Court File No. CV-17-587463-00CL

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

WEST FACE COMPENDIUM OF LAW: MOTION TO STRIKE CATALYST PARTIES' CLAIM

May 14, 2021

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A. The Multi-Part Test for Dismissing a Proceeding under Section 137.1 of the CJA

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 1, Tab 1

The principles governing the test under s. 137.1 of the *CJA* are found in this excerpt as follows:
.
GENERAL PRINCIPLES (see paras. 5, 16-19 & 32-33);
SECTION 137.1*(3)* (see paras. 20-31);
SECTION 137.1*(4)(a)* (see paras. 34-43);
SECTION 137.1*(4)(a)(i)* (see paras. 44-54); .
SECTION 137.1*(4)(a)(ii)* (see paras. 55-60); and
SECTION 137.1*(4)(b)* (see paras. 61-82)
.

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)

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.

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

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

> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.
>
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,

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

[33] As the text of this provision makes explicit, the burden is on the *responding party* (i.e. the plaintiff in the underlying proceeding) to satisfy the motion judge of *both* (a) *and* (b). Therefore, if *either* (a) *or* (b) is not met, then this will be fatal to the plaintiff[2] discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both (a) *and* (b) are met, then the proceeding will be allowed to continue. While (a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence, (b) is open-endedly concerned with what is at the heart of the legislation at issue and anti-SLAPP legislation generally: the weighing of the public interest in vindicating legitimate claims through the courts against the resulting potential for quelling expression that has already been determined under s. 137.1(3) to be related to a matter of public interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 1. Of, relating to, or involving substance, material <substantial change in circumstances>. 2. Real and not imaginary; having actual, not fictitious, existence <a substantial case on the merits>. 3. Important, essential, and material; of real worth and importance <a substantial right>.
>
> (*Black's Law Dictionary* (11th ed. 2019), at p. 1728)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [TRANSLATION] Balance has been a recurring theme: the need to strike a balance that will dismiss abusive lawsuits while permitting legitimate actions. I can assure you that we have heard everything that has been said to us. Balance is a key feature of this bill.
>
> (Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur))

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

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

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

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

(a) *Harm Analysis*

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

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

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

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

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

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

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

(b) *Weighing of the Public Interest*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Application to This Case

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

A. *Factual Overview*

B. Illustrative Rulings where Proceedings have been Dismissed under Section 137.1 of the *CJA* Due to (i) Lack of Substantial Merit and/or (ii) Presence of Valid Defences and/or (iii) Balancing of Public Interest

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 1, Tab 1

The principles on which this particular proceeding was dismissed are found in this excerpt as follows:

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GENERAL COMMENTS (see paras. 1, 2, 83, 97 and 127);
SATISFACTION OF S. 137.1(3) (see paras. 98-103)
FAILURE TO SATISFY S. 137.1(4)(a) (see paras. 104-112); and
FAILURE TO SATISFY S. 137.1(4)(b) (see paras. 113-126)

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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*.

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.

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*

(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.

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 6, Tab 48

The principles on which this particular proceeding was dismissed are found in this excerpt at paras. 21-24 & 26-28. The related award of damages awarded to the successful moving party is discussed at paras. 29-39

COURT OF APPEAL FOR ONTARIO

CITATION: United Soils Management Ltd. v. Mohammed, 2019 ONCA 128
DATE: 20190220
DOCKET: C64197 and C65260

Doherty, Pardu and Nordheimer JJ.A.

BETWEEN

United Soils Management Ltd.

Plaintiff (Appellant)

Leave to appeal was dismissed by the SCC

and

Katie Mohammed

Defendant (Respondent)

AND BETWEEN

United Soils Management Ltd.

Plaintiff (Appellant)

and

Kayt Barclay

Defendant (Respondent)

William A. Chalmers, for the appellant

Jean-Marc Leclerc and Sabrina Callaway, for the respondents

Heard: February 11, 2019

On appeal from the order of Justice Thomas R. Lederer of the Superior Court of Justice, dated July 25, 2017 with reasons reported at 2017 ONSC 4450, and the

Analysis

[19] Both motion judges heard and decided the s. 137.1 motion before this court released a series of judgments interpreting s. 137.1 in some detail: see *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161 and the related cases that were released simultaneously. Some of the motion judges' analyses have been overtaken by *Pointes* and those related authorities.

[20] In light of the significant developments in the case law since the motion judges released their reasons, we see no need to engage in a detailed consideration of those reasons. Whatever may be said about the correctness of their analyses in respect of s. 137.1(4)(a) (the substantial merit and valid defense provisions), the appellant cannot succeed on these appeals unless it satisfies this court that the motion judges each reached the wrong conclusion in respect of s. 137.1(4)(b), the public interest balancing provision.

[21] Section 137.1(4)(b) required the motion judges to dismiss the appellant's lawsuits unless the appellant could demonstrate that the harm suffered by it, or likely to be suffered by it, as a result of the respondents' statements was sufficiently serious that the public interest in permitting the appellant's lawsuit to go forward outweighed the public interest in protecting the respondents' freedom of expression. This court considered the factors relevant to the balancing process

described in s. 137.1(4)(b) in *Pointes*, at paras. 85-98; *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690, at paras. 37-44; and *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1, at paras. 42-52.

[22] Any monetary damages suffered by a plaintiff, or likely to be suffered by a plaintiff, as a consequence of alleged defamatory statements is a key feature in the assessment of the harm suffered or likely to be suffered by the plaintiff: *Pointes*, at para. 88. The appellant offered no evidence of any monetary damage suffered by it. While damages are presumed if defamation is established, there is no presumption about the nature or quantum of that damage. On this evidence, there is no reason to think that any damages awarded to the appellant would be anything more than modest, if not nominal.

[23] Nor is there any evidence of any reputational harm done to the appellant's business. There is no suggestion that the appellant, a corporation, suffered any damage to, or was likely to suffer any damage to, its business reputation as a result of the respondents' Facebook posts.

[24] The extent of any harm suffered or likely to be suffered by the appellant is also significantly diminished by the very limited circulation of the alleged defamatory comments. In both instances, they were posted only for a few days

and to a limited audience of likeminded individuals also concerned about potential damage to the environment.

[25] Further, in the case of Ms. Mohammed, the timely and unqualified apology, and retraction of the offensive portions of her posts, is a crucial factor in assessing harm caused or likely to be caused to the appellant. The apology goes a long way to eliminating any possible future harm to the appellant's reputation from the posts. To the extent that the appellant claims to have taken legal action to vindicate its good name, the unqualified and timely apology by Ms. Mohammed would seem to achieve that vindication.

[26] While the appellant can point to little, if any, harm or potential harm, both respondents make a strong case for protecting their freedom of expression. The statements related to a matter of significant public importance. They were also part of an ongoing political dialogue in the local community. Democracy thrives through open and public debate on matters of public policy. Strong citizen involvement in those debates can only strengthen our democracy. Although both respondents can properly be criticized for the particular words used – "poisoning our children" and "in the pocket of United Soils" – there can be no doubt that both the subject matter of their concerns, and the manner in which they advanced those concerns, constituted expression that engaged the public interest.

[27] The appellant has the onus of demonstrating that the harm suffered or likely to be suffered by it was sufficiently significant to show that the public interest in allowing the appellant to proceed outweighed the public interest in protecting the respondents' expression. On these records, the appellant cannot meet that onus in either case.

[28] The proceedings were properly dismissed on the basis that the respondent had not met its onus in respect of s. 137.1(4)(b).

Damages

[29] A separate issue arises on both of these appeals and that is the proper application of s. 137.1(9). That section reads:

> If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

[30] The motion judge awarded Ms. Mohammed damages of $7,500. In doing so he found that prior motions brought by the appellant were "an objective demonstration of improper purpose": *Mohammed*, at para. 78. The motion judge also pointed out that the appellant instituted the proceeding notwithstanding that Ms. Mohammed had apologized, as demanded by the appellant. He found that this was "a continuation of its desire to intimidate": *Mohammed*, at para. 78.

[31] In fixing the amount of damages, the motion judge noted that there was no medical evidence in support of Ms. Mohammed's claim that she suffered stress as a result of the proceeding being instituted against her. He also noted that there was no other corroborating evidence of any adverse effects on Ms. Mohammed. Nevertheless, the motion judge accepted that the proceeding unnecessarily caused Ms. Mohammed stress that affected her day-to-day life: *Mohammed*, at paras. 79-80.

[32] In the case of Ms. Barclay, the motion judge awarded her damages of $20,000. The motion judge found that the action was brought in bad faith and for an improper purpose "of stifling public debate around a crucially important public issue": *Barclay*, at para. 136. The motion judge found that Ms. Barclay had suffered "personal anguish" as a result of the action: *Barclay*, at para. 136.

[33] The motion judge also found, in the alternative, that s. 137.1(9) would permit an award of punitive damages in the same amount. She found that the appellant's conduct "warrants denunciation and deterrence": *Barclay*, at paras. 134, 136.

[34] The wording of s. 137.1(9) is somewhat problematic. On one view, the wording of s. 137.1(9) would seem redundant, as a finding that an action has been commenced for the purpose of unduly limiting expression on matters of public interest would seem to qualify as one that has been brought for an

improper purpose. On another view, the wording of s. 137.1(9) could be seen as an effort to separate out a subset of SLAPP cases which go beyond simply reflecting an effort to limit expression and include active efforts to intimidate or to inflict harm on the defendant.

[35] A review of the "Anti-SLAPP Advisory Panel Report to the Attorney General", dated October 28, 2010, supports the latter interpretation. In that report, the Advisory Panel recommended, at para. 46:

> [T]he court should not be required to make findings as to bad faith or improper motive on the part of the plaintiff in deciding a motion under the special procedure. If in a particular case, however, the court is satisfied on the record before it that an action has been brought in bad faith or for an improper motive, such as punishing, silencing or intimidating the defendant rather than any legitimate pursuit of a legal remedy, an additional remedy should be available for this improper conduct. In such circumstances, the court should have the power to award damages to the defendant in such amount as is just. [Emphasis added].

[36] We would make two observations regarding the approach taken by the motion judges in these cases with respect to this issue. First, we do not view it as necessary for a defendant to adduce medical evidence in order to support a claim for damages. While medical evidence might be of assistance in determining the proper quantum of damages to be awarded, in certain cases, such as the ones here, it may be presumed that damages will arise from the use of a SLAPP lawsuit. Both of the respondents were individuals inexperienced in

litigation, who would understandably suffer the stress and anxiety associated with being the subject of a proceeding of this type. This is especially true given the intimidating nature of the conduct of the appellant.

[37] That observation does not mean that damages will naturally follow in every case where the action is dismissed. The exact limits to the circumstances justifying an award of damages must await further development of the law surrounding s. 137.1. Whether an award of damages is warranted should also take into account the presumption that costs will be awarded on a full indemnity basis. Such an award may, in some cases, address the harm to a defendant that arises from a SLAPP proceeding.

[38] Second, we do not view the wording of s. 137.1(9) as being so broad as to encompass punitive damages awards. In our view, the thrust of s. 137.1(9) is to provide compensation for harm done directly to the defendant arising from the impact of the instituted proceeding. The section is not intended to provide wide-ranging authority for the court to sanction the conduct of the plaintiff through a damages award, such as an award for punitive damages. Any need to sanction the conduct of the plaintiff is already addressed through the provision in s. 137.1(7) of a presumptive award of full indemnity costs.

[39] All of that said, we do not see any basis for interfering with the damages awards that were made in either of these cases. There was evidence of harm to

Ms. Mohammed and Ms. Barclay arising from these proceedings. Each of the motion judges gave reasons for the conclusions that they reached regarding the quantum of damages to be awarded. There is no palpable and overriding error in either of their conclusions that would warrant intervention by this court.

Costs

[40] In each of these appeals, the appellant sought leave to appeal the costs award made. In each instance, the appellant submits that the amount of costs awarded was excessive and that the motion judges failed to carry out the requisite analysis of the costs claimed and determine whether those costs were reasonable.

[41] We do not see any grounds, much less strong grounds, on which we could conclude that either of the motion judges erred in exercising their discretion in fixing costs such that leave to appeal should be granted: *Brad-Jay Investments Ltd. v. Szijjarto* (2006), 218 O.A.C. 315 (C.A.), at para. 21; *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 ONCA 101, 119 O.R. (3d) 81, at para. 77. It was acknowledged that the motions were complex and that considerable time was spent on them. The amounts awarded, given that they were on a full indemnity basis, were not unreasonable.

[42] We do, however, agree with the appellant that there remains an obligation on a motion judge, when determining the quantum of costs under s. 137.1(7), to

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 3, Tab 21

The principles on which this particular proceeding was dismissed are found in this excerpt at paras. 1, 2, 7-27 & 33-53

COURT OF APPEAL FOR ONTARIO

CITATION: Fortress Real Developments Inc. v. Rabidoux, 2018 ONCA 686
DATE: 20180830
DOCKET: C63350

Doherty, Brown and Huscroft JJ.A.

BETWEEN

Fortress Real Developments Inc., Fortress Real Capital Inc., Jawad Rathore and Vince Petrozza

Plaintiffs (Appellants/Respondents in the Cross-Appeal)

and

Ben Rabidoux

Defendant (Respondent/Appellant in the Cross-Appeal)

Jeremy Devereux and Andrea Campbell, for the appellants/respondents in the cross-appeal

Gil Zvulony, for the respondent/appellant in the cross-appeal

Heard: June 27, 2017

On appeal from the order of Justice Andra Pollak of the Superior Court of Justice, dated January 11, 2017, with reasons reported at 2017 ONSC 167, 6 C.P.C. (8th) 373, and from the costs order, dated April 4, 2017.

Doherty J.A.:

A. OVERVIEW

[1] The appellants (sometimes collectively referred to as “Fortress”) sued the respondent, Ben Rabidoux, for defamation and breach of contract. Fortress alleged that Mr. Rabidoux made various defamatory comments about its

business operations and the personal appellants on his Twitter account. They further alleged that the comments breached an agreement that Mr. Rabidoux had made with the appellants in which he had promised to make no further comments about the appellants and their business operations. Fortress alleged that Mr. Rabidoux had agreed that if he breached the agreement, he would pay $10,000 for the legal costs incurred by Fortress in responding to Mr. Rabidoux's various allegedly defamatory comments.

[2] Mr. Rabidoux did not file a statement of defence. Instead, he moved for an order under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), dismissing Fortress's lawsuit.

[3] The motion judge found that Mr. Rabidoux's tweets that precipitated the lawsuit related to a matter of public interest, as that term is used in s. 137.1(3) of the *CJA*. She further held that Fortress had not satisfied her that the harm caused or likely to be caused to Fortress by Mr. Rabidoux's tweets was sufficiently serious that the public interest in permitting Fortress to proceed with its lawsuit outweighed the public interest in protecting Mr. Rabidoux's freedom of expression. Having determined that Fortress had failed to meet its onus under s. 137.1(4)(b), the motion judge dismissed the claims against Mr. Rabidoux.

[4] The motion judge, relying on s. 137.1(7), awarded costs to Mr. Rabidoux on a full indemnity basis in the amount of $129,106.61.

[5] There are three appeals before this court. Fortress appeals from the order dismissing its claims. If that appeal fails, Fortress seeks leave to appeal the costs order, arguing that costs should have been awarded on a partial indemnity basis. Mr. Rabidoux also seeks leave to cross-appeal the costs order. He submits that costs were correctly awarded on a full indemnity basis, but that the amount awarded does not constitute full indemnity, as it does not take into account HST or the costs arising out of an additional attendance before the motion judge.

[6] For the reasons that follow, I would dismiss Fortress's appeal from the order dismissing its action. I would grant leave to both Fortress and Mr. Rabidoux to appeal the costs order, but would vary the costs order only to the extent of adding HST.

B. THE FACTS

(i) The Parties

[7] Mr. Rabidoux operates his own "one-man" business. He provides market research and opinions to institutional investors and to various media outlets. Mr. Rabidoux focuses on the real estate market in Canada. In his affidavit filed on the motion, Mr. Rabidoux indicates that he is regarded as "a leading expert in Canadian housing and household credit trends". He holds the view that Canadian real estate is, generally speaking, overvalued and that some of those who promote certain kinds of real estate investments, such as some kinds of

syndicated mortgages, significantly underestimate the risks associated with those investments. In essence, Mr. Rabidoux sees the real estate investment market in Canada as overhyped and under-regulated.

[8] Mr. Rabidoux is not shy about expressing his opinions. He does so regularly through various forums, including his Twitter account. The evidence on the motion was that as of April 2016, he had about 3,880 followers. At least some of Mr. Rabidoux's followers are avid supporters. He and his supporters often retweet each other's tweets.

[9] The corporate appellants, Fortress Real Developments Inc. and Fortress Real Capital Inc., are in the real estate development business across Canada. They identify and develop large real estate projects, including condominiums and commercial properties. Their projects are mainly financed by large institutional lenders and by individuals through syndicated mortgage loans. Fortress also offers advice to other real estate developers.

[10] The personal appellants, Jawad Rathore ("Mr. Rathore") and Vince Petrozza ("Mr. Petrozza"), are senior officers and directors of the corporate appellants. They started the business together.

[11] Fortress operates a very successful business. Its projects are valued in the billions of dollars. At the time of the motion, Fortress had raised about $700 million in investments from syndicated mortgage loans.

(ii) The Tweets

[12] The alleged defamatory tweets were made in the course of an ongoing Twitter exchange between Mr. Rabidoux and his supporters on one side, and Fortress and its supporters on the other. Their exchanges have gone on for years. Many are referred to in the motion record. Some of the comments made by both sides take on the tone of what would be described in the sports world as "trash talk". Most of the tweets can be understood only by persons who are familiar with the prior Twitter exchanges and the subject matter of those exchanges. Some of the comments, coming from both sides, are sarcastic and seem more calculated to entertain or to embarrass than to enlighten.

[13] The Statement of Claim and the affidavits filed by both parties refer at length to many tweets between many parties going back to 2014. In the course of the proceedings, Fortress limited its claim for damages to tweets made by Mr. Rabidoux in December 2015 and early January 2016. The other tweets are offered as context for the tweets that are the subject matter of the claims.

[14] Mr. Rabidoux has expressed concerns about Fortress's marketing practices for some time, particularly as they relate to syndicated mortgages. In late September and early October 2014, he posted a series of tweets that attracted Fortress's attention.

[15] Fortress took these tweets to imply that it was misleading investors, or at least encouraging brokers to mislead investors on its behalf, and receiving improper payments from those brokers. Fortress also viewed one of the tweets as defamatory in that it compared Fortress's projects to "a product with Ponzi-like characteristics".

[16] Lawyers for Fortress wrote to Mr. Rabidoux demanding that he retract the statements he had made and not make any further such statements. After correspondence between counsel for Fortress and for Mr. Rabidoux, Mr. Rabidoux posted a retraction. In that posting, he "completely and without reservation" retracted "any and all" comments he had made about Fortress and promised not to repeat any of those comments. In exchange for the retraction, Fortress released Mr. Rabidoux from any further claims arising out of the comments.

[17] In February 2015, Mr. Rabidoux posted another set of tweets that again attracted Fortress's attention. These tweets made reference to an article that appeared in the Globe and Mail on September 10, 2014. The article referred to proceedings before the Ontario Securities Commission ("OSC") in 2011 and the British Columbia Securities Commission in 2014. Those proceedings related to the market manipulation of shares in the stock of OSE Corp., a small oil and gas exploration company. The proceedings had involved Mr. Rathore, Mr. Petrozza, a company they operated called Phoenix Credit Risk Management Consulting

Inc., and several other individuals. Clients of Phoenix had lost money investing in OSE Corp. Mr. Rathore and Mr. Petrozza, among other parties, had reached a settlement with the OSC in 2011 and agreed to make payments of over $3.3 million.

[18] Mr. Rathore and Mr. Petrozza regarded Mr. Rabidoux's comments as defamatory. In their view, he improperly implied, through selective and inaccurate references to the Globe and Mail article, that Mr. Rathore and Mr. Petrozza had been implicated in the market manipulation. According to Mr. Rathore and Mr. Petrozza, neither the Globe and Mail article nor the decisions of the respective securities commissions offered any support for that allegation.

[19] Once again, lawyers for Mr. Rathore and Mr. Petrozza contacted Mr. Rabidoux. They demanded an apology and an immediate retraction of his comments. They also served a libel notice on Mr. Rabidoux.

[20] In March 2015, Mr. Rabidoux agreed once again to publicly retract the impugned statements. He issued a retraction and an apology. He also indicated that he would not make any further "comments, suggestions, opinions or statements of any kind whatsoever about Messrs. Rathore, Petrozza or their businesses, subsidiaries, affiliates, directors, officers, employees, agents, representatives, business associates, partners, projects or in respect of any brokerage or EMD offering investment in any Fortress project in any forum."

[21] In his affidavit, Mr. Rabidoux indicated that he was afraid of being drawn into costly and drawn-out litigation. He elected to make the apology and promise in exchange for a release.

[22] In addition to the apology and retraction, Mr. Rabidoux agreed that if he breached his promise not to make further statements, he would pay damages of $10,000 “representing the legal fees incurred to date to address all of the defamatory comments made by [him]”.

[23] Mr. Rabidoux did not receive the promised release from Fortress until April 2016, about two months after this action was commenced.

[24] Mr. Rabidoux posted a third series of tweets in December 2015 and early January 2016. These are the allegedly defamatory tweets for which the appellants claim damages. These tweets did not refer specifically to Fortress or to the personal appellants. In the tweets, Mr. Rabidoux made sarcastic remarks about the impact of the downturn of the real estate market in Calgary on the value of real-estate-based investments in that city. Another tweet referred sarcastically to the suggestion, apparently made by unnamed sources, that the Winnipeg real estate market was attracting significant foreign investment. Fortress had substantial real estate projects in Calgary and Winnipeg.

[25] Mr. Rabidoux posted three tweets on December 13, 2015. In these tweets, he predicted that the OSC would soon assume responsibility for the regulation of

syndicated mortgage investments. He predicted that the OSC would "sla[m the] door on shadier operators". The tweets went on to assert that some operators would be in immediate trouble with the OSC because they had previously been sanctioned by the OSC. Finally, Mr. Rabidoux tweeted, "all that's assuming these guys don't blow themselves up before that, which may very well happen".

[26] Fortress alleged that, put in the context of Mr. Rabidoux's earlier tweets, a reader would understand that the reference to "shadier operators" who had previous difficulties with the OSC was a reference to Mr. Rathore and Mr. Petrozza, who had been the subjects of the OSC proceeding in 2011. Fortress also alleged that the reader would understand that the reference in the third tweet to "these guys" was a reference to Fortress, Mr. Rathore, and Mr. Petrozza, and an assertion that Fortress's developments could well fail in the near future.

[27] Fortress commenced this action in early 2016. It alleged that none of the representations or innuendo flowing from Mr. Rabidoux's tweets were true. Fortress alleged that the assertions and implications defamed both Fortress and the personal appellants. Fortress further alleged that Mr. Rabidoux breached the March 2015 settlement agreement when he tweeted about the affairs of Fortress and the personal appellants in December 2015 and January 2016. Fortress claimed $150,000 in damages for defamation and $10,000 in damages for breach of the settlement agreement.

> The harm likely to be or have been suffered by the responding party [Fortress] as a result of the moving party's [Mr. Rabidoux's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. [Emphasis omitted.]

[31] The motion judge appreciated that unless Fortress could meet its onus under both ss. 137.1(4)(a) and (b), she was obliged to allow the motion and dismiss the action against Mr. Rabidoux. The motion judge chose to proceed directly to a consideration of s. 137.1(4)(b). She did not consider s. 137.1(4)(a).

[32] In assessing the harm caused or likely to be caused to Fortress, the motion judge focused almost exclusively on the damages, if any, suffered or likely to be suffered by Fortress. She concluded that Fortress provided no evidence of any specific damage that it suffered and no evidence to support any reasonable belief that the impugned tweets had harmed the business reputation of Fortress or of the personal appellants. The motion judge determined that, absent any evidence of damages, Fortress had failed to show harm that would warrant allowing its action to proceed. The motion judge did not consider the public interest, if any, in protecting the tweets in issue.

D. THE MAIN APPEAL

[33] Fortress raises two grounds of appeal. First, it argues that the motion judge interpreted s. 137.1(3) too broadly and without regard to either the appellants' established right to sue for defamation, or the kind of expression s.

137.1 was designed to protect. Fortress submits that the phrase "matter of public interest" in s. 137.1(3) must, as a matter of statutory interpretation, be read narrowly to minimize the interference with a plaintiff's established right to seek compensation for damages arising from defamatory statements. Fortress further argues that the legislation is only intended to protect "responsible" and "legitimate" expression on matters of public interest.

[34] Second, Fortress submits that the motion judge erred in her interpretation of s. 137.1(4)(b). Fortress argues that the motion judge wrongly limited her harm assessment to evidence of specific damages suffered as a direct consequence of the impugned expression. Fortress further submits that the motion judge erred in failing to consider the nature of the public interest engaged in protecting the actual expression found in the impugned tweets. Fortress refers to the tweets as "insults or invective intended to harm the Appellants" with no real public interest value.

[35] Fortress submits that had the motion judge properly weighed the harm it suffered against the nature of the public interest served by protecting Mr. Rabidoux's tweets, she would have concluded that Fortress suffered significant harm and that there was virtually no public interest in protecting the contents of the tweets. According to Fortress, the balance clearly favoured allowing its action to proceed.

(i) The Interpretation of Section 137.1(3)

[36] The meaning of the phrase "relates to a matter of public interest" in s. 137.1(3) was considered in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at paras. 50-66 (released concurrently with these reasons). Like the motion judge, this court has opted for a broad reading of the phrase, consistent with the analysis in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. In *Pointes*, at para. 65, this court said:

> In summary, the concept of "public interest" as it is used in s. 137.1(3) is a broad one that does not take into account the merits or manner of the expression, nor the motive of the author. The determination of whether an expression relates to a matter of public interest must be made objectively, having regard to the context in which the expression was made and the entirety of the relevant communication. An expression may relate to more than one matter. If one of those matters is a "matter of public interest", the defendant will have met its onus under s. 137.1(3).

[37] The arguments advanced by Fortress were considered and rejected in *Pointes*. I will, however, make brief reference to Fortress's principal argument.

[38] Fortress submits that s. 137.1(3) must be strictly construed because it restricts an individual's right to sue for defamation. Counsel refers to the well-known rule of statutory interpretation that explicit language is required to divest a person of existing rights: *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43.

[39] Section 137.1(3) does not restrict Fortress's right to bring an action for defamation. A finding under s. 137.1(3) that the expression in issue "relates to a matter of public interest" in no way prevents Fortress from pursuing its lawsuit. A finding that Mr. Rabidoux met his onus under s. 137.1(3) does no more than open the door to the two-pronged inquiry required under s. 137.1(4). The outcome of that inquiry determines whether Fortress's claim survives Mr. Rabidoux's s. 137.1 motion.

[40] Applying the analysis in *Pointes*, I read the tweets as intended to educate and caution the investing public about the risks associated with certain kinds of real estate-based investments. The identified risks include sudden downturns in the real estate market, false predictions of future investments, and "shady", inadequately regulated operators who understate the risks associated with certain kinds of investments. In my view, alerting the investing public to risks associated with the purchase of certain products in the public marketplace is a matter of public interest.

[41] I see no error in the motion judge's determination that the tweets related to a matter of public interest.

(ii) The Public Interest Analysis Under Section 137.1(4)(b)

[42] The operation of s. 137.1(4)(b) is considered in *Pointes*, at paras. 85-101. Fortress submits that, under s. 137.1(4)(b), it is required only to show "grounds to

believe" that the harm it has or will suffer because of the tweets is sufficiently serious to make the public interest in allowing its claim to proceed outweigh the public interest in protecting Mr. Rabidoux's freedom of expression. This submission misreads the section. The phrase "grounds to believe" appears in s. 137.1(4)(a) and not in s. 137.1(4)(b). Under s. 137.1(4)(b), Fortress must satisfy the judge that the harm it has suffered or is likely to suffer is "sufficiently serious" that the public interest in allowing Fortress to vindicate that harm through litigation outweighs the public interest in protecting the expression in issue. The word, satisfy, connotes the usual balance of probabilities standard.

[43] I agree with the submissions of counsel for Fortress that the motion judge's "public interest" analysis is deficient in certain respects. In my view, however, the motion judge correctly focused on the evidence of damages when considering what harm Fortress had shown that it had suffered or was likely to suffer as a result of the tweets. As explained in *Pointes*, at para. 88, harm under s. 137.1(4)(b) will usually be measured primarily, although not exclusively, by reference to monetary damages, special or general, suffered by the plaintiff as a result of the defendant's expression.

[44] The motion judge considered Mr. Rathore's evidence (adopted in Mr. Petrozza's affidavit) that Fortress, as well as he and Mr. Petrozza, had suffered damage to their reputation as a result of the tweets and that the tweets may have had a negative impact on Fortress's business fortunes. The motion judge was not

impressed with the evidence, mostly because it consisted almost entirely of Mr. Rathore's unsubstantiated opinion as to the effect of the tweets. I cannot say the motion judge was wrong in her assessment of this evidence.

[45] I also agree with counsel for Fortress that the motion judge should have considered potential general damages. Counsel correctly notes that general damages are assumed in libel cases: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 164; *Grant v. Torstar Corp.*, at para. 28. Those damages, however, may be nominal: see Raymond E. Brown, *Defamation Law: A Primer*, 2d ed. (Toronto: Carswell, 2013), at p. 321; Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, loose-leaf, 2d ed., vol. 8 (Toronto: Carswell, 1999), at pp. 25-46 to 25-48.

[46] Had the motion judge considered general damages in assessing the potential harm to Fortress, nothing in the motion record would support anything more than nominal general damages. As Mr. Rathore's cross-examination and some of the tweets from Fortress executives demonstrate, Fortress regards Mr. Rabidoux to be an inconsequential lightweight with no influence in its investment world. Mr. Rabidoux is treated more as a noisy irritant than a threat to Fortress's business or reputation. To the extent that the record offers any insight into the reach of Mr. Rabidoux's opinions concerning Fortress, that reach seems confined to persons who already share Mr. Rabidoux's views. A consideration of the

potential general damages flowing from the tweets would add little to the monetary harm caused or likely to be caused to Fortress.

[47] Counsel for Fortress submits, once again correctly, that the motion judge failed to consider its contract claim in assessing harm caused to Fortress. Fortress argues that the December 2015 and January 2016 tweets clearly breached the March 2015 agreement and that under the terms of the agreement, Mr. Rabidoux had agreed to pay $10,000 in damages. Fortress contends that the motion judge should have considered both the monetary consequences of the breach of the agreement, and the harm caused to Fortress's reasonable expectation that concerns about any future litigation with Mr. Rabidoux had been ended by the agreement. As observed in *Pointes*, at para. 89, a reasonable expectation of finality in litigation is an interest that warrants protection when considering harm to a plaintiff under s. 137.1(4)(b).

[48] However, a review of the language used in the agreement crafted by Fortress and signed by Mr. Rabidoux strongly indicates that Fortress was seeking much more than finality in litigation when it drafted this agreement. The agreement prohibited Mr. Rabidoux, under threat of a $10,000 penalty, from saying anything "of any kind whatsoever" about Mr. Rathore, Mr. Petrozza, or any of their businesses, projects, or investments. The agreement demanded total silence from Mr. Rabidoux on all business matters relating to Mr. Rathore and

Mr. Petrozza, regardless of the nature or content of any comment Mr. Rabidoux might make.

[49] The sweeping nature of the language in the agreement, and the requirement that Mr. Rabidoux pay $10,000 for any breach – regardless of whether the breach caused any harm – strongly suggests that this agreement was designed more to silence Mr. Rabidoux than to gain any finality for Fortress in relation to potential litigation with Mr. Rabidoux. Indeed, the terms of the agreement all but guaranteed further litigation unless Mr. Rabidoux found a different line of work or changed his opinions.

[50] The “gag” Fortress tried to place on Mr. Rabidoux by the terms of the agreement speaks to the potential damage done to the public interest in protecting Mr. Rabidoux’s freedom of expression if Fortress’s claim were allowed to proceed. By advancing a claim under the agreement, Fortress seeks to exclude Mr. Rabidoux from any public discourse relating to Fortress and its principals. In my view, that consequence sits firmly on the side of the public interest analysis in s. 137.1(4)(b) that favours Mr. Rabidoux’s position.

[51] Nor do I accept Fortress’s submission that the tone and content of the impugned tweets render them unworthy of any public interest protection. In keeping with the medium and the intended audience, the tweets are conclusory and, in some respects, sarcastic. There is, however, no basis upon which to

conclude that they are deliberately false or were intended to mislead. While the subject matter and tone may disentitle Mr. Rabidoux from claiming any special or added public interest in the expressions, the tweets retain the inherent value that most expressions on matters of public interest have: see *Pointes*, at para. 93.

[52] In summary, while the motion judge's public interest analysis was not as fulsome as it should have been, my analysis arrives at the same result. Fortress failed to show that the harm caused or likely to be caused to it by the impugned tweets is "sufficiently serious" to outweigh the public interest in protecting Mr. Rabidoux's right to freedom of expression.

[53] I would dismiss the main appeal.

E. THE COST APPEALS

[54] In their submissions on costs before the motion judge, counsel filed a document entitled "Costs Amounts Agreed by Counsel". It read:

Partial Indemnity:	$75,000 + HST
Substantial Indemnity:	$99,000 + HST
Full Indemnity:	$129,106.61 + HST

[55] The parties also agreed that in light of the motion judge's dismissal of the proceeding, s. 137.1(7) applied. It provides:

C. Proceedings Have Been Dismissed under Section 137.1 of the *CJA* where the Impugned "Expression" Involves a Cause of Action *Other than* Defamation

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 1, Tab 1

The proceeding dismissed under s. 137.1 of the *CJA* in this case involved an "expression" that was alleged to constitute a breach of contract. There was *no* allegation of defamation *per se*. See paras. 24, 89, 90, 98, 102-105, 111, 117, 118 & 127.

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*.

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

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

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

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

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

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

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

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

[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.

(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.

> 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

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.

[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.

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 3, Tab 21

The proceeding dismissed under s. 137.1 of the *CJA* in this case involved an "expression" that was alleged to constitute *both* defamation *and* a breach of contract. On the latter issue, paras. 1, 20, 22, 27 & 47-50.

COURT OF APPEAL FOR ONTARIO

CITATION: Fortress Real Developments Inc. v. Rabidoux, 2018 ONCA 686
DATE: 20180830
DOCKET: C63350

Doherty, Brown and Huscroft JJ.A.

BETWEEN

Fortress Real Developments Inc., Fortress Real Capital Inc., Jawad Rathore and Vince Petrozza

Plaintiffs (Appellants/Respondents in the Cross-Appeal)

and

Ben Rabidoux

Defendant (Respondent/Appellant in the Cross-Appeal)

Jeremy Devereux and Andrea Campbell, for the appellants/respondents in the cross-appeal

Gil Zvulony, for the respondent/appellant in the cross-appeal

Heard: June 27, 2017

On appeal from the order of Justice Andra Pollak of the Superior Court of Justice, dated January 11, 2017, with reasons reported at 2017 ONSC 167, 6 C.P.C. (8th) 373, and from the costs order, dated April 4, 2017.

Doherty J.A.:

A. OVERVIEW

[1] The appellants (sometimes collectively referred to as “Fortress”) sued the respondent, Ben Rabidoux, for defamation and breach of contract. Fortress alleged that Mr. Rabidoux made various defamatory comments about its

business operations and the personal appellants on his Twitter account. They further alleged that the comments breached an agreement that Mr. Rabidoux had made with the appellants in which he had promised to make no further comments about the appellants and their business operations. Fortress alleged that Mr. Rabidoux had agreed that if he breached the agreement, he would pay $10,000 for the legal costs incurred by Fortress in responding to Mr. Rabidoux's various allegedly defamatory comments.

[2] Mr. Rabidoux did not file a statement of defence. Instead, he moved for an order under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), dismissing Fortress's lawsuit.

[3] The motion judge found that Mr. Rabidoux's tweets that precipitated the lawsuit related to a matter of public interest, as that term is used in s. 137.1(3) of the *CJA*. She further held that Fortress had not satisfied her that the harm caused or likely to be caused to Fortress by Mr. Rabidoux's tweets was sufficiently serious that the public interest in permitting Fortress to proceed with its lawsuit outweighed the public interest in protecting Mr. Rabidoux's freedom of expression. Having determined that Fortress had failed to meet its onus under s. 137.1(4)(b), the motion judge dismissed the claims against Mr. Rabidoux.

[4] The motion judge, relying on s. 137.1(7), awarded costs to Mr. Rabidoux on a full indemnity basis in the amount of $129,106.61.

Inc., and several other individuals. Clients of Phoenix had lost money investing in OSE Corp. Mr. Rathore and Mr. Petrozza, among other parties, had reached a settlement with the OSC in 2011 and agreed to make payments of over $3.3 million.

[18] Mr. Rathore and Mr. Petrozza regarded Mr. Rabidoux's comments as defamatory. In their view, he improperly implied, through selective and inaccurate references to the Globe and Mail article, that Mr. Rathore and Mr. Petrozza had been implicated in the market manipulation. According to Mr. Rathore and Mr. Petrozza, neither the Globe and Mail article nor the decisions of the respective securities commissions offered any support for that allegation.

[19] Once again, lawyers for Mr. Rathore and Mr. Petrozza contacted Mr. Rabidoux. They demanded an apology and an immediate retraction of his comments. They also served a libel notice on Mr. Rabidoux.

[20] In March 2015, Mr. Rabidoux agreed once again to publicly retract the impugned statements. He issued a retraction and an apology. He also indicated that he would not make any further "comments, suggestions, opinions or statements of any kind whatsoever about Messrs. Rathore, Petrozza or their businesses, subsidiaries, affiliates, directors, officers, employees, agents, representatives, business associates, partners, projects or in respect of any brokerage or EMD offering investment in any Fortress project in any forum."

[21] In his affidavit, Mr. Rabidoux indicated that he was afraid of being drawn into costly and drawn-out litigation. He elected to make the apology and promise in exchange for a release.

[22] In addition to the apology and retraction, Mr. Rabidoux agreed that if he breached his promise not to make further statements, he would pay damages of $10,000 “representing the legal fees incurred to date to address all of the defamatory comments made by [him]”.

[23] Mr. Rabidoux did not receive the promised release from Fortress until April 2016, about two months after this action was commenced.

[24] Mr. Rabidoux posted a third series of tweets in December 2015 and early January 2016. These are the allegedly defamatory tweets for which the appellants claim damages. These tweets did not refer specifically to Fortress or to the personal appellants. In the tweets, Mr. Rabidoux made sarcastic remarks about the impact of the downturn of the real estate market in Calgary on the value of real-estate-based investments in that city. Another tweet referred sarcastically to the suggestion, apparently made by unnamed sources, that the Winnipeg real estate market was attracting significant foreign investment. Fortress had substantial real estate projects in Calgary and Winnipeg.

[25] Mr. Rabidoux posted three tweets on December 13, 2015. In these tweets, he predicted that the OSC would soon assume responsibility for the regulation of

syndicated mortgage investments. He predicted that the OSC would "sla[m the] door on shadier operators". The tweets went on to assert that some operators would be in immediate trouble with the OSC because they had previously been sanctioned by the OSC. Finally, Mr. Rabidoux tweeted, "all that's assuming these guys don't blow themselves up before that, which may very well happen".

[26] Fortress alleged that, put in the context of Mr. Rabidoux's earlier tweets, a reader would understand that the reference to "shadier operators" who had previous difficulties with the OSC was a reference to Mr. Rathore and Mr. Petrozza, who had been the subjects of the OSC proceeding in 2011. Fortress also alleged that the reader would understand that the reference in the third tweet to "these guys" was a reference to Fortress, Mr. Rathore, and Mr. Petrozza, and an assertion that Fortress's developments could well fail in the near future.

[27] Fortress commenced this action in early 2016. It alleged that none of the representations or innuendo flowing from Mr. Rabidoux's tweets were true. Fortress alleged that the assertions and implications defamed both Fortress and the personal appellants. Fortress further alleged that Mr. Rabidoux breached the March 2015 settlement agreement when he tweeted about the affairs of Fortress and the personal appellants in December 2015 and January 2016. Fortress claimed $150,000 in damages for defamation and $10,000 in damages for breach of the settlement agreement.

potential general damages flowing from the tweets would add little to the monetary harm caused or likely to be caused to Fortress.

[47] Counsel for Fortress submits, once again correctly, that the motion judge failed to consider its contract claim in assessing harm caused to Fortress. Fortress argues that the December 2015 and January 2016 tweets clearly breached the March 2015 agreement and that under the terms of the agreement, Mr. Rabidoux had agreed to pay $10,000 in damages. Fortress contends that the motion judge should have considered both the monetary consequences of the breach of the agreement, and the harm caused to Fortress's reasonable expectation that concerns about any future litigation with Mr. Rabidoux had been ended by the agreement. As observed in *Pointes*, at para. 89, a reasonable expectation of finality in litigation is an interest that warrants protection when considering harm to a plaintiff under s. 137.1(4)(b).

[48] However, a review of the language used in the agreement crafted by Fortress and signed by Mr. Rabidoux strongly indicates that Fortress was seeking much more than finality in litigation when it drafted this agreement. The agreement prohibited Mr. Rabidoux, under threat of a $10,000 penalty, from saying anything "of any kind whatsoever" about Mr. Rathore, Mr. Petrozza, or any of their businesses, projects, or investments. The agreement demanded total silence from Mr. Rabidoux on all business matters relating to Mr. Rathore and

Mr. Petrozza, regardless of the nature or content of any comment Mr. Rabidoux might make.

[49] The sweeping nature of the language in the agreement, and the requirement that Mr. Rabidoux pay $10,000 for any breach – regardless of whether the breach caused any harm – strongly suggests that this agreement was designed more to silence Mr. Rabidoux than to gain any finality for Fortress in relation to potential litigation with Mr. Rabidoux. Indeed, the terms of the agreement all but guaranteed further litigation unless Mr. Rabidoux found a different line of work or changed his opinions.

[50] The "gag" Fortress tried to place on Mr. Rabidoux by the terms of the agreement speaks to the potential damage done to the public interest in protecting Mr. Rabidoux's freedom of expression if Fortress's claim were allowed to proceed. By advancing a claim under the agreement, Fortress seeks to exclude Mr. Rabidoux from any public discourse relating to Fortress and its principals. In my view, that consequence sits firmly on the side of the public interest analysis in s. 137.1(4)(b) that favours Mr. Rabidoux's position.

[51] Nor do I accept Fortress's submission that the tone and content of the impugned tweets render them unworthy of any public interest protection. In keeping with the medium and the intended audience, the tweets are conclusory and, in some respects, sarcastic. There is, however, no basis upon which to

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 3, Tab 21

The claim dismissed under s. 137.1 of the *CJA* in this case involved "expressions" said to reflect negligence that related to a defamatory broadcast. See paras. 1-5, 9 & 31-47

COURT OF APPEAL FOR ONTARIO

CITATION: Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation, 2021 ONCA 25
DATE: 20210118
DOCKET: C67850

Brown, Zarnett and Thorburn JJ.A.

BETWEEN

Subway Franchise Systems of Canada, Inc., Subway IP Inc. and Doctors Associates Inc.

Plaintiffs (Respondents)

and

Canadian Broadcasting Corporation, Charlsie Agro, Kathleen Coughlin, Eric Szeto and Trent University

Defendants (Appellant)

Alexander D. Pettingill, Joyce Tam and Natasha O'Toole, for the appellant

William C. McDowell, Sana Halwani and Paul-Erik Veel and Brendan F. Morrison, for the respondents

Heard: June 26, 2020 by video conference, with supplementary submissions in writing

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated November 22, 2019, with reasons reported at 2019 ONSC 6758, and from the costs decision, dated March 3, 2020, with reasons reported at 2020 ONSC 1263.

Zarnett J.A.:

I. INTRODUCTION

[1] When does a claim that is framed in negligence fall within the scrutiny of Ontario's anti-SLAPP (Strategic Litigation Against Public Participation) legislation in s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*")? When will such a claim pass the legislation's substantial merit hurdle necessary to allow it to continue? This appeal raises those questions.

[2] On February 24, 2017, the Canadian Broadcasting Corporation ("CBC") aired an episode of its television show, "*Marketplace*". It featured an investigative report comparing the contents of chicken sandwiches sold by five fast food chains in Canada. The chicken sandwiches sold by the respondents ("Subway") were reported to be made of "only slightly more than 50% chicken", substantially below the chicken content of sandwiches sold by the other chains.

[3] Prior to the *Marketplace* broadcast, CBC contracted with a laboratory of the appellant, Trent University ("Trent"), to test the chicken content of the sandwiches. The results of that testing were, in part, the basis for the statements made on the broadcast. Trent personnel also participated in the broadcast.

[4] Subway, alleging that the statements on the broadcast were false and that the testing by Trent was inaccurate and carelessly done, launched an action against CBC and Trent. The action against CBC is exclusively for defamation. As

against Trent, the lawsuit asserts two causes of action—defamation and negligence.

[5] Trent moved under s. 137.1 of the *CJA* to dismiss the part of Subway's action that made a claim against Trent in negligence.[1] Section 137.1 contemplates that if a defendant satisfies an initial threshold of showing that the claim against it arises out of an expression it made on a matter related to the public interest, the claim is to be dismissed unless the plaintiff satisfies certain requirements under s. 137.1(4), including showing that there are grounds to believe the claim has substantial merit.

[6] Trent's motion failed. The motion judge held that the negligence claim did not arise from an expression by Trent on a matter related to the public interest, since the negligence claim was focussed on the quality of the testing, rather than the communication of the results. As the initial threshold for a s. 137.1 motion was not met, the negligence claim could proceed. In any event, applying the standard that would apply on a motion to strike under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the motion judge held that the negligence claim had sufficient merit to proceed and the harm suffered by Subway (which the continuance of the claim sought to remedy) outweighed the public interest in protecting Trent's expression.

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[1] At the same time, CBC moved to dismiss the entire action against it. CBC's motion succeeded, and Subway's appeal from that order (the "CBC Appeal") was heard together with this appeal, and is the subject of separate reasons released together with these reasons.

[7] The motion judge ordered Trent to pay costs of its unsuccessful motion to Subway; since the motion had not passed the initial threshold, the policy underlying the presumptive no costs for a failed motion in s. 137.1(8) was inapplicable.

[8] Trent appeals the dismissal of its motion and the costs it was ordered to pay. The decision on its appeal was deferred until after the Supreme Court of Canada released, and the parties had the opportunity to make submissions on, certain decisions dealing with s. 137.1 of the *CJA* and with the principles governing the duty of care analysis in cases of negligently caused pure economic loss.[2]

[9] For the reasons that follow, I would allow Trent's appeal from the dismissal of its motion. With the benefit of the Supreme Court's recent jurisprudence, I conclude that Trent satisfied the initial threshold of showing that the negligence claim arose from an expression on a matter related to the public interest. I also conclude that Subway has not satisfied its burden of showing that the negligence claim meets the substantial merit requirement under s. 137.1(4). Subway does not have a real prospect of success on the issue of whether a relationship of proximity and thus a duty of care existed necessary to support Subway's claim for pure economic loss against Trent. Subway's negligence claim ought to have been dismissed. The motion judge erred in concluding otherwise.

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[2] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 449 D.L.R. (4th) 1; *Bent v. Platnick,* 2020 SCC 23, 449 D.L.R. (4th) 45; and *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, 450 D.L.R. (4th) 181.

(2) The Initial Threshold—Is the Negligence Claim one that Arises from an Expression that Relates to a Matter of Public Interest?

[31] The gateway to s. 137.1 is the requirement, in s. 137.1(3), that the defendant show that the proceeding against it arises from an expression it made that relates to a matter of public interest. The provisions that contemplate dismissal of the proceeding unless the plaintiff satisfies certain criteria are not engaged unless this threshold requirement is met. "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": *Pointes (SCC)*, at para. 21.

[32] The role played by the threshold requirement is easily understood in light of the purposes set out in s. 137.1(1). These include the encouragement of persons to express themselves on matters of public interest, and the discouragement of the use of litigation to unduly limit such expression. Where a defendant, on a motion under s. 137.1, meets the threshold requirement, it has shown two things: (i) the proceeding arose from the defendant having done what the law seeks to encourage—express itself on a matter of public interest, and (ii) the proceeding might be litigation being used to unduly limit such expression.

[33] But if the defendant does not meet the threshold requirement, because it does not show that the claim arises from such an expression, none of the purposes enumerated in s. 137.1(1) are engaged. The provisions requiring dismissal of the

proceeding, unless the plaintiff can satisfy the criteria set out in s. 137.1(4)(a) and (b), are inapplicable.

[34] Most cases to date that have involved significant disputes about whether the threshold requirement was met have been about whether the *content* of the expression from which the proceeding arose related to a matter of public interest. Here, the primary issue is about whether the proceeding *arose from an expression*.

[35] The motion judge did not view the negligence claim as having arisen from an expression, as he considered s. 137.1 to be aimed at what he called "expressive torts", like defamation, not other types of wrongdoing. He stated that "the terms of s. 137.1 of the *CJA* are an awkward fit for claims which are framed other than in defamation-related torts such as libel and slander. The legislative purpose is to protect free and democratic expression, not conduct at large, and the statute is correspondingly designed to address expressive torts, not wrongdoing at large". He distinguished the claim made against Trent for defamation for publishing inaccurate test results, from the negligence claim which he viewed as focussed on holding "the laboratory to the appropriate scientific and professional standard", not on whether or how they published the results. The "site" of the negligence claim was how Trent performed its testing, not the way the results were communicated.

[36] Trent argues that the motion judge erred in coming to this conclusion. It submits that s. 137.1 is not limited to defamation claims, and that an expression is

an integral part of this negligence claim. A successful action in negligence requires the plaintiff to show, among other things, that it was owed a duty of care, that the defendant breached the duty, and that the plaintiff sustained damages. It was only the communication or expression of the test results, by Trent to CBC, and by CBC and Trent personnel on the *Marketplace* broadcast to a viewing audience, that caused any damage to Subway and thus crystallized the claim. Unpublished research cannot give rise to a claim by the subject of the research as no damages can flow from unpublished negligent research: *Fulton v. Globe & Mail* (1997), 207 A.R. 374 (Alta. Q.B.), at paras. 18-19.

[37] Subway, on the other hand, argues that it is not sufficient, for a claim to meet the threshold requirement, that it involve some expressive content. To so hold would sweep many types of claim within the anti-SLAPP provisions which, Subway submits, were not intended to be covered. Expression must be the gravamen of the claim. The gravamen of this negligence claim, it submits, is not an expression but how Trent conducted the testing.

[38] I agree with Trent that the motion judge erred in reaching the conclusion that the claim in negligence did not arise from an expression that related to a matter of public interest. It was an error of law to view s. 137.1 as aimed at a limited category of torts like defamation. It was also an error of law not to appreciate the centrality of expression to this negligence claim.

[39] In *Pointes*, the claim was not for defamation; it alleged that the defendant had breached a contract by making certain statements and offering certain opinions at an Ontario Municipal Board hearing. Section 137.1 was held to apply to that claim. As this court explained in *Pointes (ONCA)*, the requirement that the proceeding arise from an expression is met where the expression "grounds" the claim. Putting it another way, this court considered the requirement to have been met because the claim "targets" the expression: at paras. 52, 103.

[40] In *Pointes (SCC)*, Côté J. discussed the proper approach to determine when a proceeding "arises from" an expression:

> 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. 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 [Footnote omitted.]: at para. 24.

Returning later in her reasons to the precise claim in *Pointes (SCC)*, Côté J. found it to pass the threshold because: "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": at para. 102.

[41] The negligence claim here arises from an expression, in the sense described both by this court and by the Supreme Court in *Pointes*. The expression is causally connected to the claim; there is a nexus between them; the expression grounds the claim; and the claim targets the expression. The expression or communication of or about the test results is integral to all aspects of Subway's negligence claim: the existence of a duty of care, whether the duty was breached, and damages.

[42] In pleading that Trent owed it a duty of care, Subway alleges that Trent knew that its testing was being conducted "for the purpose of broadcasting conclusions about [Subway's] products" (emphasis added).

[43] In pleading that Trent breached its duty to Subway, Subway pleads that Trent knew or ought to have known that its "[t]ests would be reported and/or relied on", that "Trent reported conclusions to CBC that were materially different from the conclusions it made", that Trent's results "did not support the conclusions reported to the CBC" or the viewing audience, and that "test results were not explained with the appropriate caveats to CBC" or the viewing audience (emphasis added).

[44] In pleading damages, Subway alleges that Trent's "carrying out the testing of SUBWAY® products and/or making statements to the CBC", caused damage to

their reputation and brand (emphasis added). No basis is suggested on which Subway is said to have suffered damages from Trent's testing, other than by virtue of communication of or about the results.

[45] Although in important ways the negligence action is concerned with the quality of Trent's testing, in equally important and fundamental ways it is concerned with Trent's knowledge that it was doing the testing to provide information to be broadcast; it is concerned with what Trent communicated about its tests; and it is concerned with the harm that resulted from the communication of, about, and based on, its test results. That is sufficient to satisfy the initial threshold of being a claim that arises out of an expression. A claim in an action that complains about these matters falls within the category of litigation that could unduly limit such expression.

[46] Subway further argues that even if the claim arose from an expression, the expression did not relate to a matter of public interest because Trent's testing was of the DNA content of the sandwiches, in which the public would have no interest. I reject that argument. The very essence of Subway's claim is that the purpose of Trent's testing was for it to be the basis of conclusions that would be broadcast about the chicken content of sandwiches sold by Subway and certain of its competitors, and that this is what occurred. That is the very matter the motion judge found to be, and that Subway does not contest is, a matter of public interest.

[47] Accordingly, the motion judge erred in finding that Trent's motion did not pass the initial threshold requirement. Contrary to the motion judge's conclusion, the negligence claim had to be dismissed unless Subway satisfied the relevant criteria in s. 137.1(4) of the *CJA*. I now turn to that issue.

(3) Are There Grounds to Believe that Subway's Negligence Claim has Substantive Merit?

A. The Standard Against Which the Substantial Merit of a Claim is to be Assessed

[48] The motion judge, in considering whether there are grounds to believe the negligence claim has substantial merit, used the standard applicable on a motion to strike. He did not have the benefit of the Supreme Court's decision in *Pointes*, which describes the applicable standard as one that "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. 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" (citations omitted): at para. 50. The standard is lower, however, than that applicable on a motion for summary judgment: at para. 51.

[49] Instead,

> 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

In dismissing (under s. 137.1 of the *CJA)* allegations that the impugned "expressions" were defamatory, the Court *also* rejected allegations of a conspiracy to defame. See paras. 1, 2 & 49-51.

CITATION: DEI Films Ltd. v. Tiwari, 2018 ONSC 4423
COURT FILE NO.: CV-17-585589
DATE: 20180719

ONTARIO
SUPERIOR COURT OF JUSTICE

PLEASE NOTE: This full text case appears only in this Compendium.

BETWEEN:	)	
DEI Films Ltd.	)	
Plaintiff	)	*Muhammad Zafar* for the Plaintiff
– and –	)	
Rakesh Tiwari and 3885275 Canada Inc., carrying on business as CMR 101.3 Diversity FM	)	
Defendants	)	*Raj K. Sharda* for the Defendant Rakesh Tiwari
	)	*Igor Ellyn, Q.C.* for the Defendant 3885275 Canada Inc.
	)	**HEARD**: July 11, 2018

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] DEI Films sues Rakesh Tiwari and 3885275 Canada Inc., which carries on business as CMR 101.3 Diversity FM, for defamation. DEI claims damages of $1.5 million. Pursuant to s.137.1 of the *Courts of Justice Act*,[1] Mr. Tiwari and CMR 101.3 bring anti-SLAPP motions (anti-strategic lawsuit against public participation) to have DEI's action dismissed.

[2] For the reasons that follow, Mr. Tiwari's and CMR 101.3's motions are granted and DEI Films action is dismissed with costs to be determined.

B. The Kashmir and Indo-Pakistani Wars

[3] To understand the defamation claim and the anti-SLAPP motion, it is necessary to recall some history.

[4] After World War II, British India, whose population comprised both Hindus and

[1] R.S.O. 1990, c. C.4.

Muslims, was partitioned into India and Pakistan. The principality of Kashmir was also involved in the partition. Both India and Pakistan desired Kashmir, which had a Muslim majority population. In 1947, the Indo-Pakistani War of 1947 broke out. A formal ceasefire was declared on January 1, 1949. As a result of the war, India gained control of about two-thirds of Kashmir and Pakistan gained control of the balance. War erupted again in 1965. The hostilities, which included the largest tank battle since WWII, lasted seventeen days, and there were thousands of casualties. With the Tashkent Declaration, a ceasefire was declared. In 1971, there was another war between India and Pakistan. This war did not involve the Kashmir and concerned the Bangladesh liberation movement. After two weeks of intense warfare and very heavy casualties, Pakistani forces in East Pakistan surrendered, following which the People's Republic of Bangladesh was created. In 1999, there was another Indo-Pakistani war, known as the Kargil War. Kargil is a district within the Indian section of Kashmir. The war was a military defeat for the Pakistani Army. There have been insurgencies involving Kashmir from time to time, heightening tension between India and Pakistan, and India has accused Pakistan of supporting terrorists. Incidents include: an attack on the Indian Parliament in 2001, a terrorist attack in Mumbai in 2008, a 2016 attack on the Indian Army's brigade headquarters, and an Indian Army raid into Pakistan-Administered Kashmir. India and Pakistan are both military powers with nuclear armaments.

C. Facts

[5] CMR 101.3 is a multi-cultural radio station owned Stanislaus Antony who emigrated to Canada from Sri Lanka more than 30 years ago. He does not speak Hindi, one of the languages spoken on his radio station.

[6] CMR 101.3 operates a multicultural FM radio station that broadcasts programs to 20 ethnic groups in 24 languages.[2] CMR 101.3 mainly serves the South Asian communities of Southern Ontario. The station licenses broadcast time to independent producers whose programs include music, news, and forums for debate and discussion of community, local, national, and international news and events of interest to the diverse ethnic communities. CMR 101.3 does not monitor the content of the broadcasts that are produced by the independent producers. Every program must adhere to CRTC guidelines, but this has never been a problem at CMR 101.3 with the Apna Radio program, which has been on the air for nine years.

[7] Mr. Tiwari is the independent producer and radio host of the 1-hour Apna Radio Program. The other co-host is Sunny Joshi. Apna Radio is broadcast in Hindi. It is a listener call-in show. It has been broadcast on CMR 101.3 since 2009 during the 6 to 7 p.m. time lot Monday to Friday. CMR 101.3 has no involvement in the production of Apna Radio apart from providing its broadcast facilities in a radio studio.

[8] DEI Film is in the business of a concert and event promoter. Its director is Sital Panesar. Mr. Panesar's business associates are Brij Trikha and Ravi Verma.

[9] In 2016, DEI Film retained CMR 101.3 to provide promotional material for a DEI Film concert scheduled for July 2016. There was an angry dispute among Mr. Panesar, Mr. Trikha,

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[2] Arabic, Bengali, English, Filipino (Tagalog/Bisaya), Ga, Guajurali, Guyanese, Hindi Punjabi, Kannada, Macedonian, Malayalam, Marathi, Nepalese, Sinhala, Somali, Tamil, Telugu, Tibetan, Twi, Urdu.

Mr. Verma, and Mr. Tiwani as to the payment for the promotional materials. Because of the dispute, Mr. Panesar decided that DEI Films would no longer do business with Mr. Tiwari.

[10] Mr. Tiwari admitted that there was a dispute. He said that it was caused by Mr. Trika or Mr. Verma failing to pay what had been agreed. He said that he was not aware that because of the dispute that Mr. Panesar had decided to end any business relationship.

[11] There was also evidence from Mr. Joshi that in early 2017, he was approached by Mr. Trika about promoting a concert that DEI Films was planning for the summer of 2017.

[12] In 2017, DEI Films organized a concert called "Klose to You 2017" scheduled for August 5, 2017, for the Air Canada Centre in Toronto, Ontario, for performances by Sonu Nigham from India and Atif Aslam from Pakistan. Soni Nighham and Atif Aslam are music icons in their respective countries, and this was the first time that they would perform together. The concert was part of the celebrations for Canada's 150th Anniversary.

[13] Mr. Trikha invested $100,000 in the Klose to You 2017 Concert.

[14] DEI Films promoted the Klose to You 2017 Concert by providing the producers of four radio programs broadcast on CMR 101.3. Mr. Panesar, however, refused to provide any promotional material to Mr. Tiwari because of the 2016 dispute. Mr. Panesar believes that this infuriated Mr. Tiwari. However, as already noted above, Mr. Tiwari said that he was unaware of Mr. Panesar's attitude. In any event, DEI did not hire Mr. Tiwari to promote their upcoming concert.

[15] Meanwhile, on July 21, 2017, on its Facebook page, the Indo-Canadian Kashmir Forum posted a flyer suggesting a boycott of the Klose to You 2017 Concert. DEI Films was not aware of the posting.

[16] On July 28, 2017, Mr. Tiwari read about the proposed boycott. He decided that the boycott would be a possible topic for his radio show. He contacted Vidhya Bhushan Dhar. Mr. Tiwari invited Vidhya Bhushan Dhar to express his views about the proposed boycott of the concert. It is not clear whether Mr. Dhar was a member of the Indo-Canadian Kashmir Forum or an organizer of the boycott. What is known is that Mr. Tiwari knew Mr. Dhar, and that Mr. Dhar supported the idea of boycotting the concert.

[17] Mr. Tiwari also invited Deepak Rajdan to be a guest at the broadcast. Mr. Dhar and Mr. Rajdan are Kashmiri Pandits, a Brahmin community that lived in the Kashmir Valley.

[18] On August 2, 2015, three days before the concert, DEI Films had sold 6,245 tickets. The net capacity of the Air Canada Centre is 11,017 seats, which could be expanded to 13,000 seats at extra cost. DEI Films needed to sell 10,500 tickets to break even on the concert; i.e., DEI Films need to sell more than 4,200 tickets in 72 hours to break even.

[19] On August 2, 2015, Vidhya Bhushan Dhar and Deepak Rajdan, another supporter of the boycott, appeared as guests on the Apna Radio program. A transcript of the broadcast is set out below.

> **Translation and Transcript of Apna Radio Show on CMR Diversity 101.3 FM Broadcast on August 2, 2017 from 6 pm to 7 pm EDT 2nd Aug 2017**
>
> **Intro Commercial from CMR**: You are listening to CMR101.3FM
>
> **Intro Commercial of Apna Radio**: [….].

Hindi Prayer [….]

Disclaimer: The views expressed by the listeners or advertisers are their own and do not necessary reflect the views of staff and management of CMR and Apna Radio Apne Geet. Similarly, we do not make any recommendations or endorsement for products mentioned or aired on our show. The sole purpose of this show is to provide information and entertainment. It is not intended to form any basis for investment decisions.

Commercial [….]

Sunny Joshi: [….] I Sunny Joshi welcomes you whole heartedly. Before we start headlines, Mr. Bobby Kakkar of Century 21 Innovative Reality has joined us now. [….]

Commercial [….]

Weather Update: [….]

News: [….]

Commercial: [….]

Birthday Song Music: [….]

Sunny Joshi: Welcome Friends, [….] I wanted to give you a little surprise, may be a little shock, so I have given. Today is the Birthday of Gautam Tiwari, son of my dear friend, producer and co-host of this show, Rakesh Tiwari. Today is the 21st birthday of Gautam Tiwari. Tiwari, ji, many congrats to you. [….]

Sunny Joshi [Announcement, ….]

Sunny Joshi: But before that let me tell you the "Topic of the Day". There is an upcoming show in this weekend on 5th August of Sonu Nigam and Atif Aslam. And Facebook page of "Indo-Canadian Kashmiri Forum" is doing a protest about that show. According to them, this show should not happen. They have given their own reasons as well. But as we always and repeatedly say on our show that "art, literature and entertainment has no religion or nation". Artists, author, entertainers are just there to entertain people. They bring people together. But in our studio, we have Vidhya Bhushan Dhar and Deepak Rajdan, they both are Kashmiri Pundit, let's ask what is their view on this whole protest thing. But before that we have Waqar Khan Sahib, who has brought some terrific deals from Rogers, then we will have 'their' views. Lines are opened, and you can also express your views. [….]

Sunny Joshi: [….] Lines are flashing, but wait, I have with me Deepak Rajdan and Vidhya Bhushan Dhar. They both are Kashmiri Pundit, and let's ask what is their view, as I have mentioned before that Indo-Canadian Forum has put up a Facebook page which is protesting that this show should not happen. Vidya, ji, welcome to Apna Radio.

Vidhya Bhushan Dhar: Sunny, ji, thank you so much to bring us on line. On your radio program, I would like to say this. In fact, I would like repeat the same thing and take this a bit further. Indeed art, literature has no religion, cast, or country, and here I would like to repeat what Charlie Chaplin has said: "An artist, musician, or writer, does have the religion, cast and nation, so I think that whosoever is listening to us on this program may agree that whatever is happening in India and whatever is happening at the border of India and Pakistan, also whatever is happening in Kashmir, we have to understand it. Also this [boycott] or comments are not happening for the first time about Pakistani artists. It is not the first time that people are opposing or making comments that this type of thing should not happen. You know that since partition, there have been four wars between India and Pakistan. And for seventy years there has been a cold war going on between India and Pakistan. More than five Lakhs peace loving people of my community have left Kashmir. They are living in their own country as a refugee being trapped in a cage. I am personally not against Sonu Nigam or Atif Aslam. Sonu is a very great artist.

Sunny Joshi: Are you against the peace and harmony? If two artists are coming here from India and Pakistan, what is wrong if they are talking about peace and harmony? We have to start from somewhere about peace and harmony.

Vidhya Bhushan Dhar: Please. I know what is happening in the last seventy years. We have run the from Aman Ki Asha to peace full train. But what did we get in return? We get 26/11, we get Mumbai attack, we get bomb explosion, we get attack on Amarnath travelers. Then, tell me how long we can sing the song of peace. I would like to share with you a small piece of poetry. "I want to fight you when some low-level person asks, Don't show your back, and talk about peace, either win the war on the power of love, or make that low life, kiss your feet." We know but the question is that we are trying for peace, since seventy years. Nothing happened.

Sunny Joshi: But there has to be a beginning. War is not the solution.

Vidhya Bhushan Dhar: We are not talking about war, protesting against a show is not a war. In my opinion, all these programs are insulting the sacrifice of a soldier.

Sunny Joshi: You are telling me that you will not blame Sonu, but also your mind must be thinking that Sonu Nigam should not have done this show.

Vidhya Bhushan Dhar: Absolutely, in today's situation, both singers should not have come on same platform. Both of them should not come on same platform. They are basically mocking the sacrifice of millions of soldiers.

Rakesh Tiwari: Why don't you think that if these two respectable artists come together on same platform, they will support and promote the peace?

Vidhya Bhushan Dhar: These kinds of shows have happened many times. How much peace have come till now? You have seen how dirty it got in the cricket matches.

Sunny Joshi: But these types of shows are not many. It is rare that such great artists from India and Pakistan come together. On one side stalwart singer Sonu Nigam of India, and on other hand Atif Aslam is also such a great artist from Pakistan.

Vidhya Bhushan Dhar: You have seen how dirty it got in the cricket matches.

Sunny Joshi: Ji.

Vidhya Bhushan Dhar: On the contrary, more hatred has erupted.

Sunny Joshi: Let's do this thing. All the phone lines are flashing. I would like to take one by one our callers. But my request to the callers is not to deviate from today's topic.

Rakesh Tiwari: We are not addressing the Kashmir's issue here. Vidhya Bhushan Dhar is a Kashmiri Pundit. He has his own views and ideas. He agrees with the boycotting which is taking place in Facebook and a same kind of boycott has taken place in Australia. Now let's take the next caller.

Sunny Joshi: Yes, now let's take some caller. Let's see what the callers have to say about this issue, and please say your comments in brief and say it within 25 seconds, and if suppose your language is inappropriate to us, then, I am sorry I will be forced to disconnect the call.

Rakesh Tiwari: Yeah, yeah make your comments precise.

Sunny Joshi: Ji. Welcome to Apna radio. Sir please go ahead.

Sunny Joshi: Sir, please turn your radio off.

Caller-1: [not clearly audible, so is disconnected]

Sunny Joshi: Let's take the next caller. hello

Caller-2: Hello.

Sunny Joshi: Hello, ji. Sir, please go ahead.

Caller-2: Okay. I wanted to know if the Pakistani shows hire Indian artists?

Sunny Joshi: Let's not go to a different issue altogether.

Rakesh Tiwari: Sunny, Sunny, Sunny!

Sunny Joshi: Whatever Midyear wants to say is that this is a Pandora's Box. If this opens, then the whole debate goes on a different level altogether. The question is: Do you agree with the protest or are you with us where we think that only through talking to each other we will attain the peace treaty with Pakistan?

Rakesh Tiwari: Do you agree with this show? Do you want this show to air or not?

Caller-2: I don't want this show to air.

Rakesh Tiwari: Okay. fine.

Sunny Joshi: I'll take the next caller. Ji, welcome to Apna Radio.

Caller-3: Hello.

Sunny Joshi: Hello, ji. Please go ahead.

Caller-3: Namaste Joshi, ji.

Sunny Joshi: Namaste, ji. Please go-ahead sir.

Caller-3: Sir, I feel the topic is getting deviated. We started off by talking about the show but...

Rakesh Tiwari: This is why we are keeping the actual topic of the show as our prime factor and we are not letting the talk get deviated.

Caller-3: Yeah, this is what I am trying to tell you that a show must be run like a show. As the first caller, the Panditji with all due respect, his choice of words was unpleasant. He should have spoken in a proper and a polite way.

Rakesh Tiwari: Do you agree with the show or not?

Caller-3: Let me finish my talk...

Rakesh Tiwari: We have to give a chance to everyone to come on air.

Caller-3: Sir, sir, sir! From seventy years, recently, we celebrated Mr Muhammad Rafi's birthday. he has sung many bhajans too. If he had any hatred, then a great legend like Rafi would not sing any bhajans.

Sunny Joshi: Let's not get into a different topic altogether.

Rakesh Tiwari: Muhammad Rafi Saab.

Caller-3: This gentleman said that all this is going on from seventy years.

Sunny Joshi: This is that gentleman's opinion.

Rakesh Tiwari: This is his opinion. What is your opinion?

Caller-3: In my opinion, this show must go on.

Rakesh Tiwari: Good very good. Thank you.

Vidhya Bhushan Dhar: Even I am saying the same.

Rakesh Tiwari: Apni baat rakhe. Ji, thank you.

Sunny Joshi: I'll take the next caller. Sir, welcome to Apna Radio.

Rakesh Tiwari: See to that the callers keep their questions precise and quick.

Caller-4: Sunny, ji?

Sunny Joshi: Yes sir.

Caller-4: First of all, Panditji is trying to spread hatred under the blanket of aman ki yatra [peace efforts]. According to me, this show must go on, and you will have my support for it, and I am ready to do anything for the show.

Rakesh Tiwari: Very good. Very good.

Sunny Joshi: I'll take the next caller. Welcome to Apna Radio.

Caller-5: Sunny, ji. Whenever things happen outside Pakistan and India, we must leave it to the people, whether or not it is favourable for them. Those who do not want to go let them not go.

Sunny Joshi: Are you in favour of the show Sanjeevji?

Caller-5: I am not in favour or -

Sunny Joshi: But you have to have an opinion. You are in favour or you are not in favour?

Caller-5: I am in favour, because it is outside India and Pakistan.

Rakesh Tiwari: So, according to you the show must go on?

Sunny Joshi: Sanjeevji thinks the show must go on. [….] It's time for a break now. Vidhya Bhushan Dharji who is a Kashmiri Pandit and Deepak Rajdhaan are protesting the concert of Sonu Nigam and Atif Aslam. They do not agree with the show. They are protesting it. Let it be quiet protest or sort of. We will be taking your calls and will know your opinion. Whereas me and Tiwariji think that for the sake of peace among the two countries, Atif and Sonu should do this concert, but again, Vidyadhar and Deepakji have their own perspective. Time for a short break, then we will comeback with the views of Deepak Rajdhan and then take your calls too.

Advertisement: […]

Sunny Joshi: Let's see who is calling us next. Welcome to Apna Radio.

Caller-6: Hello.

Sunny Joshi: Hello, ji. Please go ahead.

Caller-6: Sunny, ji. I would like to say two things as quickly as possible.

Sunny Joshi: Yeah.

Caller-6: First of all, it is not necessary that whatever has happened in the last seventy years should repeat in the next coming years. It is possibility that there is a change in the people.

Rakesh Tiwari: Once there is peace everything will be fine. Okay, the next thing is not so clear sir.

Sunny Joshi: Thank you sir. Let's take the other caller. Welcome to Apna Radio.

Caller-7: Namaste, ji.

Sunny Joshi: Namaste. please go-ahead sir.

Caller-7: First of all, I would like to wish Mr. Tiwari's son on his birthday.

Rakesh Tiwari: Thank you sir.

Caller-7: I will support all the causes which upheld the peace.

Sunny Joshi: So, you will support it?

Caller-7: Yes. I have to make one make small comment from Indian Army, if you permit me. Rakesh Tiwari and Sunny Joshi: Please go-ahead sir.

Caller-7: If we can play cricket matches, do concerts together, sing gazals. then why should we fight with them? It's not that we have a personal enmity with them, even we can organise for concerts and gazals and even play cricket.

Sunny Joshi: Thank you, you do completely agree with us. Vidhya Dharji and Deepakji, I would like to ask you both a question why have bought up this protest against this concert as Sanjeevji and other of our caller had asked you, why bring it here as it will be a South Asian thing?

Rakesh Tiwari: It shows that almost everyone is in support of the radio program.

Deepak Rajdan: Thank you Sunnyji and Tiwariji for having us on the show. I would like to say that we live in a free country and every man has the right to protest. It's not that we are against peace, but it's not that only a particular group, organisation, person has taken up the responsibility of spreading peace, it should happen in both ways. Having said that, you asked me why should there be a protest here? We want to protest here. as this is a free country. We can protest here.

Rakesh Tiwari: You can protest, but what is your logic for staging a protest? As Sunnyji has been addressing it from a long time that over here Pakistanis and Indians are living in peace and harmony, they do not have any problem among them, and if Sonu and Atif want to have a concert here, there must not be any problem. If you want to oppose it, you can do so, but people over here want to say that the fight between India and Pakistan is in their country. Let it be there. It's not necessary to get that hatred and fight to this country. What do you have to say about it?

Deepak Rajdan: We have no issue with the Pakistani brothers. We are opposing this concert, as we want to spread the message to everybody that this is not right.

Rakesh Tiwari: As far as I am understanding. you are thinking that if back there in India and Pakistan they are fighting and killing each other, it's not good to have a peace concert here.

Sunny Joshi: But trade links are good.

Rakesh Tiwari: Are you proposing the example of Nero's flute and Rome?

Deepak Rajdan: As Sunnyji said, we are doing business with them, but whenever India puts it one foot forward toward peace, Pakistan always messes it up. Now recently, I read an article wherein Mr. Musharaf has quoted that during the Kargil war, he had two sleepless nights wherein he was thinking if he had to do a nuclear attack against India.

Rakesh Tiwari: Okay, how does this make Sonu and Atif the culprits? They have not done something wrong to be opposed?

Sunny Joshi: We will take some callers now.

Rakesh Tiwari: Ji, ji. Let's take some callers.

Sunny Joshi: Deepakji, let's take some caller, as public's opinion does matter a lot. Yeah let's take the next caller.

Caller-8: Hello.

Sunny Joshi: Welcome to Apna Radio.

Caller-8: Thank you. Sunny ji. I would like to say that let them do their work, as it is their business, and I am understanding what Panditji is also trying to say that the Pandits in Kashmir are suffering.

Rakesh Tiwari: You mean the Pandits in Kashmir have been facing problems for a very long time, but their voice has not been heard or even addressed, and here they are having concerts for peace?

Caller-8: No, what I want to say is that don't involve Sonu and Atif in this. As anybody could have come to this concert and sung a song for us, don't involve Sonu and Atif in middle of all this. Yeah. People from both the nationality are going to address this concert, you can tell them your issue rather than stopping the concert.

Rakesh Tiwari and Sunny Joshi: Vidhya Dharji wants to say something on this. Please go-ahead sir.

Vidhya Bhushan Dhar: Poonamji and Sanjeevji. I would like to answer your question of why we are bringing this issue here. If India is my birthland, then Canada is my karam bhoomi (a place one earns or works). If I have to raise this issue, I would not go to India, as we all work here. All I want to say is, even if our soldiers die, as their duty is to duty for their country, everyday our soldiers are dying, the pilgrims of aman ki yatra [peace efforts] are being attacked, how can we share one platform with such a country? It's not that this protest is taking place for the first time.

It's happened before in Australia, in India also they keep opposing this again and again. I personally have no issue with Pakistanis, one of my Rakhi sister is a Pakistani, and I am proud of it. We want to reach the higher authorities about this issue through this protest.

Rakesh Tiwari: Are you trying to say that Sonu and Atif have to condemn these fighting, in the concert?

Vidhya Bhushan Dhar: Absolutely. Just answer one question, have any Pakistani artists ever condemned the terror attacks? No, they have not. In fact, after going back they say something different. You can see that so many Pakistani artists have got an opportunity to work with India, and after they go back to their country, they have a negative picture about India. These are the things which basically create the rift.

Sunny Joshi: [….] Let's take brief break, and I will try to air all your calls.

Advertisement: [….]

Sunny Joshi: It's Sunny Joshi here. This is a never-ending topic. Tiwariji, I think we would need extra time for the discussion, but I couldn't air all the callers, because of time shortage, but I would like to put up a conclusion from Vidhya Bhushan Dhar, before we wrap up the show.

Vidhya Bhushan Dhar: We all want peace. Both in India and Pakistan, people do love to live in peace, but there are some social elements, people who do not want peace. This protest is just the result that such elements, people do not want the two artists to be performing on the same platform.

Sunny Joshi: Okay sir, Thanks a lot.

[…Advertisement]

Sunny Joshi: Here we would like to take our leave. Goodnight. And have a great evening.

Rakesh Tiwari: Good night friends.

[20] It may be noted that during the broadcast, there was no mention of DEI Films by name and no identification of the promoters of the concert. DEI Films believes that these references have been deleted from the transcript. Apart from that alleged delegation, DEI Films does not dispute the accuracy of the translation, and indeed DEI Films relies on the transcript to make its argument that the broadcast published defamatory statements.

[21] DEI Films asserts that both CMR 101.3 and Mr. Tiwari are liable for defamation. Mr. Panesar believes that Mr. Tiwari deliberately invited Vidhya Bhushan Dhar and Deepak Rajdan as an act of revenge for his decision not to allow DEI Films to advertise on Mr. Tiwari's program. Mr. Panesar believes that, notwithstanding that Mr. Tiwari and Mr. Joshi expressly supported attendance at the concert and opposed the boycott, they deliberately invited Vidhya Bhushan Dhar and Deepak Rajdan knowing that their comments would create fear and discourage attendance at the concert. Mr. Panesar believes that Messrs. Dhar's and Rajdan's references to the wars between Pakistan and India, the deaths of soldiers, nuclear bomb threats, and terrorist incidents were exaggerated and false statements and amounted to hate speech and racially discriminatory propaganda that would discourage attendance at the concert. Mr. Panesar alleges that Mr. Tiwari made statements to incite hatred and violence between India and Pakistan. Mr. Panesar believes that the statements made during the broadcast were a thinly-veiled personal attack and that Mr. Tiwari planned and executed a scheme to harm DEI Films. Mr. Panesar believes that the hate speech of the broadcast explains why the sale of tickets was so poor.

[22] It may be noted that the transcript of the broadcast reveals that Mr. Joshi and Mr. Tiwari opposed any boycott of the concert and expressed the view that the concert promoted peace and

harmony. There were no threats or calls for violence. Whether or not they were identified, no disparaging or derogatory statements were made about the promoters of the concert. Six callers to the radio program supported attendance at the concert. Two callers supported a boycott, but they were cut off and given little air time.

[23] DEI Films disputes that the statements made during the broadcast were matters of public interest. DEI Films asserts that the statements did not relate to any substantial or legitimate concerns of the Canadian public and did not affect the welfare of Canadians. DEI Films submitted that the concert was not a matter inviting public attention or about which the public has some substantial concern or interest.

[24] The Klose to You 2017 Concert took place on August 5, 2017. There is no evidence that before the concert there were any protests or demonstrations against the concert. The concert failed to cover expenses and there was a loss of approximately $133,000. DEI had hoped to have a profit of approximately $925,000. DEI alleges that it lost vendors, investors, and trust within the business community due to failure of the concert.

[25] Mr. Antony of CMR 101.3 did not know about the concert and DEI Films grievances until he received letters from DEI Films' lawyer on dated August 24, 2017 and October 16, 2017.

[26] On October 31, 2017, DEI Films commenced its defamation action against CMR 101.3 and Mr. Tiwari.

[27] On March 13, 2018, CMR 101.3 delivered its Statement of Defence.

[28] On March 15, Mr. Tiwari delivered its Statement of Defence.

D. Discussion

1. Defamation

[29] The elements of a claim of defamation are: (1) the defendant makes a statement; (2) the words of the statement are defamatory, i.e., the words would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (3) the statement is referable to the plaintiff; and (4) the statement is published.[3] The plaintiff must show the main thrust or "defamatory sting" of the words expressed by the defendant in the context in which those words were expressed would, from both their plain meaning and from what the ordinary, reasonable person would infer from them, tend to lower the plaintiff's reputation in the eyes of a reasonable person.[4] General damages are presumed from the publication of the defamation and need not be established by proof of actual loss.[5] The general damages compensate the plaintiff for loss of reputation and injury to the plaintiff's feelings, and to vindicate the plaintiff.[6]

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[3] *Grant v. Torstar Corp.*, 2009 SCC 61; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.); *Mantini v. Smith Lyons LLP (No. 2)* (2003), 64 O.R. (3d) 516 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 344; *Botiuk v. Toronto Free Press Publications Ltd*., [1995] 3 S.C.R. 3; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

[4] *Cusson v. Quan*, 2007 ONCA 771; *United Soils Management v. Mohammed*, 2017 ONSC 4450 para. 21

[5] *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 164 (S.C.C.).

[6] *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 at 111 (C.A.).

[30] It is a complete defence to a defamation action, known as justification, if the defamatory imputation is true or substantially true. Pursuant to section 22 of the *Libel and Slander Act*,[7] the defence of justification will not fail by reason only that the truth of every allegation of fact 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.

[31] Some communications are protected by qualified privilege, which is defined as an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.[8]

[32] Fair comment is another defence to a defamation claim. The elements of the defence are: (1) the comment is on a matter of public interest; (2) the comment is based on fact; (3) the comment, though it can include inferences of fact, is recognizable as comment; and (4) objectively, any person could honestly express that opinion on the proved facts.[9] The defence, however, can be defeated if the defendant was actuated by express malice.[10] Words that appear to be statements of fact may, in pith and substance, be properly construed as comment, particularly in an editorial context where loose, figurative, or hyperbolic language is used in the context of political debate, commentary, media campaigns and public discourse.[11] Pursuant to section 23 of the *Libel and Slander Act*,[12] in a defamation action for words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment, having regard to such of the facts alleged or referred to in the words complained of as are proved. The defence of fair comment will be unsuccessful if the plaintiff proves that the defendant was motivated by malice, which is to be assessed objectively.[13]

[33] Another defence to defamation is the defence of "responsible communication" which has two essential elements; namely: (1) the publication is a matter of public interest; and (2) the defendant shows that he or she was diligent in trying to verify the allegations in the publication having regard to all the relevant circumstances.[14] In determining whether a defamatory communication made on a matter of public interest was responsibly made, the court may consider (a) the seriousness of the allegation, (b) the public importance of the matter, (c) the urgency of the matter, (d) the status and reliability of the source, (e) whether the plaintiff's side of the story was sought and accurately reported, (f) whether the inclusion of the defamatory statement was justifiable, (g) whether the defamatory statement's public interest lay in the fact

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[7] R.S.O. 1990, c. L.12.
[8] *McLoughlin v. Kutasy*, [1979] 2 S.C.R. 311; *United Soils Management v. Mohammed*, 2017 ONSC 4450; *Adam v. Ward*, [1917] A.C. 309 c. 334 (H.L.).
[9] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 28; *Bondfield Construction Co. v. The Globe and Mail*, 2018 ONSC 1880; *Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517.
[10] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 28; *Bondfield Construction Co. v. The Globe and Mail*, 2018 ONSC 1880.
[11] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40
[12] R.S.O. 1990, c. L.12.
[13] *Grant v. Torstar Corp.*¸2009 SCC 61.
[14] *Grant v. Torstar Corp.*¸2009 SCC 61; *Cusson v. Quan*, 2007 ONCA 771; *United Soils Management v. Mohammed*, 2017 ONSC 4450.

that it was made rather than its truth (reportage), and (h) any other relevant circumstances.[15]

2. Anti-SLAPP Motions

[34] Sections 137.1 to 137.5 of the *Courts of Justice Act* are Ontario's version of an anti-SLAPP statute, where "SLAPP" refers to "Strategic Lawsuit Against Public Participation." The anti-SLAPP provisions are designed to discourage the use of litigation as a means of unduly limiting expression on matters of public interest. Under the anti-SLAPP statute, a defendant or respondent may bring a motion to have a proceeding dismissed, if he or she satisfies the court that the proceeding arises from an expression made by the defendant or respondent that relates to a matter of public interest.

[35] The purpose of the anti-SLAPP provisions of the *Courts of Justice Act* 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.[16] The anti-SLAPP provisions of the *Courts of Justice Act* are a preliminary merits-review that dispenses with the need for an inquiry into the subjective intention of the plaintiff.[17]

[36] Under the anti-SLAPP provisions, 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.[18]

[37] Subject to certain limitations and exclusions, discussed below, the anti-SLAPP provisions provide that on motion by a person against whom a proceeding is brought, a judge shall 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.[19] On a motion under the anti-SLAPP provisions, the moving party bears the initial onus of satisfying the court that the other party's proceeding arises from an expression made by the moving party that relates to a matter of public interest.

[38] The anti-SLAPP provisions do not define what is a matter of public interest, but case law indicates that it is a broad concept and that a matter of public interest involves matters in which the public has some substantial concern beyond curiosity or prurient interest, and a matter of public interest affects the welfare of citizens or concerns an issue of public controversy or concerns an issue about which citizens have a right to make fair comment.[20]

[39] In *McLaughlin v. Maynard*,[21] allegedly defamatory comments about the acts or omissions of a mayor and a municipal council member in the discharge of their public duties were held to

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[15] *Grant v. Torstar Corp.*¸2009 SCC 61; *Bondfield Construction Co. v. The Globe and Mail*, 2018 ONSC 1880; *United Soils Management v. Mohammed*, 2017 ONSC 4450.
[16] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(1).
[17] *Lascaris v. B'nai Brith Canada*, 2018 ONSC 3068 at para. 4.
[18] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(2).
[19] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(3).
[20] *1704604 Ontario Ltd. v. Pointes Protection Assn*., 2016 ONSC 2884; *Grant v. Torstar Corp*., SCC 61 at paras. 103-106; *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.).
[21] 2017 ONSC 6820.

be expressions relating to matters of public interest. In *Niagara Peninsula Conservation Authority v. Smith*,[22] comments about the governance of a conservation authority that was also a registered charity were held to be expressions relating to matters of public interest. In *Moraine United Soils Management Ltd. v. Barclay*,[23] the environmental implications of expanded dumping rights in an environmental protection area was a matter of public interest. In *McQueen v. Reid*,[24] an article about the management of the Toronto Port Authority that was alleged to have tarnished the reputation of the chair of the authority was found to be a matter of public interest. In *New Dermamed Inc. v. Sulaiman*,[25] an Internet review of a cosmetic treatment using lasers that was offered to the consumers was considered to be a matter in the public interest and a defamation action was dismissed because the plaintiff was unable to prove that the defendant did not have a defence.

[40] In *Rizvee v. Newman*,[26] the defendant's defamatory social media postings about the character and suitability for election of a candidate for election to Parliament were held to be expressions relating to matters of public interest. Justice Fitzpatrick stated at para. 64 that: "While there is no static list of topics which qualify as matters of public interest, politics is the classic example of such a topic." At para. 122, he added:

> 122. It is an obvious statement that free speech is one of the fundamental underpinnings to any democratic, open and tolerant society. The right to offer commentary free from fear of litigation is especially critical to our election process. How are citizens to make an informed, independent and objective selection of who should lead us without the exchange of ideas, critical or otherwise? The public has a strong interest in its citizens exchanging ideas respecting the merits of a candidate for public office. ….

[41] The anti-SLAPP provisions of the *Courts of Justice Act* do not protect hate speech.[27] Hate speech is by its nature not in the public interest and hate speech interferes with public discourse and debate.[28] The anti-SLAPP provisions of the *Courts of Justice Act*, do not create a "safe space" for defamation because the subject matter is one of public interest and hateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest are not protected from suit by the legislation.[29]

[42] If the moving party meets the onus of showing a communication on a matter of public interest, under the anti-SLAPP provisions, the onus of proof shifts to the other party, and his or her proceeding will be dismissed, unless he or she shows that: (1) his or her proceeding has substantial merit; (2) the moving party has no valid defence in the proceeding;[30] and (3) the harm likely to be or have been suffered by the other party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs

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[22] 2017 ONSC 6973.
[23] 2018 ONSC 1372.
[24] 2018 ONSC 1662.
[25] 2018 ONSC 2517.
[26] 2017 ONSC 4024 (Ont. S.C.J.).
[27] *Paramount v. Johnston*, 2018 ONSC 3711; *Hudspeth v. Whatcott*, 2017 ONSC 1708 at paras. 172-186.
[28] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11.
[29] *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785 at paras. 38, 84 (Ont. S.C.J.).
[30] *Bondfield Construction Co. v. The Globe and Mail*, 2018 ONSC 1880; *Niagara Peninsula Conservation Authority v. Smith*, 2017 ONSC 6973; *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450; *Rizvee v. Newman* 2017 ONSC 4024; *Platnick v. Bent*, 2016 ONSC 7340; *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785.

the public interest in protecting that expression.[31] The responding party must satisfy all three requirements in order to successfully defeat the motion.[32]

[43] The legislative intent of the anti-SLAPP provisions is to introduce a preliminary merits review that dispenses with the need for an inquiry into the subjective intention of a plaintiff[33] and is a fast track process for summary dismissal of the action.[34]

[44] The authorities hold that anti-SLAPP provisions do not capture and dismiss claims simply because their subject matter is one of public interest, but rather scrutinizes such claims and imposes a burden on the plaintiff to show more than that his or her claim is not frivolous or vexatious, and rather the plaintiff must show there are reasonable grounds to believe that his or her proceeding has substantial merit and that the defendant has no valid defence to the proceeding.[35]

[45] Some courts have held that the burden of proof under section 137.1 of the *Courts of Justice Act* is the civil standard of proof on the balance of probabilities,[36] but other courts have held that the standard of proof is below the civil standard and the responding party to an anti-SLAPP motion bears the burden of establishing on objective evidence compelling and credible grounds that his or her claim has substantial merit and that there is no valid defence to it.[37]

E. Discussion and Analysis

[46] There is no dispute that the broadcast was an expression, and, in my opinion, Mr. Tiwari and CMR 101.3 have established that the communication was a matter of public interest.

[47] The state of the relationship between India and Pakistan, be it a state of peace or be it a state of warfare, is not a matter of curiosity and prurient interest; it is a matter that rises to the level of world security. From time to time, the relationship between India and Pakistan is controversial. The general issue of whether entertainers from countries formerly at war with one another should not perform together because it would show disrespect for the casualties of the former conflict is an issue worthy of comment and debate and is an aspect of the profound topic of how to achieve both truth and reconciliation between former antagonists.

[48] Even assuming that the broadcast identified DEI and its principals and investors, there is no

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[31] *Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517; *Niagara Peninsula Conservation Authority v. Smith*, 2017 ONSC 6973; *McLaughlin v. Maynard*, 2017 ONSC 6820; *Moutour v. Beacon Publishing Inc.*, 2017 ONSC 4735; *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450; *Rizvee v. Newman* 2017 ONSC 4024; *1704604 Ontario Ltd. v. Pointes Protection Assn*., 2016 ONSC 2884.

[32] *Lascaris v. B'nai Brith Canada*, 2018 ONSC 3068 at para. 41; *Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517; *Bondfield Construction Co. v. The Globe and Mail*, 2018 ONSC 1880 at para. 29.

[33] *Lascaris v. B'nai Brith Canada*, 2018 ONSC 3068 para. 4

[34] *Able Translations Ltd. v. Express International Translations* 2016 ONSC 6785 paras. 33

[35] *Bondfield Construction Co. v. The Globe and Mail*, 2018 ONSC 1880; *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785.

[36] *Lascaris v. B'nai Brith Canada*, 2018 ONSC 3068 at paras 24-30; *McLaughlin v. Maynard*, 2017 ONSC 6820 at para. 15; *Rizvee v. Newman* 2017 ONSC 4024.

[37] *Bondfield Construction Co. v. The Globe and Mail*, 2018 ONSC 1880; *Niagara Peninsula Conservation Authority v. Smith*, 2017 ONSC 6973; *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450; *Rizvee v. Newman* 2017 ONSC 4024; *Platnick v. Bent*, 2016 ONSC 7340; *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785.

merit to DEI Films' argument that the broadcast was a disguised personal attack on them. It is a stretch into the impossible to find that a reasonable person would infer that the broadcast on CMR 101.3 was not a genuine commentary on a matter of public interest but a disguised personal attack on DEI Films and its principals and investors.

[49] Mr. Tiwari and CMR 101.3 have met the onus of showing a communication on a matter of public interest. The onus then shifts to DEI Films to show all of that: (1) its action has substantial merit; (2) Mr. Tiwari and CMR 101.3 have no valid defence; and (3) the harm likely to be or have been suffered by the DEI Films is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[50] In my opinion, DEI Films fails on all accounts; namely: (1) DEI Films' action does not have substantial merit; (2) Mr. Tiwari and CMR 101.3 have the defences that there was no defamatory statement, justification, and fair comment; and (3) the harm suffered by DEI Films that can be connected to even assuming a defamatory statement is not sufficiently serious that the public interest weighs in favour of allowing the action to proceed.

[51] This is not a close call. There was nothing said expressly or said by innuendo that was defamatory, and there is no evidence that a broadcast less than three days had any effect on DEI Film's ticket sales. Any suggestion that CMR 101.3, whose principal was unaware of the concert until after the event, was motivated by malice is absurd. And any suggestion that Mr. Tiwari was motivated by malice is silly and contrary to the facts that establish that Mr. Tiwari was unaware of Mr. Panesar's animus toward him and that Mr. Tiwari was supportive of the concert going forward. The notion of a conspiracy to injure DEI Films by a broadcast of a matter of obvious public interest is not supportable and this idea is just a feeble and failed effort to find a scapegoat for the poor attendance at the concert. There was no defamatory statement, and indeed the Defendants might well have succeeded on a motion under Rule 21 that there was no reasonable cause of action pleaded. Even assuming a defamatory statement, it is not serious enough to justify allowing the action to proceed.

F. Conclusion

[52] For the above reasons, Mr. Tiwari's and CMR 101.3's motions are granted and DEI Films' action is dismissed.

[53] Neither Mr. Tiwari nor CMR 101.3 are claiming damages. The only outstanding matter is costs. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Tiwari's and CMR 101.3's submissions within twenty days of the release of these Reason for Decision followed by DEI Film's submissions within a further twenty days. There shall be no reply submissions.

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Perell, J.

Released: July 19, 2018

CITATION: DEI Films Ltd. v. Tiwari, 2018 ONSC 4423
COURT FILE NO.: CV-17-585589
DATE: 20180719

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DEI Films Ltd.

Plaintiff

– and –

Rakesh Tiwari and 3885275 Canada Inc., carrying on business as CMR 101.3 Diversity FM

Defendants

REASONS FOR DECISION

Released: July 19, 2018

D. The Elements of the Unlawful Means Tort (a.k.a. the Tort of Causing Harm Through Unlawful Means)

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 1, Tab 3

For a discussion of the elements of the Unlawful Means Tort, see paras. 23, 26, 74 & 76

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

v.

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

and

Attorney General of British Columbia *Intervener*

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

2014 SCC 12

File No.: 34863.

2013: May 22; 2014: January 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

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

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

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

c.

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

et

Procureur général de la Colombie-Britannique *Intervenant*

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

2014 CSC 12

N° du greffe : 34863.

2013 : 22 mai; 2014 : 31 janvier.

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

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

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

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

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

Podolny, Ronald. "The Tort of Intentional Interference with Economic Relations: Is Clarity Out of *Reach*?" (2012), 52 *Can. Bus. L.J.* 63.

Sales, Philip, and Daniel Stilitz. "Intentional Infliction of Harm by Unlawful Means" (1999), 115 *Law Q. Rev.* 411.

Stevens, Lyn L. "Interference With Economic Relations — Some Aspects of the Turmoil in the Intentional Torts" (1974), 12 *Osgoode Hall L.J.* 595.

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Watkins, Larry. "Tort Law — Tortious Interference with Business Expectancy — A Trap for the Wary and Unwary Alike" (2012), 34 *U. Ark. Little Rock L. Rev.* 619.

Weir, Tony. *Economic Torts*. Oxford: Clarendon Press, 1997.

Winfield and Jolowicz on Tort, 18th ed. by W. V. H. Rogers. London: Sweet & Maxwell, 2010.

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

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

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

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

The judgment of the Court was delivered by

CROMWELL J. —

I. Overview

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

Podolny, Ronald. « The Tort of Intentional Interference with Economic Relations : Is Clarity Out of *Reach*? » (2012), 52 *Rev. can. dr. comm.* 63.

Sales, Philip, and Daniel Stilitz. « Intentional Infliction of Harm by Unlawful Means » (1999), 115 *Law Q. Rev.* 411.

Stevens, Lyn L. « Interference With Economic Relations — Some Aspects of the Turmoil in the Intentional Torts » (1974), 12 *Osgoode Hall L.J.* 595.

Stevens, Robert. *Torts and Rights*. Oxford : Oxford University Press, 2007.

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Watkins, Larry. « Tort Law — Tortious Interference with Business Expectancy — A Trap for the Wary and Unwary Alike » (2012), 34 *U. Ark. Little Rock L. Rev.* 619.

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POURVOI contre un arrêt de la Cour d'appel du Nouveau-Brunswick (les juges Robertson, Bell et Green), 2012 NBCA 33, 387 R.N.-B. (2e) 215, 350 D.L.R. (4th) 601, 96 C.C.L.T. (3d) 1, 2 B.L.R. (5th) 171, [2012] A.N.-B. nº 116 (QL), 2012 CarswellNB 195, qui a confirmé une décision du juge Dionne, 2010 NBBR 245, 22 juillet 2010. Pourvoi rejeté.

Richard J. Scott, *c.r.*, pour les appelants.

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

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

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Aperçu

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

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

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

III. Analysis

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

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

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

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

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

III. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a) *Les délits économiques et la common law*

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

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

(d) *Conclusion Regarding the Unlawfulness Requirement*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 3, Tab 15

For a discussion of the elements of the Unlawful Means Tort, see paras. 84 & 87-90.

CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2019 ONSC 128
COURT FILE NO.: CV-17-587463-00CL
DATE: 20190109

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Catalyst Capital Group Inc. and Callidus Capital Corporation

AND:

West Face Capital Inc., Gregory Boland, M5V Advisors Inc. C.O.B. Anson Group Canada, Admirality Advisors LLC, Frigate Ventures LP, Anson Investments LP, Anson Capital LP, Anson Investments Master Fund LP, AIMF GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears, Sunny Puri, ClaritySpring Inc., Nathan Anderson, Bruce Langstaff, Rob Copeland, Kevin Baumann, Jeffrey McFarlane, Darryl Levitt, Richard Molyneux and John Does #1-10

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Linda Plumpton* and *Leora Jackson*, for the Applicants the Anson Defendants

Brian Radnoff, for the Applicants Nathan Anderson and ClaritySpring Inc.

Nancy Tourgis and *Melvyn Solmon*, for the Applicant Richard Molyneux

Darryl Levitt, Self-Represented, Applicant

David Moore, Ken Jones and Matthew Karabus, for the Respondents Catalyst Capital Group and Callidus Capital Corporation

HEARD: October 29, 2018

ENDORSEMENT

[1] On these motions, various defendants in this action (the "applicants") seek an order striking the statement of claim dated November 7, 2017 (the "Statement of Claim") and dismissing the action against them under Rules 21, 25.06(1) and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

The Parties

[2] The following sets out the parties in the action and the defined terms in the Statement of Claim that are relevant for the present motions.

pleadings do not allege that the Article refers to the substance of any Complaint of Clarity or Anderson. It is therefore not possible to infer any defamatory statements to Copeland based on the pleadings regarding the content of the Article. Accordingly, Anderson cannot know the case that he has to meet and cannot plead otherwise than by way of a blanket denial that he made any defamatory statement to Copeland.

[78] In my view, in the absence of a pleading regarding the substance, even if not the details, of a defamatory statement made by Anderson to Copeland, the pleadings fail to disclose a reasonable cause of action against Anderson and Clarity for the purposes of r. 21.01(1)(b). In addition, the plaintiffs have failed to plead the material facts upon which they base their claim that Anderson's alleged conversation with Copeland was actionable in view of the text of the Article. Accordingly, the plaintiffs' defamation plea against both Clarity and Anderson is also struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claim based on the Article.

Molyneux and Levitt

[79] Molyneux and Levitt also move to strike the defamation claims against them.

[80] Both Molyneux and Levitt are in litigation with Callidus and are attempting to enforce their personal guarantees in respect of a loan made by Callidus to an entity referred to as "Fortress Resources" in the Statement of Claim. However, there is no pleading that the Article refers to Fortress Resources nor is there a pleading regarding what either Molyneux or Levitt is alleged to have said to Copeland. There is therefore no pleading as to what either Molyneux or Levitt communicated to Copeland that was defamatory of the plaintiffs.

[81] Further, Molyneux and Levitt could possibly be liable in defamation if they pursued a "common design" with McFarlane to publish a defamatory article concerning the plaintiffs. However, the plaintiffs' pleading does not plead facts that would establish such a common design, as opposed to an agreement for a larger conspiracy, which is discussed below.

[82] In my view, therefore, the positions of Anderson, Molyneux and Levitt on this issue are substantially similar. On this basis, the defamation claims against each of Molyneux and Levitt should be struck under r. 21.01(1)(b) as failing to disclose a reasonable cause of action and, in addition, should be struck under r. 25.06(1) as failing to plead the material facts upon which the plaintiffs rely for their claims based the Article.

Intentional Interference with Economic Relations

[83] The plaintiffs assert claims of intentional interference with economic relations against all of the applicants.

[84] The elements of this tort were addressed by the Supreme Court in *A. I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177. In that decision, Cromwell J. concluded at para. 5 that the tort was available in three-party situations in which the defendant

commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. He also concluded that, for the purposes of the tort, conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result of it. At para. 45, Cromwell J. went on to state that "[t]he two core components of the unlawful means tort are … that the defendant must use unlawful means, in the narrow sense, and that the defendant must intend to harm the plaintiff through the use of the unlawful means." For this purpose, breaches of criminal or regulatory law do not satisfy the criteria for "unlawful means".

[85] The plaintiffs' claims for damages for intentional interference with economic relations against all of the applicants in these motions should be struck for two reasons.

[86] First, given the determinations above that the plaintiffs' defamation claims against the applicants should be struck, the plaintiffs' claims against the applicants for intentional interference with economic relations cannot survive. These claims are based on "unlawful means" in the form of actionable defamation of the plaintiffs. As the plaintiffs' defamation claims have been struck, the plaintiffs' claims for interference with economic relations fail to plead an essential element of the tort.

[87] Second, with respect to the element of third-party involvement, the pleadings state simply that the Defendants "deceived third-party market participants into believing that Callidus and Catalyst were engaged in fraudulent activity and were subject to 'investigation' by the OSC and the Toronto police." The plaintiffs further plead that the Defamatory Words were published to induce these market participants to sell their Callidus Shares, thereby lowering the Callidus share price for a prolonged period of time.

[88] The plaintiffs have therefore failed to identify the third party or third parties against whom the applicants are alleged to have committed an unlawful act. They have also failed to plead facts that establish the commission of an unlawful act that constitutes unlawful means, as understood for the purposes of this tort, directed against such third party or third parties. Specifically, they have failed to identify a claim of any third-party market participant against the applicants arising out of the publication of the Defamatory Words by the applicants.

[89] Counsel for the plaintiffs conceded that if a plaintiff asserting a claim of intentional interference with economic relations must plead facts that identify a third party against whom the defendant has committed an unlawful act, and the actionable claim of such third-party against the defendant that arose as a result of the applicants' actions, the claim is deficient. As I find that such pleadings are required, the pleadings against the applicants fail to disclose a reasonable cause of action.

[90] Accordingly, this claim should be struck under r. 21.01(1)(b) as against all of the applicants.

E. Civil Conspiracy and the Mandatory Requirement for "Concerted Action, by Agreement or Common Design" on the Part of *All* Defendants

The full text of this decision is found in the Catalyst Parties' BOA at Vol. 4, Tab 41

A useful discussion of the requirements for "concerted action" among co-conspirators is found at paras. 30-42

COURT OF APPEAL FOR ONTARIO

CITATION: Rutman v. Rabinowitz, 2018 ONCA 80
DATE: 20180131
DOCKET: C63148

Cronk, Huscroft and Nordheimer JJ.A.

BETWEEN

Ronald Rutman

Plaintiff (Respondent)

and

Saul Rabinowitz, Moishe Bergman, Artcraft Company Inc., John Doe 4 and John Doe 5

Defendants (Appellants)

Helen A. Daley and Michael Finley, for the appellants Moishe Bergman and Artcraft Company Inc.,

John J. Adair, for the appellant Saul Rabinowitz

Matthew P. Sammon and S. Jessica Roher, for the respondent

Heard: November 16, 2017

On appeal from the judgment of Justice Michael A. Penny of the Superior Court of Justice (Commercial List), dated November 30, 2016, with reasons reported at 2016 ONSC 5864.

By the Court:

INTRODUCTION

[1] This is a case of serious, sustained, and baseless Internet defamation.

[2] The respondent, Ronald Rutman, a Toronto chartered accountant and businessman, was subjected to an orchestrated Internet defamation campaign specifically designed to harm his personal and professional reputations. The campaign involved postings on the Internet of numerous defamatory allegations, including that he had engaged in tax fraud and was a thief and a cheat. The allegations were entirely without substance.

[3] The defamatory statements were made by the appellant, Saul Rabinowitz, who admitted liability at trial. The trial judge found the appellants, Moishe Bergman and Artcraft Company Inc., jointly and severally liable for the defamation. He awarded: $200,000 general damages as against all three defendants; $200,000 aggravated damages and $250,000 punitive damages as against Rabinowitz; and $50,000 punitive damages as against Bergman.

[4] Rabinowitz appeals the trial judge's damages awards. He argues that a total award of $400,000 compensatory damages ($200,000 general damages, plus $200,000 aggravated damages), is inordinately high. According to Rabinowitz, awards of $50,000 for general damages and $50,000 for aggravated damages are at the upper end of the range for compensatory damages in cases

DISCUSSION

A. Liability: Bergman and Artcraft

1) Did the trial judge err by misconstruing the test for concerted action liability?

[30] Bergman argues that joint liability in defamation requires either approval or publication of the defamatory statements at issue, neither of which occurred in this case: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 179; *Lawson v. Burs, Succamore and Jim Pattison Broadcasting Ltd.*, [1976] 6 W.W.R. 362, at para. 17; *Kent v. Postmedia Network Inc.*, 2015 ABQB 461, 77 C.P.C. (7th) 419, at para. 77.

[31] More particularly, Bergman submits there was no evidence at trial that he wrote or repeated the defamatory statements at issue and, consequently, he could not be held jointly and severally liable on the basis of the concerted action doctrine. At its highest, Bergman contends, he knew of Rabinowitz's plan and did nothing to stop it. However, he says, he was under no duty to do so; passivity does not render him a joint tortfeaser. Rather, active assistance in the commission of a tort is required: *Sea Shepherd UK v. Fish & Fish Limited*, [2015] UKSC 10, at paras. 55 and 57-60, per Lord Neuberger.

[32] We reject this ground of appeal.

[33] Concerted action may occur in a variety of ways. Generally, it involves a common design or conspiracy. In *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, the Supreme Court of Canada adopted the following formulation of the law regarding concerted action liability as set out by John G. Fleming in *The Law of Torts*, 8th ed. (Sydney: Law Book Co., 1992), at p. 255:

> The critical element of [concerted action liability] 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 realize they are committing a tort.

[34] The difficulty, of course, is determining the degree of involvement or connection necessary to meet the requirements of concerted action liability. Canadian authorities suggest that concerted action liability arises when a tort is committed in furtherance of a common design or plan, by one party on behalf of or in concert with another party: see Lewis N. Klar & Cameron S.G. Jefferies, *Tort Law*, 6th ed. (Toronto: Thomson Reuters, 2017), at p. 657; G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010), at p. 856. In *The Law of Torts*, 10th ed. (Sydney: Thomson Reuters, 2011), at p. 302, Fleming puts it this way: "[k]nowingly assisting, encouraging or merely being present as a conspirator at the commission of the wrong would suffice, so too would any form of 'inducement, incitement or persuasion' which procures the commission of the

wrong." And, W. Page Keeton, in *Prosser and Keeton on the Law of Torts,* 5th ed. (Minnesota: West Publishing Co., 1984), at p. 323, states:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable.

[35] The key point is that concerted action liability is a fact-sensitive concept. Lord Neuberger emphasized as much in *Sea Shepherd*, at para. 56, reiterating Bankes LJ's admonition from *The Koursk*, [1924] P 140, at p. 151 that "[i]t would be unwise to attempt to define the necessary amount of connection", and that each case "must depend on its own circumstances". We agree.

[36] In our view, on the facts here, the trial judge was correct to hold that the test for concerted action liability was made out in respect of Bergman. That Bergman did not publically approve or repeat the defamatory statements at issue does not absolve him from liability for Rabinowitz's tortious conduct. Bergman was not merely a passive or silent observer of the Internet defamation campaign. There was ample evidence at trial to support the trial judge's conclusion that there was a common design between Bergman and Rabinowitz to cause harm to Rutman, not only by the campaign of defamatory statements but also by threats of litigation and reports to the CRA levied against Rutman in order to exhort him

to settle the parties' Laptide dispute on terms favourable to Bergman and Rabinowitz.

[37] It was not necessary for the trial judge to find that Bergman was an active participant in the Internet defamation campaign from the outset in order to attract joint and several liability. The trial judge found that Bergman was aware of the campaign at least by the end of April 2009 and was willing to use it to his potential advantage. Bergman did not simply agree with or acquiesce in Rabinowitz's campaign. To the contrary, on the trial judge's factual findings, he was involved in authorizing the use of Artcraft equipment and personnel to facilitate the defamation campaign; he jointly authorized his lawyer to use the defamation campaign and threats of an adverse report concerning Rutman to the CRA in an effort to extort an advantageous settlement of the Laptide litigation; and, contrary to court order, he deleted and destroyed emails and other data relevant to his involvement in the Internet defamation campaign.

[38] It was therefore open to the trial judge to hold that the foundation for a finding of concerted action liability had been established, thus rendering Bergman jointly and severally liable for defamation. We see no reversible error in this holding.

2) Did the trial judge err by in inferring Bergman's knowledge of the Internet defamation campaign?

[39] In his factum, Bergman argues that, even assuming he knew of Rabinowitz's defamatory activities, it could not be inferred that he knew of them prior to April 19, 2009. He submits that the trial judge impermissibly used his rejection of Bergman's evidence as proof of the affirmative proposition that Bergman knew of Rabinowitz's wrongdoing from the outset.

[40] Bergman did not press this ground of appeal at the appeal hearing. This was a prudent decision. In our view, on this record, this ground has no merit.

[41] The trial judge's appreciation of the evidence and his fact finding are entitled to deference from this court. His factual findings can be disturbed by a reviewing court only if they are tainted by palpable and overriding error. No such error has been established here. In particular, it was open to the trial judge on the evidentiary record to conclude there were sound reasons for disbelieving Bergman's claim that he never agreed to Rabinowitz's Internet defamation campaign, and was unaware of it until April 19, 2009. This finding was supported, for instance, by the evidence of their lawyer's knowledge of the campaign, as well as the email exchanges between Bergman and Rabinowitz using the fraudulent account that Rabinowitz had established in Rutman's name – the disclosure of which Bergman had sought to keep from the court.

[42] This ground of appeal fails.

3) Did the trial judge err by misconstruing the test for the vicarious liability of Artcraft?

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 1, Tab 4

A useful discussion of the requirements for "concerted action" among co-conspirators in an unlawful means conspiracy is found at paras. 27, 28 & 43

Agribrands Purina Canada Inc. v. Kasamekas et al.

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

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

106 O.R. (3d) 427

2011 ONCA 460

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

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

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

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

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

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

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

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

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

tort, namely, that Ren's caused Purina to breach its contract with Raywalt or induced McGrath [page439] to breach its contract with Purina, assuming such a breach could be found. There was nothing in Ren's conduct that was wrong in law. It was not "unlawful conduct" for the purposes of the tort of conspiracy.

[42] Turning to McGrath's conduct, the trial judge found it to be "unlawful" because McGrath had no authority to effectively establish a sub-dealership for Ren's to obtain Purina feed at advantageous prices and then sell it into Raywalt's territory. The trial judge characterized McGrath's conduct as a violation of Purina's standard operating procedures. He therefore did not find McGrath's conduct to constitute a breach of his contract with Purina. Indeed, the standard dealership agreement that Raywalt and Ren's had with Purina did not prohibit such an arrangement. Moreover, the trial judge could not have found McGrath to be in breach of his dealership contract with Purina. His finding that Purina knew and approved of what McGrath was doing precluded that possibility, even if such a prohibition had been a term of McGrath's contract. There is no suggestion that McGrath's actions were tortious or in violation of any statute or in other way wrong in law. In my opinion, McGrath's actions cannot be said to be "unlawful conduct" for the purposes of the tort of conspiracy.

[43] In summary, I conclude that only Purina engaged in any unlawful conduct. The other two appellants did not. As a consequence, the finding of unlawful conduct conspiracy and the damages flowing from it must be set aside. The respondents' claim based on civil conspiracy must be dismissed.

Second issue -- The method of calculating breach of contract damages

[44] In Hamilton, Ms. Hamilton entered into a contract with Open Window Bakery Ltd. ("Open Window") for a term of 36 months to serve as its exclusive agent in Japan. The contract gave Open Window the unconditional right to terminate the contract on three months' notice, effective after the commencement of

The full text of this decision is found in the Defendants' Joint Memo of Law BOA at Vol. 3, Tab 22

A useful discussion of the requirements for "concerted action" among co-conspirators in an unlawful purpose conspiracy is found at paras. 69 & 70

CITATION: Fournier v. Mercedes-Benz Canada, 2012 ONSC 2752
COURT FILE NO.: CV-10-4306-00
DATE: 2012 05 16

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
FOURNIER LEASING COMPANY LTD., CANADIAN AUTO ASSOCIATES LTD. and WESTPORT MOTOR CARS LTD.	)	B. Osler and G. Hotz for the Plaintiffs
	)	
Plaintiffs	)	
- and -	)	
	)	
MERCEDES-BENZ CANADA INC., MERCEDES-BENZ USA LLC, and BMW CANADA INC., and THE ATTORNEY GENERAL OF CANADA	)	D. Kent and M. Seers for the Defendants Mercedes-Benz Canada Inc. and Mercedes-Benz USA LLC
	)	
	)	A. McKinnon for the Defendant BMW Canada Inc.
Defendants	)	
	)	
	)	B. Brucker and V. Paolone for the Defendant The Attorney General of Canada

Reasons for Decision on Rule 21 Motion

K.M. van RENSBURG J. **As she then was**

A. Introduction

[1] This proposed class proceeding concerns claims by the plaintiffs who are car dealers who imported vehicles into Canada. The plaintiffs seek to represent a class of persons in Canada who imported Mercedes Benz, BMW and Mini vehicles into Canada from the United States. While the class period is not

83. Alternatively, the primary purpose of the conduct and acts of the Mercedes defendants and BMW was to cause injury and financial losses to the plaintiffs and other importers.

[67] The facts relied upon are those set out in paragraphs 74 to 81 (again, including the subparagraphs and additional wording inadvertently omitted from the latest amendment to the Claim referred to earlier in these reasons).

[68] The defendants raise two objections to the pleading of civil conspiracy in this case. They assert that the Claim does not properly plead either or both types of civil conspiracy, and that the tort has not been pleaded with sufficient particularity.

1. Is the Tort of Civil Conspiracy Properly Pleaded?

[69] According to the leading case of *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.,* [1983] 1 S.C.R. 452, the tort of civil conspiracy can be committed in two ways:

(a) Where the defendants' conduct is itself unlawful, directed at the plaintiff, and will foreseeably result in harm to the plaintiff; or

(b) Where the predominant purpose of the defendants' conduct is to injure the plaintiff, regardless of whether the means used are lawful or unlawful.

[70] In *Dale v. Toronto Real Estate Board*, 2012 ONSC 512 (S.C.J.), K. Campell J., citing the relevant authorities, described the elements of the two types of conspiracy as follows (at para. 49):

> …[T]he elements of "predominant purpose conspiracy" require the plaintiff to establish that: (1) the defendants acted in combination, that is, in concert, by agreement or common design; (2) the predominant purpose of the defendants was to intentionally harm the plaintiff; and (3) the defendants' conduct caused harm to the plaintiff. The elements of "unlawful means conspiracy" require the plaintiff to establish that: (1) the defendants acted in combination, again that is, in concert, by agreement or common design; (2) the defendants committed some unlawful act such as a crime, a tort, or breached some statute; (3) the defendants conduct was directed towards the plaintiffs; (4) the defendants knew or ought to have known that injury to the plaintiffs was likely to occur from their unlawful act; and (5) the defendants' unlawful conduct in furtherance of their conspiracy caused harm to the plaintiff. See: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, at pp. 471-472; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 35-43; *Lombardo v. Caiazzo*, [2006] O.J. No. 2286 (C.A.) at para. 16-17; *Robinson v.*

Medtronic, Inc., [2009] O.J. No. 4366 (S.C.J.) at para. 85-120; *Harris v. GlaxoSmithKline Inc. et al.* (2010), 106 O.R. (3d) 661 (C.A.) at para. 39-51; *Agribrands Purina Canada Inc. v. Kasamekas* (2011), 106 O.R. (3d) 427 (C.A.) at para. 24-43.

[71] In this case the plaintiffs rely on both types of civil conspiracy. The question is whether it is plain and obvious from the pleading that the tort will not be made out.

a. Unlawful Conduct Conspiracy

[72] For defendants to be liable for the tort of unlawful conduct conspiracy, a plaintiff must prove that (a) the conspirators acted in combination; that is, in concert, by agreement or with a common design; (b) their conduct is unlawful; (c) their conduct is directed towards the plaintiffs; (d) the conspirators should know that, in the circumstances, injury to the plaintiffs is likely to result; and (e) their conduct causes injury to the plaintiffs: *Agribrands Purina Canada Inc. v. Kasamekas* (2011), 106 O.R. (3d) 427 (C.A.), at para. 26.

[73] The defendants assert that the requirement that the defendants engaged in unlawful conduct cannot be met in this case.

[74] "Unlawful conduct" for the purpose of the tort of conspiracy need not be independently actionable, but must be conduct that is a tort, breach of statute or breach of contract. It is not sufficient that the conduct is something that the defendants are "not at liberty to do": *Agribrands,* at paras. 36 to 38.

[75] Paragraphs 74 to 81 of the Claim (including the passages that were unintentionally deleted in the last revision of the pleading), allege conduct by the defendants and their dealers in violation of the *Competition Act* and the *Consumer Protection Act*. Paragraph 82 of the Claim pleads that the acts were "unlawful acts directed towards the plaintiffs and other importers…which unlawful acts the defendants knew in the circumstances would likely cause and did cause injury, damages and losses". I am satisfied that the pleading discloses allegations of unlawful conduct by the defendants and their dealers, who are the alleged parties to the conspiracies pleaded, as well as all of the other elements of the tort necessary to plead a cause of action of unlawful conduct conspiracy.

b. Unlawful Injury Conspiracy

[76] The defendants assert that the Claim does not disclose a claim for conspiracy to injure. This type of conspiracy requires that the defendants' predominant purpose was to harm the plaintiffs. Where the predominant purpose is to promote legitimate self-interest, the unlawful purpose conspiracy will not

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

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WEST FACE COMPENDIUM OF LAW: MOTION TO STRIKE CATALYST PARTIES' CLAIM

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