable point on the defence side. That is, a defense that could go either way – i.e. one that could potentially apply but it is not clear at this stage whether or not it will actually succeed – does not meet the statutory criterion of "no valid defence to the proceeding." [Citation omitted.] In order to meet the [s. 137.1(4)(a)(ii)] criterion, Bondfield must establish that the Globe has no valid defence whatsoever. [Emphasis added.]

[11] The motion judge proceeded to accurately and clearly set out the elements of the fair comment defence. He then said, at para. 56:

It is therefore evident at this stage of the action that the Globe has a potentially valid defence of fair comment. I reiterate that this finding is not that the defence is successful such as might be made at the conclusion of a trial or summary judgment motion. Rather, it is a finding made at an early stage of the action and within the terms of s. 137.1(4)(a)(ii) of the *CJA* that a valid defence potentially exists. On the state of the record before me, there is no reason to conclude that the defence of fair comment is unavailable to the Globe or that the defence cannot succeed.

[12] If the above passages left any doubt about the motion judge's interpretation of the "no valid defence" provision, the trial judge's comments near the end of his reasons when discussing the effect of his interpretation of s. 137.1 remove that doubt. He said, at para. 89:

In requiring an otherwise serious and meritorious claim to be dismissed because at this stage a potential defence cannot be eliminated, s. 137.1 of the *CJA* risks tipping the balance further in the publisher's favor than the anti-SLAPP policy requires.

[13] The motion judge recognized that his finding that Bondfield had not cleared the "no valid defence" hurdle in s. 137.1(4)(a)(ii) necessitated the dismissal of Bondfield's claim. He went on, however, to consider s. 137.1(4)(b). He ultimately concluded that the balancing of public interests identified in that clause favoured proceeding with Bondfield's claim.

### **III. DID THE MOTION JUDGE ERR IN HIS INTERPRETATION OF THE "NO VALID DEFENCE" PROVISION?**

[14] The motion judge did not have the benefit of this court's reasons in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161, and related cases. His interpretation of s. 137.1(4)(a)(ii) has been overtaken by those cases. As explained in *Pointes*, at para. 84:

The onus rests on the plaintiff to convince the motion judge that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed.

[15] The motion judge placed the onus on Bondfield to show that “the Globe has no valid defence whatsoever.” As explained in *Pointes*, s. 137.1(4)(a)(ii) imposes a significantly less onerous burden on Bondfield. Bondfield was required to show that a reasonable trier could conclude that the Globe did not have a valid defence. Bondfield would meet that onus if it showed that a reasonable trier could reject all of the various defences put in play by the Globe. A determination that a defence “could go either way” in the sense that a reasonable trier could accept it or reject it is a finding that a reasonable trier could reject the defence. That is as far as Bondfield had to go to meet its onus under s. 137.1(4)(a)(ii). The motion judge erred in law in holding that Bondfield was required to show that the Globe had no valid defence. Bondfield was only required to show that a reasonable trier could reject the defences advanced by the Globe.

[16] On my reading of the motion judge’s reasons, had he had the benefit of the analysis in *Pointes*, he would have found that Bondfield had met its onus to show grounds to believe that the Globe had no valid defence. The motion judge accepted that the Globe had “a potentially valid defence of fair comment.” However, he also accepted that Bondfield had a “serious and meritorious claim.” The motion judge saw this as a case that “could go either way.”

[17] My assessment of the record arrives at the same conclusion. The Globe advanced at least two defences, fair comment and responsible communication, that could reasonably be accepted by a trier. However, the ultimate success of

those defences depended on whether the trier would make certain findings. For example, in respect of the fair comment defence, a reasonable trier could view the statements suggesting corruption and collusion in the bidding process as factual assertions or as statements of opinion. If the trier characterized them as the former, the fair comment defence would not succeed. If the trier characterized them as statements of opinion, the defence could well succeed. In short, there was a reasonable prospect that the Globe's fair comment defence could succeed or could fail. That was enough to get Bondfield past s. 137.1(4)(a)(ii).

[18] In respect of the responsible communication defence, the Globe was required to show first that the subject matter of the publications was of public interest, and second, that the publication was responsible, in the sense that reasonable steps were taken to ensure the overall fairness of the publication and the accuracy of any factual assertions in the publication: *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 98; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54, at para. 28. On my review of the record, both the overall fairness of the Globe's articles and the reasonableness of the steps taken to validate the accuracy of any factual assertions in the articles are open to legitimate dispute. A trier could reasonably find for or against the Globe on these issues. Bondfield established grounds to believe that the responsible communication defence would fail.

[19] I would hold that Bondfield met its onus under s. 137.1(4)(a)(ii) to show grounds to believe that a reasonable trier could conclude that the Globe did not have a valid defence. Bondfield cleared both merits hurdles in s. 137.1(4)(a).

#### IV. SHOULD THE CLAIM HAVE BEEN DISMISSED ON THE “PUBLIC INTEREST” BALANCING IN S. 137.1(4)(b)?

[20] As indicated above, the motion judge considered the application of s. 137.1(4)(b) although on his analysis it was unnecessary to do so as he had determined that Bondfield’s action must be dismissed pursuant to s. 137.1(4)(a)(ii). The motion judge found that the public interest balancing in s. 137.1(4)(b) favoured permitting Bondfield to proceed with its action. Several of the factors identified by the motion judge were subsequently acknowledged by this court in *Pointes* and related cases to be relevant to the balancing process in s. 137.1(4)(b): see *Pointes*, at paras. 85-95; *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690, at paras. 37-44.

[21] Normally a deferential standard of review will apply to a motion judge’s analysis of the competing public interests in s. 137.1(4)(b): *Pointes*, at para. 97. However, given that the motion judge did not have the benefit of this court’s subsequent decisions, I will engage in a *de novo* balancing of the competing public interests. I come to the same conclusion as did the motion judge.

[22] In *Platnick v. Bent*, 2018 ONCA 687, at para. 98, this court suggested that the public interest balancing in s. 137.1(4)(b) could begin with the question “Does this claim have the hallmarks of a classic SLAPP?” This litigation has none of those hallmarks.

[23] There is no history of Bondfield using litigation or the threat of litigation to silence critics. There is no financial or other power imbalance that favours Bondfield over the Globe. There is no suggestion of any punitive or retributory purpose motivating Bondfield’s lawsuit: *Platnick v. Bent*, at para. 99.

[24] Nor is this a case in which Bondfield has failed to produce any evidence of loss in the form of monetary damages. To the contrary, Bondfield has produced evidence that it has lost contracts, potential construction partners, and potential funding from lenders as a result of the articles written in the Globe. These losses, if connected in whole or in part to any defamatory statements, would result in a significant damage award in favour of Bondfield.

[25] I hasten to add that the Globe has a good argument that any losses suffered by Bondfield are not causally connected to the alleged defamation but are, in fact, the result of Bondfield’s failure to abide by the rules pertaining to the bidding process and, in particular, its failure to disclose in the course of that process its business connections with Mr. Georgiou. In my view, however, the s. 137.1 motion was not the place to resolve the causal connection issue as it

related to the alleged damages. For the purposes of asserting harm suffered or likely to be suffered, it was enough that Bondfield presented specific and credible evidence of potentially significant pecuniary damages flowing from the defamatory statements: *Pointes*, at para. 90-92. Like the motion judge, I think Bondfield made out a formidable case of significant harm suffered or likely to be suffered as a result of the articles should they be found to be defamatory.

[26] There is, however, much to be said for the public interest in protecting the Globe's freedom of expression. The articles dealt in considerable depth with the integrity of the contract bidding process on a project that involved millions of dollars in public funds. The community clearly has a significant interest in that subject. By engaging in a lengthy and no doubt expensive investigation, the Globe was able to shine considerable public light on that process and raise legitimate concerns about the process. There is a very real public benefit to this kind of investigative reporting.

[27] Whatever may ultimately be determined about the quality of the Globe's investigation and the fairness of the reporting, there is nothing in this record that could reasonably suggest that the Globe was motivated by anything other than a desire to inform the public about the facts the Globe's investigation had revealed. Similarly, the Globe's articles are devoid of deliberate falsehoods, hyperbole, gratuitous personal attacks, or other similar characteristics that would diminish the public interest in protecting the expression: *Pointes*, at para. 94.

[28] There are powerful arguments to be made on both sides of the public interest balancing required in s. 137.1(4)(b). In the end, I view this as a case in which Bondfield has a legitimate argument that it has been defamed and suffered significant damages as a result of the Globe articles. The Globe has legitimate arguments, both that the content is not defamatory and that it has defences to any parts that are defamatory. Unlike SLAPP suits which reek of the plaintiff's improper motives, claims of phantom harm, and bullying tactics, this litigation smells of a genuine controversy. It should be tried on its merits.

#### **V. THE APPLICATIONS FOR LEAVE TO APPEAL COSTS**

[29] Both sides sought leave to appeal the costs order made by the motion judge.

As I would allow the main appeal, the costs order made by the motion judge falls. There is no need to address the applications for leave to appeal costs.

#### **VI. CONCLUSION**

[30] For the reasons set out above, I would allow the appeal, set aside the dismissal of the action and remit the matter to the Superior Court.

[31] The parties may provide submissions of five pages or less in respect of the costs of the motion and the costs of the appeal. They should exchange those submissions and file them with the court by March 21, 2019.

“DD”

“I agree G. Pardu J.A.”

“I agree I.V.B. Nordheimer J.A.”

**Ihor Bardyn, Bohdan Onyschuk, Bohdan Zarowsky, Q.C., and W. Yurij Danyliw, Q.C.** Appellants

v.

**Y. R. Botiuk** Respondent

and between

**B. I. Maksymec and Maksymec & Associates Ltd.** Appellants

v.

**Y. R. Botiuk** Respondent

INDEXED AS: **BOTIUK v. TORONTO FREE PRESS PUBLICATIONS LTD.**

File Nos.: 23517, 23519.

1994: December 8; 1995: September 21.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Libel and slander — Joint liability — Defences — Qualified privilege — Appellants alleging in three different documents that respondent lawyer had breached promise to give certain fees he was paid to community organization — Whether appellants defamed respondent — Whether appellants jointly and severally liable for damage caused by all three publications — Whether defence of qualified privilege available.*

*Libel and slander — Damages — Aggravated damages — Special damages — Appellants alleging in three different documents that respondent lawyer had breached promise to give certain fees he was paid to community organization — Combined effect of documents clearly defamatory — Whether appellants motivated by malice — Whether award for aggravated damages should stand — Whether loss of business sufficiently pleaded to warrant special damages award.*

**Ihor Bardyn, Bohdan Onyschuk, Bohdan Zarowsky, c.r., et W. Yurij Danyliw, c.r.** Appellants

c.

**Y. R. Botiuk** Intimé

et entre

**B. I. Maksymec et Maksymec & Associates Ltd.** Appellants

c.

**Y. R. Botiuk** Intimé

RÉPERTORIÉ: **BOTIUK c. TORONTO FREE PRESS PUBLICATIONS LTD.**

N<sup>os</sup> du greffe: 23517, 23519.

1994: 8 décembre; 1995: 21 septembre.

Présents: Les juges La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Libelle et diffamation — Responsabilité conjointe — Moyens de défense — Immunité relative — Appellants alléguant, dans trois documents distincts, que l'avocat intimé a manqué à sa promesse de donner à un organisme communautaire certains honoraires qu'il avait touchés — Les appelants ont-ils diffamé l'intimé? — Les appelants sont-ils solidairement responsables du préjudice causé par les trois publications? — Peut-on invoquer le moyen de défense fondé sur l'immunité relative?*

*Libelle et diffamation — Dommages-intérêts — Dommages-intérêts majorés — Dommages-intérêts spéciaux — Appellants alléguant, dans trois documents distincts, que l'avocat intimé a manqué à sa promesse de donner à un organisme communautaire certains honoraires qu'il avait touchés — Effet combiné des documents clairement diffamatoire — Les appelants étaient-ils motivés par la malveillance? — L'attribution de dommages-intérêts majorés devrait-elle être maintenue? — La perte de clientèle a-t-elle été suffisamment invoquée pour justifier l'attribution de dommages-intérêts spéciaux?*

In 1971 members of the Ukrainian community became involved in a confrontation with the police during a demonstration organized by the Ukrainian-Canadian Committee (UCC). The UCC obtained standing as the representative of the Ukrainian community at the public inquiry that was subsequently held. It retained counsel, who was assisted by the respondent, the UCC's legal adviser. The costs of both lawyers were reimbursed by the municipality following the inquiry. The respondent retained the amount paid to him. Rumours began to circulate in the Ukrainian community that he was in breach of his agreement to donate this money to the UCC. The issue was raised at a meeting of the UCC executive, where the concerns were addressed by the respondent and others to the complete satisfaction of those in attendance. The UCC published a letter in a community newspaper reiterating that financial matters connected with the demonstration had already been reported and were satisfactorily settled. Just over a year later, however, the individual appellant M tabled a report at the UCC's general meeting alleging that the respondent had reneged on his promise to give the money he received to the UCC. The UCC drafted a response which was published in a community newspaper. M in turn prepared a declaration signed by eight lawyers, four of whom are appellants here, confirming M's report. The declaration was reproduced in a community newspaper and mailed to certain members of the Ukrainian community. M also presented a separate reply to the Ontario Council of the UCC which incorporated the lawyers' declaration. The respondent sued the appellants for libel. The trial judge awarded him \$140,000 in compensatory damages, which included general damages, aggravated damages and the present value of future pecuniary loss, and special damages of \$325,000 for loss of income. Prejudgment interest was awarded for a 12½-year period. The Court of Appeal held that since special damages were not specifically pleaded, they could only form a part of the general damage award. It awarded \$200,000 in compensatory damages. The court also reduced the term of prejudgment interest to 10 years.

En 1971, des membres de la collectivité ukrainienne ont participé à une altercation avec des agents de police, au cours d'une manifestation organisée par le Comité des Ukrainiens-Canadiens («CUC»). Le CUC a obtenu qualité pour agir comme représentant de la collectivité ukrainienne à l'enquête publique tenue subséquemment. Il a retenu les services d'un avocat qui était assisté par l'intimé, le conseiller juridique du CUC. Après l'enquête, la municipalité a remboursé les frais des deux avocats. L'intimé a conservé le montant qui lui a été versé. Des rumeurs ont commencé à courir dans la collectivité ukrainienne, selon lesquelles il aurait manqué à son engagement de faire don de cette somme au CUC. Cette question a été soulevée lors d'une réunion de la direction du CUC, au cours de laquelle l'intimé et d'autres y ont répondu à l'entière satisfaction des participants. Le CUC a publié une lettre dans un journal communautaire, répétant que les questions financières liées à la manifestation avaient déjà fait l'objet d'un rapport et d'un règlement satisfaisant. Cependant, à l'assemblée générale du CUC, tenue un peu plus d'une année plus tard, l'appellant M a déposé un rapport dans lequel il alléguait que l'intimé avait manqué à sa promesse de remettre au CUC la somme qu'il avait reçue. Le CUC a rédigé une réponse qui a été publiée dans un journal communautaire. À son tour, M a rédigé une déclaration confirmant le rapport de M, qui a été signée par huit avocats, dont quatre agissent comme appelants devant notre Cour. La déclaration a été reproduite dans un journal communautaire et envoyée par la poste à certains membres de la collectivité ukrainienne. M a également soumis au conseil ontarien du CUC une réponse distincte comportant la déclaration des avocats. L'intimé a intenté une action pour libelle contre les appelants. Le juge de première instance lui a accordé la somme de 140 000 \$ à titre de dommages-intérêts compensatoires, comprenant des dommages-intérêts généraux, des dommages-intérêts majorés et la valeur actualisée de toute perte pécuniaire future, ainsi que la somme de 325 000 \$ à titre de dommages-intérêts spéciaux pour la perte de revenu subie. Des intérêts avant jugement ont été consentis pour une période de 12 ans et demi. La Cour d'appel a conclu que des dommages-intérêts spéciaux ne pouvaient pas faire partie du montant des dommages-intérêts généraux accordés puisqu'ils n'avaient pas été demandés expressément. Elle a accordé la somme de 200 000 \$ à titre de dommages-intérêts compensatoires. Elle a aussi ramené à 10 ans la période pour laquelle des intérêts avant jugement avaient été consentis.

*Held:* The appeals should be dismissed and the cross-appeals allowed.

*Arrêt:* Les pourvois principaux sont rejetés et les pourvois incidents sont accueillis.

*Per La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.:* The combined effect of the report, the declaration and the reply published by M and the appellant lawyers was clearly defamatory. The documents unmistakably implied that the respondent was dishonourable and dishonest. They cast doubt upon his integrity, the most important attribute of any lawyer. The appellant lawyers are joint tortfeasors who are jointly and severally liable with M for the damage caused by publication of all three documents. The declaration expressly adopted the contents of the report, and its inclusion in the reply was a natural and logical consequence of the lawyers' signing it without placing any restrictions on its use. The appellant company is also liable since M, by his action and in his capacity as the principal shareholder and officer of the company and its directing mind, clearly associated the company with the defamatory statements.

Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. Where an occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish remarks which may be defamatory and untrue about the plaintiff. The privilege is not absolute, however, and may be defeated if the dominant motive for publishing is actual or express malice. Qualified privilege may also be defeated if the limits of the duty or interest have been exceeded. If the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated. While M had a duty to discharge arising from his position as a former president of the UCC, and the UCC's annual general meeting was an appropriate forum at which to present the report, the limits of the privileged occasion were clearly exceeded in relation to the report. Although M may have wished to address the rumours in order to distance himself from the gossip, in doing so it was unnecessary to defame the respondent. Similarly, while the appellants were entitled to respond to the attack on the report to protect their interest, neither the declaration nor the reply was a measured response. The appellants went well beyond what was reasonably appropriate to the occasion and as a result lost the protection afforded by the defence of qualified privilege.

If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by malice. It is clear in this case that M was motivated by express malice. Taking into account the appellant lawyers' status and influential position in the community, and the

*Les juges La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin et Iacobucci:* L'effet combiné du rapport, de la déclaration et de la réponse publiés par M et les avocats appelants était clairement diffamatoire. Ces documents insinuaient indubitablement que l'intimé était un personnage infâme et malhonnête. Ils laissaient planer des doutes sur son intégrité, la plus importante qualité d'un avocat. Les avocats appelants sont les coauteurs d'un délit, qui sont solidairement responsables avec M du préjudice causé par la publication des trois documents. La déclaration adoptait expressément le contenu du rapport et il était naturel et logique qu'elle soit incluse dans la réponse puisque les avocats qui l'avaient signée n'avaient fixé aucune restriction quant à son utilisation. La société appelante est également responsable puisque, par ses actes et en sa qualité de cadre, actionnaire principal et âme dirigeante de la société, M avait nettement associé la société aux déclarations diffamatoires.

L'immunité relative se rattache aux circonstances entourant la communication et non à la communication elle-même. Lorsqu'on établit qu'il y a immunité, la bonne foi du défendeur est présumée et ce dernier est alors libre de publier des remarques sur le demandeur, qui peuvent être diffamatoires et inexactes. Toutefois, l'immunité n'est pas absolue et elle peut cesser d'exister si la publication est principalement motivée par la malveillance véritable ou expresse. L'immunité relative peut également cesser d'exister lorsqu'on a outrepassé les limites du devoir ou de l'intérêt. Si l'information communiquée n'était pas raisonnablement appropriée pour les fins légitimes de l'occasion, l'immunité relative cessera d'exister. Bien qu'un devoir ait incombé à M en tant qu'ancien président du CUC et que l'assemblée générale annuelle du CUC ait constitué un lieu approprié pour déposer le rapport, on a clairement excédé les limites de l'immunité relativement au rapport. M a peut-être voulu s'attaquer aux rumeurs pour se dissocier des racontars, mais ce faisant il n'avait pas à diffamer l'intimé. De plus, même si les appelants avaient le droit de répondre à l'attaque contre le rapport pour protéger leur intérêt, ni la déclaration ni la réponse ne constituaient une réponse modérée. Les appelants sont allés bien au-delà de ce qui était raisonnablement approprié dans les circonstances et ont, de ce fait, perdu la protection offerte par le moyen de défense fondé sur l'immunité relative.

Pour accorder des dommages-intérêts majorés, il faut conclure que le défendeur était motivé par la malveillance. Il est clair que M était motivé par une malveillance expresse. Compte tenu de la situation des appelants comme avocats et personnes influentes dans la

effect of their concerted action in signing the declaration, their conduct in signing the document without undertaking a reasonable investigation as to its correctness was reckless, as was their failure to place any restriction or qualification upon the use that could be made of it. The legal consequence of their recklessness is that their actions must be found to be malicious. Since both M and the appellant lawyers were motivated by malice, they are jointly and severally liable for the compensatory damages awarded, including that portion which represents aggravated damages. For the reasons given in *Hill v. Church of Scientology of Toronto*, a cap on damages in defamation cases is neither needed nor desirable. The loss of business was sufficiently pleaded to warrant the award of special damages, which should be restored. The trial judge's determination that the respondent was entitled to prejudgment interest for a period of 12½ years should also be restored.

*Per* Major J.: Cory J.'s reasons were agreed with, subject to observations on the extent of liability for defamatory publications where more than one defendant is involved. Not all actions in which multiple defendants are sued will result in a finding of joint and several liability. Depending on the circumstances of a given case, it may be necessary to assess each instance of publication as a separate cause of action. The question of whether the defendants acted jointly or in concert should be considered and where there is the absence of common action the defendants' liability ought to be assessed individually. It is not clear from the record in this case that all of the defamatory documents should have been treated as one libel nor that the necessary concerted action was present for a finding of joint and several liability. The trial judge has an advantage over appellate courts in making findings of fact, however, particularly in matters of credibility, and it would therefore be inappropriate absent palpable error to interfere with either the trial judge's findings of fact or the exercise of his discretion.

### Cases Cited

By Cory J.

**Applied:** *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Borland v. Muttersbach* (1985), 53 O.R. (2d) 129; **referred to:** *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067; *Basse v. Toronto*

collectivité, et de l'effet du geste concerté qu'ils ont accompli en signant la déclaration, ils ont fait preuve d'insouciance en signant ce document sans procéder à un examen raisonnable de son exactitude, et en omettant de formuler une restriction ou une réserve quant à l'utilisation qui pourrait en être faite. La conséquence juridique de leur insouciance est que leurs actes doivent être jugés comme étant malveillants. Étant donné que M et les avocats appelants étaient motivés par la malveillance, ils sont solidairement responsables du paiement des dommages-intérêts compensatoires accordés, y compris la partie représentant des dommages-intérêts majorés. Pour les motifs exposés dans l'arrêt *Hill c. Église de scientologie de Toronto*, il n'est ni nécessaire ni souhaitable de fixer un plafond aux dommages-intérêts dans les affaires de diffamation. On a suffisamment invoqué la perte de clientèle pour justifier l'attribution de dommages-intérêts spéciaux, qui devrait être rétablie. Il y a également lieu de rétablir la décision du juge de première instance que l'intimé avait droit à des intérêts avant jugement pour une période de 12 ans et demi.

*Le* juge Major: Les motifs du juge Cory sont acceptés, sous réserve de certaines observations sur l'étendue de la responsabilité relative à des publications diffamatoires lorsque plus d'un défendeur est en cause. Ce ne sont pas toutes les actions intentées contre plusieurs défendeurs qui aboutiront à une conclusion de responsabilité solidaire. Suivant les circonstances d'une affaire donnée, il peut être nécessaire de traiter chaque publication comme une cause d'action distincte. Il faut se demander si les défendeurs ont agi conjointement ou de concert, et, en l'absence d'une action commune, la responsabilité des défendeurs doit être appréciée individuellement. Il n'est pas clair, à la lecture du dossier, que tous les documents diffamatoires auraient dû être considérés comme un seul acte diffamatoire, ni que l'action concertée requise pour conclure à la responsabilité solidaire existait. Le juge de première instance jouit d'un avantage sur les cours d'appel pour tirer des conclusions de fait, particulièrement en matière de crédibilité, et il serait donc inopportun, en l'absence d'une erreur manifeste, de modifier les conclusions de fait du juge de première instance ou d'intervenir dans l'exercice de son pouvoir discrétionnaire.

### Jurisprudence

Citée par le juge Cory

**Arrêts appliqués:** *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130; *Borland c. Muttersbach* (1985), 53 O.R. (2d) 129; **arrêts mentionnés:** *Cherneskey c. Armadale Publishers Ltd.*, [1979] 1 R.C.S. 1067;

*Star Newspapers Ltd.* (1983), 44 O.R. (2d) 164; *Adam v. Ward*, [1917] A.C. 309; *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311; *Douglas v. Tucker*, [1952] 1 S.C.R. 275; *H. L. Bolton (Engineering) Co. v. T. J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159; *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1986), 52 O.R. (2d) 473; *People ex rel. Karlin v. Culkin*, 162 N.E. 487 (1928); *Horrocks v. Lowe*, [1975] A.C. 135; *Lindal v. Lindal*, [1981] 2 S.C.R. 629.

By Major J.

**Referred to:** *Barber v. Pigden*, [1937] 1 K.B. 664; *Hayward v. Thompson*, [1982] 1 Q.B. 47; *Westbank Indian Bank v. Tomat* (1992), 63 B.C.L.R. (2d) 273.

#### Statutes and Regulations Cited

*Courts of Justice Act*, 1984, S.O. 1984, c. 11, s. 138(2).  
*Judicature Act*, R.S.O. 1980, c. 223, s. 36(6).  
*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 49.10.  
*Trustee Act*, R.S.O. 1990, c. T.23, s. 38.

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*Gatley on Libel and Slander*, 8th ed. By Philip Lewis. London: Sweet & Maxwell, 1981.

APPEALS and CROSS-APPEALS from a judgment of the Ontario Court of Appeal, [1993] O.J. No. 239 (QL), varying a judgment of the Ontario Court (General Division), [1991] O.J. No. 925 (QL), allowing the respondent's action and awarding him damages. Appeals dismissed and cross-appeals allowed.

*J. Edgar Sexton, Q.C.*, and *Mark A. Gelowitz*, for the appellants Ihor Bardyn et al.

*Bryan Finlay, Q.C.*, and *Christopher J. Tzekas*, for the appellants B. I. Maksymec and Maksymec & Associates Ltd.

*Basse c. Toronto Star Newspapers Ltd.* (1983), 44 O.R. (2d) 164; *Adam c. Ward*, [1917] A.C. 309; *McLoughlin c. Kutasy*, [1979] 2 R.C.S. 311; *Douglas c. Tucker*, [1952] 1 R.C.S. 275; *H. L. Bolton (Engineering) Co. c. T. J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159; *Standard Investments Ltd. c. Canadian Imperial Bank of Commerce* (1986), 52 O.R. (2d) 473; *People ex rel. Karlin c. Culkin*, 162 N.E. 487 (1928); *Horrocks c. Lowe*, [1975] A.C. 135; *Lindal c. Lindal*, [1981] 2 R.C.S. 629.

Citée par le juge Major

**Arrêts mentionnés:** *Barber c. Pigden*, [1937] 1 K.B. 664; *Hayward c. Thompson*, [1982] 1 Q.B. 47; *Westbank Indian Bank c. Tomat* (1992), 63 B.C.L.R. (2d) 273.

#### Lois et règlements cités

*Judicature Act*, R.S.O. 1980, ch. 223, art. 36(6).  
*Loi de 1984 sur les tribunaux judiciaires*, L.O. 1984, ch. 11, art. 138(2).  
*Loi sur les fiduciaires*, L.R.O. 1990, ch. T.23, art. 38.  
*Règles de procédure civile*, R.R.O. 1990, règl. 194, art. 49.10.

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*Gatley on Libel and Slander*, 8th ed. By Philip Lewis. London: Sweet & Maxwell, 1981.

POURVOIS PRINCIPAUX et POURVOIS INCIDENTS contre un arrêt de la Cour d'appel de l'Ontario, [1993] O.J. No. 239 (QL), qui a modifié un jugement de la Cour de l'Ontario (Division générale), [1991] O.J. No. 925 (QL), qui avait accueilli l'action de l'intimé et lui avait accordé des dommages-intérêts. Pourvois principaux rejetés et pourvois incidents accueillis.

*J. Edgar Sexton, c.r.*, et *Mark A. Gelowitz*, pour les appelants Ihor Bardyn et autres.

*Bryan Finlay, c.r.*, et *Christopher J. Tzekas*, pour les appelants B. I. Maksymec et Maksymec & Associates Ltd.

*Sheila R. Block and Jenifer E. Aitken, for the respondent.*

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

**CORY J.** — These appeals must consider the consequences which flow from the publication of documents which either directly alleged or clearly implied that the respondent Y. R. Botiuk, a lawyer of Ukrainian descent, had misappropriated money that belonged to the Ukrainian-Canadian community. As a result of these publications, Botiuk, who had previously enjoyed an excellent reputation, was branded as a dishonourable person who could not be trusted. Publishing the documents had a devastating and lasting effect on both his private life and his professional career.

#### I. Factual Background

Botiuk is a lawyer who has practised in the City of Toronto since 1962. From the time of his emigration to Canada in 1951, he has been extensively involved in the affairs of the Ukrainian community and his practice, to a large extent, served the members of that community.

The appellant B. I. Maksymec is a professional engineer and principal shareholder and officer of Maksymec & Associates Ltd. Mr. Maksymec has also played a prominent role in the Ukrainian community. It was he who instituted, augmented and continued the libellous attacks on the respondent.

The appellants I. Bardyn, B. Onyschuk, B. Zarowsky, Q.C., and W. Y. Danyliw, Q.C., are lawyers of Ukrainian descent who have held positions of importance in their community. They became involved in this case when they agreed to sign a document written by Maksymec which supported his allegations of misconduct by Botiuk.

The Ukrainian-Canadian Committee ("UCC") is an extremely important institution in the Ukrainian

*Sheila R. Block et Jenifer E. Aitken, pour l'intimé.*

Version française du jugement des juges La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin et Iacobucci rendu par

LE JUGE CORY — Les présents pourvois portent sur l'examen des conséquences de la publication de documents qui soutenaient directement ou insinuaient clairement que l'intimé Y. R. Botiuk, un avocat d'origine ukrainienne, avait détourné des fonds appartenant à la communauté ukraino-canadienne. À la suite de ces publications, Botiuk, qui avait joui jusque-là d'une excellente réputation, a été étiqueté comme étant un infâme personnage qui on ne pouvait faire confiance. La publication de ces documents a eu une incidence dévastatrice et durable tant sur sa vie privée que sur sa carrière professionnelle.

#### Le contexte factuel

Botiuk est un avocat en exercice à Toronto depuis 1962. Depuis son émigration au Canada en 1951, Botiuk s'est toujours beaucoup intéressé aux affaires de la collectivité ukrainienne, dont les membres constituaient une grande partie de sa clientèle.

L'appellant B. I. Maksymec est ingénieur de même que cadre et actionnaire principal de Maksymec & Associates Ltd. Monsieur Maksymec a également joué un rôle important dans la collectivité ukrainienne. C'est lui qui a commencé, poussé et poursuivi les attaques diffamatoires contre l'intimé.

Les appelants, I. Bardyn, B. Onyschuk, B. Zarowsky, c.r., et W. Y. Danyliw, c.r., sont des avocats d'origine ukrainienne qui occupent des postes importants au sein de leur collectivité. Ils sont devenus impliqués dans la présente affaire lorsqu'ils ont accepté de signer un document que Maksymec avait rédigé pour étayer ses allégations d'inconduite de la part de Botiuk.

Le Comité des Ukrainiens-Canadiens («CUC») est une institution extrêmement importante de la

community. It is an umbrella organization serving the needs of Ukrainian-Canadians on the national, provincial and local levels. The facts of this case arise from the activities of the Toronto branch of the UCC.

In October 1971, the Russian Premier Alexei Kosygin visited Toronto. In light of their position that their homeland was occupied by the Soviet regime, this was an event of great concern to Toronto's Ukrainian community. The UCC organized a demonstration to coincide with a dinner to be held for Mr. Kosygin at the Ontario Science Centre on October 25, 1971. During the demonstration, members of the Ukrainian community became involved in a vigorous confrontation with officers of the Metropolitan Toronto Police Force. This led to criminal charges being laid against some of those members.

At a meeting of the UCC held on October 28, 1971, while Maksymec was the president of the organization, it was determined that arrangements should be made to provide legal assistance and representation to those charged with criminal offences. As a result of this decision, the UCC retained the services of a prominent Toronto lawyer, Arthur Maloney, Q.C. At the same time, it set out to raise the necessary funds by seeking donations from members of the community. In this way, some \$21,000 was gathered for what became known as the "Kosygin Demonstration Fund".

Botiuk, who had been appointed as legal adviser to the UCC immediately following the demonstration, organized and coordinated the defence of the demonstrators. It was known to all that the money collected from members of the Ukrainian community was not intended to be used to pay any Ukrainian lawyer for services relating to the criminal proceedings.

At the October 28 meeting, the decision was also made to collect evidence as to what transpired at the demonstration and to use it to lobby the Ontario government to hold a public inquiry. The

collectivité ukrainienne. C'est une organisation-cadre qui répond aux besoins des Ukraino-Canadiens à l'échelle nationale, provinciale et locale. Les faits des présents pourvois découlent des activités de la section locale du CUC à Toronto.

En octobre 1971, le premier ministre de la Russie, Alexei Kosygin, a visité Toronto. La collectivité ukrainienne de Toronto était fort préoccupée par cette visite puisqu'elle était d'avis que le régime soviétique occupait leur patrie. Le CUC a organisé une manifestation devant coïncider avec un dîner organisé pour M. Kosygin au Centre des sciences de l'Ontario, le 25 octobre 1971. Au cours de la manifestation, des membres de la collectivité ukrainienne ont participé à une altercation vigoureuse avec des agents de police de la communauté urbaine de Toronto. Cela a donné lieu à des accusations criminelles contre certains de ces membres.

Le 28 octobre 1971, lors d'une réunion du CUC, alors sous la présidence de Maksymec, on a décidé que des dispositions devraient être prises pour fournir une aide juridique et une représentation par avocat aux personnes accusées d'infractions criminelles. À la suite de cette décision, le CUC a retenu les services d'un avocat bien connu de Toronto, Arthur Maloney, c.r. Il a, en même temps, entrepris de recueillir les fonds nécessaires en demandant des dons aux membres de la collectivité. On a ainsi recueilli la somme de 21 000 \$ pour constituer ce que l'on a appelé le «Fonds de manifestation anti-Kosygin».

Botiuk, qui avait été nommé conseiller juridique du CUC immédiatement après la manifestation, a organisé et coordonné la défense des manifestants. Tous savaient que l'argent recueilli auprès des membres de la collectivité ukrainienne ne devait pas servir à rémunérer des avocats ukrainiens pour des services relatifs aux poursuites criminelles.

À la réunion du 28 octobre, on a également décidé de recueillir des éléments de preuve sur ce qui s'était produit au cours de la manifestation et de s'en servir pour faire pression auprès du gouvernement de l'Ontario pour qu'il tienne une

province eventually agreed and appointed Judge Vannini to preside.

10 The UCC obtained standing as the representative of the Ukrainian community and retained Robert Carter, Q.C., as its counsel. There was some concern as to whether sufficient funds existed to cover the legal expenses which would be incurred and, as a result, it was decided that Carter would be assisted by a Ukrainian lawyer throughout the inquiry.

11 It was suggested that Botiuk might assume the full-time position as Carter's assistant. He declined because he was a sole practitioner who could not leave his practice unattended for the five weeks scheduled for the inquiry hearings. Instead, he agreed to try to recruit and coordinate various Ukrainian duty counsel who, it was understood, would provide their services at no charge to the UCC.

12 Botiuk had little success in recruiting other Ukrainian lawyers to assist Carter, save for two or three who contributed very limited time. Consequently, Botiuk performed much of the work himself, attending 23 of the 35 days of the inquiry hearing. As well, he did a great deal of night work interviewing and preparing witnesses for their attendance at the inquiry.

13 On June 5, 1972, Judge Vannini released his decision. He found that the police were responsible for the confrontation and in effect vindicated the Ukrainian community. Thereafter, it was announced that the costs of counsel representing the Metropolitan Toronto Police Force at the inquiry would be paid by Metropolitan Toronto. On behalf of the UCC, efforts were then made by the appellants Maksymec and Onyschuk and the respondent Botiuk to obtain funding for its representatives. The Ontario government eventually agreed to this request.

enquête publique. La province a finalement accepté et le juge Vannini a été désigné pour présider cette enquête.

Le CUC a obtenu qualité pour agir comme représentant de la collectivité ukrainienne et a retenu les services de l'avocat Robert Carter, c.r. On se demandait si l'on avait suffisamment de fonds pour assumer les frais de justice qui seraient engagés, et l'on a décidé qu'un avocat ukrainien assisterait Carter tout au long de l'enquête.

On a proposé que Botiuk assume le poste d'adjoint à plein temps de Carter. Il a refusé parce qu'il se voyait dans l'impossibilité, en tant que praticien autonome, de quitter son cabinet pendant les cinq semaines prévues pour les audiences de la commission d'enquête. Il a plutôt accepté de tenter de recruter divers avocats de garde ukrainiens et de coordonner leur travail; il était entendu que ces avocats fourniraient gratuitement leurs services au CUC.

Les démarches entreprises par Botiuk pour recruter d'autres avocats ukrainiens comme adjoints de Carter ont été peu fructueuses, et seulement deux ou trois avocats ont pu lui consacrer un temps très limité. C'est donc Botiuk qui a effectué la majeure partie du travail, assistant à 23 des 35 journées d'audience de la commission d'enquête. Il a également fait beaucoup de travail de nuit pour interroger et préparer des témoins en vue de leur participation à l'enquête.

Le 5 juin 1972, le juge Vannini a rendu sa décision. Il a conclu que la police était responsable de l'altercation et s'est en fait porté à la défense de la collectivité ukrainienne. Par la suite, on a annoncé que la Communauté urbaine de Toronto allait payer les frais de l'avocat qui avait représenté son service de police au cours de l'enquête. Les appelants Maksymec et Onyschuk et l'intimé Botiuk se sont alors efforcés, au nom du CUC, d'obtenir des fonds pour les avocats qui l'avaient représenté. Le gouvernement de l'Ontario a finalement accédé à leur demande.

The proposed reimbursement was looked upon as an opportunity to replenish the UCC treasury. To this end, it was thought by some that Botiuk would submit a single figure which would encompass the work done by all the lawyers who assisted at the inquiry and that this amount would be turned over to the UCC. However, as the trial judge found, whatever the understanding may have been in this regard, it became unworkable for a number of reasons. First, none of the lawyers concerned ever submitted any information regarding their fees or disbursements. Further, both the acting president of the UCC, Dr. Hlibowych, and counsel for Metro Toronto rejected the suggested approach and insisted that every lawyer prepare his own account for the UCC. These accounts would then be submitted for payment together with a declaration that the amounts were incurred by the UCC as a legal expense connected with the inquiry.

Botiuk submitted two accounts in this fashion, one in the amount of \$12,960 for the payment made to Carter, and the other in the amount of \$10,256.79 to compensate him for his disbursements and work. In accordance with the direction, acknowledgement and release executed on behalf of the UCC by Dr. Hlibowych, Metro Toronto forwarded a cheque to Botiuk for the total amount of both accounts. He in turn sent the UCC a cheque in the amount of \$12,960 to cover Carter's account. Botiuk had indicated at a meeting of the UCC executive that since he would have to pay taxes on the fees paid to him, he would retain them.

When it received the funds for the Carter account, the UCC appointed Maksymec, A. Bandera and Botiuk to a special financial commission to decide where and how to apply this money. Although the commission never held a formal meeting, it was decided not long after its inception that a special immigration fund should be created to assist Ukrainian immigrants to settle in Canada.

On September 7, 1974, the UCC published a communiqué in the Ukrainian community newspa-

On a considéré le remboursement proposé comme une occasion de regarnir les coffres du CUC. À cette fin, certains ont cru que Botiuk soumettrait un seul montant pour le travail effectué par l'ensemble des avocats qui avaient participé à l'enquête et que cette somme serait ensuite remise au CUC. Cependant, comme l'a conclu le juge de première instance, quel qu'ait pu être l'entente à cet égard, on n'a pu la mettre en œuvre pour un certain nombre de raisons. Premièrement, aucun des avocats concernés n'a jamais soumis des renseignements sur ses honoraires ou ses débours. De plus, le président intérimaire du CUC, M. Hlibowych, et l'avocat de la Communauté urbaine de Toronto ont rejeté la méthode proposée et ont insisté pour que chaque avocat dresse son propre état de compte pour le CUC. Ces états de compte seraient ensuite présentés pour paiement, accompagnés d'une déclaration que les dépenses avaient été engagées par le CUC à titre de frais de justice liés à l'enquête.

Botiuk a ainsi déposé deux états de compte, dont l'un s'élevait à 12 960 \$ pour le paiement effectué à Carter, et l'autre à 10 256,79 \$, pour le dédommager de ses débours et de son travail. Conformément aux directives, à l'accusé de réception et au reçu libératoire signés par M. Hlibowych pour le compte du CUC, la Communauté urbaine de Toronto a envoyé un chèque à Botiuk pour le total de ces deux comptes. Botiuk a ensuite envoyé au CUC un chèque de 12 960 \$ pour payer le compte de Carter. Lors d'une réunion de la direction du CUC, Botiuk avait indiqué que, puisqu'il devrait payer des impôts sur les honoraires qui lui avaient été versés, il les conserverait.

Lorsqu'il a reçu les fonds pour le compte de Carter, le CUC a nommé Maksymec, A. Bandera et Botiuk à une commission spéciale des finances qui déciderait où et comment seraient affectés ces fonds. Bien que cette commission n'ait jamais tenu une réunion officielle, elle a décidé peu de temps après sa création qu'il y avait lieu de constituer un fonds d'immigration spécial pour aider les immigrants ukrainiens à s'établir au Canada.

Le 7 septembre 1974, le CUC a publié un communiqué dans le journal *New Pathway* de la col-

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per the *New Pathway*. Translated into English, it read as follows:

Thanks to the relentless efforts of the lawyer Y. R. Botiuk, with the assistance of Messrs. Frolick, Onyschuk and Kostuk and with support received from Alderman Bill Boychuk and Ed Negridge and Mr. Archer, and a few others, the Metropolitan Council approved the repayment of the costs in the amount of \$12,960.00, which our Committee had paid to the lawyer Carter, for his role in the public enquiry connected with the demonstration against Kosygin.

18 Subsequently, rumours concerning the Kosygin Demonstration Fund and the money paid by Metro Toronto began to circulate throughout the Ukrainian community. At a meeting of the UCC executive on March 2, 1977, the issue was raised. The record of that meeting indicates that the concerns pertaining to the funds were addressed by Botiuk and others to the complete satisfaction of those in attendance. In essence, it became clear to everyone at the meeting that a single account could not be submitted for all lawyers, and that it was open to each lawyer to submit his own account and receive payment from the City. It was emphasized, however, that nothing was paid by the UCC to any Ukrainian lawyer, including Botiuk. Botiuk was then congratulated by Dr. Hlibowych for his generosity and held up as an example for others to follow.

19 Nonetheless, an article appeared in the March 12, 1977, edition of the *Free Word*, a Ukrainian community newspaper, which raised anew the doubts concerning the financial aspects of the UCC's management of the criminal defence and inquiry proceedings. The article asked who had the money which had been remitted by Metro Toronto to the UCC to reimburse it for the payments made to non-Ukrainian lawyers out of the Kosygin Demonstration Fund.

20 In response, Dr. Sokolsky, then president of the UCC, sent a letter to the *Free Word*, dated March 15, 1977, in which he vigorously defended the integrity of the organization. He wrote:

lectivité ukrainienne. En voici une traduction en français:

[TRADUCTION] Grâce aux efforts soutenus de l'avocat Y. R. Botiuk, et à l'aide de MM. Frolick, Onyschuk et Kostuk et au soutien de l'échevin Bill Boychuk et de MM. Ed Negridge et Archer, et de quelques autres personnes, le Conseil métropolitain a approuvé le remboursement des coûts de 12 960 \$ que notre Comité avait payés à l'avocat Carter, pour sa participation à l'enquête publique sur la manifestation anti-Kosygin.

Par la suite, des rumeurs ont commencé à courir dans la collectivité ukrainienne relativement au Fonds de manifestation anti-Kosygin et aux sommes versées par la Communauté urbaine de Toronto. Au cours d'une réunion de la direction du CUC, le 2 mars 1977, on a soulevé cette question. Selon le procès-verbal de la réunion, Botiuk et d'autres ont répondu, à l'entière satisfaction des participants, aux questions relatives aux fonds. Essentiellement, les participants se sont rendu compte à la réunion qu'il n'était pas possible de soumettre un seul état de compte pour l'ensemble des avocats, et que chacun d'eux pourrait soumettre son propre état de compte et se faire payer par la ville. Cependant, on a souligné que le CUC n'avait rien versé à des avocats ukrainiens, dont Botiuk. Monsieur Hlibowych a ensuite félicité Botiuk pour sa générosité et l'a cité en exemple aux autres.

Néanmoins, un article, paru dans l'édition du 12 mars 1977 du journal *Free Word* de la collectivité ukrainienne, soulevait de nouveau des doutes sur la gestion financière du CUC relativement aux procédures de défense et d'enquête de nature criminelle. L'auteur de l'article se demandait qui était en possession des sommes que la Communauté urbaine de Toronto avait remises au CUC pour lui rembourser les sommes payées à des avocats non ukrainiens sur le Fonds de manifestation anti-Kosygin.

En réponse, M. Sokolsky, alors président du CUC, a envoyé une lettre au *Free Word*, en date du 15 mars 1977, dans laquelle il défendait vigoureusement l'intégrité de l'organisation:

Financial matters connected with the demonstration are no secret and our branch has . . . already . . . reported on them more than once. It seems odd to us that almost three years after this matter was concluded, those asking the questions remembered this (money). . . .

(A) *The "Maksymec Report"*

At the general meeting of the UCC held just over a year later on May 5, 1978, Maksymec sought to table a report entitled "Financial Accounting with Respect to the Demonstration Against Kosygin in Toronto". Initially, there was relatively forceful opposition to its presentation. However, Dr. Sokolsky introduced a motion which was seconded by Botiuk to include the Report as an item on the agenda. Before Maksymec spoke, those present expressed their gratitude for the efforts made by Botiuk on behalf of the community and emphasized it with "sincere applause".

In his Report, Maksymec put forward a number of allegations. First, that there was an agreement or understanding that the Ukrainian lawyers would not charge for the taking of affidavits in the aftermath of the demonstration. Second, that they would voluntarily assist Carter at the inquiry. Third, that Botiuk reneged on the promise he made to members of the UCC executive that he would deliver to the UCC the \$10,256.79 paid to him by Metro Toronto and instead declared that he would do with it as he saw fit. This document is the first of three which were found to have libelled Botiuk.

In the May 20, 1978 edition of the *Free Word*, an article appeared concerning the May 5 annual meeting of the UCC and the controversy surrounding the \$10,256.79 allegedly withheld by Botiuk. The article reproduced the contents of the Maksymec Report together with editorial comment which indicated that Botiuk's explanation that he was required to pay income tax on this amount was

[TRADUCTION] Les questions financières touchant la manifestation ne sont pas secrètes et notre section locale a [. . .] déjà [. . .] fourni des renseignements à ce sujet à plus d'une reprise. Il nous semble étrange que les personnes qui posaient ces questions se soient souvenu de (cet argent) presque trois ans après la conclusion de cette affaire. . . .

(A) *Le «rapport Maksymec»*

À l'assemblée générale du CUC tenue un peu plus d'une année plus tard, le 5 mai 1978, Maksymec a cherché à déposer un rapport intitulé «Financial Accounting with Respect to the Demonstration Against Kosygin in Toronto». Au départ, on s'est opposé assez vigoureusement à ce dépôt. Cependant, M. Sokolsky a présenté une motion, appuyée par Botiuk, visant à inscrire le rapport comme point à l'ordre du jour. Avant que Maksymec prenne la parole, les personnes présentes ont exprimé leur gratitude pour les efforts que Botiuk avait déployés pour le compte de la collectivité et l'ont [TRADUCTION] «chaleureusement applaudi».

Dans son rapport, Maksymec a fait un certain nombre d'allégations. Premièrement, il a allégué qu'il existait une entente selon laquelle les avocats ukrainiens n'exigeraient pas d'honoraires pour les affidavits recueillis après la manifestation. Deuxièmement, il a allégué que ces avocats devaient assister bénévolement Carter à l'enquête. Troisièmement, il a soutenu que Botiuk avait manqué à la promesse qu'il avait faite aux membres de la direction du CUC, de remettre au CUC la somme de 10 256,79 \$ que lui avait versée la Communauté urbaine de Toronto, indiquant plutôt qu'il ferait ce qu'il voulait avec l'argent. Ce document est le premier de trois documents jugés diffamatoires envers Botiuk.

Dans le numéro du 20 mai 1978 du *Free Word*, un article était consacré à l'assemblée annuelle du CUC, tenue le 5 mai, et à la controverse entourant la somme de 10 256,79 \$ que Botiuk aurait retenue. L'article reprenait le contenu du rapport Maksymec, accompagné d'un éditorial dans lequel on indiquait que l'explication de Botiuk selon laquelle il devait payer de l'impôt sur ce montant

not convincing since he could have immediately transferred the amount from the client's account to the account of the UCC branch. It called for an impartial investigation into the matter.

(B) *The "Sokolsky-Muz Declaration"*

24 On June 16, 1978, there was a meeting of the executive of the UCC during which a declaration was drafted in response to the charges levelled by Maksymec in his Report. Since Dr. Sokolsky and Dr. Muz were then the President and Secretary of the organization, it has been called the "Sokolsky-Muz Declaration".

25 The Declaration in its final form, dated July 1, 1978, was published in the *New Pathway*. It stated that the charges levelled by Maksymec were "groundless and untrue". It asserted that the UCC never had any claim to the money which was paid by Metro Toronto to Botiuk in connection with the inquiry. This was money, it stated, which Botiuk had earned and to which he was legally entitled. The Declaration again expressed the gratitude and appreciation of the UCC for the great sacrifices Botiuk had made on behalf of the Ukrainian community. It further affirmed that there were no agreements among the Ukrainian lawyers, including Botiuk, that no one would be remunerated for work done in relation to the inquiry. Finally, the Declaration asserted that the statement by Maksymec and the subsequent article in the *Free Word* were "harmful to the community and do an injustice to Mr. Botiuk".

(C) *The "Lawyers' Declaration"*

26 According to his evidence, Maksymec regarded the Sokolsky-Muz Declaration as a "massive, massive attack upon his honesty and integrity". In response, he prepared a declaration, dated July 7, 1978. It was signed by the eight lawyers who (along with Botiuk and another) had allegedly participated in the inquiry proceedings. This is the second document upon which this libel action was based. The relevant portions follow:

n'était pas convaincante puisqu'il aurait pu transférer immédiatement le montant en question du compte du client au compte de la section locale du CUC. L'auteur demandait la tenue d'une enquête impartiale sur la question.

(B) *La «déclaration Sokolsky-Muz»*

Le 16 juin 1978, il y a eu une réunion de la direction du CUC au cours de laquelle on a rédigé une déclaration en réponse aux accusations lancées par Maksymec dans son rapport. Vu que MM Sokolsky et Muz étaient respectivement président et secrétaire de l'organisation, on l'a appelée la «déclaration Sokolsky-Muz».

La version finale de cette déclaration, en date du 1<sup>er</sup> juillet 1978, a été publiée dans le *New Pathway*. On y précisait que les accusations lancées par Maksymec étaient [TRADUCTION] «sans fondement et fausses», et que le CUC n'avait jamais eu de droit sur les sommes que la Communauté urbaine de Toronto avait versées à Botiuk relativement à l'enquête. Ces sommes, disait-on, étaient des sommes que Botiuk avait gagnées et auxquelles il avait légalement droit. La déclaration exprimait également la gratitude et l'appréciation du CUC pour les grands sacrifices que Botiuk avait faits pour la collectivité ukrainienne. On y mentionnait également que les avocats ukrainiens, dont Botiuk, n'avaient jamais convenu de ne pas être rémunérés pour le travail effectué relativement à l'enquête. Enfin, on affirmait que les propos de Maksymec et l'article subséquent paru dans le *Free Word* étaient [TRADUCTION] «préjudiciables à la collectivité et injustes pour M. Botiuk».

(C) *La «déclaration des avocats»*

Dans son témoignage, Maksymec a qualifié la déclaration Sokolsky-Muz [TRADUCTION] «d'attaque massive contre son honnêteté et son intégrité». En réponse, il a rédigé une déclaration en date du 7 juillet 1978. Elle était signée par les huit avocats qui (à l'instar de Botiuk et d'une autre personne) auraient participé aux procédures d'enquête. C'est là le deuxième document sur lequel est fondée l'action pour libelle. En voici les passages pertinents:

DECLARATION

We, the Ukrainian lawyers of Toronto who assisted in the proceedings connected with the demonstration against Kosygin, having familiarized ourselves with the report of the former President of the UCC Toronto Branch on the 5th day of May of this year, do affirm, that,

...  
We hereby confirm the report of Engineer B. Maksymec about the fact that all of our efforts and endeavours connected with the court proceedings and the Vannini Royal Commission were on a voluntary and gratis basis, in accordance with our (including Mr. Botiuk) agreement with the then President of the UCC Toronto Branch, Engineer B. Maksymec, and that we never demanded payment for the services which we, to the extent we were able, contributed to those proceedings. Our work we dedicated to the Ukrainian Community through the Toronto Branch of the UCC.

Of the original eight lawyers who signed this document, four remain as appellants in this Court. Two of the lawyers, M. Romanick and S. Frolick, had died by the time of trial thus escaping liability pursuant to the provisions of s. 38 of the *Trustee Act*, R.S.O. 1990, c. T.23. Another lawyer, R. Kostuk, had withdrawn his support for the Declaration soon after signing it. R. Maksymiw, together with the late M. Romanick, did not sign the Declaration itself, but only a qualification at the end of the document which stated that in their understanding there was an agreement at the time of the Vannini inquiry to volunteer services. The Court of Appeal ruled that Maksymiw had sufficiently qualified his statement to escape liability and this finding was not challenged.

The Declaration was reproduced with some modifications in the July 22, 1978, edition of the Ukrainian community newspaper *Our Aim*. After the names of the lawyers, Maksymec gratuitously added descriptions of the positions they held in community organizations. This was obviously

[TRADUCTION] DÉCLARATION

Nous, les avocats ukrainiens de Toronto qui ont participé aux procédures concernant la manifestation anti-Kosygin et qui ont pris connaissance du rapport de l'ancien président de la section locale du CUC à Toronto, en date du 5 mai de la présente année, faisons la déclaration suivante:

...  
Nous confirmons, par la présente, le rapport de l'ingénieur B. Maksymec à ce sujet: que tous nos efforts liés aux procédures judiciaires et à la commission royale d'enquête Vannini ont été déployés bénévolement et gratuitement, conformément à l'entente intervenue entre nous (y compris M. Botiuk) et le président de l'époque de la section locale du CUC à Toronto, l'ingénieur B. Maksymec, et que nous n'avons jamais demandé de rémunération pour les services que nous avons fournis, dans la mesure de nos capacités, dans le cadre de ces procédures. Notre travail, nous l'avons consacré à la collectivité ukrainienne par l'entremise de la section locale du CUC à Toronto.

Il reste, comme appelants devant notre Cour, quatre des huit avocats qui avaient initialement signé ce document. Deux des avocats, M. Romanick et S. Frolick, sont décédés avant le procès, échappant de ce fait à toute responsabilité conformément à l'art. 38 de la *Loi sur les fiduciaires*, L.R.O. 1990, ch. T.23. Un autre avocat, R. Kostuk, avait retiré son appui en faveur de la déclaration, peu après l'avoir signée. R. Maksymiw et feu M. Romanick avaient signé non pas la déclaration en question, mais seulement une réserve à la fin du document, indiquant qu'ils croyaient qu'à l'époque de l'enquête Vannini il existait une entente de prestation bénévole de services. La Cour d'appel a statué que Maksymiw avait suffisamment nuancé sa déclaration pour se dégager de toute responsabilité, et cette conclusion n'a pas été contestée.

La déclaration a été reproduite avec certaines modifications dans le numéro du 22 juillet 1978 du journal *Our Aim* de la collectivité ukrainienne. Après le nom des avocats, Maksymec avait, sans raison, ajouté une description des postes qu'ils occupaient dans les organisations de la collectivité.

done to add weight to the document in the eyes of those who would read it.

Ces mentions visaient de toute évidence à faire en sorte que le document ait plus de poids aux yeux des personnes qui le liraient.

29 On July 27, 1978, Maksymec mailed copies of the Lawyers' Declaration, the Sokolsky-Muz Declaration and the Maksymec Reply to those members of the Ukrainian community who had donated \$100 or more to the Kosygin Demonstration Fund.

Le 27 juillet 1978, Maksymec a envoyé par la poste des copies de la déclaration des avocats, de la déclaration Sokolsky-Muz et de sa propre réponse aux membres de la collectivité ukrainienne qui avaient versé au moins 100 \$ au Fonds de manifestation anti-Kosygin.

30 The trial judge found that the Lawyers' Declaration was published at the request of and upon payment by Maksymec. The newspaper subsequently published an article on September 30, 1978 in which it acknowledged this fact and apologized to Dr. Sokolsky, Dr. Muz and Botiuk for "any unpleasantness and damages that publishing the referred to 'declaration' may have caused them".

Le juge de première instance a conclu que la déclaration des avocats avait été publiée à la demande de Maksymec et contre paiement effectué par ce dernier. Le journal a, par la suite, le 30 septembre 1978, publié un article dans lequel il reconnaissait ce fait et s'excusait auprès de MM. Sokolsky, Muz et Botiuk relativement à [TRADUCTION] «tout désagrément et tout préjudice que la publication de la «déclaration» mentionnée a pu leur causer».

31 The modified version of the Lawyers' Declaration together with the Sokolsky-Muz Declaration and the Maksymec Report was also reproduced in the August 19-26, 1978, edition of the *Free Word*. The trial judge held, and there was ample evidence to support his conclusion, that Maksymec also provided this newspaper with the material upon which the article was based.

La version modifiée de la déclaration des avocats ainsi que la déclaration Sokolsky-Muz et le rapport Maksymec ont été reproduits dans le numéro du 19 au 26 août 1978 du *Free Word*. Le juge de première instance a conclu, et il existait suffisamment d'éléments de preuve à l'appui de sa conclusion, que Maksymec avait aussi fourni à ce journal les documents sur lesquels était fondé l'article.

(D) *The "Maksymec Reply"*

(D) *La «réponse de Maksymec»*

32 Maksymec also prepared a separate reply to the Sokolsky-Muz Declaration which he presented to the Ontario Council of the UCC on July 27, 1978. This is the third and final document which led to the respondent's libel suit. In it, Maksymec alleged that the authors of the Sokolsky-Muz Declaration were "ill-informed" about matters related to the Vannini inquiry since they did not participate in the events connected with it.

Maksymec a aussi rédigé une réponse distincte à la déclaration Sokolsky-Muz, qu'il a présentée au conseil ontarien du CUC, le 27 juillet 1978. C'est le troisième et dernier document sur lequel se fonde l'action pour libelle intentée par l'intimé. Dans ce document, Maksymec soutenait que les auteurs de la déclaration Sokolsky-Muz avaient été [TRADUCTION] «mal renseignés» sur les questions relatives à l'enquête Vannini puisqu'ils n'avaient pas participé aux événements qui y étaient reliés.

33 The Maksymec Reply incorporated the Lawyers' Declaration and set out a promise alleged to have been made by Botiuk during a meeting of the

La réponse de Maksymec comportait la déclaration des avocats et parlait d'une promesse que Botiuk aurait faite au cours d'une réunion de la

executive of the UCC. It was presented in these words:

... [Mr. Botiuk] switched off the microphone and assured all those present that they had no reason to worry about his previous statement [that he would do whatever he wanted with the money] to the switched on microphone because he had to say this formally, in order to justify his account in the amount of \$10,256.79. However, he assured all those present that he considered this money to be public money and that he would hand it over to the UCC Toronto Branch. Mr. Botiuk requested that his last statement should not appear in the minutes so that it would not fall into undesirable hands. [Emphasis added.]

Maksymec further alleged that the sum which was earmarked by the special financial commission for a special immigration fund included the \$10,256.79 paid to Botiuk. He demanded that it be transferred to the UCC.

The Ontario branch of the UCC refused to deal with Maksymec's complaint, which it considered to be nothing more than a personal dispute.

## II. Judgments Below

(A) *Ontario Court, General Division*, [1991] O.J. No. 925 (QL)

Carruthers J. stated that the controversy between the parties "stems solely from the fact that the [respondent] kept the sum of \$10,256.79 and Maksymec has objected to his having done so because he has thought that the plaintiff should have handed that amount over to UCC".

It was the opinion of the trial judge that the defamatory sense of the publications was clear. Namely, that Botiuk did not live up to an agreement to volunteer his services and did not fulfil his assurances to return to the UCC the money which he received from Metro Toronto.

The trial judge observed that counsel for all parties proceeded on the basis that although the con-

direction du CUC. Voici comment cette promesse a été présentée:

[TRADUCTION] ... [M. Botiuk] a éteint le microphone et a assuré toutes les personnes présentes qu'elles n'avaient aucun motif de s'inquiéter de sa déclaration antérieure [qu'il ferait ce qu'il voudrait avec l'argent] devant le microphone ouvert parce qu'il devait le dire formellement, pour justifier son compte de 10 256,79 \$. Cependant, il a assuré toutes les personnes présentes qu'il considérait cette somme comme des deniers publics et qu'il la remettrait à la section locale du CUC à Toronto. Monsieur Botiuk a demandé que sa dernière déclaration ne figure pas au procès-verbal afin d'éviter qu'elle ne tombe entre de mauvaises mains. [Je souligne.]

Maksymec a aussi soutenu que la somme affectée par la commission spéciale des finances à un fonds spécial d'immigration incluait la somme de 10 256,79 \$ versée à Botiuk. Il a demandé que cette somme soit transférée au CUC.

La section ontarienne du CUC a refusé d'examiner la plainte de Maksymec, qu'elle considérait comme n'étant rien de plus qu'un conflit personnel.

## II. Les juridictions inférieures

(A) *La Cour de l'Ontario, Division générale*, [1991] O.J. No. 925 (QL)

Le juge Carruthers a affirmé que la controverse entre les parties [TRADUCTION] «découle seulement du fait que [l'intimé] a conservé la somme de 10 256,79 \$ et que Maksymec s'y est opposé parce qu'il croyait que le demandeur aurait dû la remettre au CUC».

De l'avis du juge de première instance, les publications étaient clairement diffamatoires. Elles mentionnaient notamment que Botiuk n'avait pas respecté l'engagement qu'il avait pris d'offrir bénévolement ses services et qu'il avait manqué à sa promesse formelle de remettre au CUC l'argent qu'il avait reçu de la Communauté urbaine de Toronto.

Le juge de première instance a fait remarquer que les avocats de toutes les parties ont tenu pour

tents of each document could be taken individually as to its defamatory nature, all three were to be considered together as creating a single act of libel. He proceeded on this basis.

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The trial judge then turned to the three grounds of defence which were advanced by the appellants: justification, fair comment and qualified privilege. With respect to justification, he emphatically rejected the argument that there was some kind of agreement between the lawyers that they would volunteer their services. He set out his conclusions on this issue in these words:

At the highest, all that can be said is that each of them, including the [respondent], understood that was to be the case for the very simple reason that no one [i.e. the UCC] was available, prepared or able to pay them. And the [respondent] has never suggested that the situation was otherwise until the prospect of payment by Metro arose.

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He stressed that all the lawyers were well aware that they could submit an account for their work and receive payment from Metro Toronto. It was his opinion that they did not do so, not because of any agreement, but because they did not wish to make the community aware of how very little work they had done at the Vannini inquiry. Their minimal efforts would suffer by comparison with the very significant contribution to the work of that inquiry made by Botiuk.

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The trial judge rejected the appellants' allegation that during a meeting of the UCC executive in 1974, Botiuk had switched off the microphone and undertaken to turn over to the UCC the funds that Metro Toronto had paid to him. Rather, he accepted Botiuk's testimony that it was always understood that he would keep those funds for himself.

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The trial judge recognized that it was open to the appellants to have made a fair comment with regard to any concern they had about the funds which Botiuk received for his participation in the

acquis que les trois documents devaient être considérés comme un seul acte diffamatoire, même si le contenu de chacun d'eux pouvait être considéré individuellement quant à son caractère diffamatoire. Il a fait de même.

Le juge de première instance a ensuite examiné les trois moyens de défense présentés par les appellants: la justification, le commentaire loyal et l'immunité relative. En ce qui concerne la justification il a catégoriquement rejeté l'argument selon lequel les avocats s'étaient en quelque sorte entendus pour offrir bénévolement leurs services. Voici comment il formule ses conclusions sur cette question:

[TRADUCTION] Le mieux que l'on puisse dire, c'est que chacun des avocats, dont [l'intimé], croyait qu'il devait en être ainsi pour le simple motif qu'il n'existait pas de bailleur de fonds, que personne [c.-à-d. le CUC] n'était disposé à les payer ou n'était en mesure de le faire. [L'intimé] n'a jamais laissé entendre le contraire jusqu'au jour où s'est présentée une possibilité d'être rémunéré par la Communauté urbaine.

Il a fait ressortir que tous les avocats savaient bien qu'ils pourraient présenter un état de compte pour leur travail et être payés par la Communauté urbaine de Toronto. À son avis, s'ils ne l'ont pas fait, ce n'est pas à cause d'une entente, mais parce qu'ils ne voulaient pas que la collectivité soit mise au courant du peu de travail qu'ils avaient accompli à l'enquête Vannini. Les efforts minimes qu'ils ont déployés à cette enquête perdraient toute importance comparés au travail considérable que Botiuk y a accompli.

Le juge de première instance a rejeté l'argument des appellants selon lequel Botiuk avait éteint le microphone pendant une réunion de la direction du CUC tenue en 1974, et s'était engagé à remettre au CUC les fonds que la Communauté urbaine de Toronto lui avait versés. Il a plutôt accepté le témoignage de Botiuk voulant qu'il ait toujours été entendu qu'il garderait ces fonds.

Le juge de première instance a reconnu que les appellants avaient pu formuler un commentaire loyal quant à leurs préoccupations relativement aux fonds que Botiuk avait reçus pour sa participa-

inquiry. However, he found that this defence was lost to them because “the whole story was not told and as a result misstatements of fact about the [respondent] were published”.

Finally, with regard to qualified privilege, the trial judge rejected the submission that Maksymec had a duty to prepare and publish the Report as a member of the special financial commission and as past president of the UCC during the relevant times. The mandate of the commission, according to the trial judge, was not to recover money from Botiuk but merely to set out the expenses incurred and to suggest a program for using both the money collected from donations as well as that received from Metro Toronto for the account of Carter. Finally, the trial judge rejected as unreasonable the explanation provided by Maksymec that he had delayed his report for four years because he was waiting for Botiuk to change his mind and hand over the money. The trial judge noted that by 1978, those present at the general meeting neither expected the Report nor wanted it.

The trial judge then turned to the appellants' argument that the Lawyers' Declaration and the Maksymec Reply were validly made in response to the Sokolsky-Muz Declaration. He concluded that the defamatory references to Botiuk were not necessary to offset what the appellants considered to be an attack upon their integrity. Although Maksymec's involvement in these publications was not in doubt, there was some dispute as to whether all of the appellant lawyers would be held responsible for the wording of the Lawyers' Declaration or the extent of its publication. The trial judge concluded that they were liable since none of them placed any qualifications or restrictions upon the use Maksymec could make of the Lawyers' Declaration.

The trial judge concluded that the Lawyers' Declaration extended and augmented the damaging effect of the Maksymec Report on Botiuk's reputa-

tion à l'enquête. Cependant, il a conclu qu'ils ne pouvaient faire valoir ce moyen de défense parce que [TRADUCTION] «l'histoire n'a pas été racontée au complet et des renseignements factuels inexacts ont donc été publiés au sujet de [l'intimé]».

Enfin, en ce qui concerne l'immunité relative, le juge de première instance a rejeté l'argument selon lequel Maksymec avait le devoir de rédiger et de publier le rapport en sa qualité de membre de la commission spéciale des finances et d'ancien président du CUC aux époques pertinentes. Selon le juge de première instance, la commission avait le mandat non pas de recouvrer des sommes auprès de Botiuk, mais simplement de dresser un état des dépenses engagées et de proposer un programme pour l'utilisation des dons recueillis et des sommes reçues de la Communauté urbaine de Toronto au titre du compte de Carter. Enfin, le juge de première instance a rejeté comme déraisonnable l'explication de Maksymec voulant qu'il ait retardé pendant quatre ans le dépôt de son rapport parce qu'il attendait que Botiuk change d'idée et remette l'argent. Le juge a précisé que les personnes présentes à l'assemblée générale de 1978 n'escomptaient pas et ne désiraient pas le dépôt de ce rapport.

Le juge de première instance a ensuite examiné l'argument des appelants voulant que la déclaration des avocats et la réponse de Maksymec aient été validement formulées en réponse à la déclaration Sokolsky-Muz. Il a conclu que les propos diffamatoires tenus à l'égard de Botiuk n'étaient pas nécessaires pour contrer ce que les appelants considéraient comme une attaque contre leur intégrité. Bien que la participation de Maksymec à ces publications n'ait pas été mise en doute, on ne s'accordait pas sur la question de savoir si tous les avocats appelants seraient tenus responsables du libellé de la déclaration ou de l'étendue de sa publication. Le juge de première instance a conclu que tous étaient responsables puisqu'aucun d'eux n'avait formulé des réserves ou des restrictions quant à l'utilisation que Maksymec pourrait faire de leur déclaration.

Le juge de première instance a conclu que la déclaration des avocats élargissait et accroissait l'effet préjudiciable du rapport Maksymec sur la

tion. He added, as well, that the Maksymec Reply significantly increased the sting of the libel by its incorporation of the words “public money”.

46 Once he had found that the privileged occasion had been exceeded by all of the appellants and therefore that the defence was not available to them, the trial judge determined that it was unnecessary to deal with the question of express malice except in relation to its effect on the assessment of damages.

47 In his consideration of the damages that should be awarded, the trial judge observed that the appellant lawyers failed to make any independent inquiry as to the truth of the allegations contained in the Lawyers’ Declaration. He noted that none of the appellant lawyers had apologized to Botiuk, that some had demonstrated hostility towards him in their testimony and that, contrary to their assertions, the respondent had actually done the lion’s share of the work at the inquiry. I would have thought that these findings would have established express malice in fact and in law. However, the trial judge concluded that, while the lawyers were “careless, impulsive or irrational”, they had not exhibited the indifference or recklessness to the truth necessary for a finding of express malice.

48 With regard to Maksymec, the trial judge found that express malice was established on the grounds that, first, he was indifferent to the truth, and second, that he was actuated by an intention to injure Botiuk. The trial judge acknowledged that it may have been necessary for Maksymec to prepare a report to distance himself from the gossip and rumours which had been circulating. This he could have done without defaming Botiuk. However, he found that Maksymec had threatened Botiuk when he told him “[i]f you don’t turn over the funds I will create a scandal and ruin you”. The trial judge concluded that this statement alone provided a sufficient basis for a finding of malice. It would also

réputation de Botiuk. Il a également ajouté que la réponse de Maksymec augmentait sensiblement la causticité de la diffamation en raison de l’expression [TRADUCTION] «deniers publics» qui y était utilisée.

Après avoir conclu que tous les appelants avaient outrepassé l’immunité et qu’ils ne pouvaient donc pas invoquer ce moyen de défense, le juge de première instance a décidé qu’il n’avait pas à examiner la question de la malveillance expresse si ce n’est relativement à son incidence sur l’évaluation des dommages-intérêts.

Dans son examen des dommages-intérêts à accorder, le juge de première instance a fait remarquer que les avocats appelants n’avaient effectué aucune enquête indépendante sur la véracité des allégations contenues dans la déclaration des avocats. Le juge a précisé qu’aucun des avocats appelants ne s’était excusé auprès de Botiuk, que certains d’entre eux avaient manifesté de l’hostilité à son égard en témoignant, et que, contrairement à leurs prétentions, c’était l’intimé qui avait effectué la majeure partie du travail à l’enquête. J’aurais cru que ces conclusions auraient établi l’existence d’une malveillance expresse en fait et en droit. Cependant, le juge de première instance a conclu que, même si les avocats avaient été [TRADUCTION] «imprudents, impulsifs ou irrationnels», ils n’avaient pas fait preuve de l’indifférence ou de l’insouciance pour la vérité qui est requise pour pouvoir conclure à l’existence d’une malveillance expresse.

En ce qui concerne Maksymec, le juge de première instance a conclu que la malveillance expresse avait été établie du fait, d’une part, qu’il ne se souciait pas de connaître la vérité et, d’autre part, qu’il était animé de l’intention de nuire à Botiuk. Le juge de première instance a reconnu que Maksymec a peut-être dû préparer un rapport pour se dissocier des racontars et des rumeurs qui couraient. Il aurait pu le faire sans diffamer Botiuk. Toutefois, il a conclu que Maksymec avait menacé Botiuk lorsqu’il lui avait dit: [TRADUCTION] «[s]i vous ne remettez pas les fonds, je vais faire un scandale et vous ruiner». Le juge de première instance a conclu que cette déclaration était à elle

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explain why in the course of distancing himself from the rumours Maksymec defamed Botiuk. This he did in order to carry out his threat.

Turning to the question of damages, the trial judge ruled that:

... a lawyer whose practice is primarily concerned with a large, long standing, well established ethnic community, cannot suffer a more significant blow than to have his reputation for honesty, integrity and reliability publicly attacked on the basis that he wrongfully kept money which belonged to the members of that community by prominent lawyers and businessmen from that community.

He concluded that Botiuk had reached a "high pinnacle of success" and that the attack upon his reputation had severely damaged his health, family relations, practice, professional and business connections and social life. The trial judge found that for many years, Botiuk would be known as "the lawyer who took or kept \$10,000.00 from that community".

The trial judge reviewed the principles governing the assessment of damages and considered the awards made in earlier libel cases. He concluded that an appropriate sum for compensatory damages, which included general damages, aggravated damages and the present value of future pecuniary loss, was \$140,000. In his view, this was not a case for punitive damages.

The trial judge also awarded special damages for the loss of income incurred by Botiuk as a result of the libel. He considered the evidentiary difficulties that are always present in proving actual loss and assessed the special damages at \$325,000. This sum represented a loss of approximately 10 percent per year of Botiuk's income or

seule un motif suffisant pour conclure à la malveillance. Cela expliquerait également pourquoi Maksymec a diffamé Botiuk en se dissociant des rumeurs qui couraient. C'est ce qu'il a fait pour mettre sa menace à exécution.

Quant à la question des dommages-intérêts, le juge de première instance a conclu:

[TRADUCTION] . . . un avocat dont la pratique est avant tout consacrée à une collectivité ethnique importante et bien établie ne peut subir un plus dur coup que de voir sa réputation d'honnêteté, d'intégrité et de fiabilité attaquée publiquement par des avocats et des hommes d'affaires bien connus dans cette collectivité, sous prétexte qu'il a illégalement conservé des sommes appartenant aux membres de cette collectivité.

Il a décidé que Botiuk avait atteint [TRADUCTION] «l'apogée du succès» et que cette attaque contre sa réputation avait gravement nuit à sa santé, à ses relations familiales, à sa pratique, à ses relations professionnelles et d'affaires de même qu'à sa vie sociale. Le juge de première instance a conclu que, pendant des années, Botiuk serait connu comme étant [TRADUCTION] «l'avocat qui s'est approprié ou a conservé une somme de 10 000 \$ appartenant à cette collectivité».

Le juge de première instance a passé en revue les principes applicables à l'évaluation des dommages-intérêts et examiné les montants accordés dans d'autres actions pour libelle. Il a conclu que la somme de 140 000 \$ constituait un montant approprié de dommages-intérêts compensatoires, comprenant des dommages-intérêts généraux, des dommages-intérêts majorés et la valeur actualisée de toute perte pécuniaire future. À son avis, il ne s'agissait pas d'un cas où il y avait lieu d'accorder des dommages-intérêts punitifs.

Le juge de première instance a également accordé des dommages-intérêts spéciaux pour la perte de revenu subie par Botiuk à cause du libelle. Il a examiné la difficulté toujours présente de prouver le montant de la perte réelle, et il a fixé à 325 000 \$ le montant des dommages-intérêts spéciaux. Cette somme représente pour Botiuk une

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one-half of the lower estimate of damages provided by Botiuk's expert.

53 The trial judge rejected the argument of the appellant lawyers that since they were only involved with the Lawyers' Declaration, the damages assessed against them should be reduced accordingly. Rather, he found that all the appellants were joint tortfeasors with respect to all three documents and that they were jointly and severally liable to the respondent for all damages. I agree with this finding. In my view, there was a sound evidentiary and legal basis for the trial judge to reach this conclusion.

54 On the issue of costs, the trial judge considered that the respondent had offered to settle in the amount of \$400,000, an apology and costs. However, as this offer was lower than the \$465,000 that Botiuk was awarded at trial, pursuant to Rule 49.10 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Botiuk was entitled to costs assessed on a solicitor-client basis. Prejudgment interest was awarded for a period of 12½ years at a rate of 13 percent per annum on \$120,000 of the \$140,000 compensatory damage award and on the entire \$325,000 special damage award.

(B) *Court of Appeal*, [1993] O.J. No. 239 (QL)

55 On the question of malice, the court agreed that there was evidence which supported the trial judge's finding that Maksymec was motivated by spite and acted with an intention to injure Botiuk.

56 On the issue of qualified privilege, it determined that Maksymec had no duty to present the Report. First, the special financial commission, on whose behalf he professed to be reporting, had made its recommendation to the UCC executive and had ceased to exist years before May 1978. Second, the general meeting of the UCC had no corresponding

perte annuelle d'environ 10 pour 100 de son revenu ou la moitié de la plus basse évaluation des dommages-intérêts fournie par l'expert de Botiuk.

Le juge de première instance a rejeté l'argument des avocats appelants voulant que, puisqu'ils n'avaient participé qu'à la déclaration des avocats, le montant de dommages-intérêts qui leur était réclamé soit réduit en conséquence. Il a plutôt conclu que tous les appelants étaient coauteurs du délit relativement aux trois documents et qu'ils étaient solidairement responsables de tous les dommages subis par l'intimé. Je suis d'accord avec cette conclusion. À mon avis, des éléments de preuve et des motifs juridiques solides justifiaient cette conclusion du juge de première instance.

Quant aux dépens, le juge de première instance a considéré que l'intimé avait offert, pour régler le litige, de verser une somme de 400 000 \$, de faire des excuses et de payer les dépens. Cependant, puisque cette offre était inférieure à la somme de 465 000 \$ accordée à Botiuk en première instance, Botiuk avait droit, conformément à l'art. 49.10 des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, règl. 194, aux dépens calculés sur la base procureur-client. Des intérêts avant jugement ont été consentis pour une période de 12 ans et demi, au taux de 13 pour 100 par année, sur 120 000 \$ des 140 000 \$ accordés à titre de dommages-intérêts compensatoires, et sur la totalité des 325 000 \$ accordés à titre de dommages-intérêts spéciaux.

(B) *La Cour d'appel*, [1993] O.J. No. 239 (QL)

Relativement à la question de la malveillance, la cour a reconnu qu'il y avait des éléments de preuve qui permettaient au juge de première instance de conclure que Maksymec était animé par la rancune et avait agi dans l'intention de nuire à Botiuk.

En ce qui concerne l'immunité relative, elle a statué que Maksymec n'était pas obligé de présenter le rapport. Premièrement, la commission spéciale des finances, au nom de laquelle il disait présenter ce rapport, avait fait sa recommandation à la direction du CUC et avait cessé d'exister des années avant le mois de mai 1978. Deuxièmement,

interest in receiving the Report. As for the Lawyers' Declaration and the Maksymec Reply, the Court of Appeal agreed with the trial judge that these documents went far beyond what was necessary in order to respond to the Sokolsky-Muz Declaration and therefore exceeded any qualified privilege that might have existed.

On the question of joint liability, the court again agreed that the trial judge was correct in holding that the three documents should be treated as one act of libel and in awarding a single set of damages in respect of them against all the appellants jointly and severally.

The liability of Maksymec & Associates Ltd., as found by the trial judge, was affirmed. It was from this company's premises that Maksymec had mailed the Maksymec Report, Lawyers' Declaration and Maksymec Reply in an envelope bearing the company's name and return address. The court agreed that since Maksymec was the company's principal shareholder and officer and its directing mind, it became associated with his libellous publications.

Finally, with respect to the quantum of damages, the court agreed that there was evidence that the libel had adversely affected Botiuk's professional practice. However, it held that since special damages were not specifically pleaded, they could only form a part of the general damage award. In the court's view, a fair sum for compensatory damages was \$200,000.

The court ruled that there should be some reduction in the term of prejudgment interest as a result of the delay occasioned by Botiuk in proceeding to trial. It reduced it to a period of 10 years. As for costs, the court agreed that since Botiuk discharged the burden of establishing that the judgment obtained by him was more favourable than the

l'assemblée générale du CUC n'avait aucun intérêt équivalent dans le dépôt du rapport. Pour ce qui est de la déclaration des avocats et de la réponse de Maksymec, la Cour d'appel était d'accord avec le juge de première instance pour dire que ces documents allaient bien au-delà de ce qui était nécessaire pour répondre à la déclaration Sokolsky-Muz, et qu'ils outrepassaient donc toute immunité relative qui aurait pu exister.

En ce qui concerne la question de la responsabilité conjointe, la cour a également convenu que le juge de première instance avait eu raison de conclure que les trois documents devraient être considérés comme un seul acte diffamatoire et de condamner solidairement l'ensemble des appelants à payer un seul montant de dommages-intérêts.

La Cour d'appel a confirmé la conclusion du juge de première instance à la responsabilité de Maksymec & Associates Ltd. C'est dans les locaux de cette société que Maksymec avait posté le rapport Maksymec, la déclaration des avocats et sa réponse dans une enveloppe portant le nom et l'adresse de retour de la société. La cour a convenu que, puisque Maksymec était cadre et actionnaire principal de la société, ainsi que son âme dirigeante, la société était devenue associée aux publications diffamatoires de Maksymec.

Enfin, en ce qui concerne le montant des dommages-intérêts, la cour était d'accord pour dire qu'il existait des éléments de preuve que le libelle avait nuit à la pratique professionnelle de Botiuk. Cependant, elle a conclu que des dommages-intérêts spéciaux ne pouvaient pas faire partie du montant des dommages-intérêts généraux accordés puisqu'ils n'avaient pas été demandés expressément. De l'avis de la cour, la somme de 200 000 \$ représentait des dommages-intérêts compensatoires équitables.

La cour a décidé que le montant des intérêts avant jugement devrait être réduit à cause du retard que Botiuk avait mis à intenter un procès. Elle les a ramenés à une période de 10 ans. Quant aux dépens, la cour a convenu qu'il n'y avait aucune raison de modifier le montant des dépens que le juge de première instance avait accordés sur la

terms of his offer to settle, there was no basis for interfering with the trial judge's award of costs on a solicitor-client basis subsequent to the date of the offer.

### III. Analysis

#### (A) *Did the Appellants Defame the Respondent*

The nature and history of the action for defamation were discussed in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

For the purposes of these reasons, it is sufficient to observe that a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule, is defamatory and will attract liability. See *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1079. What is defamatory may be determined from the ordinary meaning of the published words themselves or from the surrounding circumstances. In *The Law of Defamation in Canada* (2nd ed. 1994), R. E. Brown stated the following at p. 1-15:

[A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood. In determining its meaning, the court may take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented.

When the payment was made by Metro Toronto to Botiuk for his work at the Vannini inquiry, insidious rumours began to circulate in the Ukrainian community that he was in breach of his agreement to donate those funds to the Kosygin Demonstration Fund. The article published in the *Free Word* on March 12, 1977 asked why, if there was an agreement among Ukrainian lawyers to donate

base procureur-client après la date de l'offre, puisque Botiuk s'était acquitté du fardeau qu'il avait d'établir que le jugement qu'il avait obtenu était plus favorable que les conditions de son offre de règlement.

### III. Analyse

#### (A) *Les appelants ont-ils diffamé l'intimé?*

La nature et l'historique de l'action en diffamation ont été examinés dans l'arrêt *Hill c. Église de scientologie de Toronto*, [1995] 2 R.C.S. 1130.

Il suffit, pour les fins des présents motifs, de dire qu'une publication qui tend à diminuer une personne dans l'estime des membres bien pensants de la société ou à l'exposer à la haine, au mépris ou au ridicule, est diffamatoire et engage la responsabilité de son auteur. Voir l'arrêt *Cherneskey c. Armadale Publishers Ltd.*, [1979] 1 R.C.S. 1067, à la p. 1079. Il est possible de déterminer ce qui est diffamatoire à partir du sens ordinaire des mots publiés eux-mêmes ou des circonstances entourant leur publication. Dans l'ouvrage intitulé *The Law of Defamation in Canada* (2<sup>e</sup> éd. 1994), R. E. Brown affirme, à la p. 1-15:

[TRADUCTION] [Une publication] peut être diffamatoire dans le sens ordinaire des termes qu'elle utilise ou à cause de faits ou de circonstances extrinsèques, connus de l'auditeur ou du lecteur, qui lui confèrent un sens diffamatoire en laissant entendre quelque chose de différent de ce qui serait normalement compris. Pour en déterminer le sens, le tribunal peut tenir compte de toutes les circonstances de l'affaire, dont les répercussions que les termes peuvent raisonnablement avoir, le contexte dans lequel ils sont utilisés, l'auditoire à qui ils sont destinés et la façon dont ils ont été présentés.

Lorsque la Communauté urbaine de Toronto a payé Botiuk pour le travail qu'il avait accompli à l'enquête Vannini, des rumeurs insidieuses ont commencé à courir dans la collectivité ukrainienne, selon lesquelles il aurait manqué à son engagement de faire don de cette somme au Fonds de manifestation anti-Kosygin. Dans l'article publié dans le *Free Word* le 12 mars 1977, l'auteur se demandait pourquoi, si les avocats ukrainiens s'étaient entendus pour fournir gratuitement leurs

their services, the funds were in the possession of Botiuk.

The UCC, the very organization that was purported to be the beneficiary of the funds, sought to put these pernicious rumours to rest. To that end, it published a letter in the community newspaper on March 15, 1977, reiterating that financial matters connected with the demonstration had already been reported and were satisfactorily settled. A few days earlier, it should be remembered, those same concerns had been raised during a meeting of the executive of the UCC and answered to the complete satisfaction of all those in attendance. Indeed, Botiuk was publicly thanked for his generosity. It was, by then, clear that Botiuk had done nothing wrong. Rather, he was to be commended for his actions.

In the face of the satisfactory explanations of the UCC executive, on May 5, 1978 Maksymec published a Report which seemed to be carefully calculated to injure Botiuk. He began by listing a large group of Ukrainian lawyers, including Botiuk, who had agreed to provide their services free of charge. He then set out the relevant financial aspects relating to the conduct of the criminal and inquiry proceedings, namely the fees paid to the non-Ukrainian lawyers, the administrative expenses as well as the total income derived from donations and from Metro Toronto. He then asserted that this income was to be used for a special immigration fund for the benefit of Ukrainians outside Canada. He finished by stating that, while the portion of the funds received from Metro Toronto which was paid to Carter had been deposited in the immigration fund, the remainder of that money, which rightfully belonged to the UCC, was being withheld by Botiuk. The inference was very clear: Botiuk was a dishonourable person, if not a thief.

Once again, the leadership of the UCC attempted to rectify the situation by issuing the Sokolsky-Muz Declaration. This document noted that while the original intention might have been

services, les fonds se trouvaient en la possession de Botiuk.

Le CUC, l'organisme même qui était censé être le bénéficiaire des fonds, a cherché à mettre un terme à ces rumeurs pernicieuses. À cette fin, il a publié une lettre dans le journal communautaire, le 15 mars 1977, répétant que les questions financières liées à la manifestation avaient déjà fait l'objet d'un rapport et d'un règlement satisfaisant. Il y a lieu de se rappeler que, quelques jours auparavant, ces mêmes questions avaient été soulevées au cours d'une réunion de la direction du CUC et que l'on y avait répondu à l'entière satisfaction de toutes les personnes présentes. En fait, on avait publiquement remercié Botiuk pour sa générosité. Il était alors clair que Botiuk n'avait rien fait de mal. On devait plutôt faire son éloge pour ce qu'il avait fait.

Face aux explications satisfaisantes données par la direction du CUC, le 5 mai 1978, Maksymec a publié un rapport qui semblait soigneusement conçu pour nuire à Botiuk. Ce rapport commençait par une liste d'un important groupe d'avocats ukrainiens, dont Botiuk, qui avaient accepté de fournir gratuitement leurs services. Maksymec y énonçait ensuite les aspects financiers pertinents quant à la façon dont s'étaient déroulées les procédures criminelles et l'enquête, à savoir les honoraires versés aux avocats non ukrainiens, les dépenses administratives et le revenu total tiré des dons et des sommes versées par la Communauté urbaine de Toronto. Il affirmait ensuite que ce revenu devait servir à un fonds spécial d'immigration destiné à venir en aide aux Ukrainiens à l'extérieur du Canada. Il concluait en disant que, bien que l'on ait déposé dans le fonds d'immigration la partie des fonds reçus de la Communauté urbaine de Toronto, qui avait été payée à Carter, le reste des fonds, qui appartenait à juste titre au CUC, était retenu par Botiuk. L'inférence était fort claire: Botiuk était un infâme personnage, voire un voleur.

De nouveau, la direction du CUC a tenté de rectifier la situation en publiant la déclaration Sokolsky-Muz. Ce document précisait que, même si Botiuk pouvait avoir eu l'intention, au départ, de

for Botiuk to submit a general account in the name of all Ukrainian lawyers and turn over the money collected, this approach had been rejected. In other words, any understanding there might have been among the lawyers had been nullified.

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The trial judge observed that, had matters ended with the Sokolsky-Muz Declaration, there would probably have been no cause of action. However, Maksymec persisted in his efforts to defame Botiuk by recruiting the appellant lawyers and having them sign the Lawyers' Declaration. The endorsement of eight prominent lawyers from the Ukrainian community had the effect of greatly enhancing the credibility of Maksymec's charges. The testimony of a number of witnesses clearly demonstrated that members of the Ukrainian community were convinced that this group of lawyers would not have signed a document containing such serious allegations if they were not true.

68

As well, Maksymec published the Maksymec Reply and presented it to the Ontario Council of the UCC. It refused to deal with his complaint. Once again, despite the clear and repeated repudiations of his claims by the UCC, Maksymec continued with his vendetta against Botiuk.

69

There can be no doubt that the trial judge was correct in concluding that the combined effect of the three documents published by Maksymec and the appellant lawyers was clearly defamatory. These documents unmistakably implied that Botiuk was dishonourable and dishonest. They cast doubt upon his integrity, the most important attribute of any lawyer.

70

The devastating effect of the three publications was confirmed by the testimony of many witnesses. For example, Alderman Negridge, a prominent member of the community, spoke with tears in his eyes about members of the Ukrainian community who had "walked miles to give their donations of five or ten dollars" to help the cause and how Botiuk had misappropriated those funds.

présenter un état de compte général au nom de tous les avocats ukrainiens et de remettre la somme perçue, cette façon de procéder avait été écartée. En d'autres termes, toute entente qui avait pu exister entre les avocats avait été annulée.

Le juge de première instance a souligné que, si la déclaration Sokolsky-Muz avait clos l'affaire, il n'y aurait probablement pas eu de cause d'action. Cependant, Maksymec a persisté dans ses efforts pour diffamer Botiuk en s'adressant aux avocats appelants et en leur faisant signer la déclaration des avocats. L'appui reçu par huit avocats bien connus dans la collectivité ukrainienne a eu pour effet de rendre plus crédibles les accusations de Maksymec. Le témoignage d'un certain nombre de personnes révèle clairement que les membres de la collectivité ukrainienne étaient convaincus que ce groupe d'avocats n'auraient pas signé un document renfermant des allégations aussi graves si elles n'avaient pas été exactes.

De plus, Maksymec a publié sa réponse et l'a présentée au conseil ontarien du CUC. Celui-ci a refusé de s'occuper de sa plainte. Encore une fois, même si le CUC avait de façon claire et répétée répudié les arguments de Maksymec, ce dernier a poursuivi sa vendetta contre Botiuk.

Il n'y a pas de doute que le juge de première instance a eu raison de conclure que l'effet combiné des trois documents publiés par Maksymec et les avocats appelants était clairement diffamatoire. Ces documents insinuaient indubitablement que Botiuk était un personnage infâme et malhonnête. Ils laissaient planer des doutes sur son intégrité, la plus importante qualité d'un avocat.

De nombreux témoins sont venus confirmer l'effet dévastateur de ces trois publications. Par exemple, Alderman Negridge, membre bien connu de la collectivité, avait les larmes aux yeux lorsqu'il a parlé des membres de la collectivité ukrainienne qui [TRADUCTION] «avaient marché des kilomètres pour faire des dons de cinq ou dix dollars» pour le bien de la cause, et de la façon dont Botiuk avait détourné ces fonds.

The publications led some people to believe, as Negridge obviously did, that Botiuk had received and wrongly kept money from the Kosygin Demonstration Fund of donations. This was a false and mistaken belief. In fact, only the appellants Onyschuk and Maksymec made use of Demonstration Fund monies, the former to recoup his disbursements and the latter to pay for the publication costs of a book by the UCC which he had personally guaranteed.

Unfortunately, even at the time of the trial, more than 12 years after the libels were published, some people still believed the rumours concerning Botiuk. The trial judge was correct in his assessment that “notwithstanding the result of this action, the [respondent] will continue for the rest of his time to be considered by some members of the Ukrainian community as the lawyer who took or kept \$10,000.00 from that community”. There can be no doubt that each of the impugned documents was libellous.

#### (B) *Joint Liability*

The appellant lawyers contend that the trial judge erred when he held that all three publications were to be considered a single libel. They submit that since they were only involved with the Lawyers' Declaration, their responsibility should be limited to damages flowing from the publication of that document. They rely for this proposition on the rule which provides that every defamatory publication generally gives rise to a fresh cause of action. I cannot accept that submission. The so-called “single publication rule” does not apply to concurrent tortfeasors, who can be defined as persons whose torts concur, or run together, to produce the same damage.

In *The Law of Torts* (8th ed. 1992), Fleming discusses the concept of joint concurrent tortfeasors. He states this at p. 255:

Ces publications en ont amené certains à croire, comme ce fut de toute évidence le cas de Negridge, que Botiuk avait reçu et illégalement conservé les dons versés au Fonds de manifestation anti-Kosygin. C'était là une croyance fautive et erronée. En fait, il n'y a que les appelants Onyschuk et Maksymec qui ont utilisé le Fonds de manifestation, le premier pour se rembourser ses dépenses et le deuxième pour payer les coûts de publication d'un livre du CUC, qu'il avait personnellement cautionné.

Malheureusement, même au moment du procès, plus de 12 ans après les publications diffamatoires, certaines personnes ajoutaient encore foi aux rumeurs concernant Botiuk. Le juge de première instance a eu raison d'affirmer que [TRADUCTION] «quel que soit le résultat de la présente action, [l'intimé] continuera toujours d'être considéré par certains membres de la collectivité ukrainienne comme l'avocat qui s'est approprié ou a conservé une somme de 10 000 \$ appartenant à cette collectivité». Il n'y a pas de doute que chacun des documents attaqués était diffamatoire.

#### (B) *La responsabilité conjointe*

Les avocats appelants soutiennent que le juge de première instance a commis une erreur lorsqu'il a conclu que les trois publications devaient être considérées comme un seul acte diffamatoire. Ils font valoir que, puisqu'ils n'étaient impliqués que dans la déclaration des avocats, leur responsabilité devrait se limiter au préjudice découlant de la publication de ce document. À cette fin, ils s'appuient sur la règle voulant que chaque publication diffamatoire donne généralement lieu à une nouvelle cause d'action. Je ne puis accepter cet argument. La règle dite «de la publication unique» ne s'applique pas aux auteurs d'un délit concourant, qui peuvent être définis comme des personnes dont le délit concourt ou contribue au même préjudice.

Dans l'ouvrage intitulé *The Law of Torts* (8<sup>e</sup> éd. 1992), Fleming analyse le concept des coauteurs d'un délit concourant. Voici ce qu'il affirme, à la p. 255:

A tort is imputed to several persons as joint tortfeasors in three instances: agency, vicarious liability, and concerted action. The first two will be considered later. The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. . . . Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realise they are committing a tort. [Emphasis added.]

[TRADUCTION] Un délit est imputé à plusieurs personnes à titre de coauteurs dans trois cas: le mandat, la responsabilité du fait d'autrui et l'action concertée. Les deux premiers seront examinés plus loin. L'élément essentiel du troisième cas est que ceux qui ont participé au délit doivent avoir agi dans un dessein commun [. . .] De façon générale, cela signifie un complot avec tous les participants dans l'accomplissement du méfait, même s'il n'est probablement pas nécessaire qu'ils se rendent compte qu'ils commettent un délit. [Je souligne.]

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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.

En raison des actes qu'ils ont accomplis, les appelants tombent dans la troisième catégorie des coauteurs d'un délit, que Fleming décrit si bien. D'après le contexte dans lequel l'auteur l'a utilisé, le mot «complot» désigne le fait pour des personnes de projeter de participer à des actes délictueux ou de s'entendre pour le faire, même s'ils ne se rendent pas compte qu'ils commettent un délit.

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As set out in *Hill, supra*, “[i]f one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel” (para. 176). This statement is applicable to the case at bar. The Lawyers' Declaration expressly adopted the contents of the Maksymec Report. It follows that the appellant lawyers must be jointly responsible with Maksymec for the publication of the Report. The appellant lawyers accepted and intended that Maksymec would use the Declaration extensively and publish it. They placed no restrictions on the use to which it might be put. The Declaration and Report are by their terms inextricably interrelated. By their actions, the appellants became joint tortfeasors. Further, they, as lawyers, signed the Declaration without undertaking any investigation. For lawyers to act in this way constituted reckless behaviour. Therefore, they must be as responsible as Maksymec, not only for its publication but also for its subsequent republication.

Comme on l'affirme dans l'arrêt *Hill*, précité, «[l']auteur d'un libelle, celui qui le répète, et celui qui approuve l'écrit, se rendent tous trois coupables de libelle diffamatoire» (par. 176). Cette affirmation est applicable en l'espèce. La déclaration des avocats adoptait expressément le contenu du rapport Maksymec. Il s'ensuit que les avocats appelants et Maksymec doivent être tenus conjointement responsables de la publication du rapport. Les avocats appelants ont accepté et voulu que Maksymec utilise abondamment la déclaration et la publie. Ils n'ont imposé aucune restriction quant à son utilisation. De par leur texte, la déclaration et le rapport sont inextricablement liés. Par leurs actions, les appelants sont devenus coauteurs d'un délit. De plus, ils ont, en tant qu'avocats, signé la déclaration sans se renseigner. Les avocats qui agissent de cette façon ont un comportement insouciant. En conséquence, ils sont aussi responsables que Maksymec non seulement de la publication du rapport mais aussi de sa publication ultérieure.

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The appellant lawyers are, as well, jointly and severally liable with Maksymec for the damage caused by the Maksymec Reply. The inclusion of the Lawyers' Declaration in the Maksymec Reply was a natural and logical consequence of the law-

Les avocats appelants sont également solidairement responsables avec Maksymec du préjudice causé par la réponse de Maksymec. Il était naturel et logique que Maksymec inclue la déclaration des avocats dans sa réponse puisque les avocats qui

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yers signing it without placing any restrictions on its use. Support for this position can be found in *Basse v. Toronto Star Newspapers Ltd.* (1983), 44 O.R. (2d) 164 (H.C.), at p. 165, and *Gatley on Libel and Slander* (8th ed. 1981), at pp. 119-20.

### (C) *Qualified Privilege*

Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. It was explained in this way by Lord Atkinson in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

See also *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311, at p. 321.

Where an occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute. It may be defeated in two ways. The first arises if the dominant motive for publishing is actual or express malice. Malice is commonly understood as ill will toward someone, but it also relates to any indirect motive which conflicts with the sense of duty created by the occasion. Malice may be established by showing that the defendant either knew that he was not telling the truth, or was reckless in that regard.

Second, qualified privilege may be defeated if the limits of the duty or interest have been exceeded. In other words, if the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated. This was discussed at

avaient signé cette déclaration n'avaient fixé aucune restriction quant à son utilisation. Cette position s'appuie sur l'arrêt *Basse c. Toronto Star Newspapers Ltd.* (1983), 44 O.R. (2d) 164 (H.C.), à la p. 165, et l'ouvrage intitulé *Gatley on Libel and Slander* (8<sup>e</sup> éd. 1981), aux pp. 119 et 120.

### (C) *L'immunité relative*

L'immunité relative se rattache aux circonstances entourant la communication et non à la communication elle-même. Comme l'explique lord Atkinson dans *Adam c. Ward*, [1917] A.C. 309 (H.L.), à la p. 334:

[TRADUCTION] ... il y a immunité relative [...] dans des circonstances où la personne qui donne des renseignements a un intérêt ou une obligation légale, sociale ou morale, de les donner à la personne à qui elle les fournit et la personne qui les reçoit a un intérêt ou une obligation correspondant de les recevoir. La réciprocité est essentielle.

Voir aussi l'arrêt *McLoughlin c. Kutasy*, [1979] 2 R.C.S. 311, à la p. 321.

Lorsqu'on établit qu'il y a immunité, la bonne foi du défendeur est présumée et ce dernier est alors libre de publier des remarques sur le demandeur, qui peuvent être diffamatoires et inexactes. Toutefois, l'immunité n'est pas absolue. Elle peut cesser d'exister pour deux raisons. Premièrement, si la publication est principalement motivée par la malveillance véritable ou expresse. Ordinairement, la malveillance s'entend de l'animosité envers quelqu'un, mais elle s'entend aussi de tout motif indirect qui entre en conflit avec le sens du devoir que l'occasion a créé. On établira l'existence de la malveillance en démontrant que le défendeur savait qu'il ne disait pas la vérité ou qu'il était insouciant à cet égard.

Deuxièmement, l'immunité relative peut cesser d'exister lorsqu'on a outrepassé les limites du devoir ou de l'intérêt. En d'autres termes, si l'information communiquée n'était pas raisonnablement appropriée pour les fins légitimes de l'occasion, l'immunité relative cessera d'exister. Cette

some length in *Hill, supra*, and there is no need to repeat it in these reasons.

81 The appellants contend that they are entitled to raise the defence of qualified privilege in two ways. First, Maksymec asserts that in publishing his Report to the annual general meeting of the UCC in May 1978, he was acting pursuant to a duty to report which arose as a result of both his position on the special financial commission as well as his overall involvement in the inquiry proceedings. Second, both Maksymec and the appellant lawyers claim that the Lawyers' Declaration and the Maksymec Reply were a legitimate response to the Sokolsky-Muz Declaration.

(1) Qualified Privilege in Relation to the Report

82 Maksymec argues that the special financial commission had been specifically established to make proposals as to how the UCC should use the costs paid by Metro Toronto and to present an accounting of the expenses incurred by the UCC in connection with the proceedings. I agree with the trial judge that by 1978, no duty, however widely it might be defined, remained to be discharged by Maksymec. The commission had long since ceased to exist. It had fulfilled its assigned function shortly after its creation by suggesting that a special immigration fund be established. The recovery of funds was never a part of its mandate.

83 Further, the UCC had no interest in receiving the Maksymec Report four years after the events. The evidence adduced indicated that those in attendance at the annual general meeting neither expected it nor wanted it to be introduced.

84 I am, however, prepared to accept the existence of a duty arising from Maksymec's position as a former president of the UCC. It was during his administration that the proceedings arising out of

question a été examinée en profondeur dans l'arrêt *Hill*, précité, et il n'est pas nécessaire de la reprendre en l'espèce.

Les appelants soutiennent qu'ils ont le droit d'invoquer de deux façons le moyen de défense fondé sur l'immunité relative. Premièrement, Maksymec soutient qu'en publiant son rapport à l'assemblée générale annuelle du CUC en mai 1978, il agissait conformément au devoir de rendre compte qu'il avait comme titulaire du poste qu'il occupait au sein de la commission spéciale des finances, et conformément à sa participation globale aux procédures d'enquête. Deuxièmement, Maksymec et les avocats appelants soutiennent que la déclaration des avocats et la réponse de Maksymec constituaient une réponse légitime à la déclaration Sokolsky-Muz.

(1) L'immunité relative et le rapport

Maksymec soutient que la commission spéciale des finances avait été spécifiquement constituée, d'une part, pour formuler des propositions sur la façon dont le CUC devrait utiliser les fonds versés par la Communauté urbaine de Toronto et, d'autre part, pour présenter un état des dépenses engagées par le CUC relativement aux procédures. Je suis d'accord avec le juge de première instance pour dire que Maksymec n'avait plus, en 1978, aucun devoir, aussi large qu'on puisse le définir, dont il devait s'acquitter. La commission n'existait plus depuis longtemps. Elle avait rempli son mandat peu de temps après sa création en proposant l'établissement d'un fonds spécial d'immigration. Le recouvrement de fonds n'a jamais fait partie de son mandat.

De plus, le CUC n'avait aucun intérêt à recevoir le rapport Maksymec quatre ans après les événements. Selon les éléments de preuve déposés, les participants à l'assemblée générale annuelle n'espéraient pas et ne désiraient pas le dépôt de ce rapport.

Cependant, je suis disposé à accepter que Maksymec avait un devoir en tant qu'ancien président du CUC. C'est au cours de son administration que les procédures découlant de la manifestation

the anti-Kosygin demonstration commenced. Similarly, the UCC had a reciprocal interest in receiving pertinent information in light of the rumours which had been circulating within the Ukrainian community. The annual general meeting of the UCC, where discussions relating to community affairs took place, was an appropriate forum to present the Maksymec Report.

This said, I am satisfied that the limits of the privileged occasion were clearly exceeded. As the trial judge stated, Maksymec may have wanted to address the rumours in order to distance himself from the gossip, but in doing so it was unnecessary to defame Botiuk. The libellous references to Botiuk contained in the Maksymec Report exceeded the qualified privilege that attached to the occasion.

(2) Qualified Privilege in Relation to the Lawyers' Declaration and the Maksymec Reply

Both Maksymec and the appellant lawyers claim that the occasion was privileged because in the Lawyers' Declaration and Maksymec Reply they were responding to what they perceived to be an attack on their honesty and integrity presented by the Sokolsky-Muz Declaration. As this Court held in *Douglas v. Tucker*, [1952] 1 S.C.R. 275, at p. 286, following *Adam v. Ward*, *supra*, a response to a personal attack is protected by a qualified privilege. However, that response must be "germane and reasonably appropriate to the occasion". See also *Gatley on Libel and Slander*, *supra*, at p. 218.

The Sokolsky-Muz Declaration attacked the Maksymec Report as "groundless and untrue" and "harmful to the community". The appellants were entitled to respond to protect their interest and, therefore, the defence of qualified privilege was available to them. However, they went well beyond what was reasonably appropriate to the occasion, and as a result, they lost the protections afforded by that defence.

anti-Kosygin ont commencé. De même, le CUC avait un intérêt réciproque à recevoir des renseignements pertinents compte tenu des rumeurs qui couraient dans la collectivité ukrainienne. L'assemblée générale annuelle du CUC, au cours de laquelle on discutait de questions concernant la collectivité, constituait un lieu approprié pour déposer le rapport Maksymec.

Ceci dit, je suis convaincu que l'on a clairement excédé les limites de l'immunité. Comme l'a dit le juge de première instance, Maksymec a peut-être voulu s'attaquer aux rumeurs pour se dissocier des racontars, mais ce faisant il n'avait pas à diffamer Botiuk. Les mentions diffamatoires relatives à Botiuk contenues dans le rapport Maksymec outrepassaient l'immunité relative rattachée aux circonstances.

(2) L'immunité relative et la déclaration des avocats et la réponse de Maksymec

Maksymec et les avocats appelants soutiennent qu'il y avait immunité parce que, dans la déclaration des avocats et la réponse de Maksymec, ils répondaient à ce qu'ils considéraient comme une attaque contre leur honnêteté et leur intégrité dans la déclaration Sokolsky-Muz. Comme notre Cour l'a affirmé dans l'arrêt *Douglas c. Tucker*, [1952] 1 R.C.S. 275, à la p. 286, dans la foulée de l'arrêt *Adam c. Ward*, précité, une réponse à une attaque personnelle bénéficie d'une immunité relative. Cependant, cette réponse doit être [TRADUCTION] «pertinent[e] et raisonnablement approprié[e] aux circonstances». Voir aussi *Gatley on Libel and Slander*, *op. cit.*, à la p. 218.

La déclaration Sokolsky-Muz attaquait le rapport Maksymec comme étant [TRADUCTION] «sans fondement et fau[x]» et [TRADUCTION] «préjudiciable [...] à la collectivité». Les appelants avaient le droit d'y répondre pour protéger leur intérêt et pouvaient donc invoquer le moyen de défense fondé sur l'immunité relative. Cependant, ils sont allés bien au-delà de ce qui était raisonnablement approprié dans les circonstances et ont, de ce fait, perdu la protection offerte par ce moyen de défense.

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As the trial judge observed, "it was [not] necessary for the [appellants] to continue to defame the [respondent] in order to deal with the Sokolsky-Muz declaration". Neither the Lawyers' Declaration nor the Maksymec Reply was a measured response to the document authored by the UCC. By adopting the omissions and inaccuracies of the Maksymec Report, the Lawyers' Declaration and Maksymec Reply increased the injurious effect of the defamation contained in the Report.

(D) *Liability of Maksymec & Associates Ltd.*

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On behalf of the company, it is argued that a corporation can only be held liable for the acts of its agents if they are acting pursuant to the corporation's express authorization, or in direct obedience of its orders, or within the authority and power conferred on them by the corporation. It is submitted that there was no evidence that either Maksymec or his secretary were acting with the authority of the corporation when they stamped the company's name and return address on the envelopes used to send the libellous documents to selected members of the Ukrainian community.

90

The Court of Appeal upheld the trial judge's finding of liability on the part of Maksymec & Associates Ltd. It found that, by his action and in his capacity as the principal shareholder and officer of the company and its directing mind, Maksymec clearly associated the company with the defamatory statements. I agree with this conclusion. As Lord Denning states in *H. L. Bolton (Engineering) Co. v. T. J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159 (C.A.), at p. 173, "the intention of the company can be derived from the intention of its officers and agents". See also *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1986), 52 O.R. (2d) 473 (C.A.).

(E) *Damages*

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In *Hill, supra*, the importance of the reputation of the individual was discussed. These words appear at para. 107:

Comme l'a fait remarquer le juge de première instance: [TRADUCTION] «[les appelants] n'avaient pas à continuer de diffamer [l'intimé] pour répondre à la déclaration Sokolsky-Muz». Ni la déclaration des avocats ni la réponse de Maksymec ne constituaient une réponse modérée au document du CUC. En reprenant les omissions et les inexactitudes du rapport Maksymec, la déclaration des avocats et la réponse de Maksymec intensifiaient l'effet préjudiciable de la diffamation contenue dans ce rapport.

(D) *La responsabilité de Maksymec & Associates Ltd.*

Au nom de la société, on soutient qu'une personne morale ne peut être tenue responsable des actes de ses mandataires que si ces derniers agissent conformément à l'autorisation expresse de la société, sur son ordre direct ou conformément à la compétence et au pouvoir qu'elle leur a conférés. On soutient qu'il n'y avait aucune preuve que Maksymec ou sa secrétaire agissait avec l'autorisation de la société lorsqu'ils ont apposé le nom et l'adresse de retour de la société sur les enveloppes utilisées pour envoyer les documents diffamatoires à certains membres de la collectivité ukrainienne.

La Cour d'appel a confirmé la conclusion du juge de première instance relativement à la responsabilité de Maksymec & Associates Ltd. Elle a statué que, par ses actes et en sa qualité de cadre, actionnaire principal et âme dirigeante de la société, Maksymec avait nettement associé la société aux déclarations diffamatoires. Je suis d'accord avec cette conclusion. Comme lord Denning l'affirme dans l'arrêt *H. L. Bolton (Engineering) Co. c. T. J. Graham & Sons Ltd.*, [1957] 1 Q.B. 159 (C.A.), à la p. 173, [TRADUCTION] «l'intention de la société peut émaner de celle de ses dirigeants et mandataires». Voir aussi l'arrêt *Standard Investments Ltd. c. Canadian Imperial Bank of Commerce* (1986), 52 O.R. (2d) 473 (C.A.).

(E) *Dommages-intérêts*

L'importance de la réputation de la personne a été analysée dans l'arrêt *Hill*, précité. Ce passage figure au par. 107:

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A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws.

It was observed in *Hill* that this is particularly true of lawyers. A reputation for integrity and trustworthiness is the cornerstone of their professional life. Injury done to reputation can only with the greatest difficulty be repaired. As Cardozo J. put it in *People ex rel. Karlin v. Culkin*, 162 N.E. 487 (N.Y. 1928), at p. 492, “[r]eputation in such a calling is a plant of tender growth and its blossom, once lost, is not easily restored”. It should be recognized that these observations will be equally applicable to other professions and callings. It is simply that this case is concerned with a lawyer. I would add that for a lawyer whose practice stems in large part from a tightly knit, ethnic community, a charge of dishonesty would undoubtedly cause a crushing injury.

The trial judge found that prior to the libel, Botiuk was, in every way, a leader in the Ukrainian community. He had reached a “high pinnacle of success” and enjoyed a “first-class reputation”. Following the publications, his practice, his personal and social life, even his health, suffered greatly. In addition, the devastating effects of the libellous statements have persisted over the years.

#### (1) Malice

The figure of \$140,000 arrived at by the trial judge included an award for aggravated damages. In my reasons in *Hill*, *supra*, the following appears at para. 190:

If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and

... [une] bonne réputation [...] se rattache étroitement à la valeur et à la dignité innées de la personne. Elle est un attribut qui doit, au même titre que la liberté d'expression, être protégé par les lois de la société.

Dans l'arrêt *Hill*, on a fait remarquer que cela est tout particulièrement vrai des avocats. Une réputation d'intégrité et de conscience professionnelles est la pierre angulaire de leur vie professionnelle. Il est fort difficile de réparer le tort causé à la réputation. Comme l'affirme le juge Cardozo, dans l'affaire *People ex rel. Karlin c. Culkin*, 162 N.E. 487 (N.Y. 1928), à la p. 492: [TRADUCTION] «[l]a réputation d'une personne occupant un tel poste est une plante à croissance délicate qu'il est difficile de faire refleurir, une fois les fleurs tombées». Il y a lieu de reconnaître que ces observations seront également applicables à d'autres métiers et professions. Il se trouve simplement que la présente affaire concerne un avocat. Je tiens à ajouter qu'un avocat dont les clients proviennent en grande partie d'une communauté ethnique fort unie subirait certainement un préjudice écrasant s'il était accusé de malhonnêteté.

Selon le juge de première instance, Botiuk était à tous les points de vue un dirigeant de la collectivité ukrainienne, avant le libelle. Il avait atteint [TRADUCTION] «l'apogée du succès» et jouissait [TRADUCTION] «d'une réputation de première classe». À la suite des publications, sa pratique professionnelle, sa vie personnelle et sociale, même sa santé, ont subi un grave préjudice. De plus, les effets dévastateurs des déclarations diffamatoires ont continué de se faire sentir au fil des ans.

#### (1) La malveillance

La somme de 140 000 \$ calculée par le juge de première instance incluait des dommages-intérêts majorés. Dans les motifs que j'ai rédigés dans l'arrêt *Hill*, précité, le passage suivant figure au par. 190:

Pour accorder des dommages-intérêts majorés, le jury doit conclure que le défendeur était motivé par une malveillance véritable et a ainsi accru le préjudice subi par le demandeur, soit en propageant davantage le tort causé à sa réputation, soit en intensifiant son angoisse morale

humiliation of the plaintiff. See, for example, *Walker v. CFTO*, *supra*, at p. 111; *Vogel*, *supra*, at p. 178; *Kerr v. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (S.C.), at p. 93; and *Cassell & Co. v. Broome*, *supra*, at pp. 825-26. The malice may be established by intrinsic evidence derived from the libellous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances, which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See *Taylor v. Despard*, *supra*, at p. 975.

95 The trial judge had no difficulty finding that Maksymec was motivated by express malice. I agree. Overwhelming evidence was presented upon which he could base this conclusion. Of a little greater complexity is the question of whether the appellants were also motivated by malice.

96 A distinction in law exists between “carelessness” with regard to the truth, which does not amount to actual malice, and “recklessness”, which does. In *The Law of Defamation in Canada*, *supra*, R. E. Brown refers to the distinction in this way (at pp. 16-29 to 16-30):

... a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice.

97 The author then puts forward the reasons of Lord Diplock in *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), as representative (though not definitively) of the Canadian position. In that case Lord Diplock wrote at p. 150:

... what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, “honest belief”. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsive-

et son humiliation. Voir par exemple *Walker c. CFTO*, précité, à la p. 111, *Vogel*, précité, à la p. 178, *Kerr c. Conlogue* (1992), 65 B.C.L.R. (2d) 70 (C.S.), à la p. 93, et *Cassell & Co. c. Broome*, précité, aux pp. 825 et 826. On peut établir l'existence de la malveillance à l'aide d'une preuve intrinsèque qui découle de la déclaration diffamatoire elle-même et des circonstances de sa publication, ou encore à l'aide d'éléments de preuve extrinsèques relatifs aux circonstances, qui démontrent que le défendeur avait l'intention injustifiable de causer un préjudice au demandeur. Voir *Taylor c. Despard*, précité, à la p. 975.

Le juge de première instance n'a eu aucune difficulté à conclure que Maksymec était motivé par une malveillance expresse. Je suis d'accord. La preuve accablante présentée le justifiait d'arriver à cette conclusion. Il est un peu plus difficile de déterminer si les avocats appellants étaient aussi motivés par la malveillance.

Il existe en droit une distinction entre «l'indifférence» à l'égard de la vérité, qui n'équivaut pas à une malveillance véritable, et «l'insouciance» qui y équivaut. Dans *The Law of Defamation in Canada*, *op. cit.*, R. E. Brown parle ainsi de cette distinction (aux pp. 16-29 et 16-30):

[TRADUCTION] ... un défendeur n'est pas malveillant simplement parce qu'il se fie seulement à des racontars et à des soupçons, ou parce qu'il est irrationnel, impulsif, stupide, emporté, impétueux, imprévoyant ou naïf, insensé, injuste, entêté ou opiniâtre, ou parce qu'il n'avait pas bien compris ou ne se rappelait pas correctement; cependant, l'existence de ces facteurs peut être une preuve de malveillance.

L'auteur expose ensuite les motifs de lord Diplock dans l'arrêt *Horrocks c. Lowe*, [1975] A.C. 135 (H.L.), comme étant représentatifs (mais d'une façon non définitive) de la position canadienne. Lord Diplock y affirme, à la p. 150:

[TRADUCTION] ... l'auteur du libelle peut bénéficier de l'immunité s'il a une croyance positive que les propos qu'il publie sont véridiques ou s'il a «une croyance honnête», comme on le dit généralement, mais de façon tautologique. S'il publie des propos inexacts diffamatoires d'une façon insouciante, et qu'il lui est indifférent qu'ils soient véridiques ou non, on considère, dans ce cas comme dans d'autres domaines du droit, qu'il était au courant de la fausseté des propos. Cependant, l'absence

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ness or irrationality in arriving at a positive belief that it is true. . . . But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", that is, a positive belief that the conclusions they have reached are true. The law demands no more. [Emphasis added.]

This proposition does indeed seem to be generally representative of the Canadian position on the matter. However, when the defendants are lawyers who must be presumed to be reasonably familiar with both the law of libel and the legal consequences flowing from the signing of a document, their actions will be more closely scrutinized than would those of a lay person. That is to say, actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer with all the resulting legal consequences of reckless behaviour. That is the very situation presented in this case.

The appellant lawyers signed a Lawyers' Declaration which stated that they had "familiarized" themselves with the Report and that it "correctly and accurately" reflected the state of affairs during and after the Kosygin demonstration. Yet, several of them had not even read it. Most of them did not know anything about the preparation of Botiuk's account. Some neither talked to Botiuk before signing the Lawyers' Declaration nor discussed it with the others. As lawyers, they should have known how significant the impact of the Lawyers' Declaration would be on Botiuk. They were duty-bound to take reasonable steps to investigate and ensure that the document was correct.

In the Maksymec Reply, Maksymec referred to the Lawyers' Declaration as the basis for the statement that the various lawyers, including the appellants, gave generously of their time and assistance before and during the Vannini inquiry and that they had agreed not to charge for their work. Although the appellants knew that in reality they

de préoccupation pour l'exactitude des propos publiés par une personne n'équivaut pas à l'indifférence, à l'impulsivité ou à l'irrationalité dont on fait preuve pour arriver à une croyance positive que les propos sont véridiques [. . .] Toutefois, malgré l'imperfection du processus mental par lequel on est arrivé à la croyance, il peut encore être «honnête», c'est-à-dire une croyance positive que les conclusions tirées sont véridiques. La loi n'en demande pas plus. [Je souligne.]

Cette proposition semble, en fait, généralement représentative de la position canadienne sur la question. Cependant, si les défendeurs sont des avocats qui, doit-on présumer, connaissent raisonnablement bien le droit en matière de libelle et les conséquences juridiques de la signature d'un document, leurs actes seront examinés de plus près que ceux d'un profane. Autrement dit, les actes qui, chez un profane, pourraient bien être qualifiés de comportement indifférent pourraient être considérés comme un comportement insouciant chez un avocat, et entraîner toutes les conséquences juridiques s'y rapportant. C'est précisément ce qui se passe en l'espèce.

Les avocats appelants ont signé la déclaration des avocats qui précisait qu'ils avaient [TRADUCTION] «pris connaissance» du rapport qui reflétait «correctement et fidèlement» la situation pendant et après la manifestation anti-Kosygin. Cependant, plusieurs d'entre eux ne l'avaient même pas lu. La plupart d'entre eux n'étaient pas au courant de la préparation de l'état de compte de Botiuk. Certains n'avaient ni parlé à Botiuk avant la signature de la déclaration des avocats, ni n'en avaient discuté avec les autres. En tant qu'avocats, ils auraient dû connaître l'importance de l'incidence que la déclaration des avocats aurait sur Botiuk. Ils avaient l'obligation de prendre des mesures raisonnables pour examiner l'exactitude du document et s'en assurer.

Dans sa réponse, Maksymec s'est fondé sur la déclaration des avocats pour affirmer que les divers avocats, y compris les appelants, avaient généreusement donné de leur temps et fourni leur aide avant et pendant l'enquête Vannini, et qu'ils avaient convenu d'accomplir gratuitement ce travail. Même si les appelants savaient que leur con-

had contributed very little and that there could not have been any such agreement, they did nothing to correct the inaccurate impression left by the Maksymec Reply and raised no objection to Maksymec's subsequent use of the Lawyers' Declaration.

101 Although it is not determinative, the conduct of the appellants lawyers prior to and during the trial can properly be taken into consideration as an indication of their general attitude toward Botiuk. None of them apologized to him or retracted what was written in the Lawyers' Declaration. Rather, as the trial progressed and the true situation was revealed, each continued to maintain that the plaintiff was wrong. As the trial judge found, the appellants Zarowsky and Bardyn manifested hostility towards the plaintiff during their testimony, particularly in relation to the extent of Botiuk's participation at the inquiry. Despite the overwhelming evidence on this point, most of the lawyers were reluctant to acknowledge how little each of them had done and, conversely, how much Botiuk had given of his time and energy.

102 The appellants must have, or at the very least should have, realized that the endorsement of eight prominent lawyers would have a devastating effect on Botiuk's reputation. The evidence indicates that after the publication of the Lawyers' Declaration, public opinion in the community swung decisively against Botiuk. Witnesses testified that they became convinced that the rumours might actually be true after they had read the document.

103 Taking into account the appellants' status as lawyers and influential persons in the community, and the effect of their concerted action in signing the Lawyers' Declaration, I am satisfied that their conduct in signing the document without undertaking a reasonable investigation as to the correctness of the document, which they were duty-bound to do, was reckless. This same conclusion can be reached from their failure to place any restriction or qualification upon the use that could be made of it. The legal consequence of their recklessness is that their actions must be found to be malicious.

tribution avait été très faible en réalité, et qu'il ne pouvait y avoir eu une telle entente, ils n'ont rien fait pour corriger la fausse impression laissée par la réponse de Maksymec et ne se sont pas opposés à l'utilisation ultérieure que Maksymec a faite de la déclaration des avocats.

Bien qu'elle ne soit pas déterminante, la conduite des avocats appelants, avant et pendant le procès, peut être prise en considération à titre d'indication de leur attitude générale envers Botiuk. Aucun d'eux ne lui a présenté ses excuses ni rétracté les propos écrits dans la déclaration des avocats. Au contraire, au fur et à mesure que le procès avançait et que la situation réelle se faisait jour, chacun a continué de maintenir que le demandeur avait tort. Comme l'a conclu le juge de première instance, les appelants Zarowsky et Bardyn ont manifesté de l'hostilité envers le demandeur lorsqu'ils ont témoigné, particulièrement en ce qui concernait la mesure dans laquelle Botiuk a participé à l'enquête. Malgré la preuve accablante sur ce point, la plupart des avocats ont hésité à reconnaître le peu de travail accompli par chacun d'eux, et, inversement, combien de temps et d'énergie avaient été consacrés par Botiuk.

Les appelants ont dû, ou auraient tout au moins dû, se rendre compte que l'appui de huit avocats bien connus aurait un effet dévastateur sur la réputation de Botiuk. La preuve révèle qu'il y a eu un revirement catégorique de l'opinion publique à l'égard de Botiuk après la publication de la déclaration des avocats. Selon des témoins, c'est après avoir lu le document qu'ils sont devenus convaincus que les rumeurs pourraient bien être fondées.

Compte tenu de la situation des appelants comme avocats et personnes influentes dans la collectivité, et de l'effet du geste concerté qu'ils ont accompli en signant la déclaration des avocats, je suis convaincu que leur conduite a été insouciance lorsqu'ils ont signé ce document sans procéder à l'examen raisonnable de son exactitude, qu'ils étaient tenus de faire. La même conclusion peut être tirée de leur omission de formuler une restriction ou une réserve quant à l'utilisation qui pourrait en être faite. La conséquence juridique de leur insouciance est que leurs actes doivent être jugés

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Since both Maksymec and the appellant lawyers were motivated by malice, they are, therefore, jointly and severally liable for the \$140,000 award, including that portion which represents aggravated damages, as well as for the \$325,000 special damages award, which I will discuss later.

#### (F) *Assessment of Damages*

A number of the issues raised in this appeal pertaining to damages have been discussed and determined in *Hill, supra*. As a result, they can be dealt with in a relatively summary manner in these reasons.

##### (1) Comparison With Awards Made in Other Libel Cases

In *Hill* it was emphasized that each libel case is unique and little can be gained from a detailed comparison of awards made in other cases. It was explained in these words (at para. 187):

The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel, the nature and position of the victim of the libel, the possible effects of the libel statement upon the life of the plaintiff, and the actions and motivations of the defendants.

##### (2) Should a Cap Be Imposed on Damages in Defamation Cases

For the reasons expressed in *Hill* a cap on damages in defamation cases is neither needed nor desirable.

##### (3) Appellate Review of Assessments of Damages in Defamation Cases

Perhaps the cautionary note expressed in *Hill* bears repeating. Namely, that appellate courts should, for the reasons expressed in *Hill*, proceed

comme étant malveillants. Étant donné que Maksymec et les avocats appelants étaient motivés par la malveillance, ils sont, en conséquence, solidairement responsables du paiement des 140 000 \$ accordés, y compris la partie représentant des dommages-intérêts majorés, ainsi que des 325 000 \$ de dommages-intérêts spéciaux, que j'examinerai plus loin.

#### (F) *Évaluation des dommages-intérêts*

Un certain nombre des questions soulevées en l'espèce relativement aux dommages-intérêts ont été examinées et tranchées dans l'arrêt *Hill*, précité. C'est pourquoi il est possible ici de les examiner d'une façon relativement sommaire.

##### (1) Comparaison avec les montants accordés dans d'autres affaires de libelle

Dans l'arrêt *Hill*, on a souligné que chaque cas de libelle est unique et qu'il n'est pas vraiment utile de faire une comparaison détaillée entre les montants accordés dans d'autres affaires. Voici l'explication qui est donnée (au par. 187):

L'évaluation des dommages-intérêts dans une affaire de libelle ressortit à l'ensemble des éléments suivants: la nature et les circonstances de la publication du libelle, le caractère et la situation de la victime du libelle, les effets possibles de la déclaration diffamatoire sur la vie du demandeur, et les actes et motivations des défendeurs.

##### (2) Y a-t-il lieu de fixer un plafond aux dommages-intérêts dans les affaires de diffamation?

Pour les motifs exposés dans l'arrêt *Hill*, il n'est ni nécessaire ni souhaitable de fixer un plafond aux dommages-intérêts dans les affaires de diffamation.

##### (3) La révision en appel de l'évaluation des dommages-intérêts dans les affaires de diffamation

Il vaut peut-être la peine de répéter la mise en garde formulée dans l'arrêt *Hill*, à savoir qu'une cour d'appel devrait, pour les motifs exprimés dans

with restraint and caution before making any variation in assessments of damages in libel cases.

#### (4) Special Damages

108 It will be remembered that the trial judge awarded Botiuk special damages for the loss of income from his practice occasioned by the libellous publications. However, the Court of Appeal held that since Botiuk had not specifically claimed special damages, they should not have been awarded. A portion of the special damages was then added to the award as an element of the general damages. With the greatest respect, I cannot agree with that position.

109 It is true that proof relevant to special damages may be admissible for the purpose of supporting general damages. However, unlike general damages, actual pecuniary loss is not presumed. Therefore, special damages must be specifically pleaded and proved in court. See *The Law of Defamation in Canada, supra*, at p. 25-75.

110 In my view, the loss of business was sufficiently pleaded to warrant the award of special damages. In his amended fresh statement of claim, Botiuk pleaded that, by reason of the defamatory statements made against him, he suffered, among other things, a "loss in his practice of his profession as a barrister and solicitor" and "suffered injury to his career". A lump sum for damages was claimed to compensate for these injuries.

111 Special damages may arise from a general falling of business, a loss or decline of patronage and a loss of custom. If the libellous words are in their nature intended, or are reasonably likely to produce, or actually do produce, such a loss, the plain-

l'arrêt *Hill*, faire preuve de retenue et de prudence avant de modifier l'évaluation des dommages-intérêts dans les affaires de libelle.

#### (4) Les dommages-intérêts spéciaux

On se souviendra que le juge de première instance a accordé à Botiuk des dommages-intérêts spéciaux pour la perte de revenus tirés de sa pratique du droit, que les publications diffamatoires ont entraînée. Cependant, la Cour d'appel a conclu qu'ils n'auraient pas dû être accordés parce que Botiuk ne les avaient pas spécifiquement réclamés. Une partie des dommages-intérêts spéciaux a ensuite été ajoutée comme poste des dommages-intérêts généraux. En toute déférence, je ne puis souscrire à ce point de vue.

Il est vrai qu'une preuve pertinente relativement à la question des dommages-intérêts spéciaux peut être admissible pour justifier des dommages-intérêts généraux. Cependant, contrairement aux dommages-intérêts généraux, la perte pécuniaire réelle ne se présume pas. En conséquence, il faut spécifiquement réclamer devant le tribunal des dommages-intérêts spéciaux et en établir le bien-fondé. Voir *The Law of Defamation in Canada, op. cit.*, à la p. 25-75.

À mon avis, on a suffisamment invoqué la perte de clientèle pour justifier l'attribution de dommages-intérêts spéciaux. Dans sa nouvelle déclaration modifiée, Botiuk a soutenu qu'il avait notamment subi, en raison des déclarations diffamatoires faites contre lui, [TRADUCTION] «une perte de clientèle en tant qu'avocat» et «une atteinte à sa carrière». Un montant forfaitaire de dommages-intérêts était réclamé à titre d'indemnité pour ces préjudices.

Des dommages-intérêts spéciaux peuvent découler d'un ralentissement général des affaires, d'une perte ou diminution d'achalandage ou d'une perte de clients. Si les propos diffamatoires visent, de par leur nature, à engendrer une telle perte ou encore sont raisonnablement susceptibles de le faire, ou s'ils le font effectivement, la partie demanderesse peut obtenir un recouvrement. Voir

tiff may recover. See *Gatley on Libel and Slander, supra*, at pp. 94-100.

This is one of those rare cases in which it was possible to adduce the necessary evidence to prove actual pecuniary loss. There was ample evidence presented upon which the trial judge could properly base his decision to award and arrive at his assessment of the special damages. It follows that neither the finding that all of the appellants are jointly and severally liable for the compensatory damages, nor the assessment of special damages, should have been disturbed by the Court of Appeal. I would, therefore, restore the special damages award made by the trial judge.

#### (5) Prejudgment Interest

The trial judge made two decisions with respect to the award of prejudgment interest. First, he excluded that portion of the compensatory damage award attributed to the present value of future pecuniary loss. Second, he determined that the period of entitlement to prejudgment interest was governed by s. 138(2) of the *Courts of Justice Act, 1984*, S.O. 1984, c. 11, and amounted to 12½ years.

The Court of Appeal reduced the period for which prejudgment interest would be computed from 12½ to 10 years. It was said that this reduction was necessitated by the failure of successive counsel of record for Botiuk to pursue the action. The interest rate of 13 percent was not disputed.

The appellants contend that in fixing Botiuk's general damages, the trial judge explicitly and the Court of Appeal implicitly took into account the effects of inflation. It is argued that the addition of the prejudgment rate of 13 percent amounts to a double recovery. The appellants contend that *Borland v. Muttersbach* (1985), 53 O.R. (2d) 129 (C.A.), was wrongly applied or alternatively, that it was wrongly decided.

*Gatley on Libel and Slander, op. cit.*, aux pp. 94 à 100.

Il s'agit de l'un des rares cas où l'on pouvait présenter les éléments de preuve nécessaires pour établir l'existence d'une perte pécuniaire réelle. On a présenté suffisamment d'éléments de preuve sur lesquels le juge de première instance pouvait fonder sa décision d'accorder des dommages-intérêts spéciaux et en faire le calcul. Il s'ensuit que ni la conclusion que tous les appelants sont solidairement responsables au titre des dommages-intérêts compensatoires, ni l'évaluation de dommages-intérêts spéciaux, n'auraient dû être modifiées par la Cour d'appel. En conséquence, je suis d'avis de rétablir les dommages-intérêts spéciaux accordés par le juge de première instance.

#### (5) Les intérêts avant jugement

Le juge de première instance a pris deux décisions relativement à l'attribution d'intérêts avant jugement. Premièrement, il a écarté la partie des dommages-intérêts compensatoires, imputée à la valeur actualisée de la perte pécuniaire future. Deuxièmement, il a déterminé que c'est le par. 138(2) de la *Loi de 1984 sur les tribunaux judiciaires*, L.O. 1984, ch. 11, qui servait à déterminer la durée de la période visée par les intérêts avant jugement, et qu'il s'agissait en l'espèce d'une période de 12 ans et demi.

La Cour d'appel a réduit cette période et l'a fixée à 10 ans. À son avis, cette période devait être réduite parce que les avocats qui ont successivement représenté Botiuk n'ont pas continué l'action. On n'a pas contesté le taux d'intérêt de 13 pour 100.

Les appelants soutiennent que, dans le calcul des dommages-intérêts généraux de Botiuk, le juge de première instance a explicitement et la Cour d'appel a implicitement tenu compte des effets de l'inflation. On soutient que l'ajout des intérêts avant jugement calculés au taux de 13 pour 100 équivaut à un double recouvrement. Les appelants soutiennent que l'arrêt *Borland c. Muttersbach* (1985), 53 O.R. (2d) 129 (C.A.), a été mal appliqué ou, subsidiairement, que cet arrêt est mal fondé.

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116 In *Borland* consideration was given to the question of prejudgment interest. Objection was taken to the award of prejudgment interest on the non-pecuniary general damages of one of the plaintiffs. The award was made under the discretionary power conferred on the trial judge by s. 36(6) of the *Judicature Act*, R.S.O. 1980, c. 223. That subsection permits the judge to vary the rate of interest and the period for which it is payable, "where he considers it to be just to do so in all the circumstances", from the rate prescribed in s. 36(3) of the Act for general or non-pecuniary damages.

117 It was contended in *Borland* that since the ceiling on awards for non-pecuniary damages established by the "trilogy" of cases from this Court could be increased to reflect inflation (*Lindal v. Lindal*, [1981] 2 S.C.R. 629), the award of prejudgment interest on the inflated sum amounted to a double payment. The Court of Appeal did not agree and upheld the trial judge's decision on this matter.

118 The trial judge in *Borland* had observed that the award adjusted for inflation buys no more than the original figure did in 1978. He went on to determine that whatever the award, the statute gives the plaintiff the *prima facie* right to receive prejudgment interest on it at the prevailing prime rate. In the absence of such a guarantee, there would be no incentive for defendants to make advance payments, thereby foregoing investment income. He concluded that the fact of inflation is not a proper ground for depriving plaintiffs of their *prima facie* right to receive prejudgment interest.

119 In my view, the decision in *Borland* is correct and the reasoning should be applied to the award made to Botiuk. This is what the trial judge did and, with great respect, the Court of Appeal erred in varying his decision pertaining to the award of interest. The trial judge considered the delays occasioned by Botiuk's counsel and rightly concluded that they had been taken into account in the Court of Appeal's disposition of the 1990 motion

Dans l'arrêt *Borland*, on a examiné la question des intérêts avant jugement. On s'est opposé à l'attribution d'intérêts avant jugement sur les dommages généraux non pécuniaires subis par l'une des parties demanderesse. L'attribution a été faite en vertu du pouvoir discrétionnaire conféré au juge de première instance par le par. 36(6) de la *Judicature Act*, R.S.O. 1980, ch. 223. Cette disposition permet au juge, [TRADUCTION] «s'il estime justifié de le faire compte tenu de toutes les circonstances», de modifier le taux d'intérêt et la période pendant laquelle il est payable, par rapport au taux prévu au par. 36(3) de la Loi relativement aux dommages généraux ou non pécuniaires.

Dans l'arrêt *Borland*, on a soutenu que, puisqu'il est possible, de majorer le plafond fixé par la «trilogie» de notre Cour pour des dommages non pécuniaires, afin de tenir compte de l'inflation (*Lindal c. Lindal*, [1981] 2 R.C.S. 629), l'attribution d'intérêts avant jugement sur le montant majoré équivalait à un double paiement. La Cour d'appel n'était pas de cet avis et a confirmé la décision du juge de première instance à ce propos.

Dans l'arrêt *Borland*, le juge de première instance avait fait remarquer que le montant rajusté pour tenir compte de l'inflation ne permettait pas d'acheter davantage que le montant initial en 1978. Il a ensuite statué que, quel que soit le montant accordé, la loi confère à la demanderesse le droit *prima facie* de toucher des intérêts avant jugement, au taux préférentiel en vigueur. En l'absence d'une telle garantie, rien n'inciterait les défendeurs à faire des paiements anticipés et à renoncer ainsi à des revenus de placement. Il a conclu que l'inflation n'est pas un motif valable de priver les demandeurs de leur droit *prima facie* de toucher des intérêts avant jugement.

À mon avis, l'arrêt *Borland* est correct et le raisonnement qu'on y adopte devrait être appliqué au montant accordé à Botiuk. C'est ce qu'a fait le juge de première instance et, en toute déférence, la Cour d'appel a commis une erreur en modifiant sa décision relative aux intérêts accordés. Le juge de première instance a pris en considération les retards causés par les avocats de Botiuk et a eu raison de conclure que la Cour d'appel en avait égale-

to dismiss the action. In the result, I would restore the trial judge's determination that Botiuk was entitled to prejudgment interest for a period of 12½ years.

#### IV. Costs

The award of costs made by the trial judge should be upheld. Botiuk successfully met the burden of establishing that the judgment he obtained was more favourable than the terms of the offer to settle submitted by him.

#### V. Disposition

In the result, the appeals are dismissed with costs. The cross-appeals are allowed with costs. The order of the Court of Appeal is set aside, and the judgment of the trial judge is restored.

The following are the reasons delivered by

MAJOR J. — I agree with the reasons of Justice Cory, but have some observations on the extent of liability for defamatory publications where more than one defendant is involved.

It is not clear how the trial judge concluded that he would treat all the defamatory publications as one libel. It was open to him to consider each act of publication as a separate cause of action. However, the trial judge had a discretion to combine the several closely related publications and to make a single award of damages in relation to those publications (e.g. *Barber v. Pigden*, [1937] 1 K.B. 664, *Hayward v. Thompson*, [1982] 1 Q.B. 47 (C.A.)). The various defamatory publications in these appeals were closely intertwined and no basis has been shown that would warrant interfering with that discretion.

ment tenu compte dans sa décision concernant la requête en rejet de l'action, présentée en 1990. En définitive, je suis d'avis de rétablir la décision du juge de première instance que Botiuk avait droit à des intérêts avant jugement pour une période de 12 ans et demi.

#### IV. Les dépens

Il y a lieu de confirmer les dépens accordés par le juge de première instance. Botiuk a réussi à établir que le jugement qu'il avait obtenu était plus favorable que les conditions de son offre de règlement.

#### V. Dispositif

En définitive, les pourvois principaux sont rejetés avec dépens. Les pourvois incidents sont accueillis avec dépens. L'ordonnance de la Cour d'appel est annulée et le jugement du juge de première instance est rétabli.

Version française des motifs rendus par

LE JUGE MAJOR — Tout en souscrivant aux motifs du juge Cory, je tiens à formuler certaines observations sur l'étendue de la responsabilité relative à des publications diffamatoires lorsque plus d'un défendeur est en cause.

On ne sait pas clairement comment le juge de première instance en est arrivé à la décision de considérer toutes les publications diffamatoires comme un seul acte diffamatoire. Il aurait pu considérer chaque publication comme une cause d'action distincte. Cependant, le juge de première instance avait le pouvoir discrétionnaire de réunir les diverses publications étroitement liées, et d'attribuer un seul montant de dommages-intérêts pour celles-ci (voir, par exemple, *Barber c. Pigden*, [1937] 1 K.B. 664, *Hayward c. Thompson*, [1982] 1 Q.B. 47 (C.A.)). Les diverses publications diffamatoires dans les présents pourvois étaient étroitement liées, et on n'a établi l'existence d'aucun motif d'intervenir dans l'exercice de ce pouvoir discrétionnaire.

124 The trial judge found that the appellant Maksymec and the appellants I. Bardyn, B. Onyschuk, B. Zarowsky, Q.C., and W. Y. Danyliw, Q.C., were joint tortfeasors. He must have concluded that all the appellants acted in concert with one another and that the defamatory statements were published in furtherance of a common design. In order to hold that all the appellants are joint tortfeasors, it is necessary to find concerted action towards a common end (G. H. L. Fridman, *The Law of Torts in Canada* (1990), vol. 2, at pp. 347-48). It is not evident from the record why the trial judge concluded that all of the appellants had a common intention to defame the respondent Botiuk and consequently were joint tortfeasors.

125 I am not certain from the record that all of the defamatory documents should have been treated as one libel nor that the necessary concerted action was present for a finding of joint and several liability. However, I recognize that the trial judge has an advantage over appellate courts in making findings of fact, particularly in matters of credibility. It would, therefore, be inappropriate absent palpable error to interfere with either the trial judge's findings of fact or the exercise of his discretion.

126 Nevertheless, it is important to note that not all actions in which multiple defendants are sued will result in a finding of joint and several liability. In some cases, it will be more appropriate to consider each defendant's participation separately from that of the others, and to assess liability on an individual basis. In *Westbank Indian Bank v. Tomat* (1992), 63 B.C.L.R. (2d) 273 (C.A.), the British Columbia Court of Appeal found that liability with respect to each defendant had to be considered separately because the defendants did not act as a formal group, nor did they act pursuant to a civil conspiracy such that the acts of one defendant will be imputed to all the defendants. The degree of each defendant's involvement in the commission of the tort had to be considered and assessed separately.

Le juge de première instance a conclu que l'appelant Maksymec et les appelants I. Bardyn, B. Onyschuk, B. Zarowsky, c.r., et W. Y. Danyliw, c.r., étaient coauteurs d'un délit. Il a dû conclure que tous les appelants avaient agi de concert et que les déclarations diffamatoires avaient été publiées dans le but de réaliser un dessein commun. Pour conclure que tous les appelants sont coauteurs d'un délit, il faut conclure à l'existence d'une action concertée en vue de réaliser un but commun (G. H. L. Fridman, *The Law of Torts in Canada* (1990), vol. 2, aux pp. 347 et 348). Le dossier n'indique pas clairement pourquoi le juge de première instance a conclu que tous les appelants avaient l'intention commune de diffamer l'intimé Botiuk et qu'ils étaient donc coauteurs d'un délit.

Je ne suis pas convaincu, à la lecture du dossier, que tous les documents diffamatoires auraient dû être considérés comme un seul acte diffamatoire, ni que l'action concertée requise pour conclure à la responsabilité solidaire existait. Toutefois, je reconnais que le juge de première instance jouit d'un avantage sur les cours d'appel pour tirer des conclusions de fait, particulièrement en matière de crédibilité. Il serait donc inopportun, en l'absence d'une erreur manifeste, de modifier les conclusions de fait du juge de première instance ou d'intervenir dans l'exercice de son pouvoir discrétionnaire.

Il importe néanmoins de souligner que ce ne sont pas toutes les actions intentées contre plusieurs défendeurs qui aboutiront à une conclusion de responsabilité solidaire. Il sera parfois plus approprié de considérer la participation de chaque défendeur indépendamment de celle des autres et d'apprécier la responsabilité de chacun individuellement. Dans l'arrêt *Westbank Indian Bank c. Tomat* (1992), 63 B.C.L.R. (2d) 273 (C.A.), la Cour d'appel de la Colombie-Britannique a conclu que la responsabilité de chaque défendeur devait être appréciée séparément parce que les défendeurs n'avaient pas agi à titre de groupe ni conformément à un complot civil, de manière à imputer à tous les défendeurs les actes d'un défendeur donné. Le degré de participation de chaque défendeur dans la perpétration du délit devait être considéré et apprécié séparément.

Depending on the circumstances of a given case, it may be necessary to assess each instance of publication as a separate cause of action. The question of whether the defendants acted jointly or in concert should be considered and where there is the absence of common action the defendants' liability ought to be assessed individually.

*Appeals dismissed with costs and cross-appeals allowed with costs.*

*Solicitors for the appellants Ihor Bardyn et al.: Osler, Hoskin & Harcourt, Toronto.*

*Solicitors for the appellants B. I. Maksymec and Maksymec & Associates Ltd.: Weir & Foulds, Toronto.*

*Solicitors for the respondent: Tory Tory DesLauriers & Binnington, Toronto.*

Suivant les circonstances d'une affaire donnée, il peut être nécessaire de traiter chaque publication comme une cause d'action distincte. Il faut se demander si les défendeurs ont agi conjointement ou de concert, et, en l'absence d'une action commune, la responsabilité des défendeurs doit être appréciée individuellement.

*Pourvois principaux rejetés avec dépens et pourvois incidents accueillis avec dépens.*

*Procureurs des appelants Ihor Bardyn et autres: Osler, Hoskin & Harcourt, Toronto.*

*Procureurs des appelants B. I. Maksymec et Maksymec & Associates Ltd.: Weir & Foulds, Toronto.*

*Procureurs de l'intimé: Tory Tory DesLauriers & Binnington, Toronto.*

Please see para. 110

2018 ONSC 5455

Ontario Superior Court of Justice

Bucknol v. 2280882 Ontario Inc.

2018 CarswellOnt 15474, 2018 ONSC 5455, 296 A.C.W.S. (3d) 897

**KEVIN BUCKNOL (Plaintiff / Responding Party) and  
2280882 ONTARIO INC., o/a CLASSIC LOUNGE, aka  
CLASSIC LOUNGE NIGHTCLUB (Defendant / Moving Party)**

Coroza J.

Judgment: September 17, 2018

Docket: CV-14-887-00

Counsel: Jeffrey Herman, for Plaintiff / Responding Party  
Robert Betts, for Defendant / Moving Party

Subject: Civil Practice and Procedure; Evidence; Torts

#### Headnote

Torts --- Negligence — Duty and standard of care — Standard of care

Patron went to nightclub with brother and friends — Some two hours or more later, unidentified person threw beer bottle that struck patron and caused significant injury to his eye — Patron claimed he had noticed altercation close to him just seconds before — About seven weeks later, patron gave nightclub notice of possible claim — Patron brought action against nightclub for damages for negligence — Nightclub brought motion for summary judgment dismissing action — Motion granted — Whereas patron had not filed evidence setting out relevant standard of care for bar, nightclub had introduced evidence to demonstrate it had fulfilled its duty of reasonable care to make premises safe — Nightclub had adequate security personnel inside club and paid police presence outside — Nightclub had 16 surveillance cameras that covered most areas of interior of club — Nightclub had busboys to clear glass bottles from premises throughout night and had system in place to make sure employees were following protocols and keeping recordings of incidents per its stated policy — Patron failed to point to some act or failure to act on nightclub's part that led to injury.

Torts --- Negligence — Occupiers' liability — Particular situations — Hotels and taverns

Patron went to nightclub with brother and friends — Some two hours or more later, unidentified person threw beer bottle that struck patron and caused significant injury to his eye — Patron claimed he had noticed altercation close to him just seconds before — About seven weeks later, patron gave nightclub notice of possible claim — Patron brought action against nightclub for damages for negligence — Nightclub brought motion for summary judgment dismissing action —

Motion granted — Statutory duty on nightclub to ensure its premises were reasonably safe did not mean nightclub had to remove every possible danger from their premises — Statutory duty also did not require nightclub to constantly look for potential dangers or conduct constant surveillance — Nightclub was only required to take measures that were reasonable in circumstances — There was no evidence introduced by patron on how nightclub failed in its duty to make premises reasonably safe, whereas nightclub introduced evidence to demonstrate it had fulfilled its duty of reasonable care to make premises safe — Nothing suggested incident such as this one was frequent occurrence; nightclub had adequate security personnel inside club and paid police presence outside; timing of incident did not support claim that it could have been prevented; and there was no evidence that bottle that hit patron was one that should have been cleared by busboys.

Torts --- Negligence — Causation — Foreseeability and remoteness

Patron went to nightclub with brother and friends — Some two hours or more later, unidentified person threw beer bottle that struck patron and caused significant injury to his eye — Patron claimed he had noticed altercation close to him just seconds before — About seven weeks later, patron gave nightclub notice of possible claim — Patron brought action against nightclub for damages for negligence — Nightclub brought motion for summary judgment dismissing action — Motion granted — Incident had not been reasonably foreseeable, and it could not be said that nightclub should bear liability — There had been nothing to alert nightclub to any danger — There was no evidence that incident arose from intoxication, that particular location where patron had been standing was dangerous, that there had been prior instances of beer bottles being thrown, or that there had been frequent altercations — Entire incident occurred in very short time frame — Although nightclub had not introduced any evidence from additional security personnel, police officers, or bartenders, absence of this evidence did not convert incident to reasonably foreseeable one.

Evidence --- Miscellaneous

Spoilation — Patron went to nightclub with brother and friends — Some two hours or more later, unidentified person threw beer bottle that struck patron and caused significant injury to his eye — About seven weeks later, being about three weeks after surveillance video was automatically deleted, patron gave nightclub notice of possible claim — Patron brought action against nightclub for damages for negligence — Nightclub brought motion for summary judgment dismissing action — Motion granted — Patron failed to establish required elements of spoliation in relation to surveillance video — Recordings had been deleted because nightclub had not been given notice of any incident — Concept of spoliation refers to intentional destruction of relevant evidence when litigation is existing or pending — Even assuming one employee knew about incident and never passed it on, this did not mean recordings had been intentionally destroyed — At time videos were deleted, there was no ongoing or contemplated litigation.

### Table of Authorities

#### Cases considered by *Coroza J.*:

*Catalyst Capital Group Inc. v. Moyses* (2016), 2016 ONSC 5271, 2016 CarswellOnt 13362, 35 C.C.E.L. (4th) 242 (Ont. S.C.J. [Commercial List]) — considered

*Da Silva v. Gomes* (2018), 2018 ONCA 610, 2018 CarswellOnt 10782 (Ont. C.A.) — considered

*Hryniak v. Mauldin* (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — referred to

*Leon v. Toronto Transit Commission* (2014), 2014 ONSC 1600, 2014 CarswellOnt 3380, 22 M.P.L.R. (5th) 100 (Ont. S.C.J.) — followed

*McDougall v. Black & Decker Canada Inc.* (2008), 2008 ABCA 353, 2008 CarswellAlta 1686, 97 Alta. L.R. (4th) 199, [2009] 1 W.W.R. 257, 61 C.C.L.T. (3d) 96, 62 C.P.C. (6th) 293, 440 A.R. 253, 438 W.A.C. 235, 302 D.L.R. (4th) 661 (Alta. C.A.) — considered

*McKenna v. Greco (No. 2)* (1985), 52 O.R. (2d) 85, 1985 CarswellOnt 1428 (Ont. H.C.) — considered

*McKenna v. Greco (No. 2)* (1986), 58 O.R. (2d) 63, 1986 CarswellOnt 1049 (Ont. C.A.) — referred to

*Nespolon v. Alford* (1998), 1998 CarswellOnt 2654, 161 D.L.R. (4th) 646, 35 M.V.R. (3d) 280, 110 O.A.C. 108, 40 O.R. (3d) 355, 41 C.C.L.T. (2d) 258 (Ont. C.A.) — considered

*Rankin (Rankin's Garage & Sales) v. J.J.* (2018), 2018 SCC 19, 2018 CSC 19, 2018 CarswellOnt 7370, 2018 CarswellOnt 7371, 25 M.V.R. (7th) 1, 422 D.L.R. (4th) 317, 47 C.C.L.T. (4th) 1 (S.C.C.) — considered

*Ryan v. Victoria (City)* (1999), 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, 4 C.C.L.T. (2d) 1 (S.C.C.) — considered

*Sweda Farms Ltd. v. Egg Farmers of Ontario* (2014), 2014 ONSC 1200, 2014 CarswellOnt 2149 (Ont. S.C.J.) — considered

*Waldick v. Malcolm* (1989), 63 D.L.R. (4th) 583, 70 O.R. (2d) 717, 35 O.A.C. 389, 2 C.C.L.T. (2d) 22, 1989 CarswellOnt 679 (Ont. C.A.) — considered

#### **Statutes considered:**

*Occupiers' Liability Act*, R.S.O. 1990, c. O.2

Generally — referred to

#### **Rules considered:**

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

R. 20.04(2) — considered

R. 39.03 — considered

#### **Words and phrases considered:**

#### **spoliation**

The concept of spoliation refers to the intentional destruction of relevant evidence when litigation is existing or pending.

MOTION by nightclub for summary judgment dismissing patron's action against it.

### **Coroza J.:**

#### **Overview**

1 In the early morning hours of May 5, 2012, Mr. Bucknol was a customer in the Classic Lounge Nightclub ("Classic") and was struck by a beer bottle that caused a significant injury to his eye. The person who threw the bottle has never been identified. As a result of this regrettable incident, Mr. Bucknol has sued the bar for negligence.

2 Classic has brought this motion for summary judgment asking that I dismiss all claims against it. Mr. Bucknol requests that I dismiss the motion. In the alternative, he requests that I grant summary judgment in favour of him and find Classic liable for his injuries.

3 I originally heard this motion on January 24, 2018 and I reserved. However, in June of 2018, counsel for Classic brought to my attention that in May of 2018, the Supreme Court of Canada released the decision of *Rankin (Rankin's Garage & Sales) v. J.J.*, [2018 SCC 19](#), [2018] S.C.J. No. 19 (S.C.C.) I requested that both parties file further written submissions on the impact of *Rankin*. I received their helpful submissions on June 11, 2018. I am very grateful to both counsel for their diligence.

4 For the reasons that follow, I allow the application. There is no genuine issue for trial.

#### **Factual Background**

5 Mr. Bucknol went to Classic with his brother and friends. He arrived at the bar around midnight. Sometime, between 2:00 a.m. and 2:30 a.m., he was struck in the face by a beer bottle that had been thrown. Moments before he was struck, Mr. Bucknol noticed an altercation between two men close to him, and he believed that the bottle hit him one to two seconds after he saw the two men. The incident happened very quickly.

6 After being struck, Mr. Bucknol immediately went to the washroom to clean himself up. He then left the premises immediately to attend at a hospital. According to Mr. Bucknol, he did not speak with employees, security personnel, or police officers who were at the club to report the incident.

7 Mr. Bucknol suffered significant injuries. The bottle shattered the bone above and around his left eye, causing immediate swelling and damage to the eye.

8 On June 29, 2012, Mr. Bucknol's counsel wrote to Classic advising the bar that he was contemplating a lawsuit. Classic's insurer retained investigators to look into the claim.

9 On February 26, 2014, Mr. Bucknol issued a statement of claim naming Classic as a defendant.

### **The Issues**

10 The following issues must be resolved on this motion:

1. Has Mr. Bucknol proven negligence on the part of Classic?
2. Has Mr. Bucknol proven a breach of the *Occupiers' Liability Act*, R.S.O. 1990, c. O.2 ("OLA")?
3. Was the incident reasonably foreseeable?
4. Has Mr. Bucknol established the required elements of spoliation?
5. Is there a genuine issue for trial?

11 Before I turn to the analysis of these issues, I will start with setting out what is not disputed by the parties.

12 First, the *Occupiers' Liability Act* imposes a legal duty on an occupier of a premises towards another person who comes onto those premises. That duty is on the occupier to ensure that its premises are, in all the circumstances as is reasonable in the situation, reasonably safe for persons attending on the premises.

13 Second, Classic is an occupier of the premises. Classic acknowledges that it owes a duty to customers when they enter the bar.

14 Third, summary judgment is available to Classic if I am able to reach a fair and just determination of the merits and find that there is no genuine issue for trial. This test has been set out by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) (see also Rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194).

15 Fourth, a summary judgment motion cannot be defeated by vague references to what may be adduced in the future. In a summary judgment motion, the court can reasonably assume that the parties have placed before it, in some form, all of the evidence that will be available for trial (see: *Da Silva v. Gomes*, 2018 ONCA 610 (Ont. C.A.)).

16 I now turn to the issues raised on this motion.

### ***ISSUE 1: Has Mr. Bucknol proven negligence on the part of Classic?***

17 The Supreme Court of Canada has provided a very concise definition of negligence. Conduct is negligent if it creates an objectively unreasonable risk of harm. In order to avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances (see: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.), at para. 28).

*a. Classic's Position*

18 Classic makes the following arguments.

19 First, Mr. Bucknol has failed to show that Classic fell short of the applicable standard of care because he has not offered evidence as to what the expected standard of care should be.

20 Second, Mr. Bucknol has not introduced any evidence as to what Classic could have done to eliminate the risk of harm to Mr. Bucknol.

21 Third, Mr. Bucknol must demonstrate that something Classic did, or did not do, caused the injury. Classic argues that there is no evidence on this record that would permit me to draw the inference that it did anything that caused the bottle to be thrown at Mr. Bucknol.

*b. Mr. Bucknol's Position*

22 Mr. Bucknol argues Classic has a duty to make the premises safe. That duty includes: i) having adequate security personnel inside the club; ii) providing proper training to employees; and iii) putting a system in place to ensure employees were following protocols. Since Classic did not produce firsthand evidence from witnesses who would have knowledge of the relevant facts, including employees such as security guards who are still in its employ, not all the evidence that will be available for trial has been placed before the court. Therefore, there are genuine issues for trial.

*c. Analysis on Issue 1*

23 I cannot accept Mr. Bucknol's argument that the failure of Classic to produce firsthand evidence from witnesses who are in its employ is fatal to its position. It seems to me that if Mr. Bucknol is relying on the absence of evidence, then, as the responding party on this motion, he must "lead trump or risk losing" (see: *Da Silva v. Gomes*, *supra* at para 15).

24 In my view, Classic has introduced evidence on this motion to demonstrate that in the circumstances of this case, it has fulfilled its duty of reasonable care to make the premises safe by: i) having adequate security personnel inside of the club; ii) providing proper training to employees and iii) putting a system in place to make sure they were following protocols and keeping recordings of incidents per its stated policy.

25 The evidence comes from the following material filed on this motion: i) the statement of Clint Marshall who was head of security, dated September 25, 2012, that was read in at an examination for discovery on March 17, 2015; ii) the evidence of Classic's owner, Randolph Lima, who was examined for discovery on March 17, 2015 and cross examined on an affidavit that he prepared for this motion on October 5, 2017; iii) the statement of Cst. Mark Haljaste, a Toronto Police Service Officer who was hired by the bar that evening; and iv) the statement of Maria Garcia, the bar's manager, dated August 23, 2012, that was read in at the examination of discovery on March 17, 2015.

*d. Evidence of Clint Marshall*

26 Clint Marshall stated that during the time when the bar was open on Friday and Saturday, there are usually eight security personnel present and they wear black attire with the word "security" on the front and back. Security is usually posted at the common entry and exit points of the club. All security personnel have licenses issued to them.

27 Security personnel and all bartenders are Smart Serve certified (i.e. certified to serve alcohol by the Alcohol Gaming Commission of Ontario).

28 Classic has surveillance cameras that operate 24 hours a day, 7 days a week and when the club is open, there are also four paid Toronto Police Service Officers stationed outside the entrance of the club.

29 When patrons first enter the club, they are physically searched and padded down. They are also checked over by a hand metal detector and a stationary metal detector.

30 The club has a maximum occupancy of 385 patrons and they have a counter system at the front of the club to ensure they do not exceed this number.

31 On May 5, 2012, he recalls being called to the DJ booth where he met a man who was dripping blood on the DJ equipment. He saw some blood on part of his face and on the floor. Security had asked him what had happened but he refused to tell them. He said that someone had hit him. After escorting this male outside of the club, other males associated to this male acknowledged that they would seek medical attention.

32 The police were not aware of the incident. The incident happened quickly and everything was under control.

33 He discussed the incident briefly with Maria Garcia.

*e. Evidence of Mr. Randolph Lima*

34 Mr. Lima is the owner of Classic. He is usually on site to ensure that the bar is running smoothly. However, he could not recall if he was there on May 4 to 5, 2012. If he was not there, then Maria Garcia would have been in charge. Maria is the manager of the bar and is his mother.

35 Classic is licensed to serve alcohol and has a capacity of 382 customers with room for an additional 108 customers on the patio. A headcount "clicker" is used to track the occupancy on a nightly basis. However, the information is not logged. He is usually present and will ask his head of security for a status on customers and whether anything has occurred that requires his attention.

36 There are usually 15 to 20 employed people working in the bar comprised of bartenders, busboys, disc jockeys and security with four paid police officers.

37 On most evenings, there are eight security personnel, six to eight bartenders and two to three busboys with one doorman in the front entrance. There are also four paid duty police officers who are stationed near the entrance.

38 In May of 2012, the head of security was Clint Marshall. If there were any incidents, Mr. Marshall was required to tell him and bring it to his attention. He believed that on May 5, 2012, seven security personnel and four paid duty uniformed police officers were working.

39 All of the security personnel who work in his bar are licensed. All bartenders are Smart Serve certified.

40 Mr. Lima employs three "busboys" during the evening. The busboys are employed to clear bottles. The busboys come in at 10:00 p.m. and throughout the night are walking around the bar clearing bottles and glasses.

41 According to Mr. Lima, there have been about five fights in the bar since he has owned it. There have been no major incidents and, in his view, the presence of police officers near the entrance deters customers from causing trouble.

42 There were 16 surveillance cameras in the premises in 2012. He did not have many blind spots in the club. Video footage from these cameras is saved for thirty days before it is automatically deleted.

43 Mr. Lima explained that if he is given notice about something he should be looking for, he will save the video recording and ensure that it is not deleted. The video in this case from the cameras was not preserved because he did not receive notice of an incident.

44 Although he could not recall it, he acknowledged that a letter was sent to Classic on June 29, 2012. After receiving the letter, he checked to see if the video was retained for May 4 and May 5 but it had already been automatically deleted.

*f. Evidence of P.C. Haljaste*

45 Cst. Haljaste was interviewed on April of 2013 about the incident by the insurance investigators.

46 He provided paid duty services to Mr. Lima and Ms. Garcia for a number of years.

47 There are usually three paid duty officers who wear their uniforms outside near the entrance of the bar. They usually remain outside but will go in to the bar if required.

48 The bar has a metal detector and customers are also checked by security with hand wands.

49 He was not aware of any major incidents involving this bar.

50 In his view, the bar's staff seemed well trained.

*g. Evidence of Maria Garcia*

51 Maria Garcia stated that the bar had been operating for about nine months before this incident. The bar is usually open from Friday and Saturday between 9:00 p.m. and 3:00 a.m. Employees do regular safety checks of the bar and patrons must go through a metal detector to enter into the premises. Patrons are also physically searched and given wristbands. She is usually present at the club as a manager.

52 Security personnel wear black and the security logo must be visible in the front and the back of the attire.

53 Bartenders are Smart Serve certified. There are 16 different angles shown by the surveillance cameras.

54 There are usually three police officers present and one sergeant from 31 Division of the Toronto Police Service.

55 Security personnel are posted at entry and exit points of the club.

56 There have been minor scuffles at the bar but security has always dealt with it in the past and there has never been a need for police to intervene.

57 If there are incidents, they log it into a record book for record keeping. However, security had no reason to interject in any incident or altercation that evening. No one approached her or her employees about the incident.

58 In my view, contrary to Mr. Bucknol's assertion, Classic has introduced evidence that it took the following steps to ensure the premises are safe:

1. Ensuring police presence to deter any criminal behaviour;
2. Employing licensed security guards;
3. Employing more security than the requirements under the *Toronto Municipal Code* require (see Article XLI of *Toronto Municipal Code*, Chapter 545 By-Law 20-2006). The by-law for the City of Toronto requires that a club have at least one security guard for every 100 patrons in attendance at the premises. The maximum capacity according to Mr. Lima is 490 patrons and Classic had seven security personnel and four police officers employed on May 4 to 5, 2012. Instead of the required ratio of 1:100 (security to patrons), Classic is utilizing a ratio of 1:44.
4. Installing 16 surveillance cameras in the premises that cover most areas of the interior of the club;
5. Ensuring that security personnel are posted at all entry and exit points and within the club;
6. Requiring that bartenders are Smart Serve certified; and
7. Employing busboys to clear glass bottles from the premises throughout the night.

*h. Conclusion on Issue 1*

59 While there is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe, in this lawsuit, the onus is upon Mr. Bucknol to prove on a balance of probabilities that Classic failed to meet the standard of reasonable care. There is no presumption of negligence and the fact of Mr. Bucknol's injury in and of itself does not create a presumption of negligence.

60 I agree with Classic that Mr. Bucknol must point to some act or failure to act on its part that led to the injury. He has failed to do so.

61 Furthermore, Mr. Bucknol has filed no evidence setting out the relevant standard of care for the bar. If Mr. Bucknol is relying on a standard of care, one would have expected they would have set out evidence as to what this standard of care is. Expert evidence could have been called, or documentation from the City of Toronto setting out the standards for bars in terms of security would have been helpful.

62 I also agree with Classic that it did not have to call all specific employees that were working that night to advance their claim for summary judgment. I say this for the following reasons.

63 First, it must be kept in mind that Mr. Bucknol bears the onus here on the issue of negligence.

64 Second, Mr. Bucknol must also put his "best foot forward" on this motion.

65 Third, there is no property in a witness and the names of employees who were working that evening were provided to Mr. Bucknol and there appears to be no request for will says from these employees.

66 Finally some of these employees including Mr. Marshall no longer work for Classic and it was open to Mr. Bucknol to examine these individuals pursuant to Rule 39.03 of the Ontario *Rules of Civil Procedure*. That Rule provides that a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. This was not done. There has been ample time for Mr. Bucknol to obtain evidence in responding to the summary judgment motion.

67 Mr. Bucknol also specifically argues that Ms. Garcia, as manager of the bar, would have been relevant and helpful. He highlights that Mr. Marshall's evidence is that he reported the incident to her and Ms. Garcia's evidence is that no one reported the incident to her. Mr. Bucknol therefore submits that the failure to secure her evidence on this motion means that it would not be favourable to Classic.

68 In my respectful view, these claims are without merit.

69 First, to the contrary, Maria Garcia's statement was read in by counsel at the examination for discovery in March of 2015. That statement specifically states that Maria Garcia had no record of altercations and that she approached her staff after the incident and no one had any knowledge or recognized Mr. Bucknol.

70 Second, while there may be a contradiction between Mr. Marshall and Ms. Garcia's evidence about the reporting of the incident (he says he reported it to her and she says no one reported anything to her), in my view this is not material to the issue of whether or not Classic implemented reasonable steps to make the premises safe at the time of the incident. An internal reporting system relating to incidents that have already occurred can do nothing to prevent the incidents occurring in the first place. The contradiction is not material.

71 I conclude that Classic has shown that it has a regular regime of inspection, maintenance and monitoring sufficient to discharge its obligation. The test is not whether the system in place prevented the incident. The test is whether there were reasonable efforts made. On my review of this record, I am prepared to say that Classic has taken all reasonable steps to minimize risk of injury to its customers.

## ***ISSUE 2: Has Mr. Bucknol proven a breach of the Occupiers' Liability Act?***

72 Mr. Bucknol claims that Classic is also negligent pursuant to the provisions of the OLA. As I have set out above, the OLA provides that there is a positive duty on Classic to ensure that its premises are, in all the circumstances as is reasonable in the situation, reasonably safe for persons attending on the premises. The positive duty imposed on Classic does not mean that they must remove every possible danger from their premises. It also does not require that they must constantly look for potential dangers or conduct constant surveillance. They need only take measures that are reasonable in the circumstances. Again, perfection is not the standard.

73 What is reasonable? That depends on the circumstances. What is reasonable is measured by the average person, not an extraordinary conscientious individual and not an exceptionally skilled person, but a person of reasonable, average, ordinary prudence in the same set of circumstances.

74 The Court of Appeal has made the following three observations about the OLA.

75 First, the OLA imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm.

76 Second, the OLA assimilates occupiers' liability with the modern law of negligence.

77 Third, the responsibility of the occupier is not absolute and they are only required to take such care as in all the circumstances of the case is reasonable (see *Waldick v. Malcolm* (1989), 70 O.R. (2d) 717 (Ont. C.A.)).

*a. Classic's Position*

78 Classic concedes it is an occupier as defined in the OLA and is subject to the duties outlined above. Therefore, Classic owed a duty and they accept that this duty applied to it on May 5, 2012. Pursuant to *Waldick*, Classic argues that it has met its obligations under the OLA and Mr. Bucknol has not offered evidence to establish what was reasonable in the circumstances. Alternatively, Classic argues that Mr. Bucknol has not proven a breach of the duty under the OLA.

*b. Mr. Bucknol's position*

79 Mr. Bucknol argues that Classic has not established that it implemented reasonable care in the circumstances of this case to make the premises safe. Mr. Bucknol asserts the following:

- (i) There were no security personnel in the vicinity of the incident at the time Mr. Bucknol was struck. If there had been, security would have been able to prevent the incident from occurring;

(ii) Mr. Bucknol was struck because there had to have been an uncleared beer bottle remaining in the club originating from the sale of an alcoholic beverage to a customer of Classic lounge; and

(iii) There is an absence of evidence from security staff, bartenders, or busboys who were working on the night of the incident.

*c. Analysis on Issue 2*

80 For the reasons dealt with above in my analysis of Issue 1, I find that Classic has met its obligations under the OLA. There has been no evidence introduced by Mr. Bucknol on how Classic failed in its duty to make the premises reasonably safe. I also make the following three points.

81 First, there is no history of bottles or glass objects being thrown at this club. Indeed, the evidence from Mr. Marshall, Mr. Lima and Ms. Garcia is that there have not been any significant issues with the bar in the nine months it was open before the incident. There is nothing on this record that would suggest that an incident such as this one was a frequent occurrence.

82 Second, I reject Mr. Bucknol's claim that there was no security personnel in the vicinity of the incident and that if there had been, they would have prevented any incident from occurring. In my view, this argument is speculative. I acknowledge that Mr. Bucknol asserts that he did not see any security inside of the club when he was struck. However, the fact that he did not see anyone does not mean that security was absent in the vicinity of the incident when it happened. Indeed, Mr. Marshall explained that all security personnel regularly rotate within the premises except those who are stationed out at the front door.

83 More significantly, I do not accept the argument the incident could have been prevented had security been present during in the area. The context of this incident must be taken into account. On Mr. Bucknol's evidence, the incident occurred very quickly. He noticed an altercation between two others and he was hit one or two seconds after hearing the commotion. It seems to me that the timing of the whole incident does not support Mr. Bucknol's claim that security and busboys could have prevented this incident.

84 Third, the assertion that it was a bottle that was not cleared that had struck Mr. Bucknol is speculative. There is no evidence that the bottle that hit Mr. Bucknol was a bottle that had not been cleared. The evidence is that three regular busboys are employed between 10:00 p.m. to 3:00 a.m. to clear bottles. We simply do not know who threw the bottle or where the bottle came from.

*d. Conclusion on Issue 2*

85 I do not accept that there is evidence of a breach of the OLA.

### ***ISSUE 3: Was the incident reasonably foreseeable?***

86 Foreseeability of harm is a necessary ingredient of a relationship that gives rise to a duty of care (see *Nespolon v. Alford* (1998), 40 O.R. (3d) 355 (Ont. C.A.)).

#### *a. Classic's Position*

87 Classic argues that the incident was not reasonably foreseeable and Classic cannot be liable for Mr. Bucknol's injuries.

#### *b. Mr. Bucknol's position*

88 Mr. Bucknol concedes that he did not detect that he was in danger from being hit by a bottle. However, he argues that a situation of danger developed in the bar and Classic had a duty of care to prevent potential harm caused by other customers. Mr. Bucknol argues that since Classic did not produce first hand witnesses who would have knowledge of relevant facts, not all of the evidence is available for trial and there is a genuine issue for trial.

#### *c. Analysis on Issue 3*

89 To provide context for my analysis on this issue, I will start with a general summary of the *Rankin's Garage* case released by the Supreme Court of Canada in May. In that case, the plaintiff J. and his friend C. were at C.'s mother's house. The boys drank alcohol provided by C.'s mother and smoked marijuana. Sometime after midnight, the boys made their way to Rankin's Garage, a car garage. The garage property was not secured, and the boys began walking around the lot checking for unlocked cars with the intention of stealing valuables. C. found an unlocked car parked behind the garage. He opened the car and found its keys in the ashtray. Though he did not have a driver's licence and had never driven a car on the road before, C. decided to steal the car so that he could go and pick up a friend. C. told J. to "get in", which he did. C. drove the car out of the garage and drove off. Tragically, while on the highway, the car crashed and J. suffered a catastrophic brain injury.

90 J. sued Rankin's Garage, his friend C., and his friend's mother for negligence.

91 The majority decision of the Supreme Court of Canada held that the defendant, Rankin did not owe the plaintiff a duty of care.

92 In doing so, the Court helpfully listed the first principles regarding foreseeability and the duty of care. I highlight some of these principles:

1. Whether or not a duty of care exists is a question of law. The plaintiff bears the legal burden of establishing a cause of action, and thus the existence of a prima facie duty of care.

2. In order to meet this burden, the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship. In the absence of such evidence, the claim may fail.

3. When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has offered facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged. It is important to frame the question of whether harm is foreseeable with sufficient analytical rigour to connect the failure to take care to the type of harm caused to persons in the plaintiff's situation. The foreseeability question must therefore be framed in a way that links the impugned act to the harm suffered by the plaintiff.

4. Further, the fact that something is possible does not mean that it is reasonably foreseeable. Obviously, any harm that has occurred was, by definition, possible. Thus, for harm to be reasonably foreseeable, a higher threshold than mere possibility must be met.

5. Whether or not something is "reasonably foreseeable" is an objective test. The analysis is focussed on whether someone in the defendant's position ought reasonably to have foreseen the harm rather than whether the specific defendant did.

6. Courts should be vigilant in ensuring that the analysis is not clouded by the fact that the event in question actually did occur. The question is properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of 20/20 hindsight.

93 The majority held that all the evidence respecting the practices of Rankin's Garage or the history of theft in the area, such as it was, concerned the risk of theft. The evidence did not suggest that a vehicle, if stolen, would be operated in an unsafe manner. This evidence did not address the risk of theft by a minor, or the risk of theft leading to an accident causing personal injury. Therefore the majority reasoned that it did not automatically flow from evidence of the risk of theft in general that a garage owner should have considered the risk of physical injury.

94 On the facts of this case, the Supreme Court held that physical injury is only foreseeable when there is something in the facts to suggest that there is not only a risk of theft, but that the stolen vehicle might be operated in a dangerous manner. Therefore, the evidence did not demonstrate that bodily harm resulting from the theft of the vehicle was reasonably foreseeable.

95 In my view, *Rankin* supports Classic's position on this motion.

96 First, the decision confirms that there must be some circumstance or evidence to suggest that Classic ought to have reasonably foreseen the risk of injury.

97 Second, it also reminds us that it is Mr. Bucknol who bears the onus of establishing that Classic ought to have contemplated the risk of personal injury when considering its security practices.

98 Third, the evidence introduced on this motion does not demonstrate that a bottle being thrown and hitting Mr. Bucknol in the face was a risk that Classic should have considered.

99 In my view, the record supports Classic's position that the incident was not reasonably foreseeable.

100 The record includes the following:

- (i) The entire incident occurred in a very short time frame — seconds.
- (ii) There is no evidence that intoxication by any patron led to the incident.
- (iii) There is no evidence that the particular location Mr. Bucknol was standing in was dangerous.
- (iv) There is no evidence of prior instances of beer bottles being thrown inside of the bar.
- (v) There is no history of frequent altercations or disputes involving customers in the bar.

101 Classic relies on the decision in *McKenna v. Greco (No. 2)* (1985), 52 O.R. (2d) 85 (Ont. H.C.) (appeal dismissed: see 1986 CanLII 2553 1986 CarswellOnt 1049 (Ont. C.A.)).

102 In *McKenna*, a patron was seriously injured by one of the individual defendants in an altercation which occurred in a bar in the defendant hotel. The altercation in question was of short duration. Steele J. ruled that the hotel was not liable to the plaintiff.

103 He found that the hotel and bar were reasonably staffed for the clientele at the time and the individual defendants were not known to be intoxicated persons who constituted a danger to the hotel's invitees. Moreover, there was nothing to alert the hotel to any danger on the occasion in question, or on previous occasions. Steele J. concluded that the injury was caused solely by one of the individual defendants, whose actions could not be apprehended, reasonably anticipated or prevented by the hotel.

104 In my view, *McKenna* is instructive. This is a similar case. Like the bar in *McKenna*, there was no prior history of an incidents. Even if there was a fight taking place between the two men near the DJ booth, a bottle being thrown across to where Mr. Bucknol was standing was not reasonably foreseeable. This incident happened so quickly that even if employees saw the fight or altercation, it is speculative to suggest that the actual throwing of the bottle could have been prevented.

105 I acknowledge that Classic could have secured more evidence on this motion from other employees. However, as I stated earlier, this is not fatal and I must assume all of the evidence that could have been called has been called. In my view, although Classic did not introduce any evidence from other security personnel, police officers, or bartenders, the absence of this evidence does not convert the incident to a reasonably foreseeable one.

*d. Conclusion in Issue 3*

106 I conclude that the incident was not reasonably foreseeable and it cannot be said that Classic should bear liability. On this record, there was nothing to alert Classic to any danger in the evening in question.

***ISSUE 4: Has Mr. Bucknol established the required elements of spoliation?***

107 Classic had 16 surveillance cameras on the premises in 2012. These cameras capture footage 24 hours a day, 7 days a week. The video footage is catalogued for one month before being deleted. Mr. Lima explained that if he is given notice about something he should be looking for, he will save the video recording. In this case, the recordings were deleted because he was not given notice of any incident.

108 The concept of spoliation refers to the intentional destruction of relevant evidence when litigation is existing or pending.

109 The principal remedy for spoliation is the imposition of a rebuttable presumption of fact that the lost or destroyed evidence would not assist the spoliator. The presumption can be rebutted by evidence showing the spoliator did not intend, by destroying the evidence, to affect the litigation, or by other evidence to prove or repel the case. Generally, the issues of whether spoliation has occurred, and what remedy should be given if it has, are matters best left for trial where the trial judge can consider all of the facts and fashion the most appropriate response (see: *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 (Alta. C.A.) (CanLII)).

110 The leading case regarding spoliation in Ontario is the decision of Newbould J. in *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, 35 C.C.E.L. (4th) 242 (Ont. S.C.J. [Commercial List]). Newbould J. found that spoliation requires four elements.

111 First, the missing evidence must be relevant.

112 Second, the missing evidence must have been destroyed intentionally.

113 Third, at the time of destruction, litigation must have been ongoing or contemplated.

114 Finally, it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation

115 I also adopt the comments of Penny J. in *Leon v. Toronto Transit Commission*, 2014 ONSC 1600, 22 M.P.L.R. (5th) 100 (Ont. S.C.J.), at paras 9 and 10:

Spoliation in law, however, does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation. Once this is demonstrated, a presumption arises that the evidence would have been unfavorable to the party destroying it. This presumption may be rebutted by other evidence through which the alleged spoliator proves that his actions, although intentional, were not aimed at affecting the litigation, or through which a party either proves his case or repels the case against them. When the destruction is not intentional, it is not possible to draw the inference that the evidence would tell against the person who destroyed it. The unintentional destruction of evidence is not spoliation. It is not appropriate to presume the missing evidence would tell against the person destroying it where the destruction is unintentional.

*a. Position of Mr. Bucknol*

116 Mr. Bucknol claims that the recordings of the surveillance cameras positioned in the interior of the club would have revealed what had occurred to Mr. Bucknol. Since the videos from the surveillance cameras were not preserved and automatically deleted 30 days after the incident, then I can draw an adverse inference that the recordings would have provided evidence that was unfavourable to it.

*b. Classic's position*

117 Classic argues that Mr. Lima has provided evidence that he did not get notice of the incident within 30 days and, as such, video footage of the incident was not preserved (security cameras on premises only retain footage for one month prior to being deleted). There is no evidence that the video recordings were intentionally destroyed, which is an essential element of spoliation.

*c. Analysis on Issue 4*

118 In my view, Mr. Bucknol's claim of spoliation is not supported on this record.

119 I accept that Mr. Marshall stated that Ms. Garcia had knowledge of the incident in question in the case at bar because they discussed it briefly. Ms. Garcia contradicts this evidence because she states she did not know about the incident.

120 However, even assuming that Ms. Garcia knew about the incident and never passed it on to Mr. Lima, this does not mean that the recordings were intentionally destroyed.

121 The mischief that the principle of spoliation of evidence seeks to prevent is the inference with: (1) the establishment and maintenance of a fair trial process; and (2) the quest for the truth.

122 Even if Mr. Marshall and Ms. Garcia did not notify Mr. Lima about the incident, these actions cannot be examined in isolation. I cannot ignore that Mr. Bucknol has admitted that he did not report the incident to anyone in the club or speak with the police. I am not criticizing his decision because he may very well have been trying to focus on leaving the club to seek immediate medical attention. However, his evidence is that he did not contact the club in the days after the incident.

123 In my view, the claim of spoliation fails at step three of the test set out by Newbould J. in *Catalyst Capital Group*. At the time the videos were deleted, there was no ongoing or contemplated litigation. Mr. Bucknol did not serve his notice on Classic until after the video surveillance retention system automatically deleted the videos for the date in question. I disagree with Mr. Bucknol's suggestion that a reasonable person would contemplate that, following a bloody injury incident, litigation would likely ensue. There are many bar fights and/or accidents where people end up bleeding where nobody decides to sue the occupier of a premises, let alone the person who caused the injury.

#### *d. Conclusion on Issue 4*

124 I do not accept that the principle of spoliation applies here.

125 First, there is no evidence that the evidence was destroyed intentionally.

126 Second, there is no evidence that would allow me to infer that the evidence was destroyed in order to affect the outcome of the litigation.

127 In any event, even assuming that the security video could have shown a fight taking place that does not mean that the incident was reasonably foreseeable.

#### ***ISSUE 5: Is there a genuine issue for trial?***

128 The roadmap for summary judgment summarized by Corbett J. in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, 2014 ONSC 1200 (Ont. S.C.J.) at paras. 33-34 is helpful:

[33] As I read Hryniak, the court on a motion for summary judgment should undertake the following analysis:

- 1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
- 2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;
- 3) If the court cannot grant judgment on the motion, the court should:
  - a. Decide those issues that can be decided in accordance with the principles described in 2), above;
  - b. Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;
  - c. In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.

129 Applying this test, for the reasons noted above, I grant Classic's motion for summary judgment.

130 I have assumed that I have all of the substantive evidence I need to make a decision on liability.

131 I am satisfied that the evidence shows that the act of the unknown individual who threw the bottle was not reasonably foreseeable in the circumstances. Since the element of foreseeability is not present, Mr. Bucknol's claim against Classic must fail. There is no genuine liability issue requiring a trial.

132 I am also satisfied that Classic did not have to remove every possible danger from their premises. They took measures that were reasonable in the circumstances to make sure that their customers were safe. Again, perfection is not the standard.

## **Conclusion**

133 I find that there is no genuine issue requiring a trial and the action against Classic is dismissed

134 If counsel cannot agree on costs, they may file written submissions, of no more than five pages, and their bill of costs. I will receive Classic's submissions 15 days from the date of this ruling. Mr. Bucknol's submissions are due 15 days after the receipt of Classic's submissions. There will be no reply.

*Motion granted.*

**End of Document**

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**CITATION:** Canadian National Railway Company v. Holmes, 2014 ONSC 593

**COURT FILE NO.:** CV-08-7670-00CL

**COURT FILE NO.:** CV-13-10158-00CL

**DATE:** 20140124

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Canadian National Railway Company

and

Scott Paul Holmes, Jennifer Parisien, also known as Jennifer Lynn Flynn in her personal capacity and as the sole proprietor and operating as Efficient Construction, Janice Shirley Maureen Holmes, Murray Fussie, Scott Albert Pole, Rick Sousa, also known as Ricky Sousa, in his personal capacity and operating as Trax Unlimited, Michael Sousa, also known as Mike Sousa, in his personal capacity and operating as Trax Unlimited, Julie Sousa, 2035113 Ontario Ltd., Complete Excavating Ltd., Monterey Consulting & Construction Ltd., 2071438 Ontario Ltd., operating as Complete Trax, 2071442 Ontario Ltd., The Scott Holmes Living Trust, The Jennifer Lynn Flynn Living Trust, Greystone Ltd., and Belview Management Ltd.

**AND RE:** Scott Paul Holmes. Jennifer Lynn Parisien also known as Jennifer Lynn Flynn, Complete Excavating Ltd., Monterey Consulting & Construction Ltd., 2035113 Ontario Ltd., 2071442 Ontario Ltd., The Scott Holmes Living Trust and The Jennifer Flynn Living Trust

and

Canadian National Railway Company, E. Hunter Harrison, Claude Mongeau, Olivier Chouc, Keith Creel, John Dalzell, Michael Cory, Nazam-U-Din Hasham, Michael Farkouh, Dave Roy, Nick Nielsen, Serge Meloche, Ben Fusco, Bruce Power, Robert Michael Zawerbny, Scott William McCallum, Marc Pontenier and Janice Shirley Maureen Holmes

**BEFORE:** Justice J.A. Thorburn **As she then was**

**COUNSEL:** *Monique Jilesen* and *Julia Lefebvre* for the moving party Canadian National Railway Company

*David Porter* and *Eric Block* for the moving parties John Dalzell, Serge Meloche, Ben Fusco, Bruce Power, Robert Zawerbny, Scott McCallum and Marc Pontenier

*Norman Groot* for the responding party, Derrick Snowdy

**DATE HEARD:** January 7 and 20, 2014

## **ENDORSEMENT**

### ***The Issues to be Determined***

[1] The moving parties seek an Order “to restrain Derrick Snowdy from directly or indirectly assisting any person to disclose any documentary or oral discovery in these proceedings or the content of any such documentary or oral discovery.”

[2] The Respondent Snowdy is a private investigator who is not a party to this action.

[3] The deemed undertaking rule set out in Rule 30.1.01 of the *Rules of Civil Procedure*, R.R.O., 1990, Reg. 194 provides that, “All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.” This rule applies to both documentary and oral discovery.

[4] The issues in this case are:

- a) can a third party be restrained from retaining, using and/or disclosing to others, documents obtained through the discovery process; and
- b) should Snowdy be so restrained.

[5] Snowdy claims he no longer has these documents in his possession, and had given an undertaking, “not to acquire any documents produced by CN on discovery from Holmes or anyone else subject to the deemed undertaking rule, for the duration of this action.”

### ***The Evidence***

#### ***Legal Proceedings***

[6] In August 2008, Canadian National Railway (CN) commenced this civil proceeding against Holmes and others. Holmes was a former track supervisor in the engineering group at CN. CN claims he approved fraudulent invoices from companies owned or controlled by him. Damages for deceit, breach of contract, breach of trust, breach of fiduciary duty, breach of confidence, deceit, conversion and conspiracy are sought against Holmes and others. Also in August 2008, a Mareva injunction and Anton Piller Order were granted against Holmes.

[7] In February 2011, Holmes brought an action against CN claiming misconduct against CN and some of its current and former officers and employees.

[8] In March 2011, the court ordered that the Crown brief in a related criminal proceeding (which had been stayed) be provided to Holmes.

*Circumstances Surrounding the Collection of Documents from Holmes*

[9] Snowdy claims he was retained by a client (whom he did not identify) to conduct an investigation into CN. He says he has been collecting documents about CN since 2008 and has created an anonymous “mailbox” for persons who wish to provide information without attribution.

[10] Snowdy got to know Holmes in 2011. In Snowdy’s factum, it is admitted that,

“Snowdy enticed Holmes to communicate with him by providing Holmes with information about the historical working relationship between Justice Campbell and CN solicitor Peter Griffen...where an alleged concern was raised that Mr. Griffen and Campbell enjoyed an extraordinary relationship beyond that which was apparent and known to the people who appeared before them”.

[11] On his cross-examination in respect of this motion, Snowdy admitted that he further enticed Holmes, “by advising him that he had information on [CN] solicitor Jileson such as her home address, husband’s identity, her financial picture and her phone records...related to her participation in a scheme related to a horribly constructed criminal investigation” and that someone had gone through her garbage.

[12] At the time he received the documents from Holmes, Snowdy says he believed he was allowed to have them.

[13] Holmes provided Snowdy with a USB key that contained thousands of CN documents that were produced to Holmes in this legal proceeding against him.

*Motions to Prevent Dissemination of CN Discovery Documents*

[14] On October 1, 2013 CN served a motion record on Holmes claiming that “the documents provided by Holmes to the media and to the OPP are the property and confidential information of CN and are subject to the deemed undertaking rule.” On October 17, CN brought its motion to prevent Holmes from disseminating documents subject to the implied undertaking rule. Snowdy says,

“At the October 17 motion, I learned that documents that Holmes gave me may be the subject of his deemed undertaking rule obligation. I advised my clients that CN may bring a motion against me to acquire my CN investigation file on their suspicion that the document in the APTN article was provided to them by me, and that it was not safe for me to remain in possession of my CN investigation file. Accordingly, it was agreed that I

would transfer it to New York, outside of the jurisdiction of the Ontario courts.”

[15] On October 17<sup>th</sup>, Holmes was ordered to produce a list of all documents he disseminated to third parties and the names of the third parties who received them.

[16] On November 1<sup>st</sup>, Holmes advised CN that he had given Snowdy a USB device containing documents and that, “without prior knowledge or consent of Holmes, Mr. Snowdy recovered the residual data from the aforementioned deleted files and has distributed some or all of the recovered documents to third party recipients, including the APTN...”

[17] On November 7<sup>th</sup>, Holmes was ordered to seek the immediate return of the electronic storage devices that contained some or all of CN’s documentary discovery.

[18] On November 14<sup>th</sup>, Holmes asked Snowdy to return any electronic storage device that might contain CN’s documents in this proceeding. Snowdy advised that it was not in his client’s interests “to divulge what materials have been obtained in my investigation wholly or in part.”

[19] On November 26<sup>th</sup>, Snowdy advised CN that Holmes had provided him with a USB device that contained, “several thousand pages of documents related to the litigation between CN Rail and Holmes.” Snowdy advised that he had provided documents to third party media outlets.

[20] In light of Snowdy’s receipt and dissemination of CN’s productions to third parties, CN brought this motion to seek an Order to restrain Derrick Snowdy from directly or indirectly assisting any person to disclose any documentary or oral discovery in these proceedings or the content of any such documentary or oral discovery.

*Snowdy’s Admissions on Cross Examination*

[21] At his cross examination on December 19<sup>th</sup>, Snowdy testified that he had “no idea” that CN was looking for the CN documents given to him by Holmes. He later conceded that Holmes had advised him in early October 2013, that CN was bringing a motion because they wanted the documents returned.

[22] Snowdy also testified that he and others went through “extraordinary efforts” to remove the CN files from the jurisdiction. Sometime after November 11, 2013, he put everything he received from Holmes onto several external hard drives, took them to Ottawa and then to the Peninsula Hotel in New York. He claims he does not know the name of the client in New York.

[23] He took the documents to New York so that they would not be subject to the jurisdiction of the Ontario courts. After being asked to retrieve the documents, he called his client in New York to determine what had happened to the documents and where they had been sent. He received no response to his message and claims he has no other means of contacting his client.

[24] Snowdy states he no longer has any of the documents he was given by Holmes. The USB key, and any copies he had, were given to the Independent Supervising Solicitor who was retained by the moving parties, in part, to receive documents from Snowdy.

### ***Snowdy's Reponse to the Request for Injunctive Relief***

[25] Snowdy's position is that no restraining order should be granted for the following reasons:

- a) he is not a party to this proceeding and is therefore not covered by the deemed undertaking rule in Rule 30.1.01 of the *Rules of Civil Procedure*;
- b) at the time he collected the documents from Holmes, he had no idea there was a rule preventing Holmes from disclosing them to him;
- c) CN has made no effort to seek the return of documents from other third parties to whom Snowdy disclosed the information and thus, there is no irreparable harm;
- d) Snowdy no longer has any of the CN documents in issue;
- e) the appropriate remedy for Holmes' decision to disclose documents to Snowdy contrary to the implied undertaking rule, is to strike Holmes' claim; and
- f) in his affidavit filed after the first day of hearing, he stated that, "I undertake to this Court not to acquire any [documents related to CN] from Holmes or anyone else subject to the deemed undertaking rule related to this action for the duration of this action."

### ***Analysis of the Law and Conclusion***

#### ***Legal Interpretation of the Deemed Undertaking Rule***

[26] Rule 30.1.01 of the *Rules of Civil Procedure* provides that all parties are deemed to undertake not to use evidence or information obtained on discovery for any purpose other than the proceeding in which the evidence was obtained.

[27] Rule 30 does not explicitly address the use by third parties of documents subject to the deemed undertaking rule.

[28] However, the Supreme Court of Canada in *Juman v. Doucette*, [2008] 1 S.C.R. 157, at para. 25, held that, "[t]he general ideal [of the deemed undertaking rule], metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order."

[29] Similarly, in *Globe and Mail v. Canada*, [2010] 2 S.C.R. 592, at para. 77, the Supreme court held that the deemed undertaking rule “is meant to allow the parties to obtain as full a picture of the case as possible, without the fear that disclosure of the information will be harmful to their interests, privacy-related or otherwise.”

[30] The UK decision in *The Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*, [1975] 1 All E.R. 41, deals specifically with the application of the deemed undertaking rule to third parties. In that case, a number of claimants sued the plaintiff for damages arising out of the use of the drug thalidomide. On discovery, the plaintiff provided the claimants with a large number of documents which they handed over to a third party retained to advise them. The third party sold the documents to the Times Newspapers Ltd.. The court issued an injunction against the Times, restraining its publication of the documents. In so doing, the court held that,

- a) those who disclose documents on discovery are entitled to the protection of the court against any use of the documents otherwise than in the action in which they are disclosed;
- b) this protection can be extended to prevent the use of the documents by any person in whose hands they come unless it be directly connected with the action in which they are produced; and
- c) it is a matter of public interest that documents disclosed on discovery should not be permitted to be put to improper use and that the court should give its protection in the right case.

[31] In *Fraser v. Evans* [1969] 1 QB 349, 361, Lord Denning held that, “the jurisdiction is based ... on the duty to be of good faith. No person is permitted to divulge to the world, information which he has received in confidence, unless he has just cause or excuse for doing so. Even if he comes by it innocently, nevertheless, once he gets to know it was originally given in confidence, he can be restrained from breaking that confidence.”

[32] Rule 1.04 of the Ontario *Rules of Civil Procedure* provides that the Rules are to be “liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”

[33] The deemed undertaking rule prohibits the use of materials or information obtained in discovery for an ulterior or collateral purpose: see *Kitchenham v. AXA Insurance Canada*, 2008 ONCA 877, 94 O.R. (3d) 276, at paras. 28, 31; and *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.), at pp. 367-371. The rationale is that parties will be reticent to make full disclosure if they believe documents they produce in the course of discovery may be used for an ulterior purpose.

#### *Application of the Deemed Undertaking Rule to the Facts of this Case*

[34] Although Snowdy was not a party to these proceedings, he sought out Holmes knowing Holmes was a party to the litigation. Snowdy enticed Holmes to provide him with the documents he had obtained from CN in the course of discovery.

[35] When Snowdy found out that CN had obtained an Order requiring Holmes to return CN's discovery documents, and knowing that CN might seek an Order against him to return the documents in his possession, Snowdy sought to circumvent that process by taking the documents out of the jurisdiction.

[36] Snowdy told the solicitors for CN that if he had been asked to return them, he would "sanitize" them.

[37] Snowdy's acts demonstrate his animosity toward CN and its solicitors. His acts are also a deliberate attempt to circumvent the deemed undertaking rule that is meant to prevent the use of the documents by any person in whose hands they come unless it be directly connected with the action in which they are produced.

[38] Snowdy's actions lead me to believe that his undertaking is insufficient and that an Order restraining him is required.

[39] Finally, Snowdy admitted that Holmes provided him with thousands of documents which were comingled with other documents pertaining to CN, and it is therefore possible that he retains some of them in his possession. Moreover, his answers on cross-examination as to whether he retained any of the CN documents he received from Holmes were equivocal.

[40] For these reasons, an Order is granted to restrain Derrick Snowdy from directly or indirectly assisting any person to disclose any documentary or oral discovery in these proceedings or the content of any such documentary or oral discovery.

[41] If the parties are unable to agree on costs, they may provide me with brief written submissions and an outline of costs within 15 days.

---

Thorburn J.

**DATE:** January 24, 2014

THE CATALYST CAPITAL GROUP INC. et al.  
Plaintiffs

-and-

WEST FACE CAPITAL INC. et al.  
Defendants

-and-

CANACCORD GENUITY CORP.  
Third Party

WEST FACE CAPITAL INC. et al.  
Plaintiffs by Counterclaim

-and-

THE CATALYST CAPITAL GROUP INC. et al.  
Defendants to the Counterclaim

Court File No. CV-17-587463-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST  
PROCEEDING COMMENCED AT  
TORONTO**

**BRIEF OF AUTHORITIES OF THE RESPONDING PARTIES (PLAINTIFFS BY  
COUNTERCLAIM) WEST FACE CAPITAL INC. AND GREGORY BOLAND**

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