

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

CYNTHIA PRESCOTT and DAVID GREEN

Appellants
(Respondents)

and

BENCHWOOD BUILDERS INC. and MICHAEL SLAVEN

Respondents
(Appellants)

APPELLANTS' CONDENSED BOOK

(Pursuant to Rule 45 of the *Rules of the Supreme Court of Canada*)

BLANEY MCMURTRY LLP
2 Queen Street East Suite 1500
Toronto, ON M5C 3G5

Sheldon Inkol
Email: sinkol@blaney.com
Tel: (416) 596-4276
Fax: (416) 594-2692

CONWAY BAXTER WILSON LLP/S.R.L.
400-411 Roosevelt Avenue
Ottawa ON K2A 3X9

Marion Sandilands
Email: msandilands@conwaylitigation.ca
Tel: (613) 780-2021
Fax: (613) 688-0271

CONWAY BAXTER WILSON LLP/S.R.L.
400-411 Roosevelt Avenue
Ottawa ON K2A 3X9

Logan Stack
Email: lstack@conwaylitigation.ca
Tel: (613) 288-0149
Fax: (613) 688-0271

Counsel for the Appellants

Agent for Counsel for the Appellants

ORIGINAL TO:

THE REGISTRAR

Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1
Email: Registry-Greffe@scc-csc.ca

COPIES TO:

BOOK ERSKINE LLP

360 Bay Street, Suite 500
Toronto, ON M5H 2V6

Sara J. Erskine
Adrienne Zaya

Email: sara@be-law.ca
adrienne.zaya@be-law.ca
Tel: (416) 597-5408

TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2

Jeremy Opolsky
Emma Ryman
Matha C. Côté

Email: jopolsky@torys.com
eryman@torys.com
mcote@torys.com
Tel: (416) 865-0040/ (416) 865-7513

Counsel for the Respondents

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Email: mfmajor@supremeadvocacy.ca
Tel: (613) 220-7490

Agent for Counsel for the Respondents

ECOJUSTICE CANADA SOCIETY

390- 425 Carrall Street
Vancouver, BC V6B 6E3

**Kegan Pepper-Smith
Julia Croome**

Email: kpsmith@ecojustice.ca
Tel: (604) 685-5618
Fax: (604) 685-7813

ADAIR GOLDBLATT BIEBER LLP

401 Bay St, Suite 3200
Toronto, ON M5H 2Y4

**Nathaniel Read- Ellis
Robert Stellick
Anna Qarri**

Tel: (416) 499-9940
Fax: (416) 689-2059

**Counsel for the Intervener,
Ecojustice Canada Society**

STOCKWOODS LLP

TD North Tower, Suite 4130
77 King Street West, P.O. Box 140
Toronto, ON M5K 1H1

**Justin Safayeni
Zachary Rosen**

Email: justins@stockwoods.ca
zacharyr@stockwoods.ca
Tel: (416) 593-3494
Fax: (416) 593-9345

**Counsel for the Intervener,
Centre for Free Expression**

ECOJUSTICE CANADA SOCIETY

1 Stewart Street Suite 216
Ottawa, ON K1N 6N5

Danielle Anderson

Email: danderson@ecojustice.ca
Tel: (613) 903-5898
Fax: (800) 926-7744

**Agent for Counsel to the Intervener,
Ecojustice Canada Society**

CONWAY BAXTER WILSON LLP/S.R.L.

400-411 Roosevelt Avenue
Ottawa ON K2A 3X9

David P. Taylor

Email: dtaylor@conwaylitigation.ca
Tel: (613) 288-0149
Fax: (613) 688-0271

**Agent for Counsel to the Intervener,
Centre for Free Expression**

DENTONS CANADA LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, ON M5K 0A1

Morgan L. Camley, KC
Meredith Bacal
Jasmine Der

Email: morgan.camley@dentons.com
meredith.bacal@dentons.com
jasmine.der@dentons.com
Tel: (604) 648-6545
Fax: (604) 683-5214

**Counsel for Intervener,
Canadian Constitution Foundation**

HUNTER LITIGATION CHAMBERS
2100 - 1040 West Georgia Street
Vancouver, BC V6E 4H1

Paul S. Jon
Austen Erhardt

Email: pjon@litigationchambers.com
aerhardt@litigationchambers.com
Tel: (604) 891-2404

**Counsel for the Intervener,
Better Business Bureau of Central Ontario
Inc.**

MATAS LEGAL
1900-25 Adelaide Street E
Toronto, ON M5C 3A1

Anna Matas

Email: anna@mataslegal.ca
Tel: (416) 561-0379

**Counsel for the Intervener,
Barbara Schlifer Commemorative Clinic**

DENTONS CANADA LLP
99 Bank Street
Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott

Email: david.elliott@dentons.com
Tel: (613) 783-9699
Fax: (613) 783-9690

**Agent for Counsel to the Intervener,
Canadian Constitution Foundation**

OLTHUIS VAN ERT
66 Lisgar Street
Ottawa, ON K2P 0C1

Dahlia Shuhaibar

Email: dshuhaibar@ovcounsel.com
Tel: (613) 501-5350

**Agent for Counsel to the Intervener,
Better Business Bureau of Central Ontario
Inc.**

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi

Email: neffendi@blg.com
Tel: (613) 787-3562
Fax: (613) 230-8842

**Agent to Counsel for the Intervener,
Barbara Schlifer Commemorative Clinic**

DEPARTMENT OF JUSTICE CANADA

Ministry of Attorney General,
Litigation Canada
1001 Douglas Street
Victoria, BC V8W 9J7

Fernando de Lima

Stephen E. King

Julia Roe

Email: fernando.deLima@gov.bc.ca
Stephen.E.King@gov.bc.ca
Julia.Roe@gov.bc.ca

Tel: (250) 356-8877

Fax: (250) 356-8653

**Counsel for the Intervener,
Attorney General of British Columbia**

DMG ADVOCATES LLP

**155 University Avenue Suite 1230
Toronto, ON M5H 3B7**

Ryder Gilliland

Michael Robson

Email: rgilliland@dmgadvocates.com
mrobson@dmgadvocates.com

Tel: (416) 238-7537

Fax: (647) 689-3062

**Counsel for the Intervener,
Ad IDEM/ Canadian Media Law
Association**

**MICHAEL SOBKIN LAW
CORPORATION**

331 Somerset Street West
Ottawa, ON K2P 0J8

Michael J. Sobkin

Email: msobkin@sympatico.ca

Tel: (613) 282-1712

Fax: (613) 288-2896

**Agent for the Counsel to the Intervener,
Attorney General of British Columbia**

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KEY FACTUAL FINDINGS / FACTS NOT IN DISPUTE

- The Homeowners contracted Benchwood to renovate their home (ONSC at paras. 9–11). After disagreements over the project and charges, Benchwood ceased all further work (ONSC at para. 18). It never finished the job and instead registered a lien (ONSC Decision at paras. 18, 45).
- In late November 2020, the Homeowners discovered that Benchwood had been posting photos of their home online “to attract new customers” (ONSC at para. 21). This discovery “prompted the [Homeowners] to post the... complaints against [Benchwood” (ONSC at para. 21).
- The Homeowners published their comments on **November 22, 2020** (Green) and **November 24-25, 2020** (Prescott). On **January 11–12, 2021** Green posted further comments after learning more about Benchwood’s pattern of conduct.
- The “dominant motive for the [Homeowners]... was as a warning to other consumers” (ONSC at para. 79). The majority of the comments were posted for a “very short period of time” (ONSC at para. 62). Prescott and Green’s personal followers were “minimal” (ONSC at para. 62). Benchwood itself had the power to delete any comments on its business pages **and it did so**.
- Benchwood “failed to show how these negative comments have reduced their image or reputation or have caused them economic harm” (ONSC at para 61). Most of its alleged harms occurred **before** the Homeowners made any posts (ONSC at paras 65-71).

PUBLIC INTEREST THRESHOLD (S. 137.1(3))

- There is no dispute that (1) the accuracy of a business’s advertisements to entice customers, (2) Benchwood’s practices and services, and (3) the ways in which consumers should delineate between trustworthy and untrustworthy service providers are matters of public interest. The question is whether the Homeowners’ expression relates to any of these matters.
- **Ms. Prescott’s** expression is consistently about the enumerated matters of public interest. Among other things, she warns consumers that photos of her home are being used to “drum up more business”, advises them to “only hire those who are Better Business Bureau certified”, warns consumers that the work installed was unsafe, and seeks to correct misrepresentations (“Don’t believe what you read”; “don’t be deceived”) [**Tab 6A**].
- **Mr. Green’s** posts may be shorter, but are about the same matters, about the same builder, based on the same renovation. They raise strongly worded complaints about Benchwood’s practices (e.g. “dont be fooled”, “con artist”, beset by “lawsuits” and “complaints”), often pointing consumers to external sources (e.g. “Dont believe it? call the Niagara home builders association”, “ask around. start with his employees”). His comments are often replying to photos of his home. He comments on Slaven’s professional behaviour towards women based on Ms. Prescott’s experiences (e.g. false assault charges, threatens women, stay “as far away from him as you can”) [**Tab 6B**]. Whether the claims are all accurate is a matter for the no valid defences prong, and qualitative considerations are reserved for the weighing stage.
- The motion judge’s finding is bolstered by considering service at issue, Benchwood’s public advertising, and pattern of consumer and industry concerns about Benchwood’s practices.
- The Ontario legislature chose a low threshold that makes room for messy, imperfect expression. The screening mechanism is not just for sophisticated, well-spoken consumers or journalists.
 - 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” (*Pointes* at para. 28). [Tab 23]

- The legislature was comfortable with a broad threshold because it distinguished between the public interest threshold (s. 137.1(3)) and an innovative public interest weighing exercise (s. 137.1(4)). (*Pointes* at para. 75, citing C.A. reasons [Tab 23]).
- The Court of Appeal has respected this approach, including for online expression. See e.g.
 - *Chaudhary v. Shadid*, 2023 ONCA 743 (Expression about a non-profit—“This a group of thieves. On the name of Dam (fund), they have stolen \$1.2 million”) [Tab 28];
 - *UM Financial Inc. v. Butler*, 2025 ONCA 844 (Expression about a mortgage provider that “ripped off it’s [sic] clients years ago & embezzled people’s [sic] money”);
 - *Gill v. Maciver*, 2024 ONCA 126 (expression about members of Concerned Ontario Doctors (“corksoakers” and “twats”, lacking “the qualities we all expect in a physician, let alone a colleague” [Tab 30])).
- In this appeal, the Court of Appeal’s “broader societal concern” threshold for online expression is inconsistent with this Court’s jurisprudence: (1) subject matter does not have to be of *societal* concern; (2) public interest is not confined to sociopolitical issues; (3) consumer expression was part and parcel of the historical development of anti-SLAPP legislation.
- Courts already apply *Grant* and *Pointes* to delineate when online/consumer expression relates to a matter of public interest (e.g. summary at 2110120 *Ontario Inc v Buttar*, 2023 ONCA 539 at para. 51 [Tab 29]). Further, where the expression passes the public interest threshold, the weighing exercise ensures that proceedings with sufficiently serious harm continue.
- Benchwood’s *FilmOn* test should be rejected. It is a restrictive standard, based on a different legislative scheme, that would require departing from *stare decisis* and revisiting this Court’s precedents, all in favour of a convoluted analysis that would result in *ad hoc* decision-making.

NO VALID DEFENCES PRONG (S. 137.1(4)(A)(II))

- Benchwood must succeed on both the merits-based hurdle and the public interest weighing exercise. Benchwood’s failure to show any harm at the weighing stage is sufficient to dispose of this appeal. Nevertheless, guidance may be warranted at the no valid defences prong. The Court of Appeal’s approach effectively flips the burden onto the defendant. Benchwood’s burden is not onerous, but it must nevertheless be met (*Pointes* at para. 39–40 [Tab 23]).

PUBLIC INTEREST WEIGHING EXERCISE (S. 137.1(4)(B))

- *Hansman* is a binding authority on the weighing exercise. Benchwood had to provide evidence that would have enabled the judge “to draw an inference of likelihood” of harm sufficient to outweigh the public interest in protecting the Homeowners’ expression and, critically, “some evidence that enables the judge to infer a causal link between the defendant’s expression and the harm suffered” (*Hansman* at paras 67-68 [Tab 25]). It failed to do so.
- The weighing exercise attracts substantial appellate deference (*Galati v. Toews* at para. 45 [Tab 36]). The motion judge accepted the Homeowners’ expression as having a public interest value, given its consumer protection dimension, found no evidence of serious harm resulting from the Homeowners’ expression and specifically rejected the links Benchwood drew between the harms it alleged and the expression in question.
- Affirming the Court of Appeal’s decision would be a serious blow to consumer protection.

CITATION: Benchwood Builders, Inc. v. Prescott, 2024 ONSC 167

COURT FILE NO.: CV-21-00060067-0000

DATE: 2024-01-16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Benchwood Builders, Inc. and Michael Slaven, Plaintiffs

AND:

Cynthia Prescott and David Green, Defendants

BEFORE: The Honourable Justice L. Walters

COUNSEL: Adrienne Zaya, counsel for the Plaintiffs

Sheldon Inkol, counsel for the Defendants

HEARD: December 12, 2023

REASONS FOR DECISION

[1] After argument heard on December 12, 2023, I reserved judgment. On January 3, 2024, I dismissed the action with reasons to follow. These are my reasons.

Overview

[2] The plaintiffs commenced an action against the defendants suing for defamation and for unlawful interference with the plaintiffs' economic relations. The plaintiffs further sought a permanent and mandatory injunction restraining the defendants from posting on the internet or publishing any statements or comments about the plaintiffs.

[3] The defendants denied all allegations and asked that the action be dismissed.

[4] On June 13, 2023, the plaintiffs moved for summary judgment against the defendants.

[5] On August 9, 2023, the defendants moved for an order dismissing the action as a proceeding that limits freedom of expression on matters of public interest pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[6] Both motions were set to be heard by me on December 12, 2023. We proceeded with the defendants' motion pursuant to section 137.1 first.

Position of the Parties

[7] The defendants acknowledge that they made the statements attributed to them in schedules A, B, C, and D to the statement of claim and that the statements refer to the plaintiffs. However, the defendants argue that the action should be dismissed as a proceeding that limits freedom of expression on a matter of public interest pursuant to section 137.1 of the *Courts of Justice Act*. There is no question that the statements or expressions in question

relate to a matter of public interest. Further, the plaintiffs' claims do not have substantial merit and the defendants have a valid defence to the claims advanced by the plaintiffs. Ultimately, the defendants argue that even if there is a meritorious claim, the public interest in protecting the statements or expressions of the defendants outweighs the public interest in allowing the proceeding to continue.

- [8] The plaintiffs argue that this anti-SLAPP motion is baseless. First, the plaintiffs argue that this is a private commercial dispute between two individuals and the expressions in question do not relate to a matter of public interest. However, in any event, the plaintiffs have satisfied the burden on them to prove there are grounds to believe the proceeding has substantial merit and that the defendants have no valid defence to their claim. Lastly, the harm that is likely to be suffered or that has actually been suffered by the plaintiffs is sufficiently serious that public interest lies in allowing the matter to proceed.

Background Facts

- [9] The plaintiff Michael Slaven is a general contractor who owns (along with his wife) and operates Benchwood Builders, Inc. ("Benchwood Builders"), a general contracting and construction management firm.
- [10] The defendants are the owners of a property municipally known as 2038 York Road, Niagara-on-the-Lake, Ontario.
- [11] The defendants entered into a renovation agreement with "Michael Slaven c.o.b. as Benchwood Builders" on October 6, 2019.
- [12] The original contract price was \$367,787 plus HST and was to be completed by April 30, 2020. Any extra work had to be agreed upon in writing.
- [13] There were additional descriptions of work agreed to on February 18, 2020 and at the end of February 2020.
- [14] The renovations began in January 2020. The completion date of April 30, 2020 changed several times, but according to the defendants, they were advised by Mr. Slaven that the work would be completed by September 11, 2020. There is nothing in writing confirming this date.
- [15] During the course of the renovations, there were several areas of disagreement between the parties.
- [16] The triggering event for this lawsuit was invoice no. 1170 dated September 7, 2020 for \$20,908.28. The defendants disputed the charges and refused to pay. The defendants also argued that the changes had not been approved in writing in accordance with the terms of the contract.
- [17] On September 17, 2020, the plaintiffs through their lawyers demanded full payment of this invoice, failing which the plaintiffs would cease all work and would interpret the contract as repudiated.

- [18] Things culminated with a heated discussion between Mr. Slaven and Ms. Prescott on October 2, 2020. Ms. Prescott threw her glasses in the direction of Mr. Slaven. This incident gave rise to suggestions of an assault. No further work was done after this date.
- [19] On October 21, 2020, Mr. Slaven reported this argument to the Niagara Regional Police. Police Constable Cirillo apparently advised Mr. Slaven that the conduct of Ms. Prescott on October 2, 2020 amounted to a technical assault, however, Mr. Slaven declined to press any charges and only wanted to retrieve his tools from the project.
- [20] The defendants allege that Mr. Slaven claimed he was assaulted by Ms. Prescott and that Mr. Slaven had abandoned the contract.
- [21] In late November 2020, the defendants discovered that Benchwood Builders had posted photographs of their home online, presumably to attract new customers. This prompted the defendants to post the alleged defamatory statements and complaints against the plaintiffs on the internet via the social media platforms Instagram and Facebook between November 2020 and January 2021.
- [22] The defendants acknowledge that these statements were made and that they were in reference to the plaintiffs. The statements in question, which do not need to be reproduced here, are contained in schedules A, B, C, and D to the statement of claim.
- [23] To summarize, the defendants made allegations that the plaintiffs engaged in unlawful conduct, operated in a dishonest manner, misrepresented their business to consumers, were “con artists”, refused to complete the job, refused to repair the deficiencies at the property, that Mr. Slaven threatens women and raises false charges against women, that the plaintiffs have “more lawsuits against them than Donald Trump”, and that Benchwood Builders has more complaints than any other contractor in Niagara combined.
- [24] On February 12, 2021, the plaintiffs’ lawyer sent a letter to the defendants demanding that they remove the defamatory statements by February 19, 2021. The defendants argue that most of the comments in question were deleted within minutes of posting, with the exception of one comment that lasted 14 hours before being deleted. However, the plaintiffs argued that some of Ms. Prescott’s comments remained for 13 weeks before being removed.

Issues to be Determined

1. Should the claim be dismissed as a proceeding that limits freedom of expression on matters of public interest pursuant to section 137.1 of the *Courts of Justice Act*?

The Law

- [25] The law on anti-SLAPP legislation is not in dispute.
- [26] The Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, at para. 18, sets out the test to be applied in determining whether or not a claim should be dismissed under these provisions of the *Courts of Justice Act*.

- [27] A number of Ontario Court of Appeal decisions have assisted in applying the principals set out by the Supreme Court in *Pointes*.
- [28] To succeed, the defendants must first establish that the expressions in question relate to a matter of a public interest. If this test is met, then the onus shifts to the plaintiffs to satisfy the court that: (1) the proceeding has substantial merit; (2) there are grounds to believe that the defendants have no valid defence to the defamation claim; and (3) the alleged harm suffered by the plaintiffs as a result of the defendants' expressions or comments are sufficiently serious such that the public interest in permitting the action to continue outweighs the public interest in protecting those expressions or statements.

Analysis

- [29] As the defendants acknowledge the alleged statements were made by them and refer to the plaintiffs, the next issue for the court to determine is whether or not these expressions or statements by the defendants relate to a matter of public interest. The onus is on the defendants to satisfy the court of this proposition on a balance of probabilities.
- [30] Giving these words a "broad and liberal interpretation" as directed by the Supreme Court of Canada, I am satisfied that these comments relate to a matter of public interest. The plaintiff is a general contractor. He offers his services to the public. Individuals looking for a contractor would surely be interested in receiving information about the service. In this computer age, where business is conducted online, customer reviews are widely utilized.
- [31] As Muszynski J. stated in *Luc Crawford Design Inc, et al v. Mullowney et al.*, 2021 ONSC 7849, at para. 26:
- Online reviews serve an important function by offering the public information about consumer experiences dealing with professionals or businesses. As noted by De Sa J. in *Bradford Travel*, at para. 31:
- Comments or conversations relating to corporations or businesses will more obviously have a public dimension to them. Members of the public or at least segments of the community will have an interest in knowing something about the companies that offer them services.
- [32] I agree.
- [33] The defendants have provided the court with five other decisions¹ where the courts have concluded negative online reviews relate to a matter of public interest.
- [34] Although the plaintiffs have insisted this is a matter of only a private dispute between parties, they have not distinguished the above referenced cases wherein a finding of a

¹ 910938 *Ontario Inc. v. Moore*, 2020 ONSC 4553
New Dermamed Inc. v. Sulaiman, 2018 ONSC 2517
Bradford Travel and Cruises Ltd. v. Viveiros, 2019 ONSC 4587
Canadian Thermo Windows Inc. v. Seangio, 2021 ONSC 6555
A&H Asset Auctions Inc. v. ABC Corporations et al, 2023 ONSC 6271

matter of public interest was made. Further, potential clients looking for a contractor would certainly be interested in the experiences of others with the plaintiffs.

[35] Accordingly, I find that the expressions in question relate to a matter of public interest.

[36] Having found that the expressions relate to a matter of public interest, s. 137.1(3) requires that the action be dismissed unless the plaintiffs show the claim should not be dismissed. To do that, the plaintiffs must establish on a balance of probabilities that: (1) there are grounds to believe that the claim has substantial merit; (2) there are grounds to believe that the defendants have no valid defence to the proceedings; and (3) that there is a greater public interest in the continuation of the action than public interest in protecting the expressions.

[37] To determine whether or not the claim has substantial merit, the plaintiff must establish that the claim is legally tenable and supported by evidence that is reasonable and capable of belief. I do not need to discuss this issue in detail. I am satisfied that there are grounds to believe this action has merit. There is no question that the statements were made by the defendants, the statements referred to the plaintiffs, the statements were communicated to at least one other person than the plaintiffs, and the nature of the statements are such that one could infer they would tend to lower the plaintiffs' reputation in the eyes of a reasonable person: see *CUPW v. B'nai Brith Canada et. Al*, 2020 ONSC 323.

[38] I now turn to whether or not the plaintiffs have satisfied the court that there are grounds to believe the defendants have no valid defence in the proceeding.

[39] The defendants claim the statements in question are either true, fair comment, protected by qualified privilege, statute barred, or not capable of harming the plaintiffs' reputation.

[40] As set out in *Pointes* at para. 60, "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."

[41] It is important to remember that even if only one defence is valid, the plaintiffs have failed to satisfy the necessary onus.

[42] I will first look at the defence of justification.

[43] The defendants argue that the bulk of the impugned statements are true.

[44] For example, the job was left unfinished; the job was clearly not a success story; there were plenty of problems; the defendants spent additional monies to fix the problems; the windows leaked; they did not receive handles; Benchwood Builders did not install the cabinetry; the plaintiffs demanded payments on invoices not in accordance with the contract; not all changes were in writing; the plaintiffs were involved in a number of lawsuits; Benchwood Builders' membership in Niagara Home Builders' Association ("NHBA") was not renewed; Benchwood Builders were not members of RenoMark, yet continued to advertise same; the NHBA did receive a number of complaints about the plaintiffs; and an ex-foreman called Mr. Slaven a "con artist".

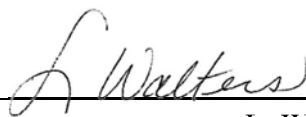
- [45] The plaintiffs argue that although several of the statements contain accurate facts, “the sting” of the defamatory comments are untrue. For example, it is true that the job was left unfinished, but that is only because the defendants refused to pay certain invoices and began to interfere with the renovation schedule. Therefore, the plaintiffs repudiated the contract and registered a lien.
- [46] In my view, whether or not the defendants refused to pay invoices or if invoices were accurate and billed in accordance with the renovation contract, are all triable issues, which cannot be determined at this stage of the proceedings. The same is true for the allegations that deficiencies were not covered. The plaintiffs’ assertions that they attended at the property but their visit was cut short by Ms. Prescott’s outburst does not make the statement untrue. This is a triable issue.
- [47] The plaintiffs admit they did not install the cabinets. Making sure the cabinets fit the space does not make the statement untrue.
- [48] There is a triable issue with respect to whether or not the contract provided authorization for the plaintiffs to photograph the job before construction was completed.
- [49] The plaintiffs dispute the assertions that the plaintiffs are engaged in more lawsuits than anyone in the NHBA or Donald Trump. Mr. Slaven deposed that at the time the impugned statements were made there was only one legal proceeding. This evidence is contradicted by the defendants, who claim there were six lawsuits at the time.
- [50] There is contradictory evidence regarding the number of complaints to the NHBA about the plaintiffs. There is, however, a written letter from the NHBA advising Benchwood Builders that their membership would not be renewed as a result of the number of complaints made against them. This letter is dated prior to the date of the impugned statements.
- [51] The defendants have acknowledged that certain of the comments were not true, for example that the NHBA received more complaints about Benchwood Builders than any other contractors combined. It is however important to remember that the *Libel and Slander Act*, R.S.O. 1990, c. L.12, sets out that “a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges.”
- [52] The plaintiffs argued that Mr. Slaven never accused Ms. Prescott of assault and no charges were ever laid. Yet, on November 27, 2020, Mani Lee, a business owner, republished an email wherein Mr. Slaven stated Ms. Prescott had assaulted him and the police had to intervene. Mr. Slaven says that somehow his email was tampered with. This sounds improbable; however, this is an issue of credibility that cannot be determined at this juncture.
- [53] The plaintiffs are correct in their argument that what the court must look at is “the sting” of the derogatory statements.
- [54] At this point of the proceedings, the court can only do a limited review of the evidence, including a preliminary assessment of credibility. In light of the very contradictory

positions taken by the principals in this action, I am not able to determine that the defence of justification will not succeed at trial.

- [55] It is particularly troubling that Mr. Slaven has already had his credibility seriously challenged by the court. Henderson J. in *Slaven v. Azadian*, 2020 ONSC 7571, dismissed Mr. Slaven's claim for lien and ordered costs against him. As I cannot find that I have grounds to believe that the defence of justification has no real prospect of success, the plaintiffs claim must be dismissed. I do not need to go on to consider any other defences raised by the defendant.
- [56] However, in the event that I am wrong, I will go on to consider the final issue, and that is s. 137.1(4)(b) of the legislation.
- [57] The Supreme Court of Canada has described this as "the crux" of the analysis. At this stage, the plaintiffs must satisfy the court 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."
- [58] In *Hansman v. Neufeld*, 2023 SCC 14, the Supreme Court of Canada stated the following at para. 67: "Although general damages are presumed in defamation law, s. 4(2)(b) prescribes a weighing exercise which requires that the harm to the plaintiff be serious enough to outweigh the public interest in protecting the defendant's expression. While the presumption of damages can establish the *existence* of harm, it cannot establish that the harm is "serious".
- [59] In balancing or weighing these interests, the court must specifically look at the harm "occasioned" or "caused" by the alleged defamatory statements. In my view, the plaintiffs have failed to satisfy the court that any harm they may have suffered as a result of the defendants' comments is serious.
- [60] Of course, the plaintiffs rely on online comments to attract clients and market their company.
- [61] However, the plaintiffs have failed to show how these negative comments have reduced their image or reputation or have caused them economic harm.
- [62] Firstly, the majority of the comments were posted for a very short period of time. The number of followers Ms. Prescott and Mr. Green had were minimal. The number of followers the plaintiffs themselves had were not significant.
- [63] There is no evidence any customers aside from family and friends saw the posts.
- [64] Although the plaintiffs need not file a damages brief, there must be some evidence of harm. Bald statements or allegations are not sufficient.
- [65] Just stating that Benchwood Builders was closing two six-figure contracts, which clients backed away from, without anything further, does not show a causal link between those cancellations to any comments made by the defendants.

- [66] Simply stating that one obtained Canada Emergency Wage Subsidies due to a loss of revenue without anything further is also not sufficient, particularly in light of the fact that other inferences such as the COVID-19 pandemic are reasonable.
- [67] Mr. Slaven stated that his marketing plan had to be placed on hold in October of 2020. The impugned statements were not posted until November 2020.
- [68] Mr. Slaven further stated that in September 2020 another contract was not fulfilled because the clients disappeared. Once again, this occurred prior to the date that the impugned statements were posted online.
- [69] Mr. Slaven stated that he was subjected to ridicule and in support of his claim described an incident where an unidentified individual approached him, took a picture, and hurriedly drove off. The court sees no causal connection between this observance and the alleged harm which Mr. Slaven says he experienced.
- [70] The plaintiffs allege that on October 8, 2020, the NHBA decided not to renew their membership for 2021. Again, this occurred prior to the posting of any online comments. More importantly, the contents of the letter itself seem to support the defendants' assertion that their complaints were not the only ones regarding Benchwood Builders.
- [71] In their letter, the NHBA indicated that a variety of client complaints had been filed with the NHBA regarding Benchwood Builders' business practices. Further, there had been many observations, complaints, and statements from longstanding NHBA members regarding Mr. Slaven's conduct.
- [72] There are other factors that may have had an effect on the plaintiffs' reputation. As stated by the Supreme Court of Canada in *Pointes* at para. 72, "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."
- [73] The defendants rely on the affidavit of Hendrik Schonewille, a former foreman of Benchwood Builders, who described his concerns regarding the plaintiffs' business practices. Mr. Schonewille also posted very negative reviews about the plaintiffs long before the current statements before the court were made. He further opined that the Mr. Slaven was a con artist.
- [74] The letter from NHBA made it clear that a variety of clients had complained regarding Benchwood Builders' business practices.
- [75] The earlier referred to case, *Slaven v. Azadian*, was published on CanLII and is available to the public.
- [76] In an affidavit in another action, Mr. Slaven blamed the clients for losing Benchwood Builders' membership in Baeumler, which he claimed meant lost benefits of \$85,000 per year and lost opportunity as well.
- [77] In light of this information, it is very difficult for the court to conclude that any damage to the plaintiffs' reputation, if any, is causally connected to the short-lived comments posted by the defendants in this case.

- [78] The plaintiffs have not challenged the defendants' assertions that the company appears to be doing well, as the plaintiffs were able to build a new home, which was completed in 2021, have a new build home for sale in Queenston, Ontario, and Niagara-on-the-Lake has approved the plaintiffs' multi-million-dollar plan to build four new single detached homes.
- [79] The plaintiffs have alleged malice on the part of the defendants in making the impugned statements. A general plea of malice without further particulars is not sufficient. In my view, I am satisfied that the dominant motive for the defendants to post the comments they did was as a warning to other consumers after they saw photos of their home posted on the plaintiffs' social media.
- [80] Another factor the court must consider is the motivation of the plaintiffs in bringing the lawsuit. Here, the plaintiffs have continued with this lawsuit despite the fact that the impugned comments and statements have long since been removed. Further, as set out above, the harm to the plaintiffs has been minimal at best. In these circumstances, it is appropriate to question the plaintiffs' motivation.
- [81] In conclusion, I find that any harm to the plaintiffs is not serious and certainly does not outweigh the public interest in protecting the defendants' expressions.
- [82] Accordingly, the motion is granted and the action is dismissed.
- [83] The defendants have also plead damages; however, counsel were not afforded an opportunity to make submissions on this issue. After reviewing the materials, I am not satisfied this is a situation where an award of damages would be appropriate, however, counsel shall be afforded the right to make submissions if they so choose. Submissions regarding damages shall be included with written submissions as to costs which are due on January 31, 2024.



L. Walters, J.

Date Released: January 16, 2024

COURT OF APPEAL FOR ONTARIO

CITATION: Benchwood Builders, Inc. v. Prescott, 2025 ONCA 171

DATE: 20250306

DOCKET: COA-24-CV-0130

Lauwers, Brown and Coroza JJ.A.

BETWEEN

Benchwood Builders, Inc. and Michael Slaven

Plaintiffs (Appellants)

and

Cynthia Prescott and David Green

Defendants (Respondents)

Adrienne Zaya and Sara J. Erskine, for the appellants

Sheldon Inkol, for the respondents

Heard: October 29, 2024

On appeal from the order of Justice Linda M. Walters of the Superior Court of Justice, dated January 3, 2024¹ and from the costs order dated April 12, 2024.

Lauwers J.A.:**A. OVERVIEW**

[1] Cynthia Prescott and David Green contracted with Benchwood Builders, Inc., owned by Michael Slaven and his spouse, to carry out some renovations on

¹ The motion judge dismissed the action by way of an endorsement on January 3, 2024, with reasons for decision released on January 16, 2024. The reasons are unreported.

their home in Niagara-on-the-Lake.² The relationship ended badly with Benchwood starting a lien action to recover for unpaid bills. Benchwood and Mr. Slaven started this defamation action for derogatory comments that Ms. Prescott and Mr. Green made about them on social media. In response, Ms. Prescott and Mr. Green brought a motion for an order dismissing the action as a Strategic Lawsuit Against Public Participation (“SLAPP”) under s. 137.1 of the *Courts of Justice Act*.³

[2] The motion judge granted the anti-SLAPP motion and dismissed Benchwood’s defamation action. For the reasons that follow, I would allow the appeal.

(1) The Factual Context

[3] About a month after they parted company, Ms. Prescott and Mr. Green saw that Benchwood had posted photographs of their home online in order to attract new customers. This angered them and they posted statements and complaints online, some of which Benchwood and Mr. Slaven assert to be defamatory.

[4] The alleged defamatory statements posted by Ms. Prescott are these: Benchwood and Mr. Slaven “misrepresent themselves to the consumer”; that her experience with them as builders was “horrific” and a “nightmare”; “[t]hey are misrepresenting our project as a ‘success story’ which it definitely IS NOT”; “[t]hese

² For brevity, I refer to the appellants collectively as “Benchwood” and to Ms. Prescott and Mr. Green as the “Homeowners” unless the context requires more specificity.

³ R.S.O. 1990, c. C.43. For convenience, the text of s. 137.1 is reproduced in an Appendix.

are just a few pix of the utter mess they left behind despite our having paid them an extraordinary amount & we're having to clean up after them at great cost." Ms. Prescott also posted that Mr. Slaven and his subcontractors were "in on this dishonest operation together", "operate in a dishonest manner," and did a "shotty job".

[5] In addition to Ms. Prescott's posts, Mr. Green responded to several comments on the Benchwood Facebook page. In response to one user, he wrote: "let me guess.. he had to charge you extra for a few things? project was a nightmare? glad it's done? aware of the lawsuits?" Mr. Green also posted that Benchwood was "trespassing", referred to Mr. Slaven as "a miserable con artist" and a "dirtbag", implied that Benchwood had a habit of walking off the job, and accused Mr. Slaven of threatening women and making false assault charges against women. These comments were posted to social media by the Homeowners between November 2020 and January 2021.

[6] Ms. Prescott and Mr. Green admit making the statements but say that most of the postings were removed within minutes, except for one that stayed up for several hours. There is some dispute about how long the postings were up on social media. Their defence is that "all of the statements ...are true, fair comments, justified, honest opinions, subject to qualified privilege, are responsible communication on matters of public interest." The motion judge summarized the defence, at para. 39: "the statements in question are either true, fair comment,

protected by qualified privilege, statute barred, or not capable of harming the plaintiffs' reputation."

(2) The Motion Judge's Decision

[7] The motion judge dismissed Benchwood's defamation action under s. 137.1, based on three findings.

[8] First, the Homeowners' comments related to a matter of public interest because Benchwood offers services to the public and customer reviews online are "widely utilized" – s. 137.1(3).

[9] Second, while there were grounds to believe that Benchwood's defamation action had substantial merit – s. 137.1(4)(a)(i) – there were triable issues with respect to the Homeowners' defence that the statements they made were true; because the motion judge was unable to find that the Homeowners' defence of justification had no real prospect of success, Benchwood's claim had to be dismissed – s. 137.1(4)(a)(ii).

[10] Third, she considered whether the harm to Benchwood was serious enough as to outweigh the public interest in protecting the Homeowners' expression – s. 137.1(4)(b). She found that Benchwood had failed to establish that any harm suffered as a result of the Homeowners' defamatory statements was serious, because there were "other factors that may have had an effect on [Benchwood's] reputation."

B. THE ISSUES

[11] Benchwood raises the following issues:

1. Did the motion judge err in finding that the Homeowners' statements relate to a matter of public interest under s. 137.1(3)?
2. Did she err in her approach to the ground of "no valid defence" under s. 137.1(4)(a)(ii)?
3. Did she err in her approach to the weighing exercise relating to harm and the public interest under s. 137.1(4)(b)?
4. Did she err in her costs award?

C. ANALYSIS

[12] In my view, the motion judge made three errors. First, the dispute is not a matter of public interest under s. 137.1. Second, the motion judge did not undertake the task of assessing the validity of the Homeowners' defence in a manner consistent with this court's guidance. Third, she carried out the task of weighing harm against the public interest only perfunctorily.

[13] In this part of the reasons, I interpret s. 137.1 in light of its text, context and purpose, and its scheme, and then turn to the issues.

The Interpretation of Section 137.1 of the *Courts of Justice Act*

[14] Section 137.1 of the *Courts of Justice Act* is poorly drafted and confusing. It has led to much litigation, which is ironic since its express purposes are to

discourage the use of litigation as a means of unduly limiting expression on matters of public interest and to promote public participation in debates on such matters: ss. 137.1(1) (b) and (c). The Byzantine operation of the section has been criticized.⁴ In short, s. 137.1 is in desperate need of a makeover, if not repeal and replacement.

Text, Context, and Purpose

[15] The governing principle of statutory interpretation is this: “Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose”.⁵ The court must consider the text of the legislation, the context within which it operates along with the specific case context, and the particular purpose for the provisions at issue.

[16] The text of s. 137.1 on “public interest” does not define the term but leaves it to the courts to develop in light of the section’s purpose.

[17] The purpose of s. 137.1 can be gleaned from its express terms, especially s. 137.1(1). Our court has adopted this general description of the purpose of the

⁴ *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 165 O.R. (3d) 753, at para. 35, citing *Tamming v. Paterson*, [2021] O.J. No. 7126, 2021 ONSC 8306 (S.C.J.), *per* Myers J. at paras. 7–9, and Professor Hilary Young, “Canadian Anti-SLAPP Laws in Action” (2022), 100:2 Can. B. Rev. 186.

⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 118. The *Vavilov* court said, at para. 117, that “text, context and purpose” reflects the “modern approach” to interpretation, which requires “that the words of a statute must be read ‘in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament’”; *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, at para. 6, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. In my view, the “text, context and purpose” approach supplants the Driedger litany.

legislation: “the anti- SLAPP legislation was designed to stop a plaintiff from silencing a defendant by pursuing meritless litigation that served to intimidate and undermine public expression”.⁶

[18] The general context is plain enough: s. 137.1 presupposes active litigation of possibly questionable value. The specific context in this appeal is a commercial dispute in which one party might have defamed the other, which requires me to comment briefly on the values underlying defamation as a cause of action, on the one hand, and the value of free expression, on the other hand.

[19] Peter Downard summarizes the purpose of the law of defamation in two dense and well footnoted paragraphs in *Halsbury’s Laws of Canada* – “Defamation” (2023 Reissue):

Protection of reputation. The Canadian law of defamation compensates and vindicates a person whose reputation in the community has been harmed by a false statement. Canadian law recognizes that reputation is an integral and fundamentally important aspect of every individual. Reputation fosters self-image and self-worth. Reputation is closely linked to the ability of the individual to participate in Canadian society. The Supreme Court of Canada has thus recognized that the protection of reputation has “*quasi*-constitutional status” in Canadian law.

Emotional security and dignity. The law of defamation also exists to provide a remedy for the harm that the

⁶ *Park Lawn*, per Pepall J.A., at para. 33. And see *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381, per Miller J.A., at para. 17, leave to appeal refused, [2023] S.C.C.A. Nos. 40876, 40867, and 40875.

defendant's wrong has caused to the plaintiff's feelings. Respect for the inherent dignity of a person is essential in a free and democratic society. (Footnotes omitted.)⁷

[20] People are entitled to defend their reputations, even in the rough and tumble of social media.

[21] Free speech is constitutionally protected from state intrusion by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The purpose of protecting freedom of expression is to “ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.”⁸

[22] Free expression is not unlimited; one constraint is defamation law. “The publication of defamatory comments constitutes an invasion of the individual’s personal privacy and is an affront to that person’s dignity.”⁹ Protecting reputation – as an aspect of dignity – must be “carefully balanced against the equally important right of freedom of expression.”¹⁰ The Supreme Court found in *WIC Radio* (2008) that “the worth and dignity of each individual, including reputation, is an important value underlying the *Charter* and is to be weighed in the balance with freedom of expression.”¹¹ The court affirmed the tension between reputation and

⁷ *Halsbury’s Laws of Canada*, “Defamation”, (Toronto: LexisNexis Canada, 2023 Reissue), at HDE-1; See also Allen M. Linden et al, *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis Canada Inc., 2022), c. 14, on defamation.

⁸ *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 968.

⁹ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 121.

¹⁰ *Church of Scientology*, at para. 121.

¹¹ *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (CanLII), [2008] 2 SCR 420 at para. 2.

free speech: “the *Charter* is about ‘expressive activity’ but it also protects the dignity and worth of individuals, whose reputation may be their most valued asset.”¹²

[23] This tension exists in the context of anti-SLAPP motions and is recognized especially in s. 137.1(4)(b).

The Scheme of s. 137.1

[24] The language of s. 137.1 is obtuse and difficult to follow. To help work through how the provisions of s. 137.1 apply to this case, I substitute the names of the parties and add pertinent details. Subsection (3) requires the motion judge to dismiss the defamation action under certain conditions; It provides:

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

[25] At the threshold, the Homeowners must establish that: (i) they expressed themselves; (ii) their expression relates to a matter of public interest; and (iii) the Benchwood defamation action which the Homeowners seek to have dismissed arises from their expression.¹³

¹² *WIC Radio*, at para. 30.

¹³ *Boyer v. Callidus Capital Corp.*, 2023 ONCA 233, 480 D.L.R. (4th) 293, at para. 28.

[26] One sticking point in this action, to which I return below, is whether the Homeowners' "expression," as defined in s. 137.1, engages a matter of "public interest" as that undefined term is understood in s. 137.1.

[27] If the threshold is passed, then subsection (4) springs into convoluted action, but the onus shifts to the party allegedly defamed, Benchwood. Subsection (4) provides:

(4) A judge shall not dismiss [Benchwood's defamation] proceeding under subsection (3) if [Benchwood] satisfies the judge that,

(a) there are grounds to believe that,

(i) the [defamation] proceeding has substantial merit, and

(ii) the moving party [the Homeowners] ha[ve] no valid defence in the [defamation] proceeding; and

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

[28] As I will explain, in my view s.137.1 (4)(a)(ii) – "no valid defence" – has been given too much weight in the operation of the section. It is better seen as no more than an obvious off-ramp for those cases in which there are clearly grounds to believe that a valid defence to the entire defamation action exists; in such cases, the defamed party has failed to meet the onus under s. 137.1 and the underlying

defamation proceeding should be dismissed.¹⁴ Such open and shut cases will be rare.

[29] But what happens when the judge is only satisfied that the defamer might have a valid defence? Some cases have placed too high a burden on the defamed plaintiff. In my view, it is an error to conclude that because the responding party – the defamed party in the underlying proceeding – is not able to utterly invalidate the defence, the motion to dismiss must be granted.¹⁵

[30] To the contrary, when the judge hearing the anti-SLAPP motion is satisfied that the defence has some merit but is not satisfied that it will prevail, then the analysis must proceed to the weighing exercise in s. 137.1(4)(b). I note that (a) is followed by “;and (b)” , which signals that the legislature intended the analysis to go from (a) to (b).

[31] Under s 137.1(4)(b), the motion judge ultimately decides whether to permit the defamation action to continue. To permit the action to proceed, the judge must be satisfied that the harm suffered by the responding party who claims to have been defamed as a result of the moving party’s purportedly defamatory expression is sufficiently serious that the public interest in permitting the defamation

¹⁴ *Pointes*, at para. 58.

¹⁵ See, for example, *Mondal v. Evans-Bitten*, 2023 ONCA 523, 485 D.L.R. (4th) 90 (“*Mondal (ONCA)*”), at para. 56; *Marcellin v. London (City) Police Services Board*, 2024 ONCA 468, at paras. 71, 77.

proceeding to continue outweighs the public interest in protecting the purportedly defamatory expression.

[32] With this statutory scheme in mind, I turn to the particular issues raised in this appeal.

(1) The motion judge erred in finding that the Homeowners’ statements relate to a matter of public interest under s. 137.1(3)

[33] The motion judge found that the “expressions in question relate to a matter of public interest”. She cited a colleague’s statement that “[o]nline reviews serve an important function by offering the public information about consumer experiences dealing with professionals or businesses” and are matters of public interest.¹⁶ This seems to be a consensus view of Superior Court judges,¹⁷ but it is not the view of this court¹⁸ whose legal rulings prevail. The motion judge made an error of law in failing to follow this court’s rulings on the interpretation of the “public interest” in s. 137.1.

[34] Online reviews of products and services are part of the pervasive social media milieu in which contemporary society operates. However, “[s]ocial media

¹⁶ *Luc Crawford Design Inc. v. Mallowney*, 2021 ONSC 7849, per Muszynski J., at para. 26.

¹⁷ See *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587, at para. 31; *910938 Ontario Inc v. Moore*, 2020 ONSC 4553, at paras. 19–22; *Thorman et al. v. McGraw*, 2021 ONSC 7671, at paras. 41–42, rev’d 2022 ONCA 851; *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555, at para. 89; and *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517, at para. 25.

¹⁸ *Sokoloff v. Tru-Path Occupational Therapy Services Ltd.*, 2020 ONCA 730, 153 O.R. (3d) 20, at para. 33; *Hamilton v. Vaughan*, 2025 ONCA 98, at para. 9; *Dent-X Canada v. Houde*, 2022 ONCA 414, at para. 11; and *Echelon Environmental Inc. v. Glassdoor Inc.*, 2022 ONCA 391, at para. 8, leave to appeal requested but application for leave discontinued, [2022] S.C.C.A. No. 274.

is not a defamation-free zone” nor do participants “consent to the risk of being defamed”.¹⁹ With these words, Huscroft J.A. qualified the lower court judge’s observation that social media is often a nasty place; Morgan J. described one manifestation, Twitter, as “a rhetorically harsh speech environment whose very pervasive harshness reduces the seriousness with which it is taken”.²⁰

[35] Section 137.1 encourages expression on matters of public interest, such as participation in debates on matters of public interest, which are protected by s. 137.1(3). But not every public expression “relates to a matter of public interest,” as Huscroft J.A. pointed out in *Sokoloff*, at para. 19:

[I]t is not enough if expression simply makes reference to something that is of public interest, or to something that arouses the public’s curiosity. Moreover, the court’s instruction of interpretive generosity cannot be read in isolation. The scope for legitimate interpretation of vaguely worded concepts such as “public interest” must be informed by the purpose of the legislation: to safeguard the fundamental value that is public participation in democracy. The burden is on the moving party to establish that its expression relates to a matter of public interest, albeit that this burden is not an onerous one.

[36] The Supreme Court said in *Grant v. Torstar Corp.* that:

To be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which

¹⁹ *Mondal (ONCA)*, at paras. 40, 42–43.

²⁰ *Mondal v. Evans-Bitten*, 2022 ONSC 809, rev’d 2023 ONCA 523, 485 D.L.R. (4th) 90, at para. 40.

considerable public notoriety or controversy has attached”: Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment “is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews”: *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.²¹

[37] The court applied *Grant’s* approach to s. 137.1 in *1704604 Ontario Ltd. v. Pointes Protection Association*.²²

[38] In *Pointes*, Côté J. said, at para. 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.

[39] *Pointes* itself concerned an individual’s testimony in administrative proceedings before a land use tribunal, which was found to be protected as “an expression on a matter of public interest”.²³

²¹ 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 105.

²² *Pointes*, at para. 27.

²³ *Pointes*, at para. 101.

[40] This court has considered the “public interest” as related to online reviews of goods or services on several occasions. Online reviews are not automatically matters of public interest. As Huscroft J.A. noted in *Sokoloff*, at para. 32:

The task of the motion judge under s. 137.1(3) is to determine “what the expression is really about”, bearing in mind the purpose of s. 137.1: protecting expression relating to matters of public interest and safeguarding the fundamental value of public participation in democracy: *Pointes* (SCC), at para. 30. Again, only expression *relating* to a matter of public interest attracts the statute’s protection; “expression that simply makes reference to something of public interest” does not: *Pointes* (SCC), at para. 29.

[41] This court noted in *Grist*, at para. 19, that “the resolution of purely private disputes between more or less equals – disputes that have no immediate bearing on the rights or obligations of others – can seldom be a matter of public interest.”²⁴ This court’s decisions that have found an expression to relate to a purely private dispute include the following: *Echelon* (an employee posted an online review of internal workplace conditions, pay, and benefits); *Sokoloff* (the president of a company stood outside a law firm with signs claiming that the firm had failed to pay his company for fees incurred by the firm’s clients); *Hamilton* (a client posted an “unflattering opinion” about her lawyer online); and *Dent-X Canada* (a client posted a review of Dent-X on Facebook that included allegations of fraud).²⁵ The result in

²⁴ *Grist v. TruGrp Inc.*, 2021 ONCA 309, 156 O.R. (3d) 171, at para. 19, citing *Sokoloff* at para. 19.

²⁵ *Echelon*, at para. 8; *Sokoloff*, at para. 33; *Hamilton*, at para. 9; *Dent-X Canada*, at paras. 11–14.

these cases is that the anti-SLAPP motion was not granted and the defamation action was left to continue.

[42] There are some cases involving online reviews or activities that rise above the purely private: *Canadian Union of Postal Workers* (an expression that dealt with “the use of union funds to take positions on the conflict in the Middle East or to help an organization that allegedly supports attacks on Israel”); *Thatcher-Craig* (expressions related to municipal land use matters); *Levant* (expressions related to climate change); *Hamer* (expressions about animal welfare); and *VAC Developments Limited* (expressions about anti-Black racism and workplace harassment).²⁶ Common to each of these cases is an expression that engages some broader societal concern.

[43] Assessing this case against the spectrum of cases reflected in the preceding two paragraphs leads me to conclude that the online reviews posted by the Homeowners reflect no more than an especially bitter private dispute. Consequently, although some members of the public might find it interesting, it is not a matter of public interest under s 137.1. The expression at issue does not engage some broader societal concern, such as those described above, nor, in

²⁶ *Canadian Union of Postal Workers v. B’nai Brith Canada*, 2021 ONCA 529, 460 D.L.R. (4th) 245, at para. 12; *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96, 480 D.L.R. (4th) 639, at paras. 44-45; *Levant v. DeMelle*, 2022 ONCA 79, 79 C.P.C. (8th) 437, at para. 60, leave to appeal refused, [2022] S.C.C.A. No. 88; *Hamer v. Jane Doe*, 2024 ONCA 721, at para. 40; and *Williams v. VAC Developments Limited*, 2024 ONCA 713, at para. 14.

my view, does it fall within the types of expression that were intended to be captured by the provision.

(2) The motion judge erred in her approach to the ground of “no valid defence” under s. 137.1(4)(a)(ii)

[44] Section 137.1(4)(a)(ii) has proved to be the most problematic of the section’s provisions. I begin with the text, which provides:

(4) A judge shall not dismiss [Benchwood’s defamation] proceeding under subsection (3) if the responding party [Benchwood] satisfies the judge that,

(a) there are grounds to believe that,

...

(ii) the moving party [the Homeowners] ha[ve] no valid defence in the [defamation] proceeding; **and** [Emphasis added.]

[45] Does s.137.1(4)(a)(ii) provide an off-ramp allowing a judge to grant the anti-SLAPP motion without proceeding to the weighing exercise required by s. 137.1(4)(b)?

[46] Consider two scenarios: 1) The responding party to the anti-SLAPP motion, here Benchwood, shows that the moving party, the Homeowners, have no valid defence to the defamation action; or 2) Benchwood is able to establish only that the Homeowners might not have a valid defence to the defamation action.

[47] Textually, the emphasized word “and” at the end of s. 137.1 (4)(a) requires the judge to advert to s. 137.1(4)(b) regardless of the scenario. The second

scenario, in which the defamer might have a defence, has proven troublesome. Some judges have treated the second scenario as though a valid defence exists: If the defamed party cannot show that it has an open and shut case against the defamer – that is, cannot show that “the moving party has no valid defence” – then the defamation action must be dismissed as an anti-SLAPP action and the purported defamer escapes.²⁷ This was the mistaken approach the motion judge took in this case.

[48] It was mistaken for four reasons: First, it effectively reads s. 137.1 (4)(b) out of the section by entirely ignoring the pregnant “and” at the end of s. 137.1 (4)(a).

[49] Second, in so doing, the mistaken approach ignores the decisions that hold the weighing exercise in s. 137.1(4)(b) is to be the “fundamental crux” of the court’s analysis.²⁸

[50] Third, the dynamic of the weighing exercise in s. 137.1(4)(b) more carefully assesses the competing interests of free speech on the one hand, and defamation law’s reputational protection on the other hand, in the fact specific context of a case.

²⁷ See, for example, *Mondal (ONCA)*, at para. 56; *Marcellin*, at paras. 71, 77.

²⁸ *Pointes*, at para. 18; *Parklawn*, at para. 28; *Hamer*, at para. 93; *Burjoski v. Waterloo Region District School Board*, 2024 ONCA 811, at para 47; *Callidus*, at para. 50; *Thorman v. McGraw*, 2022 ONCA 851, 476 D.L.R. (4th) 577 (*Thorman*, (ONCA)), at para. 9; *40 Days for Life v. Dietrich*, 2024 ONCA 599, at para. 62, leave to appeal refused, [2024] S.C.C.A. No. 396; and *Marcellin*, at para. 11.

[51] Fourth, I am of the view that the Supreme Court's decision in *Bent* calls for a more nuanced approach to s. 137.1(4)(a)(ii). In the case of a defamation action, the responding party need only show grounds to believe that the defences do not tend to weigh more in the moving party's favour.²⁹

[52] My interpretation of s.137.1(4)(a)(ii) in the context of the whole section and particularly the weighing exercise required by s. 137.1(4)(b) might seem to be inconsistent with some of Côté J.'s words in *Pointes*, at para. 58:

The word *no* [in (ii)] 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.

[53] I would distinguish *Pointes*. In my view, these words cannot be applied easily in the context of a defamation claim, as applicable as they might have been to *Pointes* itself, which was a contract dispute. I say this for several reasons. First, the intricate nature of a defamation action and the plethora of possible defences makes such a categorical approach to s. 137.1(4)(a)(ii) both problematic and unjust. It is difficult to analyze a statement or set of statements in such a categorical fashion. In this case, for example, there were several allegedly defamatory statements. The defence of justification or truth might be available for some, none, or perhaps all, of the statements. The categorical approach does not comprehend

²⁹ *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 103.

such a mixed set of possible outcomes. Quite the opposite, since the literal application of Côté J.'s words is that any valid defence to any of the allegedly defamatory statements would lead to a dismissal of the entire defamation action.

[54] Second, a defamatory statement might be true at some level, but the problem is less the truth of the statement than what has sometimes been referred to as the “sting” of the words, evident in the presence of malice.

[55] Third, the categorical approach raises the stakes in an anti-SLAPP motion and encourages the development of an enormous record exploring every possible defence at length. Such a comprehensive approach is completely inconsistent with the intended summary nature of anti-SLAPP motions. Indeed, Côté J.'s statement quoted immediately above, was followed by these lines:

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.

[56] I see these instructions as inconsistent with the categorical approach posited in the first statement with respect to defamation actions.

[57] Further, this court has observed that anti-SLAPP motions have “been misused as a costly and time-consuming surrogate for a summary judgment

motion” in defamation actions.³⁰ They are not to be “a new form of summary trial on the merits of a defamation action”.³¹ Brown J.A. recently commented that anti-SLAPP motions “are not designed or appropriate” for cases in which “any determination on the merits will patently require a deep dive into the evidence and the making of extensive findings of credibility.”³²

[58] I am therefore confident that Côté J. understood the need for a more nuanced analysis and did not intend for such a categorical approach to apply in defamation actions.

[59] I conclude that the preferable approach to take to anti-SLAPP motions in defamation actions, where it is not immediately clear that there is no valid defence, is to move smartly to the weighing exercise in s. 137.1(4)(b). After all, it is intended to be the “fundamental crux” of the court’s analysis.

(3) The motion judge erred in her approach to the weighing exercise relating to harm and the public interest under s. 137.1(4)(b)

[60] I repeat the text for convenience:

(4) A judge shall not dismiss [Benchwood’s defamation] proceeding under subsection (3) if the responding party [Benchwood] satisfies the judge that,

...

³⁰ *Catalyst*, at para. 38; *Thorman (ONCA)*, at para. 4.

³¹ *Grist*, at para. 17; *Pointes*, at para. 38; and *Hamer*, at para. 37.

³² *Li v. Barber*, 2025 ONCA 169, at para. 62.

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

[61] I address first the governing principles and then their application in this case.

(a) The Governing Principles Underpinning s. 137.1(4)(b)

[62] The public interest weighing stage is the crux of the anti-SLAPP analysis.³³

[63] Unlike the initial public interest requirement under s 137.1 (3), the focus at this stage is “what is really going on” in the case; it is necessary to assess the quality of the expression, including the motivation behind it, the medium through which it was expressed, and its subject matter.³⁴

[64] The closer an expression is to any of the fundamental values of s. 2(b) of the *Charter* – freedom of thought, belief, opinion and expression – the greater the public interest will be in protecting it.³⁵ The cases have identified several factors:

³³ *Parklawn*, at para. 28; *Hamer*, at para. 93; *Burjoski*, at para. 47; *Callidus*, at para. 50; *Thorman (ONCA)*, at para. 9; *40 Days*, at para. 62; and *Marcellin*, at para. 11.

³⁴ *Marcellin*, at para. 102; *Hamer*, at paras. 93, 96; *Burjoski*, at para. 47; *Thorman (ONCA)*, at para. 15; and *40 Days*, at para. 71.

³⁵ *Hamer*, at paras. 96–97; *Burjoski*, at para. 47.

- Personal attacks and defamatory statements are only remotely related to these core values.³⁶ Consequently, there is less public interest in protecting these types of expressions.³⁷
- Statements that are exaggerated or inaccurate, or contain deliberate misrepresentations also reduce the public interest protection afforded to those expressions.³⁸
- Expressions made for the purpose of interfering with another's ability to express their views may also attract less public interest protection.³⁹
- The motivation behind the subject expressions can lower the public interest in protecting the expression.⁴⁰
- The presence of “classic SLAPP” indicia, which include: whether the plaintiff has a history of using litigation or the threat of litigation to silence critics; a financial or power imbalance that strongly favours the plaintiff; a punitive or retributory purpose animating the action; and minimal or nominal damages suffered by the plaintiff.⁴¹

³⁶ *Marcellin*, at para. 102.

³⁷ *Hamer*, at para. 97; *Thorman*, at para. 15; and *Burjoski*, at para. 47(i).

³⁸ See *Burjoski*, at para. 93.

³⁹ See *40 Days*, at paras. 87–90.

⁴⁰ *Buttar*, at paras. 90–91.

⁴¹ *Callidus*, at para. 53; *Burjoski*, at para. 47(i).

(b) Application of the Governing Principles to this Appeal

[65] The motion judge undertook the analysis required by s. 137.1(4)(b) in case the analysis leading her to dismiss the action under s. 137.1(4)(a)(ii) – no valid defence – was wrong. She went on to find that Benchwood had failed to establish that any harm suffered as a result of the Homeowners’ defamatory statements was serious, because there were “other factors that may have had an effect on [Benchwood’s] reputation,” citing *Pointes*, at para. 72: “[E]vidence of a causal link between the expression and harm will be especially important where there may be sources other than the defendant’s expression that may have caused the plaintiff harm.”

[66] As the motion judge noted, one key problem for Benchwood is that several of the negative events cited as harming Benchwood’s business seem to have preceded the Homeowners’ postings, including the non-renewal of Benchwood’s membership in the Niagara Home Builders’ Association in October 2020, which came about as the result of customer complaints. Further, the harms asserted, such as contract cancellations, were not backed up by evidence that the Homeowners’ postings were the cause. The Benchwood firm “appears to be doing well”.

[67] The Homeowners’ statements concerned a home renovation gone wrong. The postings did not relate to a matter of public interest or to safeguarding the

fundamental value of public participation in democracy, to which personal attacks and defamatory statements are only remotely related. This was a private dispute. I repeat what this court said in *Grist*: “the resolution of purely private disputes between more or less equals – disputes that have no immediate bearing on the rights or obligations of others – can seldom be a matter of public interest.” These words also capture this dispute.

[68] There is little here partaking of classic SLAPP indicia – no power imbalance, no history of Benchwood using litigation to silence critics, although there is some doubt about whether the damages claimed are more than merely nominal.

[69] Then there is the presence of malice. The motion judge addressed this question squarely:

The plaintiffs have alleged malice on the part of the defendants in making the impugned statements. A general plea of malice without further particulars is not sufficient. In my view, I am satisfied that the dominant motive for the defendants to post the comments they did was as a warning to other consumers after they saw photos of their home posted on the plaintiffs’ [Benchwood’s] social media.

[70] With respect, this analysis falls into the problems with s. 137.1(4)(a)(ii) in the context of a defamation action that I raised earlier at paras. 53 to 56. The interest in protecting the expression is reduced by personal attacks and defamatory statements. Statements that are exaggerated, inaccurate or contain deliberate misrepresentations also reduce the public interest in protecting them. Perhaps the

Homeowners' dominant motive was to warn other consumers. But that was not their only motive. Consider these statements: Ms. Prescott posted that Mr. Slaven and his subcontractors were "in on this dishonest operation together" and "operate in a dishonest manner;" Mr. Green referred to Mr. Slaven as "a miserable con artist" and a "dirtbag", and accused him of threatening women and making false assault charges against women. The statements themselves appear to be particulars of malice. The accusations go well beyond a complaint about Benchwood walking off the job and doing some of its work poorly.

[71] This is a case in which the straight logic of a private dispute should apply. Section 137.1 does not apply. There is no reason to stop the Benchwood defamation action from proceeding. The tension between reputation and free speech that is endemic to anti-SLAPP motions resolves by giving priority to reputation in this case.

(4) Did the motion judge err in her costs award?

[72] This issue is no longer live.

D. DISPOSITION

[73] For the reasons set out above, I would allow the appeal, with costs.

[74] The successful moving party on an anti-SLAPP motion to dismiss is entitled to costs on the motion and in the proceeding on a full indemnity basis under s. 137.1(7). The motion judge awarded the Homeowners \$75,000 inclusive of

costs and disbursements. Because the appeal is being allowed, s.137.1(8) comes into play. It provides:

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

[75] I would award Benchwood costs on the appeal in the amount of \$14,000, all-inclusive, as agreed. With respect to costs for the motion, I would invite the parties to make written submissions of no more than 5 pages in length. Benchwood's submissions shall be submitted within one week from the date of these reasons and the Homeowners shall submit by March 13. Benchwood may submit a reply of no more than 2 pages in length by March 20.

Released: March 6, 2025 PDL

P. Lauwers J.A.

I agree. J. A. ...

I agree. Groza J.A.

COURT OF APPEAL FOR ONTARIO

CITATION: Benchwood Builders, Inc. v. Prescott, 2025 ONCA 238

DATE: 20250326

DOCKET: COA-24-CV-0130

Lauwers, Brown and Coroza JJ.A.

BETWEEN

Benchwood Builders, Inc. and Michael Slaven

Plaintiffs (Appellants)

and

Cynthia Prescott and David Green

Defendants (Respondents)

Adrienne Zaya and Sara J. Erskine, for the appellants

Sheldon Inkol, for the respondents

Heard: October 29, 2024

On appeal from the order of Justice Linda M. Walters of the Superior Court of Justice, dated January 3, 2024¹ and from the costs order dated April 12, 2024.

COSTS ENDORSEMENT

[1] By reasons dated March 6, 2025, we allowed the appellants' appeal and set aside the motion judge's order that had dismissed their action pursuant to s. 137.1 of the *Courts of Justice Act*. We awarded the appellants their costs of the appeal

¹ The motion judge dismissed the action by way of an endorsement on January 3, 2024, with reasons for decision released on January 16, 2024. The reasons are unreported.

and asked the parties for submissions on how we should treat the costs of the motion below, which the motion judge had awarded in favour of the respondents.

[2] The appellants seek full indemnity costs for the motion below in the amount of \$37,812.79. The respondents contend that: (i) we should apply the presumption in s. 137.1(8) of the *Courts of Justice Act* and deny the appellants any costs of the motion below; or (ii) alternatively, the costs of the motion below should be made in the cause of the proceeding; or (iii) in the further alternative, any costs of the motion awarded to the appellants should not exceed \$17,000.

[3] In para. 8 of their cost submissions, the appellants explain why the presumption against costs of the motion set out in s. 137.1(8) should not apply and that it would be “appropriate in the circumstances” to award them costs of the motion. They wrote:

8. In its Reasons for Decision dated March 6, 2025, this Court found that:

(a) the online reviews by the Respondents “reflect no more than an especially bitter private dispute” and are not matters of public interest;

(b) this case does not have the characteristics of a SLAPP;

(c) there are sufficient indicia of an ulterior motive and several of the impugned statements, including that Mr. Slaven is a “miserable con artist” and “scumbag”, themselves appear to be particulars of malice; and

(d) this is a case in which the straight logic of a private dispute should apply – section 137.1 does not apply.

[4] We accept that submission, which accords with the jurisprudence of this court.

[5] Accordingly, we award the appellants their costs of the motion below fixed in the amount of \$30,000, inclusive of disbursements and applicable taxes, payable forthwith.

PLauwers J.A.

A handwritten signature in blue ink, appearing to read 'S. Coroza J.A.', with a stylized flourish.

S. COROZA J.A.



Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

Electronically issued
Délivré par voie électronique : 15-Mar-2021
St. Catharines

BENCHWOOD BUILDERS, INC. and MICHAEL SLAVEN

Plaintiffs

and

CYNTHIA PRESCOTT and DAVID GREEN

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

CLAIM

1. The Plaintiffs claim:

- a) general damages in the amount of \$500,000 from each of the Defendants for defamation;
- b) special damages in the amount of \$1,080,486 from the Defendants, jointly and severally, for defamation;
- c) in addition, or in the alternative to b), damages in the amount of \$1,080,486 from the Defendants, jointly and severally, for unlawful interference with the Plaintiffs' economic relations;
- d) permanent and mandatory injunction restraining the Defendants from posting on the Internet or publishing, in any manner whatsoever, directly or indirectly, any statements or comments about the Plaintiffs, and shall not publish or cause to be published or otherwise disseminate or distribute in any manner whatsoever, whether by way of the Internet or other medium, any statements or other communications which refer to the Plaintiffs by name, depiction, or description;
- e) aggravated, exemplary, and punitive damages in the amount of \$100,000 from the Defendant, David Green;
- f) pre-judgment interest in accordance with section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

The Plaintiffs' Loss and Damage

33. The Plaintiffs rely on the whole of the publications published by the Defendants, attached hereto at Schedules “A”, “B”, “C”, and “D” and all posts published thereunder.

34. The false and defamatory statements published by the Defendants, in their natural and ordinary meaning, and/or by inference, including by innuendo, meant and were understood to mean the following about the Plaintiffs:

- a) Benchwood engages in unlawful conduct, including trespass;
- b) Benchwood is engaged in multiple lawsuits;
- c) Benchwood carries on its business in a deceitful and/or dishonest manner;
- d) Benchwood misrepresents its business to customers and the public;
- e) Benchwood cannot be trusted by clients;
- f) Michael engages in unlawful conduct, including trespass;
- g) Michael is an unsavory individual; and
- h) Michael is not a trustworthy individual.

35. As a result of the false and defamatory statements published by the Defendants, the Plaintiffs have suffered loss and damage for which the Defendants are liable.

36. Further, as a result of the false and defamatory statements published by the Defendants, the Plaintiffs have suffered special damages. The Plaintiffs suffered, *inter alia*, losses of an estimated \$1,080,486 on lost projects, particulars of which will be provided prior to trial.

37. In an effort to mitigate damages, and due to the Defendants' unresponsiveness to Plaintiffs' counsel's requests to remove the impugned publications, the Plaintiffs hid or deleted the impugned publications to the extent possible.

38. The Plaintiffs rely on the *Libel and Slander Act*, R.S.O. 1990, c. L. 12 and the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, where applicable.

The Plaintiffs propose that this action be tried at St. Catharines, Ontario.

March 12, 2021

WEINTRAUB ERSKINE HUANG LLP

365 Bay Street

Suite 501

Toronto ON M5H 2V1

Sara J. Erskine, LSO# 46856G

sara.erskine@wehLitigation.com

Tel: (416) 597-5408

Adrienne Zaya, LSO# 79215K

adrienne.zaya@wehlitigation.com

Tel: (416) 360-8450

Lawyers for the Plaintiffs

RCP-E 14A (June 9, 2014)

 Photos



Cynthia Prescott

Nov 24, 2020 · 



Do NOT HIRE Benchwood Builders of Niagara region Ontario. We hired owners, Michael & Gail Slaven, to undertake a major home renovation of our home. Despite their having posted photos of our home reno on their Facebook pages & website, notice that there are No Photos of the completed project ... ask yourself Why? Our horrific experience with these people would make for a great CBC Marketplace profile or a Holmes on Homes episode - of builders who misrepresent themselves to the consumer. Beware - Our project is being used by them to drum up more business. Please know that, under No Circumstances would we recommend Benchwood Builders!

- Benchwood Builders is NOT Better Business Bureau certified. Stick with BBB reputable businesses.



Benchwood Builders is in Niagara-On-The-Lake, Ontario.

May 4, 2020 · 



 Brent Jones

Most Relevant ▾

**Cynthia Prescott**

What a shame MSNR Plumbing partners with Benchwood Builders to operate in a dishonest manner. We truly thought Jake was an honest business person who had integrity, but our experience with him has taught us otherwise. He installed a new tankless water heater & sump pump when working on our reno with Benchwood Builders - neither the water heater nor the sump pump work & he refused to fix them. We paid Benchwood in full for Jake's services & now we've had to hire others to fix his mess. On top of this he installed the rough-ins for all the new plumbing fixtures incorrectly requiring us to spend a great deal more money to fix these too. It's unfortunate he chooses to conduct his business in this manner. I recommend consumers only hire those who are Better Business Bureau certified ... there's a reason businesses like this do not hold this rating. Consider carefully where you spend your money - hire dishonest operators & you'll spend substantially more than you should. As a victim, I can attest to this horrific experience.

2h Like Reply



Comment as Brent Jones



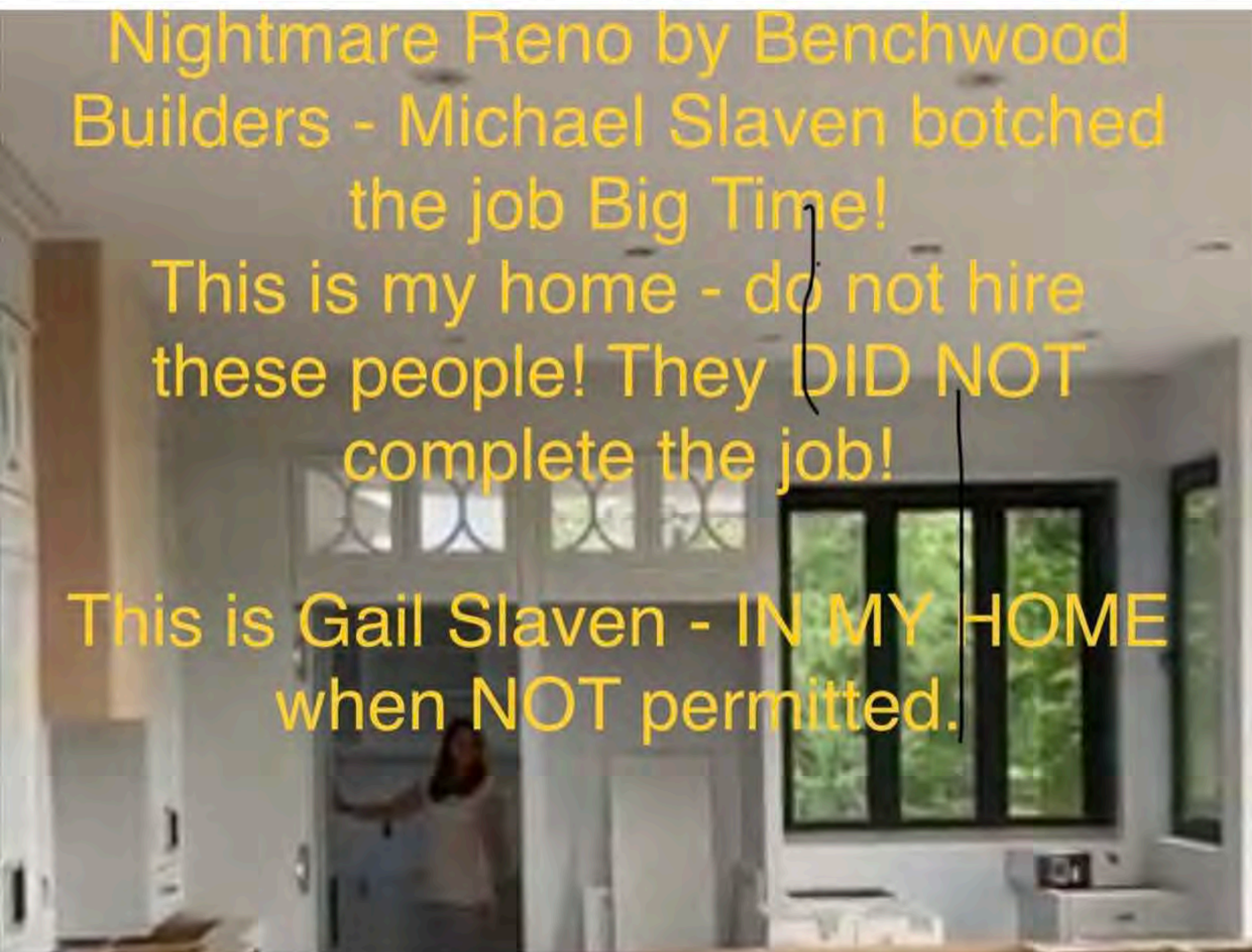
3:15



CPRESCOTT123

Posts

Follow



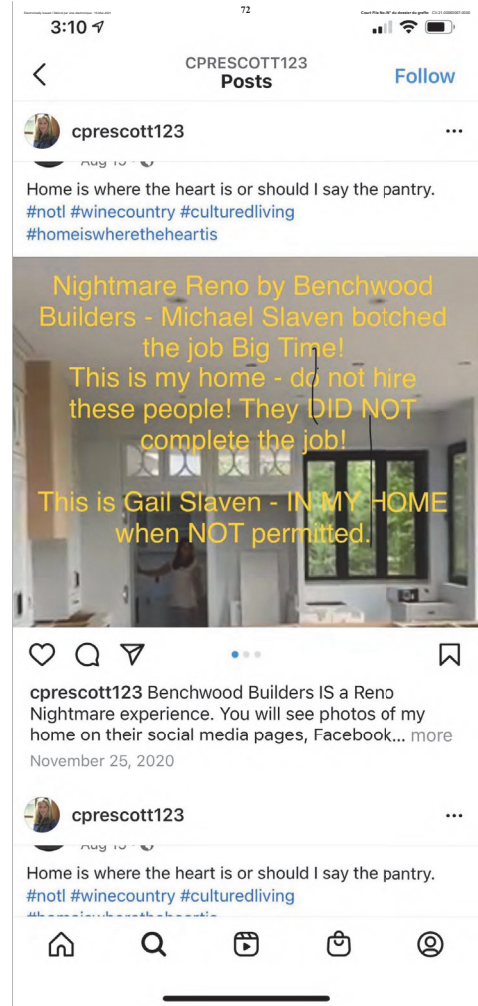
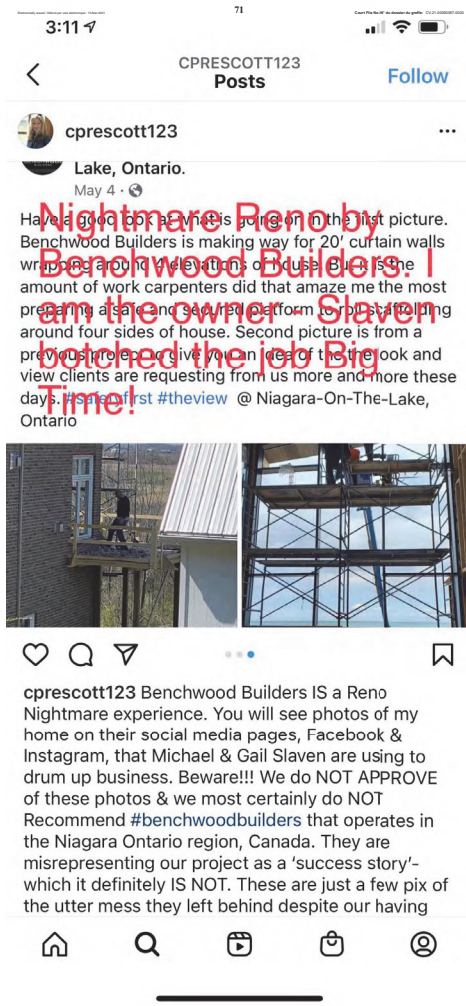
cprescott123 Benchwood Builders IS a Reno Nightmare experience. You will see photos of my home on their social media pages, Facebook & Instagram, that Michael & Gail Slaven are using to drum up business. Beware!!! We do NOT APPROVE of these photos & we most certainly do NOT Recommend [#benchwoodbuilders](#) that operates in the Niagara Ontario region, Canada. They are misrepresenting our project as a 'success story'- which it definitely IS NOT. These are just a few pix of the utter mess they left behind despite our having paid them an extraordinary amount & we're having to clean up after them at great cost. [#renonightmares](#) [#homerenovations](#) [#renomark](#) [#niagarahomebuildersassociation](#)

November 25, 2020



cprescott123







I will never understand when you have views like this why you would limit your view with a small patio door. Ok maybe not as big as 10'X8' double panel lift and slide like the one that is going in this opening. #view



 jordanstationdesignco 🍊🍊🍊
41w 1 like Reply

Hide replies

 cprescott123 @jordanstationdesignco this project has been a nightmare!!! Don't believe what you read - we're having to clean up after the horrific mess he made of our home reno.
13w Reply

 nicoleprymadesign Nice spot! ...
41w 1 like Reply

Hide replies

 cprescott123 @nicoleprymadesign yes what a shame that thus horrific nightmare reno by Slaven & Final Touch Windows that we're having to fix the incredible mess they made of the job we paid them a substantial amount of money to do. Michael & Gail Slaven should be ashamed of themselves!
13w Reply

 @cprescott123 not sure why I am tagged in this.
13w Reply

 missioncustomer I could get used to that view 😊
41w 1 like Reply

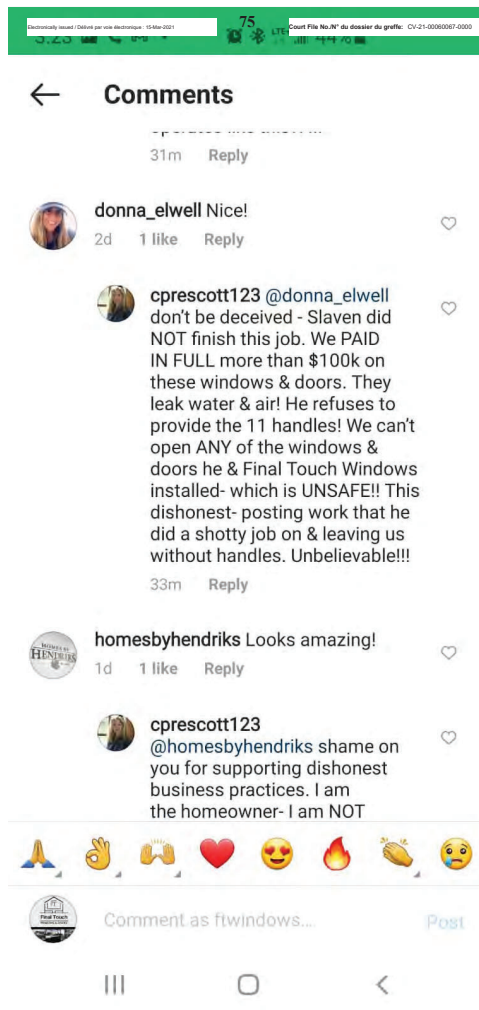
missioncustomer So much better 🍷

 Add a comment...



87 likes 5/11/20
benchwoodbuilders I will never understand when you have views like this why you would limit your view with a small patio door. Ok maybe not as big as 10'X8' double panel lift and slide like the one that is going in this opening. #view





⬅

Comment

Replies to Carol's comment on
Benchwood Builders's post

View Post



Carol Macdonald
Very cool!

39w Like Reply



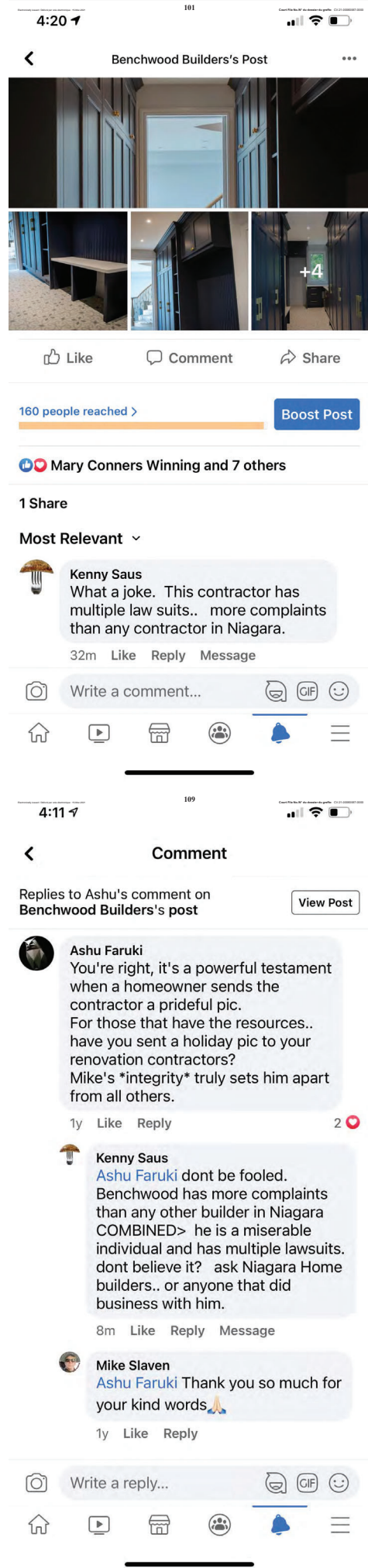
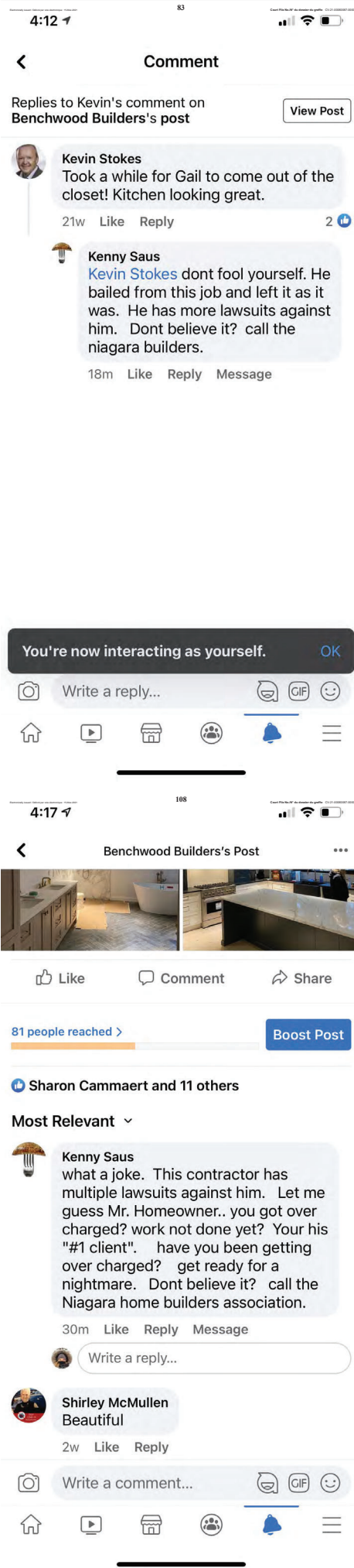
Kenny Saus
[Carol Macdonald](#) dont be fooled.
He is a miserable con artist. Dont
believe it? ask Niagara builders
association.

14m Like Reply Message



Write a reply...





<

Benchwood Builders's Post

...



75 Views

Like

Comment

Share

103 people reached >

Boost Post

Jodi Baker-Martin and 6 others

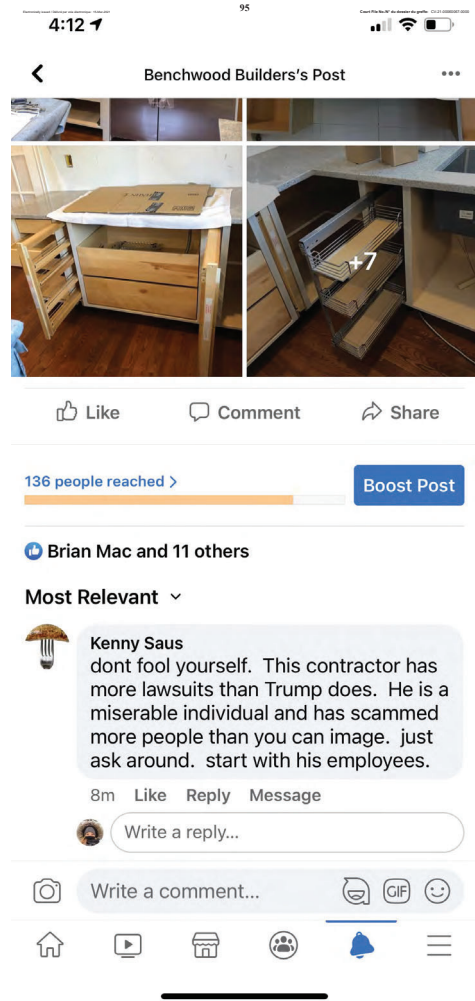
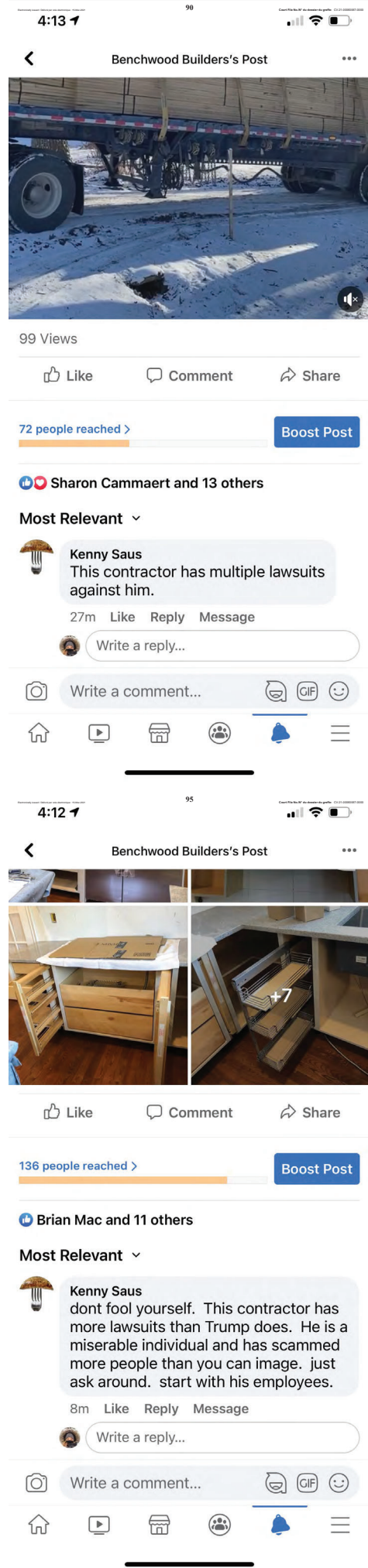
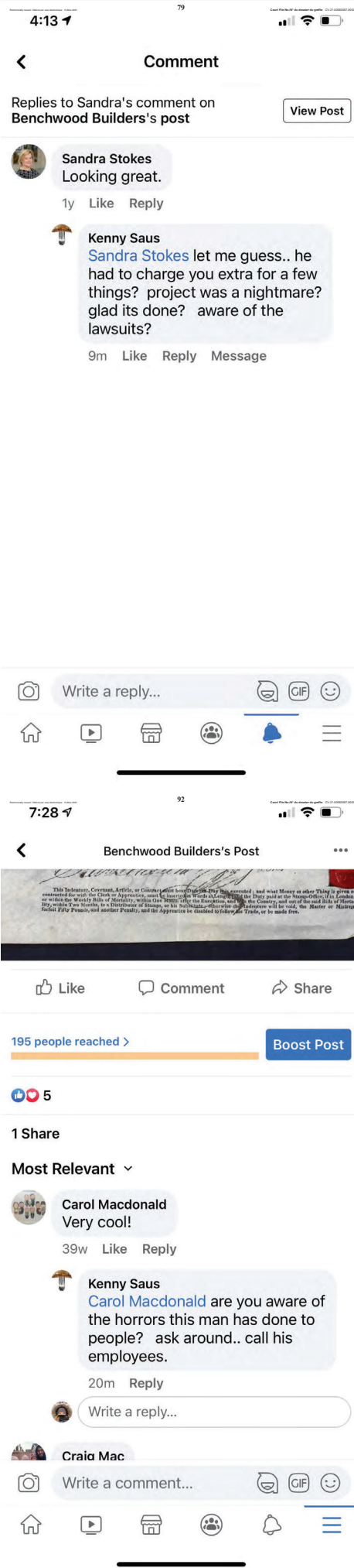
Most Relevant ▾

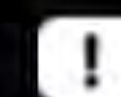


Kenny Saus
dont fool yourself. This contractor has more lawsuits than any builder in niagara . He is a miserable individual and has scammed more people than you can image. just ask around. start with his employees.

15m Like Reply Message

Write a comment...





— View replies (1)

— [View replies \(1\)](#)



dave_gr33n @ftwindows. Would be great if you actually finish the job and fixed all the mess. These windows leak and you refuse to do warranty work.

13w Reply

dave_gr33n What these photos also show is they have not provided the owners with the doorhandles. These windows are not complete and the owners can't even open them. They leak water and a leak air.

13w Reply

dave_gr33n @homesbyhendricks They are not amazing. The leak air and water and the builder refuses to give us the doorhandles back.

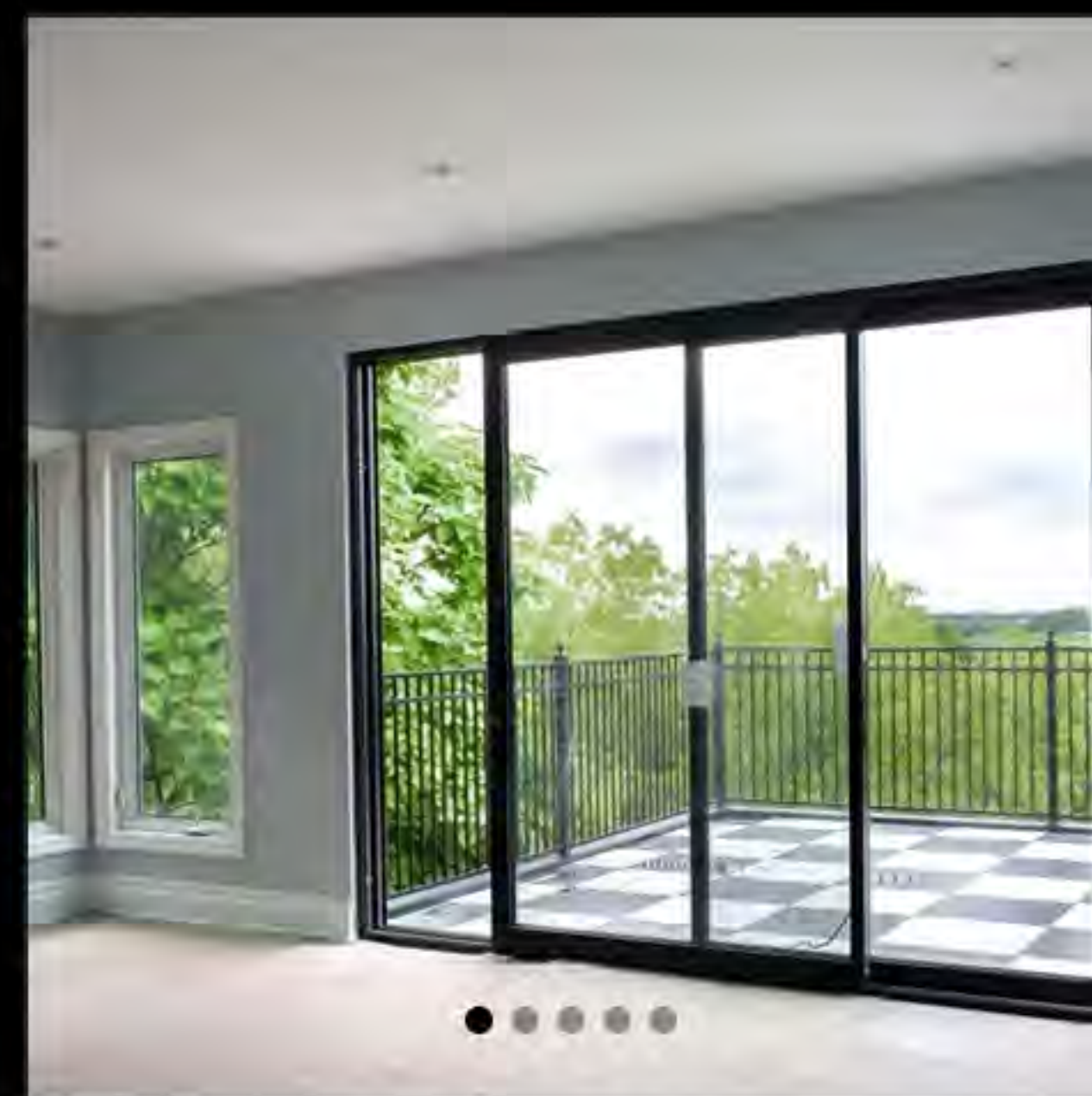
13w Reply

dave_gr33n @donna_elwell Looks can be deceiving. The windows leak water and air and the builder refuses to do anything about it so does the actual window installation company

13w Reply

I really like the black frames windows! Looks really sharp

9w 1 like Reply



90 likes

11/22/20

benchwoodbuilders It's not a big endeavour to increase opening sizes to allow for transoms to changing your patio doors from 5'X6'-8" to a modest 12'X9' like we did for our clients in these pictures.

#bigopening #culturedliving

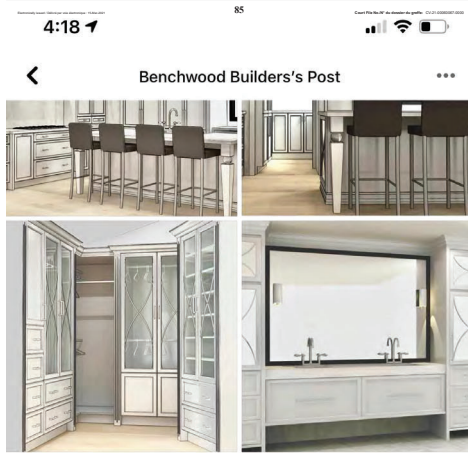
#winecountryontario

#winesofniagara #notl #renomark



Add a comment...





Like Comment Share

129 people reached >

Boost Post

Brian Mac and 10 others

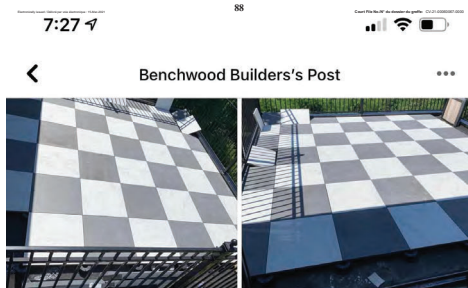
Most Relevant ▾



Kenny Saus
what a joke.. had nothing to do with this. All done by another company.. one with integrity and wont scam people. Stay away from Benchwood

17m Like Reply Message

Write a comment...



Like Comment Share

186 people reached >

Boost Post

6

1 Share

Most Relevant ▾



Kevin Stokes
Looks great for playing chess! 😊

24w Like Reply



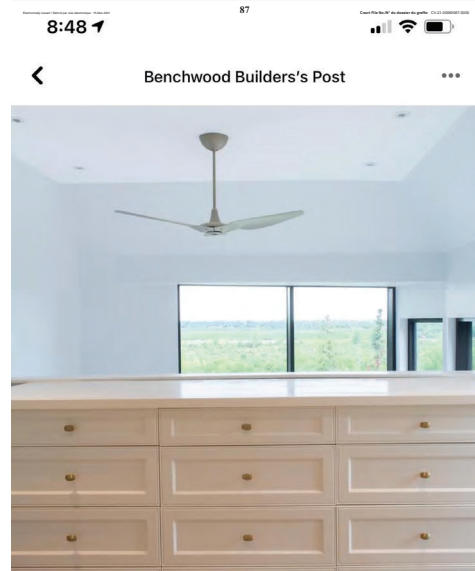
Kenny Saus
[Kevin Stokes](#) half done job. walked off the job.

21m Reply



Write a reply...

Write a comment...



Like Comment Share

Boost Unavailable

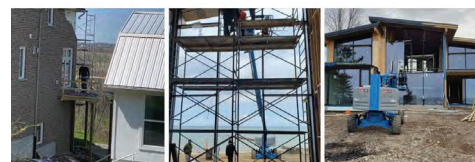
Most Relevant ▾



Kenny Saus
Someone elses work

39m Like Reply Message

Write a comment...



Like Comment Share

184 people reached >

Boost Post

Brian Mac and 11 others

Most Relevant ▾

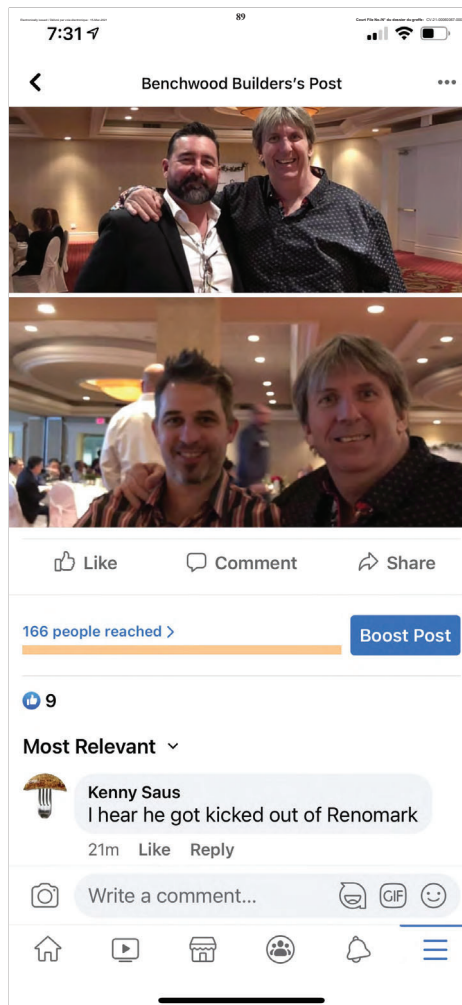
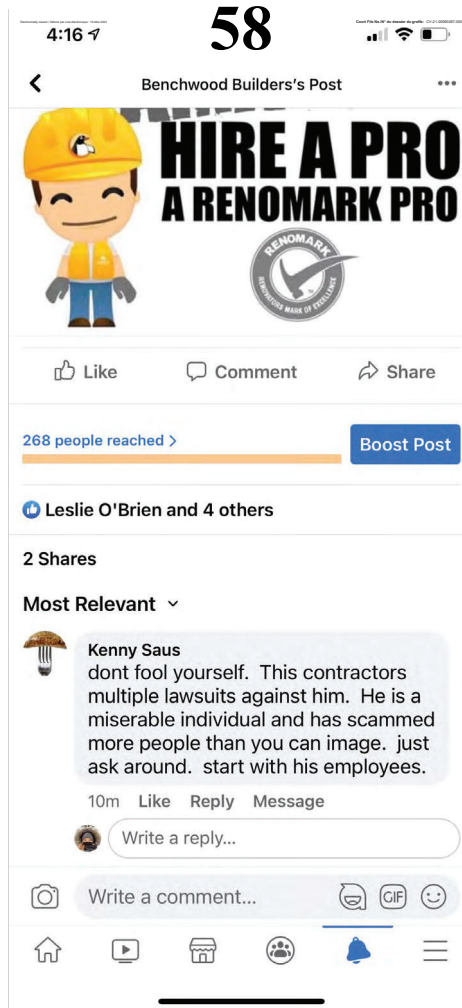


Kenny Saus
what a joke. the project is a year old and he walked off the job. a year later its a horror show.

20m Like Reply Message

Write a comment...





8:48 



Comment

Replies to Shirley's comment on
Benchwood Builders's post

View Post



Shirley McMullen
Beautiful

2w Like Reply



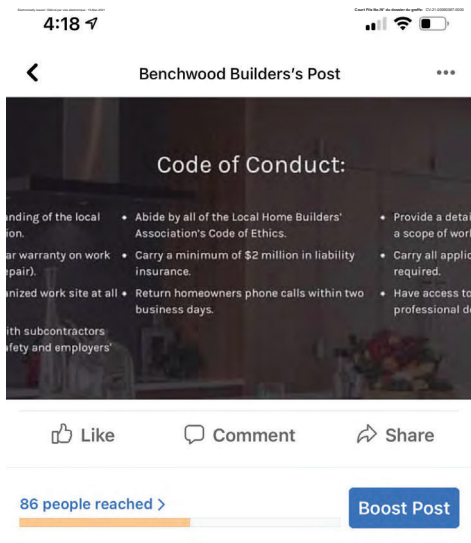
Kenny Saus
[Shirley McMullen](#) dont fool yourself.
This man is a despicable individual.
He threatens women, lies and you
would want to be as far away from
him as you can.

41m Like Reply Message

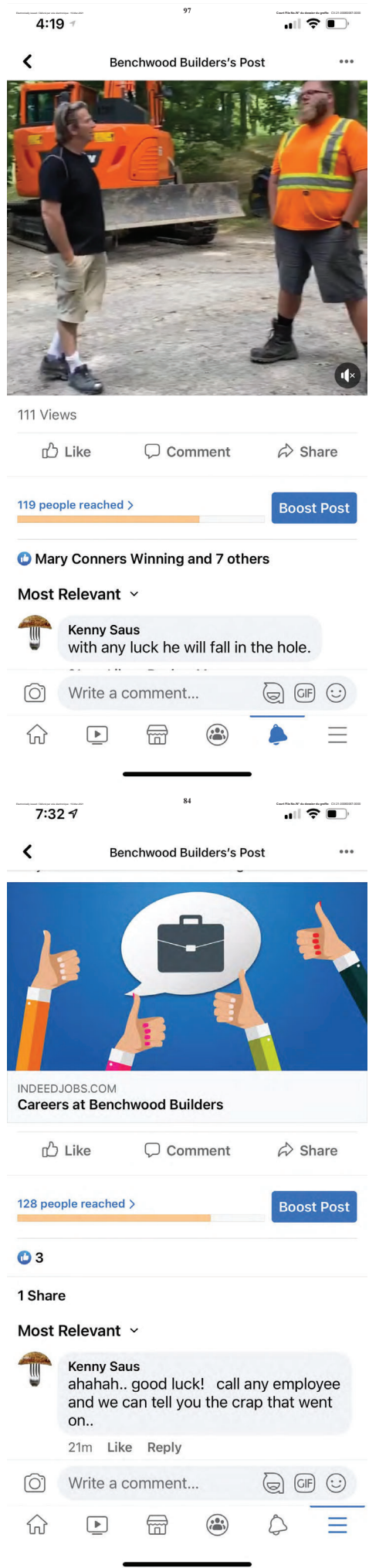
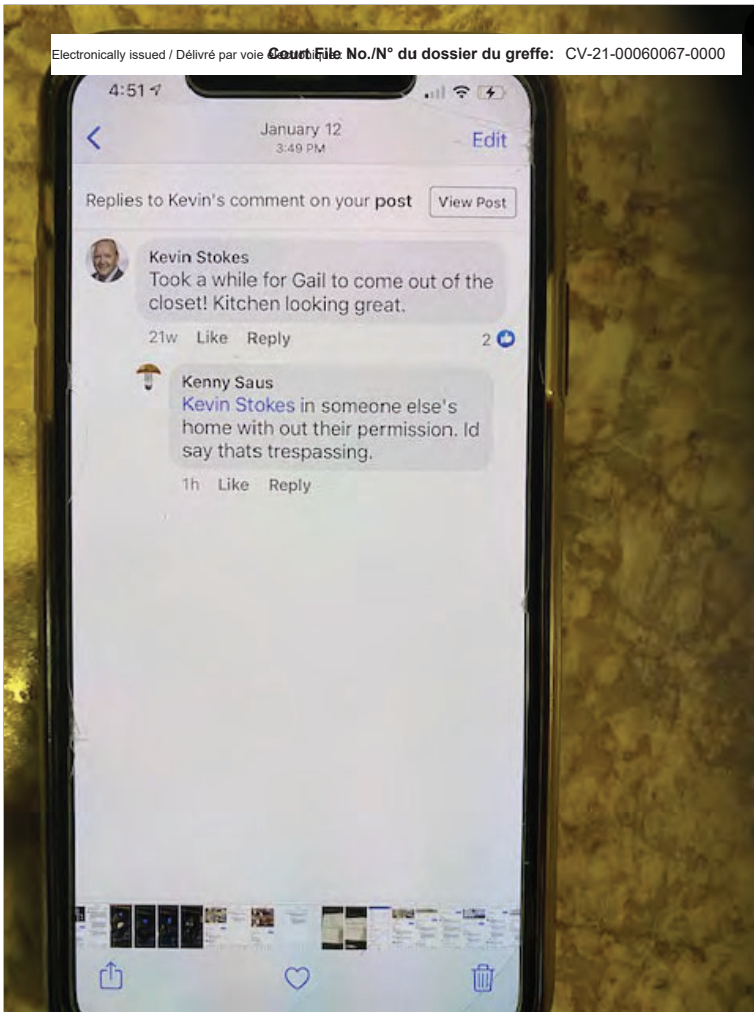


Write a reply...





61



**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BENCHWOOD BUILDERS, INC. and MICHAEL SLAVEN

Plaintiffs/Defendants by Counterclaim

- and -

CYNTHIA PRESCOTT and DAVID GREEN

Defendants/Plaintiffs by Counterclaim

AFFIDAVIT OF CYNTHIA PRESCOTT

I, **CYNTHIA PRESCOTT**, of the Town of Niagara-on-the-Lake, in the Regional Municipality of Niagara, **MAKE OATH AND SAY:**

1. I am one of the Defendants in the within action, and as such, I have knowledge of the matters hereinafter deposed to. Where I do not have personal knowledge, I have stated the source of my knowledge or belief and I do verily believe the facts stated herein to be true.

2. I am the spouse of David Green ("**David**"), my co-defendant in this action. David has sworn an affidavit of his own, which I have reviewed. David's affidavit is consistent with my own understanding of events, and I completely agree with everything stated therein.

The Renovation Contract

3. David and I purchased our home at 2038 York Road, Niagara-on-the-Lake in 2019. At the time, we were living in Toronto. We decided to renovate the property before moving in and interviewed contractors for this purpose in August and September 2019. During

this process, we met several times with Michael Slaven ("**Slaven**") and Gail Slaven (collectively, the "**Slavens**"), the principals of Benchwood Builders, Inc. ("**Benchwood**").

4. Our first meeting with the Slavens was on August 10, 2019. During this and subsequent meetings, Slaven repeatedly emphasized his company's accreditations with reputable construction industry organizations, specifically Baeumler Approved, Niagara Home Builders Association (the "**NHBA**"), and RenoMark. The trademarks of these organizations were prominently displayed on Benchwood's vehicles.

5. On August 24, 2019, Slaven presented a quote of \$217,000 plus HST for our project. On September 16, 2019, I emailed the Slavens with a link to the Google Drive storing detailed documents setting out our requirements and expectations, as well as detailed floor plans and 3D design renderings, in order to aid them in developing a revised quote. On September 17, 2019, I advised the Slavens by email that we wanted to add the basement to the project scope. We met again on September 29, 2019 to discuss further, and to make sure that they had all of the information they needed from us.

6. On October 6, 2019, Slaven presented an amended quote of \$367,787 plus HST, which included the basement. We met and signed the contract that day and paid the Slavens \$103,899.83, inclusive of HST, as a deposit. Renovations were scheduled to start on January 6, 2020 and to finish on April 30, 2020. Attached as **Exhibit "A"** to this my affidavit is a true copy of the Renovation Agreement we executed on October 6, 2019, with the Description of Work attached. (The document attached as Exhibit "A" to Slaven's affidavit sworn May 4, 2023 is Slaven's copy of the contract, which has a handwritten addition that was added after we signed, without our knowledge.)

7. During our discussions with Slaven, he directed our attention to several photos posted to the Benchwood social media pages that showcased another one of Benchwood's client projects. Attached as **Exhibit "B"** to this my affidavit is a true copy of screenshots of Facebook posts made by Benchwood regarding the project for Mihran and Ann Azadian (the "**Azadians**"). We asked to see this project first-hand and to speak with the Azadians. Slaven promised to arrange a meeting with them, but despite our

repeated requests, he did not do so. He told us that the Azadians were dealing with personal problems which prevented them from meeting with us.

8. What we did not know at the time was that Slaven and the Azadians were in the midst of a dispute that would prefigure our own dispute with Benchwood. Benchwood and the Azadians had entered into their written contract on December 15, 2018, whereby Benchwood was to carry out renovations for a stipulated price of \$319,763 plus HST, plus agreed extras, with a completion date of April 1, 2019. Although the Azadians eventually paid Benchwood a total of \$533,302, Benchwood never completed the work and abandoned the project on August 7, 2019. Despite this ongoing dispute, Slaven was telling us how happy the Azadians were with Benchwood's work, and was publishing photos of the Azadian home on Benchwood's social media pages as an example of a successfully completed project.

9. Just five days after we entered into our own contract with Benchwood, Slaven registered a claim for a lien against the Azadian property in the amount of \$201,356 (on October 11, 2019). All of this was unknown to us at the time. Justice Henderson's decisions in the matter of *Mike Slaven, c.o.b. as Benchwood Builders v. Mirhan Azadian and Ann Azadian* (Court File No. CV-20-59501) were released on December 29, 2020 and February 3, 2021 and we later found them online.¹

10. Because he was unable to arrange the meeting with the Azadians, Slaven instead took us to view a project in progress at the home of Kevin and Sandra Stokes. However, it was not disclosed to us that the Slavens and Kevin Stokes were business associates, having worked together on several real estate transactions, or that the Slavens and Stokes were neighbours and friends. We later found that Mr. Stokes called Slaven his "builder client" and "friend" online, and even posted videos of Slaven and the new Lamborghini he purchased in December 2022. Attached as **Exhibit "C"** to this my affidavit are true copies of webpages for Kevin Stokes, featuring a photograph of the Slavens as satisfied clients and referring to Slaven as his builder client, a post by Mr.

¹ *Slaven v. Azadian*, 2020 ONSC 7571 (CanLII), <<https://canlii.ca/t/jczjw>>, retrieved on 2023-07-16; *Slaven v. Azadian*, 2021 ONSC 845 (CanLII), <<https://canlii.ca/t/jczjv>>, retrieved on 2023-07-16.

Stokes on the Benchwood Facebook page, and a Facebook post in which Mr. Stokes comments on his friend Slaven's purchase of a new Lamborghini (with license plate "BENCHWD").

11. Our project began on January 9, 2020 and was finally abandoned by Benchwood on October 2, 2020. In addition to the initial contract, there were two further Descriptions of Work, a costly emergency repair, and numerous unapproved expenses, which brought the total cost to \$863,155.91 plus HST. We ultimately paid \$807,820.32 plus HST (a total of \$912,836.96) to Benchwood. However, Benchwood never completed the project and, on November 3, 2020, Slaven registered a lien of \$59,230.14 against our home.

12. Slaven followed the same pattern of behaviour with us as he appears to have followed with the Azadians (and, as were later to learn, others). He underquoted the job, ran up the project costs, demanded additional payments that were not justified under the contract, abandoned the project before completion, placed a lien on our home, and sued us.

Slaven's Failure to Obtain a Building Permit

13. We understood that it was Benchwood's responsibility to obtain the necessary building permits. On January 23, 2020, we signed a permit application at Slaven's request. Slaven told us that he had submitted the application on April 8, 2020.

14. On May 23, 2020, we found an Order to Comply in our mailbox advising us that the renovations were being done without a permit. We were ordered to apply for a permit by June 5, 2020. We immediately notified Slaven. Attached as **Exhibit "D"** to this my affidavit is a true copy of the Order to Comply dated May 20, 2020.

15. On June 2, 2020, Slaven asked me to contact the Building Inspector to help him obtain the permit. I was surprised by this request, but I did as he asked. Attached as **Exhibit "E"** to this my affidavit is a true copy of a text exchange between myself and Michael Slaven dated June 2, 2020.

Dustin's employment at risk. We had to hire and pay for another service provider to carry out the repairs.

25. After a meeting with Slaven at our home in or about March 2020, David told me that Slaven had told him that a former female client had accused him of assault. David told me that Slaven laughed about it. We were concerned by what Slaven had revealed and our concerns about his character grew.

Slaven's Dishonest Business Practices

26. Around the time we entered into the contract with Benchwood, Slaven would often emphasize his accreditation with Baeumler Approved. We later found out from Baeumler Approved that the organization had revoked Benchwood's membership in September of 2019 and issued cease and desist letters through to late December 2020. Despite this, Benchwood continued to display Baeumler Approved trademarks and actively promoted their membership in Baeumler Approved until 2021.

27. On another occasion, Slaven posted a video of an emergency repair required for our home on Benchwood's Facebook page on March 26, 2020. However, he did not contact us about this supposed emergency repair until five days later – on March 31, 2020 - at which time Slaven insisted that the repairs were urgently required to "prevent the house from corkscrewing into the ground." I had understood the estimated cost of the repair to be \$8,000, but the resulting invoice was for \$37,920.54. After I questioned the invoice, Slaven explained that his estimate was \$8,000 for each wall, and three walls needed to be shored up. A further charge of \$8,685 plus HST for the "Large Drop Beam Replacement" was completely unexpected. Slaven had pushed to remove this beam, but I asked for a quote before we made our decision. Slaven went ahead and did it before obtaining our approval. Although it is not reflected in our email exchange, I expressed my annoyance at an in-person meeting with Slaven. We reluctantly paid the full amount. Attached as **Exhibit "J"** to this my affidavit is a true copy of an email exchange between myself and Michael Slaven dated April 8, 2020 and Invoice #1160.

to repair), provide the door and window handles we had paid for (which were being withheld), and to provide a schedule for project completion.

58. We kept discovering new deficiencies that required repair, or tasks that had not been completed.

59. It was not until October 21, 2020, that we learned that Benchwood had actually abandoned our project on October 2 – and we learned this from a police officer Slaven had sent to our home.

The Spurious Assault Charge

60. On or about October 1, 2020, our respective lawyers worked out an agreement whereby Slaven and the plumbing contractor would meet us at our home the next morning to verify the existence of the deficiencies we had complained about and to take steps to rectify them. As well, Slaven was expected to provide a reasonable timeline for completion of the project for our consideration. Attached as **Exhibit “S”** to this my affidavit is a true copy of an email exchange between Patricia Joseph (our lawyer at the time) and Brent Harasym (Slaven’s lawyer at the time), redacted to protect solicitor-client privilege.

61. On the morning of October 2, 2020, Slaven arrived at our home accompanied by the plumbing contractor and, contrary to the agreement reached between counsel, a large and imposing-looking young man named Kyle. Slaven had previously told me that he had hired Kyle from a halfway house to do odd jobs as part of his community service hours. David made it clear that he was audio recording the meeting. The plumber left for the basement to fix the leak while Kyle remained near the front door. David was standing near the foyer, and I was standing in the corner of the living room by the fireplace. Slaven entered the living room and executed a wide circle of the room, glaring at me as he passed close to where I stood. I stayed where I was and remained silent. Slaven then mounted the two steps and returned to the foyer where he resumed a position beside Kyle at the front door. Slaven told David he would be picking up some of his tools from the garage and the basement. This was not something that had been agreed to beforehand. David

told Slaven that our lawyer had told us that the removal of his tools would mean Slaven was breaching the contract. David asked me to call our lawyer. Slaven told us not to worry about it. I lost my temper and yelled at Slaven, accusing him of taking our money and cheating us. David calmly told me to “cool it” and that my outburst was “not helpful”. Although I did throw my red plastic reading glasses to the floor by my feet in frustration, I did not throw them at Slaven or move towards him. Remaining calm, David told Slaven that he could get his tools at a later time.

62. As we waited quietly for the plumber to finish what he was doing in the basement, David asked Slaven if he had brought the handles to our windows or the remote control for the fan. Slaven replied in the negative. The plumber came up from the basement, and indicated that he was finished. We exchanged polite farewells, and the three men left. The entire visit lasted less than 10 minutes. Attached as **Exhibit “T”** to this my affidavit is a true copy of an audio recording made on October 2, 2020, and a transcript of same that I have prepared.

63. On October 9, 2020, Benchwood’s lawyer wrote to, among other things, advise our lawyer that his client needed to retrieve tools and scaffolding from our property. We were confused as there were only a few tools at the home, and we understood that Benchwood would be returning to complete the job, for which these tools and equipment would be needed.

64. On October 20, 2020, rain and snow began leaking through the newly installed 20-foot curtain wall windows. Water was dripping profusely down the freshly painted drywall, and pooling on the new hardwood floors. Neither Benchwood nor the window installer, Final Touch Windows, would attend to remedy the deficiencies.

65. On October 21, 2020, Officer Cirillo of the Niagara Regional Police visited our home and advised me that Slaven had accused me of physically assaulting him. I couldn’t believe it. I am only 5 foot 3, and it was Slaven who had made me fear for my safety. I began crying uncontrollably. Officer Cirillo patiently waited while I regained my composure, then asked me to physically take him through the incident. I did so and showed him the little plastic dollar store reading glasses which I’d thrown to the floor at

my feet during the alleged assault. I assured Officer Cirillo that I never physically struck Slaven, and had not come close to doing so. According to Officer Cirillo, Slaven had told the police that he had abandoned our project on October 2, 2020 (which was new information to me). Officer Cirillo told me that Slaven wanted to retrieve his tools “since he no longer will be working there” at the house. He had accused us of stealing a skill saw and a table saw, neither of which had been left at our property. Upon learning that Slaven had abandoned the project, I agreed that he should probably gather any of his remaining tools. We went through the house to see what Benchwood tools were still there. Attached as **Exhibit “U”** to this my affidavit is a true copy of the Niagara Regional Police General Occurrence Hardcopy dated October 21, 2020.

66. During Officer Cirillo’s visit, the house was freezing because the newly installed furnace wasn’t working. Officer Cirillo kindly offered contact information for reputable tradespeople in the area who could help us with the furnace.

67. Officer Cirillo arranged for another police officer to be present on the morning of October 22, 2020, when it was agreed that Slaven could retrieve his tools. This was done out of a concern for my safety. The officer who attended that day told me that Slaven was known to the police because officers had responded to other complaints at the homes of other former Benchwood customers. The officer did not elaborate further, but his comments were later confirmed in part by what Joe Thornley and Debra Atkins pleaded in their Amended Plaintiff’s Claim (Claim No. 5002/19) in the Welland Small Claims Court, which had been filed on September 12, 2019, but which we were not yet aware of.

68. On November 3, 2020, Slaven registered a lien of \$59,230.14 against our home.

My Facebook and Instagram Posts

69. On November 24, 2020, I discovered that many photos of our home were being featured on the Benchwood Facebook page as another example of a Benchwood success story.

70. When we signed the contract with Benchwood, we understood that Benchwood’s right to use our project for publicity was conditional on the successful completion of the

project. This is what the Signage clause actually states: “The Owner agrees to allow the Renovation Contractor to photograph the construction and **the completed project** and use this material only in direct promotion of the Renovation Contractor’s business...” (emphasis added). We found it reprehensible that Slaven would publish photos of our home to drum up more business, after leaving our project incomplete and placing a lien on our property. We could not live with ourselves if we stood by and let other innocent homeowners fall into the same trap that we did. To do so would have made us complicit in Benchwood’s deceit.

71. On November 24, 2020, I posted two comments about Benchwood on Facebook. These comments have been reproduced as Schedule “A” to the Statement of Claim. In making these statements, I was setting out my honestly held opinions about our experiences with MSNR Plumbing and Benchwood, and warning others about the risks of hiring Benchwood.

72. The truth is that the tankless water heater and sump pump installed by Jake Allemang of MSNR Plumbing did not work and he refused to fix them. He also incorrectly installed the rough-ins for the new plumbing fixtures. Even though we had paid Benchwood in full for this work, we had to hire others at additional cost to fix Mr. Allemang’s mistakes. Attached as **Exhibit “V”** to this my affidavit is a true copy of additional invoices from Bathworks and Go Green Plumbing Ltd. generated in October and November 2020, totalling approximately \$3,700.

73. On or about November 24-25, 2020, I commented on a photo of our home that had been posted on the Benchwood Instagram page without our permission more than six months previously. I overlaid text on the photo to warn others about the dangers of hiring Benchwood and posted it on my Instagram profile. At the time, I had 43 Instagram followers. I believe I was justified in referring to our project as “Nightmare Reno” and the comments made reflected my honestly held opinions about our experiences with the Slavens, Benchwood, and Final Touch Windows.

74. I also replied to the legacy comments of others commenting on the photos of our home that Benchwood had posted over 6 months prior, without our knowledge or consent.

My replies were made to @jordanstationdesignco, @nicoleprymadesigns, @homesbyhendriks, @donna_elwell (the wife of Slaven's friend and architect, Charlie Elwell), and @ftwindows (the handle for Final Touch Windows). The comments I posted on Benchwood's pages were deleted within minutes, with the exception of one comment that appears to have lasted 14 hours before being deleted.

75. Within a few months of posting these statements, David and I learned that there were a number of legal actions involving Benchwood and other unhappy customers, and that Benchwood's professional memberships had been revoked.

76. The statements I posted on my own Instagram or Facebook profiles remained online for less than six months. As noted above, I had 43 followers on Instagram. I rarely used my social media. All of the statements were removed by me prior to May 21, 2021.

My Google Reviews

77. I posted the Google reviews of MSNR Plumbing and Final Touch Windows that are included as Exhibit "Y" to Slaven's affidavit in late November of 2020. I am at a loss as to why Slaven has included these Google reviews as evidence on this motion. None of these reviews are mentioned in the Statement of Claim, and they were all made well over two years ago. Slaven knew of these posts within hours, as shown by the timing of his screenshots, which were made 9 hours after my MSNR Plumbing review and three hours after one of my Final Touch Windows reviews.

78. MSNR's entire Google profile was deleted shortly after my review was posted. In any event, the comments I made about MSNR were either true or my honestly held opinions.

79. On November 26, 2020, I had called Mani Leo, the owner of Final Touch Windows, to discuss the handles for the new windows and doors he had installed in our home, and the leaking windows. Mr. Leo responded angrily, demanding money for the handles, refusing to repair the windows, and refusing to honour the warranty. I asked him if Slaven had failed to pay him for the windows, because we had already paid Slaven in full. Mr.

99. Should the lien action go to trial, we expect to be able to prove that we sustained damages of approximately \$400,000, arising from the cost to repair deficiencies, the cost to complete the project, over-billed amounts, and unapproved expenses. For example, the deck was not completed by Benchwood, and what was done was done incorrectly. It cost us more than \$45,000 to repair and complete the deck. Repairs to the new furnace, sump pump, and tankless water heater that had been installed cost more than \$4,000 – despite all these items being new installs. Slaven never returned the door hardware (hinges, knobs, handles) we had paid him for, and we spent over \$1,000 to repurchase these items. We needed to remove and reinstall many of the windows and sliding doors because they had been installed incorrectly, at a cost of approximately \$5,000. Slaven did not pay for the plumbing fixtures that we had paid him for, so we had to pay more than \$10,000 to get them out of hock. The plumbing was left unfinished, which cost us more than \$6,000 after Benchwood abandoned our project. There are many other such costs.

Response to Other Allegations Made in Slaven Affidavit

100. I have reviewed the Affidavit of Michael Slaven sworn May 4, 2023, and strenuously object to the claims made by Slaven therein. I am appalled at the many misrepresentations of fact and outright falsehoods contained therein. It is obvious to me that Slaven has been very selective in the documents or portions of documents he relies on, in an effort to distort events.

101. To keep this affidavit to a reasonable length I will limit my responses to the most relevant or egregious misstatements, and will try to avoid repeating information that I have already provided in this affidavit.

102. Between August 10 and October 6, 2019, David and I did request changes to the Description of Work on two occasions. Slaven appears to be suggesting that two changes over the course of two months is somehow excessive, when it clearly is not. Moreover, both those changes were initially recommended by Slaven. One was the inclusion of a “basement mancave” in the project scope, and the other was the decision to forego the master bedroom wall transom in favour of trim work in the hallway. In both instances, we agreed to follow Slaven’s recommendations.

Benchwood had about 800 Instagram followers. In any event, I don't think this really matters as my posts were quickly removed from both Benchwood's Instagram and Facebook profiles.

137. Slaven claims in his affidavit that we "weaponized" our social media accounts in a vengeful and vindictive fashion. Nothing could be further from the truth. Entering into a contract with Benchwood was perhaps the worst decision either of us has ever made in our lives. We paid Benchwood almost \$1,000,000 for renovations that were supposed to cost less than \$400,000. And yet, Benchwood abandoned our project with hundreds of thousands of dollars of work left incomplete or needing to be redone. We were forced to endure Slaven's bullying and intimidation. Slaven and/or his employees and contractors literally stole from us and caused damage to our home. The Slavens have commenced frivolous legal proceedings against us and even involved the police for no legitimate purpose. We have suffered immeasurable mental, emotional, and financial stress due to their conduct. We could not live with ourselves if we allowed Benchwood to trumpet our project as another one of their supposed success stories in order to lure more unsuspecting victims into their clutches. We had no choice but to warn the public so they wouldn't experience the same thing that we had, or that their other victims had, including the Azadians, the Iamonacos, Mr. Thornley and Ms. Atkins, and Mr. Newman.

138. As for the harm our public statements allegedly caused to the Slavens and their business, there is none. First of all, Slaven claims that he has "spent years" building Benchwood's reputation, but Benchwood has only been in business since January 2018. Even though they had been in business for less than three years at the time we first posted our negative comments (in November 2020), Benchwood's reputation with professional associations like the NHBA and Baeumler Approved, and with tradespeople and suppliers, was already poor. The extensive litigation over a period of only a few years involving Benchwood, the Slavens, and their customers speaks for itself. All of our posts were deleted in early 2021, and most of them were taken down by Slaven himself within an hour of being posted. Slaven has provided no evidence that anything we said or did has caused him a single lost contract.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BENCHWOOD BUILDERS, INC. and MICHAEL SLAVEN

Plaintiffs/Defendants by Counterclaim

- and -

CYNTHIA PRESCOTT and DAVID GREEN

Defendants/Plaintiffs by Counterclaim

AFFIDAVIT OF DAVID GREEN

I, **DAVID GREEN**, of the Town of Niagara-on-the-Lake, in the Regional Municipality of Niagara, **MAKE OATH AND SAY:**

1. I am one of the Defendants in the within action, and as such, I have knowledge of the matters hereinafter deposed to. Where I do not have personal knowledge, I have stated the source of my knowledge or belief and I do verily believe the facts stated to be true.

2. I am the spouse of Cynthia Prescott ("**Cynthia**"), my co-defendant in this action. Cynthia has sworn an affidavit of her own, which I have reviewed. I concur with everything set out by Cynthia in her affidavit, and repeat and adopt the evidence therein. Attached as **Exhibit "A"** to this my affidavit is a true copy of the affidavit of Cynthia Prescott sworn August 9, 2023 and the exhibits attached thereto.

The Renovation Project

3. On October 6, 2019, Cynthia and I entered into a renovation agreement with Benchwood Builders, Inc. ("**Benchwood**") for the renovation of a home we had newly

purchased in Niagara-on-the-Lake. Benchwood's principals at the time were Michael Slaven ("**Slaven**") and his spouse, Gail Winning-Slaven. Slaven had provided us with a quote of \$367,787 plus HST. We paid \$103,899.83, inclusive of HST, as a deposit. Renovations were scheduled to start on January 6, 2020 and to finish on April 30, 2020.

4. During the course of our project, Slaven failed to obtain a building permit in a timely manner, regularly failed to pay Benchwood's tradespeople, used threats to prevent a subcontractor from completing necessary work on our project, misquoted costs, overcharged us, double-billed us, billed us for unapproved work, and kept changing the completion date for our project. In addition, many tasks were not completed or were not completed properly.

5. Our project began on January 9, 2020 and was abandoned by Benchwood on October 2, 2020. In addition to the initial contract, there were two further Descriptions of Work, a costly emergency repair, and numerous unapproved expenses, which brought the total cost to \$863,155.91 plus HST. We ultimately paid \$807,820.32 plus HST (a total of \$912,836.96) to Benchwood. However, Benchwood never completed the project and, on November 3, 2020, Slaven registered a lien of \$59,230.14 against our home.

6. We later learned that Slaven had followed the same pattern of behaviour with us as he appears to have followed with other unhappy customers. He underquoted the jobs, ran up project costs, demanded additional payments that were not justified under the contracts, abandoned the projects before completion, placed liens on the properties, and sued his customers.

Other Litigation Involving Benchwood and Slaven

7. Through online research and visits to the respective courthouses that began in December 2020, we obtained information about multiple lawsuits involving Benchwood, the Slavens, and their former customers. Even though Benchwood was only established in January 2018, we learned of four separate lawsuits commenced against Slaven and Benchwood between May 4, 2018 and March 4, 2020. The lawsuits are as follows:

- (a) Donald Newman; Court File No. 58102/18 (St. Catharines)
 Address: 273 Lakeshore Road, St. Catharines, Ontario
 Contract Signed on January 9, 2018
 Project Abandoned Incomplete and Deficient on February 5, 2018
Counterclaim of Donald Newman dated June 15, 2018

- (b) Joe Thornley and Debra Atkins; Claim No. 5002/19 (Welland)
 Address: 530 Woodlawn Road, Welland, Ontario
 Contract Signed on June 15, 2018 (porch and pergola)
 Project Abandoned Incomplete and Deficient on August 7, 2018
**Plaintiff's Claim of Thornley and Atkins issued April 24, 2019
 (Amended Plaintiff's Claim issued September 12, 2019)**

- (c) Joe Thornley and Debra Atkins; Claim No. 5417/19 (Welland)
 Address: 530 Woodlawn Road, Welland, Ontario
 Contract Signed on April 18, 2018 (detached garage and concrete pad)
 Project Defectively Completed on July 16, 2018
Plaintiff's Claim of Thornley and Atkins issued September 12, 2019

- (d) Danny and Luisa Iamonaco, Court File No. CV-19-00059294 (St. Catharines)
 Address: 9 Hickory Crescent, Grimsby, Ontario
 Contract Signed on December 15, 2018
 Breach of Contract; No Project Commencement as of June 17, 2019
Statement of Claim of Iamonacos issued November 15, 2019

8. As set out in greater detail in Cynthia's affidavit, at around the time we were entering into our contract with Benchwood, Slaven misrepresented to us that renovations

Benchwood had recently made to the home of Mihran and Ann Azadian (the “**Azadians**”) had been successfully completed to the immense satisfaction of the Azadians. What Slaven did not tell us was that he had abandoned their project before completion, placed a lien on their property, and commenced a pair of actions against them, with details as follows:

(a) Mihran and Ann Azadian, Court File No. CV-20-59289 (St. Catharines)

Address: 44 Harmony Drive, Niagara-on-the-Lake, Ontario

Contract Signed on December 15, 2018

Project Abandoned Incomplete and Deficient on August 7, 2019

Statement of Claim issued by Slaven c.o.b. Benchwood Builders on November 13, 2019

(b) Mihran and Ann Azadian, Court File No. CV-20-59501 (St. Catharines)

Address: 44 Harmony Drive, Niagara-on-the-Lake, Ontario

Contract Signed on December 15, 2018

Project Abandoned Incomplete and Deficient on August 7, 2019

Statement of Claim issued by Slaven c.o.b. Benchwood Builders on March 4, 2020

9. With respect to the action commenced against the Azadians on March 4, 2020, we learned that Slaven had registered a claim for a lien on their property in the amount of \$201,356 on October 11, 2019, which was just five days after we entered into our own contract with Benchwood. On a motion brought by the Azadians, Justice Henderson later ordered (on December 29, 2020) that the registration of the claim for lien, and any related

certificate of action, to be vacated. Justice Henderson also ordered (on February 3, 2021) that Slaven pay costs of the motion to the Azadians of \$46,835.03.¹

10. Upon review of the pleadings in the Donald Newman action, we saw that the Slavens had failed to obtain permits, demanded advance payments that were not in accordance with the contract, did not adhere to the Ontario Building Code, had performed unlicensed plumbing work, and had abandoned the project before it was finished. Attached as **Exhibit “B”** to this my affidavit is a true copy of the Statement of Defence and Counterclaim of Donald Newman dated June 15, 2018.

11. Upon review of the Thornley and Atkins pleadings, we saw that the Slavens were accused of failing to observe the Ontario Building Code, of abandoning the project before completion, of losing housekeys, and of overcharging or wrongly charging their clients. Attached as **Exhibit “C”** and **Exhibit “D”** to this my affidavit are true copies of Amended Plaintiff’s Claim No. 5002/19 and Plaintiff’s Claim No. 5417/19, both issued September 12, 2019.

12. Upon review of the Statement of Claim issued by the Iamonacos, we saw that the Slavens had refused to return their clients’ deposit even though they failed to do the work contracted for. However, we also saw that the Slavens had counterclaimed against the Iamonacos for defamation based on a complaint the Iamonacos had submitted to Baeumler Approved in September 2019, a copy of which the organization must have provided to Slaven. According to the Counterclaim, Benchwood’s Baeumler Approved membership had been suspended due to that complaint. Attached as **Exhibit “E”** to this my affidavit are true copies of the Statement of Claim, Statement of Defence and Counterclaim, and Reply and Defence to Counterclaim in the Iamonaco proceeding.

13. It was clear to us from the pleadings in these cases that Slaven and Benchwood repeatedly strong-armed clients for payment in advance of completion, overcharged for work, invoiced them for unapproved expenses, abandoned the projects prior to

¹ *Slaven v. Azadian*, 2020 ONSC 7571 (CanLII), <<https://canlii.ca/t/jczjw>>, retrieved on 2023-07-16; *Slaven v. Azadian*, 2021 ONSC 845 (CanLII), <<https://canlii.ca/t/jczjv>>, retrieved on 2023-07-16.

completion and/or with multiple deficiencies needing repair, refused to honour warranty work, registered liens against the properties, and used litigation to silence their critics.

14. We realized that Slaven is a serial predator who underbids on contracts to secure business, misrepresents himself to his clients, runs up the project costs, and then squeezes his clients for money through unapproved or dishonest charges. And, just as Slaven had misrepresented the Azadian project to us as a “success story” and used photos of their project as bait to lure us in, he was now posting photos of our property to Benchwood’s social media pages to do the same to others.

Benchwood’s Membership in Professional Associations

15. Over the course of our meetings leading up to and after signing the contract, Slaven had repeatedly emphasized his company’s accreditations with reputable construction industry organizations, specifically Baeumler Approved, Niagara Home Builders Association (the “**NHBA**”), and RenoMark. The trademarks of these organizations were prominently displayed on Benchwood’s vehicles.

16. As noted above, the Slavens counterclaimed against the Iamonacos for defamation arising from a complaint the Iamonacos had submitted to Baeumler Approved in September 2019. According to the Counterclaim, Benchwood’s Baeumler Approved membership had been suspended due to that complaint.

17. I called Baeumler Approved in January 2021 to inquire about this, and learned that Benchwood’s membership had been fully revoked in the fall of 2019. This surprised me, because Slaven had emphasized Benchwood’s membership in Baeumler Approved around the time we entered into our contract (October 6, 2019), and I knew that the Baeumler Approved trademarks were being displayed on Benchwood’s vehicles throughout 2020, when Benchwood had worked on our project. Baeumler Approved told us that it had been brought to their attention that Benchwood had continued to use the Baeumler Approved logo and branding after their account had been terminated, even though they had been sent several cease and desist notices. Attached as **Exhibit “F”** to this my affidavit is a true copy of a photograph of a Benchwood vehicle taken at our new

home in 2020 and posted on Benchwood's Facebook page, with an enlarged excerpt which clearly shows the Baeumler Approved logo at a time when Benchwood's membership had already been suspended or revoked.

18. A Baeumler Approved staff member indicated to us that Benchwood's membership had been revoked after it became clear to them that Benchwood was in contravention of Baeumler Approved's Code of Conduct.

19. I also called the NHBA in January 2021. I spoke by phone with the CEO, Chuck McShane, who told me that Benchwood's membership in the NHBA had not been renewed due to the number of complaints received, and that Benchwood was prohibited from using the names or logos of the NHBA or its affiliated organizations, such as the Ontario Home Builders Association. However, Mr. McShane also told me that Benchwood had not complied with this prohibition and was continuing to use the NHBA's name and logo in their marketing materials.

20. I also learned that Benchwood had been removed from the RenoMark website and had to be told to stop using the RenoMark logo after continued unauthorized use in the fall of 2020. RenoMark's focus is on renovation contractors. According to a response received via RenoMark's website "chat" function, Benchwood had been told "they were no longer welcome as members of the association." Attached as **Exhibit "G"** to this my affidavit is a true copy of the response received from RenoMark on January 11, 2021.

21. Incredibly, by January of 2021, and after only three years in business, Benchwood's professional accreditations had been revoked or terminated by three professional associations - the NHBA, RenoMark, and Baeumler Approved.

Slaven's Inappropriate Conduct Towards Women

22. When reviewing the pleadings in the Small Claims Court proceedings involving Benchwood, Joe Thornley, and Debra Atkins, we learned that the Slavens had issued a Defendant's Claim against their former clients. Mr. Thornley and Ms. Atkins pleaded the following in their Defence to the Defendant's Claim, dated June 17, 2019:

Michael Slaven is directly responsible for initiating unsuitable comments and texts. Debbie [Atkins] felt at times intimidated and embarrassed by these comments.

During the course of these two builds there were times of uncomfortableness felt by Debbie regarding Michael Slaven's [sic] comments regarding sexual innuendos which Debbie chose to ignore. At one point (July 20th) the texts Debbie was receiving were inappropriate [and] unprofessional and Debbie then relied on Joe [Thornley] to try and resolve aggregate issues and promote deck build and move forward this project to completion as quickly as possible... Copies of texts that were not suitable between Customer and employee. (#T#1, T#2, T#3, T#4[sic], T#5)

We wish to have this matter resolved with urgency due to the nature of this claim and working relationship (same employer) between Gail Winning/Slaven [sic] and Debbie Atkins. We would like to complete our home renovations after a year of struggle.

Attached as **Exhibit "H"** to this my affidavit is a true copy of the Defence of Joe Thornley and Debra Atkins to the Defendant's Claim dated June 17, 2019, without exhibits attached.

23. Attached as **Exhibit "I"** to this my affidavit are true copies of Text #1, Text #2, Text #3, Text #4, and Text #5, which were attached as exhibits to the Defence of Joe Thornley and Debra Atkins dated June 17, 2019.

24. The texts between Slaven and Ms. Atkins reminded me of a conversation I had with Slaven in or about March 2020. I recall Cynthia and I meeting with Slaven at the house to review progress. Slaven attended the meeting alone and no tradespeople were working at the time. Slaven and I were in the master bedroom discussing the project outside of Cynthia's presence when he unexpectedly told me that a former female client had accused him of assault. Slaven was laughing when he talked about it, saying that she had overreacted to something he had done. I felt uncomfortable and ended the meeting, and Cynthia and I left the house. We were concerned by what Slaven had told me and had serious doubts about his character.

25. On August 7, 2020, Cynthia met with Slaven at the home when I was working in Toronto. Afterwards, she told me that Slaven had acted aggressively towards her, to the point where she thought he might strike her. Cynthia was extremely upset by the episode.

I was angry and wanted to confront Slaven, but Cynthia begged me not to. She just wanted to concentrate on getting the project completed by September 11, as Slaven had promised. We agreed that Cynthia would never again meet alone with Slaven at the house, and that I would take over as the primary contact person for the project moving forward.

26. The decision to have me take over as the primary contact person for the project in order to insulate Cynthia from Slaven echoes in my mind the decision made by Debra Atkins to rely on Joe Thornley to move their project to completion as quickly as possible, after she received inappropriate texts from Slaven, as pleaded in their Defence to the Defendant's Claim noted above.

27. About two months later (October 2, 2020), I was present when Cynthia lost her temper and yelled at Slaven during a brief meeting at our home. However, Cynthia did not throw her plastic reading glasses at Slaven or advance towards him, as Slaven has alleged. I was there and can state unequivocally that there was never a threat of a physical assault on Slaven, who was accompanied by a large and intimidating man named Kyle. Upon listening to an audio recording I made of the entire visit (since at that time lawyers were involved on each side), I can detect no hint that Slaven had any concern for his safety.

28. Accordingly, I was shocked when Slaven made a report to the Niagara Regional Police almost three weeks later (October 21, 2020), claiming that my wife had assaulted him. This accusation is an outright lie. I believe that he made this false accusation as a way to create leverage for himself, and to put added pressure on us in our ongoing dispute with Benchwood.

29. It was through the visit of Officer Cirillo on October 21, 2020 that we learned – indirectly and for the first time – that Benchwood had already abandoned our project and would not be completing the work.

49. On October 9, 2020, Benchwood's lawyer wrote to, among other things, advise our lawyer that his client needed to retrieve tools and scaffolding from our property. We were confused as there were only a few tools at the home, and we understood that Benchwood would be returning to complete the job, for which these tools and equipment would be needed.

50. We discovered new defects every week. On October 20, 2020, rain and snow began leaking through the newly installed 20-foot curtain wall windows. Water was dripping profusely down the newly installed and freshly painted drywall, and pooling on the new hardwood floors. Neither Benchwood nor the window installer, Final Touch Windows, would attend to remedy the deficiencies. Attached as **Exhibit "W"** to this my affidavit are true copies of photographs showing the leak.

51. The next day (October 21, 2020), we learned from Officer Cirillo that Benchwood had already abandoned our project on October 2, 2020. Two weeks later (November 3, 2020), Slaven registered a lien of \$59,230.14 against our home. This is the amount billed in Invoice #1137-5 dated October 25, 2020, which was sent to our counsel but not directly to us. Invoice #1137-5 carried forward the unpaid amount from Invoice #1170 and added even more charges that had not been discussed or approved, while at the same time excluding some of the credits owed. Attached as **Exhibit "X"** to this my affidavit is a true copy of Invoice #1137-5.

My Instagram Posts

52. On or about November 22, 2020, I discovered that Benchwood was posting photographs of our home on their Instagram page to attract customers.

53. When we signed our contract with Benchwood, we understood that Benchwood's right to use our project for publicity was conditional on the successful completion of the project. This is what the Signage clause actually states: "The Owner agrees to allow the Renovation Contractor to photograph the construction and **the completed project** and use this material only in direct promotion of the Renovation Contractor's business..." (emphasis added). We found it reprehensible that Slaven would publish photos of our

home to drum up more business, after leaving our project incomplete and placing a lien on our property. We could not live with ourselves if we stood by and let other innocent homeowners fall into the same trap that we did. To do so would have made us complicit in Benchwood's deceit.

54. On or about November 22, 2020, I commented on several posts on Benchwood's Instagram page, using my Instagram account, @Dave_gr33n. All of the comments I made were true. We had not been provided with the door handles we paid for, and Benchwood would not return them. The windows were unfinished and could not be opened. The windows leaked water and air. Benchwood had abandoned the job unfinished, and the window installation company brought in by Benchwood, Final Touch Windows, refused to remedy the deficiencies.

55. In any event, all of the posts I made on Instagram were removed within minutes, presumably by one of the Slavens.

My Facebook Posts

56. I also posted a number of comments on Benchwood's Facebook page. All of these posts were made over the span of two days, specifically January 11-12, 2021. This was after we had obtained copies of the court filings in other legal actions involving the Slavens and Benchwood, and after I had learned from Baeumler Approved, Renomark, and the NHBA that Benchwood's memberships in these organizations had been revoked.

57. I had a Facebook handle that I had set up many years prior, @KennySaus, and used it to make the posts. The reason I originally set up this profile was so I could register for online games without my real name being visible. I was not trying to hide my identity from Benchwood, as it would have been obvious to the Slavens who I was due to the nature of my posts. It was so obvious that Slaven immediately called the police to make a complaint. When Officer Pouli visited our home on January 13, 2021, I readily admitted that I had made the posts. However, it appears that the officer was confused when writing his report as he refers to me as "Prescott" with respect to the Facebook posts. Attached

as **Exhibit “Y”** to this my affidavit is a true copy of the Niagara Regional Police General Occurrence Hardcopy dated January 13, 2021.

58. In almost all cases, I was replying to legacy comments made by other posters 20-40 weeks prior. What I did not know at the time was that most of the people whose posts I was commenting on were either friends, family, or business associates of the Slavens. These included Carol Macdonald (Gail Slaven’s sister, Shirley McMullen (a relative, Mary Conners Winning (Gail’s mother, Robert Greenan (a Benchwood employee, and the Stokes. Kevin Stokes and Slaven regularly did business together as realtor and builder, and based on their posts appeared to be business partners and friends.

59. I received no responses from any of these individuals, and several of them continued to post positive comments on Benchwood’s Facebook page after my posts were removed. All of my Facebook posts using the @KennySaus handle were deleted within as little as 8 minutes. To the best of my knowledge, not a single one of them lasted more than 40 minutes.

60. Many of the comments I posted on the Benchwood Facebook page were substantially true:

- Slaven had trespassed on our property.
- Benchwood was involved in an unusually high number of lawsuits.
- Slaven had falsely reported to the police that my wife had assaulted him.
- The cabinets in our home were made by Mission Cabinetry, and Benchwood had nothing to do with their construction or installation. However, Mission Cabinetry was not acknowledged in relation to photos of the cabinets posted on Benchwood’s Facebook page.

61. Many of the comments I posted on the Benchwood Facebook page were opinions that were reasonable for me to hold. After everything that had happened on our project, and in light of the information obtained from Baeumler Approved, the NHBA, RenoMark, and the court filings in various legal actions involving the Slavens and Benchwood, I honestly felt that Slaven was a “dirtbag” and a con-artist who had scammed several

people, including us, and who mistreated his employees and regularly failed to pay his tradespeople.

62. Slaven had behaved in a threatening manner towards my wife, and he himself told me (before our relationship soured) that a female client had accused him of assault, which he found to be amusing. In addition, according to the evidence filed in the legal dispute between Slaven, Joe Thornley, and Debra Atkins, Slaven had sent harassing and inappropriate messages to Ms. Atkins.

63. However, I concede that it was not accurate for me to state that Slaven had more “assault charges than anyone in Niagara Builders”, as I stated in a comment I made in response to a legacy post made 37 weeks prior by Robert Greenan. I should have used the word “accusations” instead of “charges”. Having said that, this particular comment was deleted within 20 minutes, and may not have been seen by anyone other than the person who deleted it (presumably Slaven). As for Robert Greenan, he subsequently immigrated from the United Kingdom to Canada, sponsored by Slaven. It is my understanding that he still works for Benchwood. Clearly, that comment did nothing to damage the relationship between Slaven and Mr. Greenan. Attached as **Exhibit “Z”** to this my affidavit is a true copy of Robert Greenan’s Facebook profile page, in which he identifies himself as a journeyman carpenter at Benchwood Builders.

Multiple Legal Actions Between the Parties

64. The within action is one of five legal actions between us and Benchwood and/or Slaven and Gail Slaven.

65. On November 3, 2020, Slaven registered a lien of \$59,230.14 against our home. A Statement of Claim against us was issued on February 2, 2021 in St. Catharines. We issued a Counterclaim, seeking damages for negligence, negligent misrepresentation, negligent construction, breach of contract, and/or the breach of duty of good faith in contractual performance.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DANNY IAMONACO and LUISA IAMONACO

Plaintiffs

- and -

MICHAEL SLAVEN, also known as MIKE SLAVEN; GAIL SLAVEN also known as GAIL WINNING; AND MICHAEL SLAVEN and GAIL SLAVEN, carrying on business as BENCHWOOD BUILDERS

Defendants

STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The Defendants, Michael Slaven, also known as Mike Slaven; Gail Slaven, also known as Gail Winning; and Michael Slaven and Gail Slaven, carrying on business as Benchwood Builders deny that the Plaintiffs, Danny Iamonaco and Luisa Iamonaco are entitled to the relief sought in paragraph 1 of the Statement of Claim.
2. The Defendants admit the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, and 40 of the Statement of Claim.
3. The Defendants deny the allegations contained in paragraphs 1, 11, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38 and 39 of the Statement of Claim.

DEFAMATION

50. The Defendants plead that following the cancellation of the Renovation Contract, the Iamonacos made false and defamatory statements to Baeumler Approved. In or about September of 2019, the Iamonacos sent a written complaint to Baeumler Approved. This complaint was sent directly to Baeumler Approved and to the knowledge of the Slavens was not broadcast.
51. In the complaint, the Iamonacos made statements which are false and defamatory. The complaint is reproduced below in its entirety:

We Booked Mike Slaven, Benchwood Builders in 2018 to do renovations at our home. We have attempted many times to meet with Mike Slaven to commence planning the renovations leading up to 2019 start date. Mr. Slaven has neglected to provide any service and very little guidance. During the signing of the contract, Mr. Slaven wanted 25% up front (41,000.00 +) to pay at the time of signing. We felt that was too high and he actually did not inform us of our rights, when we only had to pay a max 10% of the contract price. This is unethical practice. We requested our lawyer to review this contract and Mr. Slaven convinced us not to do so because it was a waste of money. He and along with his wife Gail Slaven (partner of Benchwood Builders) further pressured and manipulated us to sign the contract and to provide him with the 1st quarterly instalment to secure our spot for June 2019 renovations. If we did not give him the money, we will lose our spot and would have to wait into 2020. In addition, during the signing of the contract, Mike Slaven omitted items off the contract that we have talked about several times that were to be part of the contract such as: doors, hardware, installing the kitchen cabinets, etc. He said that he made an error and he would make sure that these items would be made part of the contract. After this moment we have continuously asked Mike Slaven for the updated items (addendum) and he has never provided us with this. He now denies these items which exemplifies his unethical, untrustworthy practices.

Mr. Slaven has avoided meeting with us to commence preparatory work such as: ordering kitchen cabinets; vanities, faucets; flooring and etc. and never done so. He has neglected to meet with us at all showrooms, that he has recommended and does frequent business with. He had never met with us at any time at any showrooms. After several attempts to invite him

to our home with assistance with floor plans... he showed up once on April 6, 2019, and after looking at the drawings, Mr. Slaven through out the ones he didn't like and the only drawings that he liked he said that there was not enough changes and to go back to make more changes. This was to push the cost of the renovations higher for Mr. Slaven benefits.

He also short changed us on allowance and saying that he provided more than enough funds to cover all expenses, it was definitely an understatement. He new at the end he would have us in a position that we had no choice but to dish out more money to finish the house or he will walk off the job.

He has attempted for us to sign a permit in July 2019, where we would be accepting full responsibly (liabilities, additional expense, engineering construction etc). And this was clearly the contractors responsibility, Mike Slaven Benchwood Builders as per contract. The contractor was hired by us to complete the full renovations, apply for permits, obtain approval for engineering construction to avoid any future engineering faults such as: second floor caving in because there was to be a open concept design to the home; requiring additional beams and column supports. The Town of Grimsby, Anthony Boncori the Chief Building Official stated that we not to sign the permit since there is a requirement for engineer or architect with a BCIN number to sign the permit. Mike Slaven will not obtain the engineering stamp approval for this and now wants us to sign the permit, once again we hired a contractor to do this. And it is stated in the contract that Mike Slaven is to complete this duty. If we were to act and sign for the responsibility and liability for the construction on the permit, why would we want to hire a contractor.

Mike Slaven, Benchwood Builders had never done any work including; planning leading up to start of renovations in which he said he would do; has never ordered any materials including kitchen cabinets, vanities, flooring, doors, hardware etc, no construction work at all up to this date. Mike Slaven is now attempting to blame us for all his lack of work and responsibilities in which he was to assume. He has moved onto another renovation and refuses to give us our full deposit back \$41,478.91.

In June 2019, Mr. Slaven called my husband to discuss our recent email requesting we talk over the phone instead of sending emails, in order to save time. During his conversation with Mike Slaven, Mr. Slaven commenced swearing and yelling at my husband over the phone illustrating anger and hostility; this is a destructive form of communication to harm us, and called him names, verbally assaulting him and then hung up the phone.

52. At various points throughout the complaint, the Iamonacos referred to the Slavens' practices as "unethical and untrustworthy."
53. These statements, in addition to others made throughout the complaint, were clearly meant to bring down the reputation of the Slavens and Benchwoods in the eyes of the recipient. The words, both by their plain meaning and by implication, suggest that the Slavens and Benchwood are not carrying on business in a proper and ethical manner. These statements are false.
54. Mike pleads that he provided guidance throughout the process. The early delays were caused by the Iamonacos' failure to obtain the architect drawings in a timely manner. This was their responsibility.
55. Mike denies that he told the Iamonacos not to discuss the contract with their lawyer and that he and/or Gail pressured the Iamonacos into signing the Renovation Contract. The Slavens spent nearly 3 hours with the Iamonacos in their home on the day the Renovation Contract was signed explaining the Renovation Contract to them.
56. The statements made with respect to the building permit application are both false and misleading. The Iamonacos were only to sign the Schedule 1 and would only be taking responsibility for the design. The Slavens and Benchwood did not prepare the design and this was not part of the contract.
57. The statement that Mike has not done any work is false. The engineering drawings and certificates were prepared and provided to Mr. Elwell. The lack of

construction, as previously plead, is due to the actions and omissions of the Iamonacos.

58. The Slavens and Benchwood plead that the Iamonacos made these statements maliciously, with the intent of diminishing the reputation of the Slavens and Benchwood and with the intent of harming their business. The Iamonacos made these statements knowing that they were false and/or misleading.
59. As a result of the false and defamatory statements made by the Iamonacos, Benchwood's membership with Baeumler Approved has been suspended. Benchwood has suffered damages as a result.
60. Baeumler Approved is a service provided by Brian Baeumler which is designed to help homeowners connect with contractors and trades from all across Canada. Brian Baeumler has a large television and on-line presence, along with brand knowledge and recognition.
61. In order to become a Baeumler Approved member, a contractors must demonstrate a verifiable history of quality work and customer service. A contractor is subjected to a screening process in order to become a Baeumler Approved member.
62. Benchwood had previously been a Baeumler Approved member. As a result of the false and defamatory statements made by the Iamonacos, Benchwood's Baeumler Approved membership was suspended.

63. As a Baeumler Approved member, Benchwood received the following benefits, and corresponding values:

- (a) Canada wide exposure and endorsement on the Baeumler Approved website and social medial pages-valued at \$40,000.00 per year;
- (b) Member trade shows facilitated by Baeumler-estimated value of \$20,000.00 per year;
- (c) Baeumler workshops in areas such as project management, customer relations, updates to building codes and equipment-valued at \$20,000.00 per year;
- (d) Member discounts with a variety of companies-valued at \$5,000.00 per year; and
- (e) Direct contact with customers.

64. The benefits which come with being a Baeumler Approved member are valued at approximately \$85,000.00 per year.

65. In addition to the lost benefits, Benchwood has lost award opportunities which are offered through Baeumler Approved. As a result of the suspension, this opportunity has been lost. Along with this lost opportunity, the exposure and potential business that would accompany the exposure has been lost.

66. In addition, Baeumler Construction, being Brian Baeumler's company, often used subcontractors on his television show who are located in the area in which the

show is set and are Baeumler Approved members. As a result of the Iamonacos' action, Benchwood has lost this opportunity, along with the exposure and direct revenue that would come with it.

67. In addition to the value of the benefits associated with being a Baeumler Approved member, Benchwood has lost business and income in an amount to be proven at or prior to the trial of this matter.

SLANDER OF TITLE

68. Mike and Gail plead that as a result of the Certificate of Pending Litigation which the Iamonacos have caused to be registered on the Slaven Property, they have suffered damages in an amount to be proven at or prior to the trial of this matter.
69. Mike and Gail plead that the Iamonacos do not hold any interest, beneficial or otherwise in the Slaven Property. The Slaven Property was never the subject of any contractual or other relationship between Mike and Gail and the Iamonacos.
70. Mike and Gail plead that the Certificate of Pending Litigation has been improperly registered and that the Iamonacos have done so without having any cause or excuse to place such a cloud on title to the Slaven Property.
71. The Iamonacos knew or ought to have known that they did not have any interest in the Slaven Property which is capable of registration and therefore, did not have any right to a Certificate of Pending Litigation. They knew or ought to have known that the Certificate of Pending Litigation is not based on any legitimate or lawful rights held by the Iamonacos.

Chats



RenoMark



Search



Your Story



RenoMark

5:31 PM

We have spoken with the Niagara Home Builders' Association. Benchwood Builders has not been a member of the Association nor RenoMark members since October when they were told they were no longer welcome as members of the association. They have since been removed from the RenoMark website. They were issued cease and desist letters in the fall for continuing unauthorized use of the CHBA and RenoMark logos.



Court File No. CV-21-0060067-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BENCHWOOD BUILDERS INC. and MICHAEL SLAVEN

Plaintiffs

- and -

CYNTHIA PRESCOTT and DAVID GREEN

Defendants

AFFIDAVIT OF CHARLES McSHANE

I, **CHARLES McSHANE**, also known as Chuck McShane, of the Town of Niagara-on-the-Lake, in the Regional Municipality of Niagara, **MAKE OATH AND SAY:**

1. I am the Chief Executive Officer ("**CEO**") of Niagara Home Builders' Association ("**NHBA**"), and as such, I have knowledge of the matters hereinafter deposed to. Where I do not have personal knowledge, I have stated the source of my knowledge and I do verily believe the facts stated herein to be true.
2. The NHBA is a member of the Ontario Home Builders' Association (the "**OHBA**") and the Canadian Home Builders' Association ("**CHBA**"), and was established in 1955.
3. Our organization consists of around 140 members from across the Niagara Region. Our membership includes builders of varying scale, renovators, tradespeople, and supplier members (i.e. companies of varying sizes that supply and sell products and services to the builders and tradespeople). Memberships must be applied for and approved by the NHBA Board of Directors (the "**Board**").

Benchwood Builders dated September 10, 2020, addressed to the attention of Michael Slaven.

11. Prior to sending that letter, the NHBA had received at least four complaints from customers of Benchwood Builders and four additional complaints from supplier members. The total number of complaints received about Benchwood Builders was more than the number of complaints received about all other members combined since the NHBA's formation in 1955. I note that none of these complaints was made by Cynthia Prescott or David Green.

12. In the letter of September 10, 2020, Mr. Slaven was advised that the client complaints indicated that Benchwood Builders had violated both "the NHBA Code of Conduct" (i.e. the Code of Ethics) and the CHBA National Policies. Mr. Slaven was asked to cease and desist using the names and logos of the NHBA, OHBA, and CBHA in connection with Benchwood Builders.

13. In my opinion, Benchwood Builders had not lived up to its obligations as set out in the application for membership in the NHBA, and had failed to comply with the NHBA Code of Ethics and the CHBA National Policies.

14. However, despite being asked to cease and desist using the names and logos of the NHBA, OHBA, and CBHA, Benchwood Builders continued to do so. Three such requests were sent before Mr. Slaven complied.

15. I specifically recall two meetings with representatives of Baeumler Approved during which we discussed our mutual concerns over the unauthorized use of our respective organization's names and logos by Benchwood Builders to promote their business.

16. It was not until January of 2021 that I first learned of Cynthia Prescott and David Green, and their own issues with Benchwood Builders. I believe I received a phone call from David Green at that time. I recall telling him that the NHBA had recently decided not to renew Benchwood Builders for membership.

17. On three separate occasions, the NHBA has received correspondence from lawyers representing Benchwood Builders. On December 23, 2020, Harry Korosis of Chown, Cairns LLP wrote to request that the NHBA renew his client's NHBA membership for 2021. Attached hereto as **Exhibit "C"** is a true copy of the letter from Harry Korosis to the NHBA.

18. The NHBA subsequently received correspondence from Sara J. Erskine of Weintraub Erskine Huang LLP dated February 12, 2021, in which she requested particulars of "defamatory statements" allegedly made to the NHBA by Cynthia Prescott and/or David Green, which they mistakenly believed had affected the membership status of Benchwood Builders. Attached hereto as **Exhibit "D"** is a true copy of the letter from Sara J. Erskine to the NHBA.

19. I responded by way of letter dated February 18, 2021, in which I stated the following:

The decision not to renew Benchwood Builders' membership was not made lightly. This decision was based on many observations, complaints and statements, including but not limited to statements from various longstanding NHBA members regarding your client's manner of conducting its business. Specifically, your client's conduct has objectively been assessed as: (a) not following our mission, values or principles as established by our Code; and (b) to be of such a nature that it is detrimental to NHBA's reputation and interests as well as those of its members in good standing. In light of the same, your client's membership was not renewed in our professional association.

I ended the letter by asking once again that Benchwood Builders cease and desist using "any logos or verbiage declaring membership in, and of" the NHBA, the OHBA, the CBHA, and, in addition, RenoMark. The RenoMark program was established in 2001 by the Toronto-based Building Industry and Land Development Association, and is delivered in partnership with the CHBA and local Home Builders' Associations across Canada, including the NHBA. RenoMark identifies professional contractors who have agreed to abide by a renovation-specific Code of Conduct. Attached hereto as **Exhibit "E"** is a true copy of the letter from myself to Sara J. Erskine.

20. Ms. Erskine sent a follow-up letter dated March 4, 2021, in which she took the position that my response was "deficient" and demanded that I provide particulars of the complaints made to the NHBA, "including any such observations, complaints, and statements that were made by Cynthia Prescott and/or David Green, failing which our client will explore its legal options." Attached hereto as **Exhibit "F"** is a true copy of correspondence from Sara J. Erskine to myself.

21. I perceived Ms. Erskine's letter of March 4, 2021 to be a threat and did not respond. The complaints received by the NHBA were provided on a confidential basis, and the NHBA is under no obligation to provide such information to its participant members or former participant members. Customers with legitimate complaints would be less likely to report them if they knew that their complaints would not be treated confidentially. In addition, revealing this information could make these customers vulnerable to reprisals.

SWORN BEFORE ME virtually via video
 conferencing with the Deponent at the
 Town of Niagara-on-the-Lake, in the
 Regional Municipality of Niagara, before me
 at the City of Toronto, in the Province of
 Ontario, on March 14, 2023 in
 accordance with O. Reg. 431/20,
 Administering Oath or Declaration
 Remotely.

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 CHARLES McSHANE



A Commissioner for Taking Affidavits

Tyler Andrew George Matthews,
 a Commissioner, etc., Province of Ontario,
 while a Student-at-Law.
 Expires May 4, 2024.



September 10, 2020

Benchwood Builders
 ATTN: Michael Slaven
 11 Richardson Court
 St. Catharines, Ontario L2W 0A2

Dear Michael,

Over the past several months, a variety of client complaints have been filed with the NHBA regarding business practices within your company, Benchwood Builders.

These grievances are a direct defiance of the NHBA Code of Conduct, as outlined in your signed Membership Agreement, as well as violate the CHBA National Policies.

After discussions with the Executive Committee, the Niagara Home Builders' Association has chosen not to renew Benchwood Builders Membership for the upcoming year.

We ask that you please cease and desist the use of the Niagara Home Builders', Ontario Home Builders' and Canadian Home Builders' Association name and logo(s) in print, display, social media, and additional marketing materials or in any other form in connection with Benchwood Builders.

Thank you for your past support and for your cooperation in this matter.

Sincerely,

The NHBA Executive Committee

PO Box 28 Ridgeway PO
 Ridgeway, Ontario L0S 1N0
 905-646-6281

info@nhba.ca | www.nhba.ca



The Niagara Homes Builders' Association
PO Box 28 | Ridgeway PO
Ridgeway, ON L0S 1N0

February 18, 2021

VIA EMAIL: adrienne.zaya@wehlitigation.com

Weintraub Erskine Huang LLP
365 Bay Street | Suite 501
Toronto ON M5H 2V1

Ms. Sara J. Erskine,

Re: Benchwood Builders Correspondence Dated February 12, 2021

Please note that the decision not to renew the membership of Benchwood Builders with the Niagara Home Builders' Association (NHBA) was not based on any single statement from an individual as inferred by your correspondence.

The NHBA, a professional association, has a *Members Code of Conduct* (Code) that establishes our mission, shared values and principles regarding the professional conduct of our members. All members are bound to and required to follow NHBA's Code to maintain membership.

The decision not to renew Benchwood Builders as a member of NHBA was decided upon by its Board of Directors (Board), following the same procedures as an initial membership approval. Meaning, each new membership application, along with annual membership renewals, are approved at the Board level. In making such decisions the Board assesses whether or not the applicant/members' known conduct is in line with the NHBA's Code and therefore viable.

The decision not to renew Benchwood Builders' membership was not made lightly. This decision was based on many observations, complaints and statements, including but not limited to statements from various longstanding NHBA members regarding your client's manner of conducting its business. Specifically, your client's conduct has objectively been assessed as: (a) not following our mission, values or principles as established by our Code; and (b) to be of such a nature that it is detrimental to NHBA's reputation and interests as well as those of its members in good standing. In light of the same, your client's membership was not renewed in our professional association.

This decision will not be altered without demonstrated and maintained change on the part of your client in relation to the manner your client conducts its business. Meaning, should your client improve and maintain its business practices at a level of professionalism that is in line with the NHBA's Code, your client's application for membership would be reviewed in good faith. The ability to change is within your client's control.

As previously stated in our correspondence, given the decision not to renew your client's membership, we ask once again that your client immediately cease and desist using any logos or verbiage declaring membership in, and of: the Niagara Home Builders' Association; the Ontario Home Builders' Association; the Canadian Home Builders' Association; and/or RENOMARK (collectively the HBA). In this regard, and without limiting the generality of the foregoing request, we ask that your client no later than 5:00 pm on **Friday, February 26, 2021**: (a) remove all HBA logos, verbiage, and/or references to holding membership in any of the HBAs from its websites, business cards, vehicles, and/or marketing and promotional materials; and (b) cease using and/or distributing any business cards, marketing and/or promotional materials that have any HBA logo, verbiage and/or references to membership in any of them on them. While we make this request amicably, we will follow up on the same with legal action should your client not respect this reasonable request.

Yours Truly,



Chuck McShane-Executive Officer

The Niagara Home Builders' Association

905-646-6281 C: 905-353-6920

chuck@nhba.ca | info@nhba.ca | www.nhba.ca

CC:

Ontario Home Builders' Association (OHBA)

Canadian Home Builders' Association (CHBA)



Suite 501, 365 Bay Street, Toronto, Ontario, M5H 2V1

Telephone: 416.306.8450 | Fax: 416.306.8451 |

Website: www.wehlitigation.com

Reply To: Sara J. Erskine
Office: 416-597-5408
E-mail: sara.erskine@wehlitigation.com

March 4, 2021

VIA EMAIL: chuck@nhba.ca

The Niagara Home Builders Association

PO Box 28 Ridgeway PO

Ridgeway, ON L0S 1N0

ATTN: Chuck McShane, Executive Officer

Mr. McShane:

Re: Benchwood Builders

I acknowledge receipt of your letter dated February 19, 2021 advising of the basis of the decision of the Niagara Home Builders' Association ("NHBA") not to renew the membership of Benchwood Builders ("**Benchwood**") (the "**February 19 NHBA Letter**").

The February 19 NHBA Letter delivered in response to our letter of February 12, 2021 is deficient in several respects.

The February 19 NHBA Letter does little more than make vague and elusive references to Benchwood's "conduct", which purportedly was not in accordance with the NHBA's *Members Code of Conduct* and of a nature that is detrimental to the NHBA's reputation and interests.

While the February 19 NHBA Letter states that the NHBA's position is premised on "many" complaints and/or statements that were made regarding Benchwood's "manner of conducting its business", no particulars are provided regarding the alleged conduct of Benchwood or manner of conducting its business that was complained of. The February 19 NHBA Letter then goes on to state that the decision not to renew Benchwood's membership will not be altered without change on Benchwood's part in relation to the manner in which it conducts its business, and that "the ability to change is within [Benchwood's] control."

The statements in the February 19 NHBA Letter, and particularly those referred to above, fail to provide a response to our letter of February 12 wherein we request particulars of the alleged complaints and/or statements made concerning our client. By failing to provide particulars, you have denied our client the opportunity to know the basis of the purported complaints and/or

statements made to the NHBA, and address or defend against the alleged complaints and/or statements.

Moreover, by failing to provide the particulars of the allegations against Benchwood's conduct and/or manner of conducting its business, the February 19 NHBA Letter effectively threatens an indefinite maintenance of the status quo.

Please provide us with a response by no later than Wednesday, March 10, 2021 at 5:00 p.m. with sufficient particulars of the alleged "observations, complaints, and statements" that were made to the NHBA regarding Benchwood's alleged conduct and/or manner of conducting its business, including any such observations, complaints, and statements that were made by Cynthia Prescott and/or David Green, failing which our client will explore its legal options.

We look forward to hearing from you.

Yours truly,

WEINTRAUB ERSKINE HUANG LLP

A handwritten signature in dark ink, appearing to read "Sara Erskine", written in a cursive style.

Sara J. Erskine
SJE/az

Court File No. CV-21-0060067-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BENCHWOOD BUILDERS INC. and MICHAEL SLAVEN

Plaintiffs

- and -

CYNTHIA PRESCOTT and DAVID GREEN

Defendants

AFFIDAVIT OF HENDRIK SCHONEWILLE

I, **HENDRIK SCHONEWILLE**, also known as **RICK SCHONEWILLE**, of the City of Port Colborne, in the Regional Municipality of Niagara, **MAKE OATH AND SAY:**

1. I am a construction worker who was formerly employed as a Foreman by Benchwood Builders Inc. ("**Benchwood Builders**"), and as such, I have knowledge of the matters hereinafter deposed to. Where I do not have personal knowledge, I have stated the source of my knowledge and I do verily believe the facts stated herein to be true.
2. I have more than 35 years of industry experience in commercial and residential construction projects, either as an employee or as a self-employed sub-contractor. In December of 2018, I was recruited by Michael Slaven & his wife, Gail Winning-Slaven, owners of Benchwood Builders, who hired me as a Foreman for their company.
3. During my tenure with Benchwood Builders, I worked on two residential projects in Niagara-on-the-Lake. The first was the home of Ann and Mihran Azadian. The second was the home of Kevin and Sandra Stokes. I understand that Mr. Stokes acted as the realtor for the Slavens. The Stokes home is located a short distance away from the home of the Slavens, on Melrose Drive in Niagara-on-the-Lake.

Facebook Posts

28. After I resigned from Benchwood Builders, I believed it was my duty to warn people about the dangers of hiring this company for home renovations. Accordingly, I posted comments on the Benchwood Builders Facebook page, but my comments were quickly removed. Mr. Slaven never complained to me about these posts, even though he did send me a letter warning me to stay away from his worksites.

29. Attached hereto as **Exhibit "A"** is a true copy of a comment I posted on the Benchwood Builders Facebook page, as produced by the plaintiffs at Tab 5 of their Affidavit of Documents. I believe I made this post shortly after I resigned. The post reads, in reference to Michael Slaven (with spelling and grammar as in the original):

He is going to get all thats coming to him very soon I am making it a mission to expose him and put him outta business get all the people over the last few years their money back

30. Attached hereto as **Exhibit "B"** is a true copy of another comment I posted on the Benchwood Builders Facebook page, as produced by the plaintiffs at Tab 39 of their Affidavit of Documents. I believe I made this post a year or more after resigning, around the time I noticed a post by Mr. Slaven indicating that the home of Cynthia Prescott and David Green was to be his next project. I did not know Ms. Prescott or Mr. Green personally, and had no contact with them prior to making the post. This post reads, in reference to the upcoming project (with spelling and grammar as in the original):

I would recommend to the owners of this property to get your deposit back and find a reputable contractor not a con artist . You are destined to become the next victim of subpar construction service and an uncompleted project which will leave [you] undoubtedly homeless for a time and then become the next in line to file a lawsuit. Get out while you can

31. The reason I made these posts is because I consider myself to be a person of integrity, and I could not in good conscience stay silent when I knew that Mr. Slaven was following bad building practices, mistreating his customers and employees, and outright lying to people.

32. Strangely, even though my Facebook comments were posted well over two years ago and Mr. Slaven knows full well who I am and how to find me, I was never threatened with a legal action or sued for making these posts.

Tyler Andrew George Matthews,
a Commissioner, etc., Province of Ontario,
while a Student-at-Law.
Expires May 4, 2024.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BENCHWOOD BUILDERS, INC. and MICHAEL SLAVEN
Plaintiffs (Moving Parties)

and

CYNTHIA PRESCOTT and DAVID GREEN
Defendants (Responding Parties)

AFFIDAVIT OF MICHAEL SLAVEN

(Motion for Summary Judgment, sworn May 4, 2023)

I, Michael Slaven, of the Town of Niagara-on-the-Lake, in the Province of Ontario, MAKE OATH
AND SAY:

1. I am a named Plaintiff in the within Action as well as the owner and operator of the Plaintiff Benchwood Builders, Inc. (“**Benchwood**”), and, as such, have knowledge of the matters contained in this Affidavit except where such knowledge is based on information and belief, in which case I have stated the source of the information and verily believe it to be true.

The Parties

2. I am the owner and operator of Benchwood, a full-service general contracting and construction management firm specializing in residential projects in the Town of Niagara-on-the-Lake and throughout the Golden Horseshoe region in Ontario.

-30-

86. As a result of Mr. Green and Ms. Prescott's ongoing defamatory attacks, in early February 2021, I jointly retained legal counsel with Benchwood. As mentioned at paragraph 85 of this Affidavit, my lawyer sent demand letters to Mr. Green and Ms. Prescott dated February 12, 2021, requesting that they retract their false and defamatory statements and remove the posts by 5:00 p.m. on February 19, 2021. Ms. Prescott did not remove the false and defamatory statements or respond to my counsel's correspondence.

87. On March 15, 2021, this Action was commenced by issuing a statement of claim.

Damages Suffered

88. Ms. Prescott and Mr. Green's campaign of publishing the defamatory statements online and making defamatory statements to others was concerted with a view to destroying my personal and professional reputation as well as that of Benchwood within the industry. They weaponized their social media accounts to pursue vengeful and vindictive behaviour.

89. Past and present clients research general contracting and construction companies on the internet in order to determine their reputation in the community. Additionally, other general contracting and construction companies review the profiles of like companies for their own research purposes, including the provision of appropriate referrals or collaborations. Therefore, the potential reach of the defamatory statements by the Defendants is vast.

90. I am concerned about current clients seeing the impugned false and defamatory posts, and subsequently wanting to end their contractual relationship(s) with Benchwood.

-31-

91. The Defendants have unjustifiably harmed my reputation as well as that of Benchwood, which has had devastating consequences. The Defendants' dissemination of the defamatory statements on (often public) social media accounts compounded the harm they inflicted on me personally as well as Benchwood.

92. As a result of Ms. Prescott and Mr. Green's defamatory statements and orchestrating Benchwood's demise, I have suffered great mental distress and anguish. Since Mr. Green and Ms. Prescott's defamatory statements were made, and the knock on effects that they have had, I have suffered from many sleepless nights and feeling sick to my stomach.

93. In May 2020, Benchwood had retained and was working with CREW Marketing to help with, among other things, rebranding, developing Benchwood's website, creating a content management system and assist with search engine optimization – all critical tools for the growth and success of any consumer based business. Ms. Prescott was aware of these marketing plans all along.

94. However, due to the significant losses Benchwood sustained due to Mr. Green and Ms. Prescott smear campaign, Benchwood was forced to put its marketing plan on hold in October 2020. As a result, Benchwood has been with an outdated website, lacking many critical features that search engines require in order to achieve optimal exposure. Benchwood has remained virtually invisible online and we have watched our direct competition (all of which are from out of town) overtake us in advertising and construction despite Benchwood being a local Niagara-on-the-Lake-based company.

95. It was not until January 2022 that Benchwood was able to turn its focus back toward its marketing strategy, bringing all of its accounts with CREW Marketing up to date plus incurred interest. CREW Marketing's service terms impose a 2% per month service charge, and a 24% per annum service charge on all past due accounts. Benchwood has paid interest totaling \$4,991.54. Attached hereto and marked as **Exhibit "EE"** are copies of the past due CREW Marketing invoices and attached hereto and marked as **Exhibit "FF"** is Benchwood's RBC Royal Bank transaction of \$17,918.40 dated January 14, 2022.

96. Further, despite the renovation boom in 2020-2021, which was one of the main reasons for the spike in prices in construction materials, Benchwood suffered a loss in revenue due to Mr. Green and Ms. Prescott's conduct. Benchwood was required to apply for the Canada Emergency Wage Subsidy (CEWS) from December 20, 2020 to August 28, 2021. The CEWS subsidy required a drop of at least 15% in revenue in March 2020 and 30% for the following months of April, May and June 2020, when compared to revenue for the same period in 2019. Attached hereto and marked as **Exhibit "GG"** are copies of a printout of a "frequently asked questions" page regarding the CEWS subsidy obtained from the Government of Canada website as well as letters issued from Canada Revenue Agency to Benchwood documenting Benchwood's eligibility for the CEWS subsidy from December 2020 to August 2021.

97. In fact, around the time that Mr. Green and Ms. Prescott were publishing their defamatory statements online, we were working on closing two six-figure contracts with values totaling \$391,485.96 + HST and \$367,475.96 + HST. Just before we were about to execute the contracts, the clients suddenly backed out without explanation other than that they had changed their minds.

Attached hereto and marked as **Exhibit “HH”** are copies of the estimates for the renovation work requested, redacted for confidentiality.

98. Similarly, in early September of 2020, we were working on securing another six-figure contract for extensive renovation work. The clients suddenly disappeared without another word.

99. I believe that Mr. Green and Ms. Prescott’s defamation of me and Benchwood caused the loss of these two large contracts, and caused us to lose out on securing many other potential clients.

100. I have no occupation other than owner and operator of Benchwood and my family and I depend on Benchwood’s business for our livelihoods. I have spent years building Benchwood’s reputation in the Niagara-on-the-Lake region, which is a small region in which people in the industry more or less all know one another or know of one another. Further, I have prided myself on establishing and maintaining a reputable way of conducting my business. Mr. Green and Ms. Prescott have destroyed my reputation through their smear campaign.

101. Benchwood and I have also been subjected to ridicule and harassment from others as a result of Mr. Green and Ms. Prescott’s conduct. While me and my employees were working at a site, an unidentified individual approached us and took a picture and hurriedly drove off.

102. On another occasion, in or around March 2021, a Benchwood employee drove a considerable distance to obtain lumber from one of Benchwood’s longstanding suppliers, Penner’s Home Hardware, from which Benchwood has been obtaining its supplies for the past 5 or 6 years preceding the events underlying this litigation. When he arrived, he was asked whether he worked for me. When my employee responded affirmatively, he was told that Benchwood was no longer welcome to shop there for supplies. As a result, the employee had to drive 40 kilometers to another

supplier to obtain the supplies needed. To this day, Benchwood is not permitted to shop at Penner's Home Hardware, which requires Benchwood employees to travel an additional half hour each way, as frequent as three to four times a week, to purchase lumber from the next closes supplier.

103. When I first learned about this incident, I was distraught because I realized for the first time just how far Ms. Prescott and Mr. Green's false and defamatory words about me and Benchwood had traveled throughout the region and the industry. To make matters worse, Niagara-on-the-Lake is not a large geographical area – there are not very many suppliers in the immediate area in comparison to, for example, the Greater Toronto Area. I'm afraid that if Mr. Green and Ms. Prescott's false and defamatory words continue to spread throughout the industry and the Niagara-on-the-Lake region, Benchwood will be left with insufficient or no suppliers in the Niagara-on-the-Lake area, which would pose a grave threat to Benchwood's viability as a business and the livelihoods of me and my family.

104. Additionally, one of Benchwood's painters, Aztec Painting, along with many other trades that Benchwood has worked with for several years, have now distanced themselves from me and Benchwood. As a result, Benchwood has had to find new trades to work with because Mr. Green and Ms. Prescott have ruined my and Benchwood's credibility with tradesmen that we customarily used to work with.

105. Further indicating Ms. Prescott's resolve to destroy my reputation and that of Benchwood, in October 2020, Ms. Prescott filed a claim with Benchwood's insurance adjuster, Federated Insurance Company of Canada ("**Federated Insurance**"), in bad faith claiming, among other things, that Benchwood had trespassed on the premises and stolen her property.

106. An adjuster and third party contractor visited Mr. Green and Ms. Prescott's residence and found there was no evidence to substantiate Ms. Prescott's allegations. Further, despite several requests from Federated Insurance, Mr. Green and Ms. Prescott failed to file any proof of damage (because her allegations were false and there was no such evidence to substantiate such absurd allegations). As a result, the file was deemed closed due to nonactivity. Attached hereto and marked as **Exhibit "II"** is a copy of email correspondence between myself and Ursula Lovering, a liability adjuster with Northbridge Financial Corporation (representing Benchwood in respect of the claim pertaining to the Property), indicating that the file was closed due to nonactivity.

107. In fact, as a result of the Defendants' defamatory statements, Benchwood received a letter dated October 8, 2020 from the Niagara Home Builders' Association ("NHBA") Executive Committee indicating that the Executive Committee had decided not to renew Benchwood's membership for 2021.

108. Benchwood has been a member of the NHBA since 2019. The NHBA is a highly respected, not-for-profit organization representing more than 140 member companies including builders, developers, renovators, suppliers, supplier/trade contractors, manufacturers and allied professionals, and which is involved in all facets of new home construction and residential renovation industry. Being a member of the NHBA is a mark of distinction which identified Benchwood as an industry professional. Further, NHBA members are also members of the provincial Ontario Home Builders' Association and the federal Canadian Home Builders' Association. Through its membership, Benchwood has benefitted from a host of opportunities to build its business and business network.

109. Yet, as a result of the false statements made by Mr. Green and/or Ms. Prescott, the NHBA sent the October 8th letter to Benchwood stating, among other things:

Over the past several months, a variety of client complaints have been filed with the NHBA regarding business practices within your company, Benchwood Builders.

These grievances are a direct defiance of the NHBA Code of Conduct [...] as well as violate the CHBA National Policies.

After discussions with the Executive Committee, the Niagara Home Builders' Association has chosen not to renew Benchwood Builders Membership for the upcoming year.

Attached hereto and marked as **Exhibit "JJ"** is a copy of the NHBA letter, dated October 8, 2020.

110. The lawyers that I had jointly retained with Benchwood reached out to the NHBA to try to rectify the harm done by Ms. Prescott and Mr. Green to no avail, as detailed below.

111. On February 12, 2021, my lawyers wrote a letter to the NHBA, among other things, requesting that the association provide particulars of the statements that were made to the association concerning Benchwood to allow Benchwood an opportunity to respond to the allegations being made against it. Attached hereto and marked as **Exhibit "KK"** is a copy of Ms. Erskine's letter to the NHBA, dated February 12, 2021.

112. On February 19, 2021, my lawyers received a responding letter from the NHBA. The letter made vague and elusive references to Benchwood's "conduct" and "manner of conducting its business", which the association purported was not in accordance with its code of conduct and was "detrimental to [the association's] reputation and interests". The letter then went on to state that, unless the aforementioned "conduct" and "manner of conducting business" (which was not particularized or otherwise made known to Benchwood) changed, then the association's decision

not to renew Benchwood's membership would stand. The material parts of the letter are reproduced below:

[...]

The decision not to renew Benchwood Builders' membership was not made lightly. This decision was based on many observations, complaints and statements, including but not limited to statements from various longstanding NHBA members regarding your client's manner of conducting its business. Specifically, your client's conduct has objectively been assessed as: (a) not following our mission, values or principles as established by our Code; and (b) to be of such a nature that it is detrimental to NHBA's reputation and interests as well as those of its members in good standing. In light of the same, your client's membership was not renewed in our professional association.

This decision will not be altered without demonstrated and maintained change on the part of your client in relation to the manner your client conducts its business. Meaning, should your client improve and maintain its business practices at a level of professionalism that is in line with NHBA's Code, your client's application for membership would be reviewed in good faith. The ability to change is within your client's control.

[...]

Attached hereto and marked as **Exhibit "LL"** is a copy of the NHBA letter to Ms. Erskine, dated February 19, 2021.

113. I verily believe that as part of Mr. Green and Ms. Prescott campaign against me and Benchwood, they launched complaints against me and Benchwood to the NHBA to harm our reputations.

114. On March 4, 2021, the Plaintiffs' lawyers wrote a letter to the NHBA, which pointed out that: (i) the NHBA had not provided Benchwood with any particulars of the alleged conduct or manner of conducting business that offended the NHBA's code of conduct; and, as a result, (ii) Benchwood has been denied an opportunity to know the basis of the complaints against it as well

as an opportunity to address or defend against the complaints. The material parts of the letter are reproduced below:

[...]

While the February NHBA Letter states that the NHBA's position is premised on "many" complaints and/or statements that were made regarding Benchwood's "manner of conducting its business", no particulars are provided regarding the alleged conduct of Benchwood or manner of conducting its business that was complained of. The February 19 NHBA Letter then goes on to state that the decision not to renew Benchwood's membership will not be altered without change on Benchwood's part in relation to the manner in which it conducts its business, and that "the ability to change is within [Benchwood's] control."

The statements in the February 19 NHBA Letter, and particularly those referred to above, fail to provide a response to our letter of February 12 wherein we request particulars of the alleged complaints and/or statements made concerning our client. By failing to provide particulars, you have denied our client the opportunity to know the basis of the purported complaints and/or statements made to the NHBA, and address or defend against the alleged complaints and/or statements.

Moreover, by failing to provide the particulars of the allegations against Benchwood's conduct and/or manner of conducting its business, the February 19 NHBA Letter effectively threatens an indefinite maintenance of the status quo.

[...]

Attached hereto and marked as **Exhibit "MM"** is a copy of Ms. Erskine's letter to the NHBA, dated March 4, 2021.

115. The NHBA did not respond to the letter from my lawyers dated March 4th. To this day, I do not know to what "conduct" or "manner of conducting business" the NHBA letter is referring, effectively precluding Benchwood indefinitely from becoming a member of the NHBA.

116. I swear this Affidavit in support of the Plaintiffs' motion for summary judgment against the Defendants and for no other improper purpose.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BENCHWOOD BUILDERS, INC. and MICHAEL SLAVEN

Plaintiffs

and

CYNTHIA PRESCOTT and DAVID GREEN

Defendants

AFFIDAVIT OF MICHAEL SLAVEN

(Motion for Summary Judgment and Anti-SLAPP Motion, sworn on October 11, 2023)

I, Michael Slaven, of the Town of Niagara-on-the-Lake, in the Province of Ontario, MAKE
OATH AND SAY:

1. I am a named Plaintiff in the within Action as well as the owner and operator of the Plaintiff Benchwood Builders, Inc. (“**Benchwood**”), and, as such, have knowledge of the matters contained in this affidavit except where such knowledge is based on information and belief, in which case I have stated the source of the information and verily believe it to be true.
2. I previously swore an affidavit on May 4, 2023 in support of the Plaintiffs’ motion for summary judgment. I repeat and rely on my statements therein.
3. I have reviewed the affidavit of the Defendant Cynthia Prescott (“**Ms. Prescott**”) sworn on August 9, 2023, and the affidavit of the Defendant David Green (“**Mr. Green**”) sworn on August 9, 2023, both of which were sworn in opposition to the Plaintiffs’ motion for summary judgment and in support of the Defendants’ motion under section 137.1 of the Courts of Justice Act. I deny

Attached hereto and marked as **Exhibit “JJ”** is a copy of Mr. Vajda’s letter dated August 15, 2023.

75. The claims made at paragraph 24 of Ms. Prescott’s affidavit are completely and utterly false. I would never laugh, joke or otherwise make light about being falsely accused of assault, nor would I discuss such a thing with a client.

The Defendants’ Allegations Pertaining to the Plaintiffs’ Business Practices

76. In response to paragraph 26 of Ms. Prescott’s affidavit, Baeumler Approved revoked Benchwood’s membership due to complaints that were made by Debra Atkins (“**Ms. Atkins**”) and Joey Thornley (“**Mr. Thornley**”). That litigation settled in April 2020, which resulted in Ms. Atkins and Mr. Thornley writing a letter dated April 3, 2020 to Baeumler Approved recanting all of the complaints they submitted. The body of the letter is reproduced below:

The purpose of this letter is to officially recant all of the complaints we submitted to your company via email on August 7, 2019 and August 13, 2019. The allegations made in our complaints were overstated and premature in nature, and they should not have been forwarded to you until they could properly be substantiated. In particular, we would like to recant our allegations regarding texts sent to Debra Atkins having any implicit or explicit sexual meaning.

As we understand that Benchwood Builders’ account with you was suspended subsequent to our complaints, we wish to withdraw these complaints and ask that you disregard any impact they may have had on your decision to suspend this account.

Attached hereto and marked as **Exhibit “KK”** is a copy of Ms. Atkins and Mr. Thornley’s letter dated April 3, 2020.

77. Benchwood was waiting to receive a response from Baeumler Approved with respect to reinstating Benchwood’s membership. It was not until September 10, 2020 that Benchwood

will ultimately review this evidence in deciding the Plaintiffs' summary judgment motion and the Defendants' motion under section 137.1 of the Courts of Justice Act.

168. Through very extensive efforts, just recently Benchwood has become a licensed builder with the Home Construction Regulatory Authority (“**HRC**A”) and Tarion Home Warranty. Ms. Slaven and I have worked very hard and have been very closely scrutinized. To qualify for the, one must prove competency in seven areas as well as pass police background checks as well as disclose financial records, ongoing litigation, business license and registration, and the like.

169. In response to paragraphs 7 to 14 of Mr. Green's affidavit:

- a) The lawsuit involving Donald Newman was commenced by Benchwood. That action has since settled. As such, the Defendants are effectively relying on nothing more than allegations that were never proven before a court of law.
- b) The action involving Danny and Luisa Iamonaco settled a long time ago, with Mr. and Mrs. Iamonaco delivering a recanting letter, among other things, withdrawing the claims that they had made against the Plaintiffs and Ms. Slaven. Attached hereto and marked as **Exhibit “SSS”** is a copy of Mr. and Mrs. Iamonaco's recanting letter dated August 31, 2021.
- c) As explained at paragraph 76 in this affidavit, the action involving Mr. Thornley and Ms. Atkins also settled a long time ago, with Mr. Thornley and Ms. Atkins delivering a recanting letter, among other things, recanting all the complaints and allegations made therein.

VIA REGULAR MAIL & EMAIL TO: approved@baeumler.ca
VIA EMAIL TO: michaelblaven@benchwood.ca

April 3, 2020

Baeumler Approved
3416 Fairview St.
Burlington ON
L7N 2R5

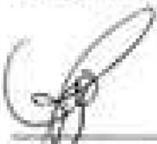
Dear Madam or Sir:

Re: **Complaints made against Benchwood Builders via email dated August 7, 2019 and August 13, 2019**

The purpose of this letter is to officially recant all of the complaints we submitted to your company via email on August 7, 2019 and August 13, 2019. The allegations made in our complaints were overstated and premature in nature, and they should not have been forwarded to you until they could properly be substantiated. In particular, we would like to recant our allegations regarding texts sent to Debra Atkins having any implicit or explicit sexual meaning.

As we understand that Benchwood Builders' account with you was suspended subsequent to our complaints, we wish to withdraw these complaints and ask that you disregard any impact they may have had on your decision to suspend this account.

Yours truly,



Joey Thornley

Debra Atkins

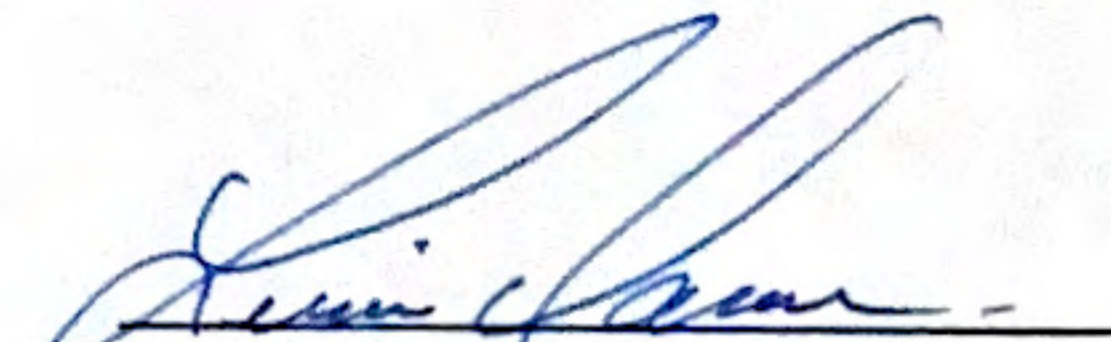
Dan and Luisa Iamonaco
9 Hickory Crescent
Grimsby, ON
L3M 5R1

August 31, 2021

Baeumler Approved
3416 Fairview Street
Burlington, ON
L7N 2R1

To Whom It May Concern:

We have resolved our dispute with Michael Slaven, also known as Mike Slaven, and Gail Slaven, also known as Gail Winning (collectively "Slaven's"), and Benchwood Builders, and accordingly we confirm that the Slaven's and/or Benchwood Builders did not abandon the Contract/project, and they did not coerce us into executing the Contract and we withdraw our complaints against them.


Danny Iamonaco
Luisa Iamonaco

ONTARIO
SUPERIOR COURT OF JUSTICE

MH/am

B E T W E E N:

BENCHWOOD BUILDERS, INC. and MICHAEL SLAVEN

Plaintiffs

- and -

CYNTHIA PRESCOTT and DAVID GREEN

Defendants

- - - - -

This is the Cross-Examination of MICHAEL SLAVEN on his Affidavits sworn the 4th day of May, 2023 and the 11th day of October, 2023, taken via videoconference at the offices of VICTORY VERBATIM REPORTING SERVICES, Suite 900, Toronto-Dominion Centre, 222 Bay Street, Toronto, Ontario, on the 7th day of November, 2023.

- - - - -

APPEARANCES:

ADRIENNE ZAYA -- for the Plaintiffs

SHELDON INKOL -- for the Defendants
CAMERON HO
(articling student)

ALSO PRESENT:

David Green
Cynthia Prescott
Gail Slaven

1 402. Q. Okay. So, you are including going
2 to get the tools as being...okay, but that is just
3 one, isn't it? Like, the police came in to help you
4 get the tools, right?

5 A. That is two. I mean, I didn't know
6 they would recommend that they would have to come
7 out again to help me get my tools. So, I count two.

8 403. Q. Okay.

9 A. Once to inquire, and then, upon
10 their suggestion, a second time to give me safe
11 escort, I guess.

12 404. Q. Okay. So, is it true, Mr. Slaven,
13 that Mrs. Prescott assaulted you?

14 A. No. No, that is not true.

15 405. Q. Okay. But that is what it says in
16 this e-mail, does it not?

17 A. That is what it says, yes. That is
18 what it says, yes.

19 406. Q. Okay. And your name is signed to
20 this e-mail.

21 A. Yes, that is not my version.

22 407. Q. Sorry, this...what do you mean by
23 that?

24 A. This is...word-for-word, that is not
25 what I e-mailed Mani.

1 408. Q. So, you are saying you sent Mani an
2 e-mail, and he altered it before he posted it?

3 A. Something happened, yes. That is
4 not my version.

5 409. Q. Okay. Could I get an undertaking,
6 Counsel, then, for Mr. Slaven's version of the
7 e-mail that he sent to Mani?

8 A. I can tell you right now, I don't
9 have it. Our e-mails were hacked. I have tried to
10 recover that e-mail several times, but it was one of
11 the...some of the e-mails that was...I couldn't
12 retrieve.

13 410. Q. Do you have any of your e-mails with
14 Mr. Leo related to this...

15 A. Yes, I do, yes, but nothing with
16 this, nothing...nothing...

17 411. Q. Okay.

18 A. ...[inaudible] sent him.

19 412. Q. Okay. So, could I get an
20 undertaking, then, for the correspondence with Mr.
21 Leo...

22 A. The other correspondence?

23 413. Q. Yes.

24 MS. ZAYA: Counsel, is there a scope?
25 You need every single e-mail with Mr. Leo?

1 e-mail...if there is a copy of the letter
2 revoking membership, I would like a copy of
3 that letter.

4 MS. ZAYA: Yes.

U/A

5 500. MR. INKOL: Okay.

6
7 BY MR. INKOL:

8 501. Q. And would it be fair to say that
9 this was in the fall of 2019, roughly?

10 A. Sounds about right.

11 502. Q. Okay. And you would agree with me
12 that that was before you actually started working on
13 the Prescott and Green project, correct?

14 A. Oh, no. No, I wouldn't say fall of
15 2019. I think more like fall 2020.

16 503. Q. Okay. I believe there is some
17 documentation...actually, we can take a look. If
18 you go to Exhibit KK, Cameron, to Mr. Slaven's
19 October 11th affidavit...okay. So, we see here,
20 there is...it looks like a letter dated April 3rd,
21 2020, to Baeumler, approved@beaumler.ca. Do you see
22 that, sir?

23 A. Yes.

24 504. Q. Okay. Now, if you look at the
25 letter, it says that the purpose of it is to recant

1 all of the complaints that were submitted on August
2 7th, 2019 and August 13th, 2019. And at the last
3 paragraph, it says:

4 "...As we understand that, Benchwood
5 Builders' account with you was suspended
6 subsequent to our complaints, we wish to
7 withdraw these complaints and ask that you
8 disregard any impact they may have had on
9 your decision to suspend this account..."

10 So, does that refresh your memory? Was it in the
11 fall of 2019 that your membership was revoked?

12 A. I don't want to say for sure,
13 because this letter was written April 3rd, 2020.
14 So...

15 505. Q. Right, but it refers to complaints
16 made in August of 2019.

17 A. It wasn't...it was complaints made
18 there, but my...I wasn't...let me just read this.
19 Yes, I don't believe my membership was suspended
20 then.

21 506. Q. Okay. Now, was this letter part of
22 the...was it agreed to as part of the settlement?

23 A. Oh, yes.

24 507. MR. INKOL: Okay. So, I am going to
25 ask, Counsel, and you can tell me if you

Dismissal of proceeding that limits debate

Purposes

- 137.1** (1) The purposes of this section and [sections 137.2 to 137.5](#) are,
- (a) to encourage individuals to express themselves on matters of public interest;
 - (b) to promote broad participation in debates on matters of public interest;
 - (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
 - (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. [2015, c. 23, s. 3.](#)

Definition, “expression”

- (2) In this section,
- “expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. [2015, c. 23, s. 3.](#)

Order to dismiss

- (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. [2015, c. 23, s. 3.](#)

No dismissal

- (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
- (a) there are grounds to believe that,
 - (i) the proceeding has substantial merit, and
 - (ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. [2015, c. 23, s. 3.](#)

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. [2015, c. 23, s. 3.](#)

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. [2015, c. 23, s. 3.](#)

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. [2015, c. 23, s. 3.](#)

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. [2015, c. 23, s. 3.](#)

Damages

(9) 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. [2015, c. 23, s. 3.](#)



State of California

CODE OF CIVIL PROCEDURE

Section 425.16

425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 11130, 11130.3, 54960, or 54960.1 of the Government Code, or pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title 1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to Section 7923.115, 11130.5, or 54960.5 of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, Insurance Commissioner, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,” “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

(Amended by Stats. 2024, Ch. 444, Sec. 1. (SB 577) Effective January 1, 2025.)

1704604 Ontario Limited *Appellant*

v.

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

and

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

**INDEXED AS: 1704604 ONTARIO LTD. v. POINTES
PROTECTION ASSOCIATION**

2020 SCC 22

File No.: 38376.

2019: November 12; 2020: September 10.

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

1704604 Ontario Limited *Appelante*

c.

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

et

**British Columbia Civil Liberties Association,
Greenpeace Canada,
Canadian Constitution Foundation,
Ecojustice Canada Society,
Centre for Free Expression,
Association canadienne des journalistes,
Gilde canadienne des médias / Syndicat des
communications d'Amérique / 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,
Association canadienne des libertés civiles,
Ad IDEM / Canadian Media Lawyers
Association,
Canadian Journalists for Free Expression,
CTV, une division de Bell Média inc.,
Global News, a division of Corus Television
Limited Partnership,
Réseau de télévision des peuples autochtones et
Postmedia Network Inc.** *Intervenants*

**RÉPERTORIÉ : 1704604 ONTARIO LTD. c.
POINTES PROTECTION ASSOCIATION**

2020 CSC 22

N° du greffe : 38376.

2019 : 12 novembre; 2020 : 10 septembre.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et
Kasirer.

dealing with s. 137.1 motions. Finally, in Part IV, I apply the established legal framework to the facts of this case.

II. Background

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

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

[8] The APR “concluded that it is desirable for Ontario to enact legislation against the use of legal processes that affect people’s ability or willingness to express views or take action on matters of public interest” (para. 10). The APR looked extensively at the need for such legislation (paras. 6-16), then

pour examiner les motions présentées en application de l’art. 137.1. Enfin, dans la section IV, j’applique ce cadre juridique aux faits de la présente affaire.

II. Contexte

[6] Avant d’expliquer les paramètres du régime établi par l’art. 137.1, il est nécessaire, pour les fins de l’exercice d’interprétation statutaire, de résumer le contexte législatif du projet de loi ayant mené à l’adoption de l’art. 137.1. Ce contexte et cet historique législatifs donnent des indices sur l’objet du projet de loi, en plus de renseigner sur la manière d’interpréter correctement les dispositions législatives concernées, que nous analyserons plus loin à tour de rôle. En effet, la Cour a maintes fois réaffirmé que, selon la méthode moderne d’interprétation statutaire, les termes d’une loi doivent être lus [TRANSDUCTION] « dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’économie de la loi, l’objet de la loi et l’intention du législateur » (E. A. Driedger, *Construction of Statutes* (2^e éd. 1983), p. 87, cité dans *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21).

[7] En 2010, le procureur général de l’Ontario a mandaté un Comité consultatif pour contrer les poursuites-bâillons (« Comité ») afin qu’il conseille le gouvernement sur les mesures à prendre pour contrer la multiplication des poursuites de ce type. Présidé par des experts, le Comité a étudié une pléthore de documents allant des articles juridiques aux mesures législatives pertinentes d’autres administrations, en passant par des documents de revendication. Le Comité a également invité le public et les parties intéressées à soumettre des mémoires. Tous ces efforts ont mené à la production d’un rapport intitulé *Comité consultatif pour contrer les poursuites-bâillons : Rapport à l’intention du procureur général* (« Rapport »), publié en octobre 2010.

[8] Dans le Rapport, le Comité « conclu[ait] qu’il serait souhaitable que le gouvernement de l’Ontario édicte des mesures législatives contre l’utilisation de procédures judiciaires qui ont une incidence sur la capacité ou la volonté des gens d’exprimer leurs opinions ou d’agir par rapport à des affaires d’intérêt

provided suggestions on the content of the legislation and outlined the concerns underlying that content.

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

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

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

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

public » (par. 10). Il y traitait également en profondeur du besoin de se doter de telles mesures législatives (par. 6-16), et formulait des propositions quant au contenu de ces mesures et aux préoccupations qui devraient le sous-tendre.

[9] Le Rapport préconisait « une protection générale » (par. 29) qui « permettra[it] de veiller à ce que toute participation légitime aux affaires d’intérêt public fasse l’objet de la procédure spéciale recommandée par le Comité » (par. 31). Au cœur de la proposition avancée dans le Rapport se trouvait le thème de l’équilibre et de la proportionnalité. Même si « [l]e fait qu’une poursuite en justice puisse avoir un effet néfaste sur la capacité d’une personne de participer à un débat sur des affaires d’intérêt public ne devrait pas suffire à empêcher un demandeur de maintenir sa poursuite » (par. 36), « le fait que la demande en justice d’un demandeur puisse avoir une valeur seulement technique ne devrait pas suffire pour permettre qu’une poursuite continue » (par. 37). **Pour concilier ces intérêts opposés, le Rapport recommandait un test à plusieurs étapes, lequel, d’ailleurs, est quasi identique à celui adopté plus tard par le législateur.**

[10] En novembre 2015, l’Ontario adoptait le projet de loi 52, la *Loi de 2015 sur la protection du droit à la participation aux affaires publiques*, 1^{re} sess., 41^e lég., 2015, lequel, comme je l’ai déjà indiqué, a modifié la *LTJ* de manière à y ajouter les art. 137.1 à 137.5. Les objets de ces dispositions sont énoncés dans le libellé même du texte de loi, au par. 137.1(1) :

137.1 (1) Les objets du présent article et des articles 137.2 à 137.5 sont les suivants :

- a) encourager les particuliers à s’exprimer sur des affaires d’intérêt public;
- b) favoriser une forte participation aux débats sur des affaires d’intérêt public;
- c) décourager le recours aux tribunaux comme moyen de limiter indûment l’expression sur des affaires d’intérêt public;
- d) réduire le risque que la participation du public aux débats sur des affaires d’intérêt public ne soit entravée par crainte d’une action en justice.

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

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

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

...

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

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

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

[13] Ultimately, the legislative debates preceding the passage of the Act echoed the same concerns expressed by the Panel in the APR. Indeed, parliamentarians acknowledged as much: “This bill came forward as a result of a report from 2010” (p. 1975 (Ms. Sylvia Jones)); “a made-in-Ontario approach to

[11] Ceci découlait du Rapport, qui énonçait que les « mesures législatives devraient comprendre une clause de justification à des fins d’interprétation judiciaire » (Résumé des recommandations, par. 2). Bien que l’objet législatif voulu ait toujours une incidence sur l’exercice d’interprétation statutaire, le fait que le Rapport ait explicitement exhorté le législateur à inclure une disposition d’objet à *des fins d’interprétation judiciaire* — ce à quoi le législateur acquiesçait en toute conscience — démontre que la disposition d’objet au par. 137.1(1) commande une autorité interprétative considérable.

[12] Les débats parlementaires de l’Assemblée législative de l’Ontario donnent un éclairage supplémentaire sur l’intention du législateur. Ainsi, en deuxième lecture du projet de loi, la procureure générale de l’Ontario de l’époque, l’hon. Madeleine Meilleur, avait déclaré :

[TRADUCTION] Si elle est adoptée, la présente mesure législative permettra aux tribunaux de reconnaître et de traiter rapidement les poursuites stratégiques, ce qui permettra de réduire le stress émotionnel et financier subi par les défendeurs, de même que le gaspillage des ressources judiciaires.

...

... En créant un juste équilibre, notre projet de loi contribuera à mettre un frein aux poursuites abusives tout en faisant en sorte que les poursuites légitimes suivent leur cours.

La loi proposée vise à empêcher les poursuites stratégiques. Quiconque se prétend à juste titre victime de libelle ou de diffamation ne devrait pas être découragé par cette mesure.

(Assemblée législative de l’Ontario, *Journal des débats (Hansard)*, n° 41A, 1^{re} sess., 41^e lég., 10 décembre 2014, p. 1975)

[13] Ultimement, les débats parlementaires ayant précédé l’adoption de la Loi faisaient écho aux préoccupations soulevées par le Comité dans son Rapport, comme en font foi les déclarations suivantes de députés : [TRADUCTION] « Ce projet de loi a été présenté pour faire suite à un rapport publié en 2010 »

address the issue of strategic lawsuits based on consensus, recommendations of an expert advisory panel and extensive stakeholder consultation” (p. 1975 (Hon. Madeleine Meilleur)). Accordingly, it should come as no surprise that the final test adopted in the legislation was very similar substantively to the test proposed in the APR. This makes it clear that the APR had a considerable influence on the legislation which was enacted and which is now at issue before this Court.

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

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

...

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

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

While reports like the APR are generally “admissible for any purpose the court thinks appropriate”, the weight accorded to them depends on

(p. 1975 (M^{me} Sylvia Jones)); et « [il s’agit là d’]une approche proprement ontarienne qui vise à remédier aux problèmes des poursuites stratégiques, et qui est issue d’un consensus, des recommandations d’un comité consultatif d’experts et de vastes consultations menées auprès des parties prenantes » (p. 1975 (l’hon. Madeleine Meilleur)). En conséquence, il n’est guère étonnant que la version définitive du test adopté par le législateur reprenne pour l’essentiel le contenu de celui proposé dans le Rapport; et il ne fait donc aucun doute que ce dernier a eu une influence considérable sur la législation qui a été adoptée, et qui est maintenant en cause devant cette Cour.

[14] Pour cette raison, le Comité et son Rapport constituent des sources persuasives aux fins de l’interprétation statutaire. Il faut se rappeler que « l’historique législatif [s’entend] des éléments touchant à la conception, à l’élaboration et à l’adoption du texte de loi », et que ces éléments « peuvent constituer des aspects importants du contexte dont il doit être tenu compte dans une démarche moderne d’interprétation des lois » (*Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471 (« CDDP »), par. 43). En fait, selon la définition donnée par le regretté Peter W. Hogg, l’historique législatif comprend les documents suivants :

[TRADUCTION]

1. [L]e rapport d’une commission royale, d’une commission de réforme du droit ou d’un comité parlementaire dans lequel on recommande l’adoption d’un texte de loi;

...

3. les rapports ou les études produits à l’extérieur du gouvernement qui existaient au moment de l’édiction du texte de loi, et sur lesquels s’est appuyé le gouvernement ayant déposé le texte de loi

(*Constitutional Law of Canada* (5^e éd. suppl.)), p. 60-1 à 60-2)

Bien que les rapports, comme celui en l’espèce, soient généralement [TRADUCTION] « admissibles à toute fin que le tribunal estime appropriée », le poids

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

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

III. Framework

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

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

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the

qu’on y accorde est fonction des circonstances de chaque cas (R. Sullivan, *Sullivan on the Construction of Statutes* (6^e éd. 2014), p. 685; voir également *R. c. Summers*, 2014 CSC 26, [2014] 1 R.C.S. 575, par. 51). Comme je l’ai déjà précisé, il ne fait aucun doute que le Rapport a été l’élément moteur de la législation en cause, et que le législateur s’y est fié dans une grande mesure pour rédiger l’art. 137.1 de la *LTJ*. Par conséquent, il constitue une source persuasive qui « peu[t] renseigner utilement sur l’historique et l’objet de la loi » (*CCDP*, par. 44).

[15] À la lumière de ce qui précède, je procède dans la section III à l’interprétation du libellé des par. 137.1(3) et (4), en tenant compte de l’historique législatif et des objets qui sous-tendent ces dispositions. Je réitère par ailleurs que cette approche s’accorde avec ce que cette Cour a appelé l’approche moderne d’interprétation statutaire.

III. Cadre législatif

[16] Comme je l’ai indiqué précédemment, l’art. 137.1 est la disposition de la *LTJ* censée servir de mécanisme limitant les poursuites qui ont pour effet d’entraver indûment l’expression relative à des affaires d’intérêt public, grâce à l’identification et au rejet de ce type d’action avant la tenue d’un procès. Le libellé de cette disposition révèle à quel point le Rapport et les débats de l’Assemblée législative en ont inspiré la rédaction. Elle prévoit en effet qu’il existe un lien entre l’expression et une affaire d’intérêt public, que l’instance sous-jacente doit avoir un bien-fondé substantiel (c.-à-d. ne pas avoir une « valeur seulement technique », comme le mentionnait le Rapport, au par. 37), et que l’intérêt public qui réside dans la protection de l’expression doit être évalué par rapport à l’intérêt public que revêt la poursuite de l’instance sous-jacente (faisant ainsi écho aux nombreuses références, dans le Rapport et les débats de l’Assemblée, à l’importance d’atteindre un équilibre).

[17] Les parties pertinentes de l’art. 137.1 sont libellées comme suit :

(3) Sur motion d’une personne contre qui une instance est introduite, un juge, sous réserve du paragraphe (4), rejette l’instance si la personne le convainc que l’instance découle

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 (C.A.), 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.

s'accorde avec la jurisprudence portant sur l'interprétation du mot « convaincu » (*R. c. Topp*, 2011 CSC 43, [2011] 3 R.C.S. 119, par. 24-25; *F.H. c. McDougall*, 2008 CSC 53, [2008] 3 R.C.S. 41, par. 49 et 53; *Shannon c. 1610635 Alberta Inc.*, 2014 ABCA 393, 588 A.R. 76, par. 14-15; *R. c. Driscoll* (1987), 79 A.R. 298 (C.A.), par. 17-18). Ainsi, l'auteur de la motion doit être en mesure de démontrer, selon la prépondérance des probabilités : (i) que l'instance découle du fait de son expression; et (ii) que cette expression est relative à une affaire d'intérêt public.

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

[24] En deuxième lieu, que requiert l'expression « découle du fait de »? Par définition, celle-ci comporte un élément de causalité. Autrement dit, une instance qui « découle du fait de » d'une expression suppose nécessairement l'existence d'un lien de causalité entre cette expression et l'instance¹. Il est essentiel de comprendre que toutes sortes d'instances peuvent découler du fait de l'expression, et que, d'après ce que nous révèle l'historique législatif de l'art. 137.1, il y a lieu d'interpréter cet énoncé de manière large et libérale à l'étape de l'analyse exigée par le par. 137.1(3). Ainsi, les instances découlant du fait d'une expression ne se limitent pas à celles qui visent *directement* l'expression, comme, par exemple, les actions en diffamation. Une bonne illustration d'un type d'instance qui n'est pas une poursuite en diffamation, mais qui découle néanmoins du fait d'une expression et tombe sous le coup du par. 137.1(3), est l'instance sous-jacente en l'espèce, soit une poursuite pour bris de contrat fondée sur une expression du défendeur (j'y reviens plus en détail à la section IV des présents motifs). De fait, le Rapport déconseillait explicitement d'employer le terme « poursuite-bâillon » dans la législation définitive, afin d'éviter de limiter étroitement la procédure fondée sur l'art. 137.1 (par. 22), une recommandation qu'a suivi le législateur.

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).

¹ Je ne crois pas qu'il faille déterminer précisément le degré de causalité en question, puisque les tribunaux ont toujours été en mesure de comprendre et d'appliquer la norme associée à la notion de « découler de » (*Allstate Insurance Co. of Canada c. Aftab*, 2015 ONCA 349, 335 O.A.C. 172; *Sheppard c. Co-operators General Insurance Co.* (1997), 33 O.R. (3d) 362 (C.A.); *Nouveau-Brunswick c. O'Leary*, [1995] 2 R.C.S. 967; *Bracklow c. Bracklow*, [1999] 1 R.C.S. 420).

[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).

[25] En troisième lieu, que requiert le terme « expression »? Celui-ci est défini largement au par. 137.1(2) même de la *LTJ* : « La définition qui suit s’applique au présent article. “expression” Toute communication, que celle-ci soit faite verbalement ou non, qu’elle soit faite en public ou en privé et qu’elle s’adresse ou non à une personne ou à une entité. » Nul besoin de précisions supplémentaires, puisque ce libellé indique très clairement que le mot « expression » doit recevoir une interprétation large.

[26] En quatrième et dernier lieu, que signifie l’expression « relative [. . .] à une affaire d’intérêt public »? Il convient d’interpréter cette expression de façon large et libérale, conformément à l’objectif législatif poursuivi par le par. 137.1(3). En effet, le Rapport mentionnait explicitement qu’un « test extensif permettra de veiller à ce que toute participation légitime aux affaires d’intérêt public fasse l’objet de la procédure spéciale » (par. 31), de telle sorte qu’« une protection générale » est préférable (par. 29).

[27] Dans l’affaire *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640, la Cour s’est penchée sur la question de savoir de quelle façon il faut établir l’intérêt public à l’égard d’une question. Bien que cet arrêt ait été rendu dans le contexte d’une défense de communication responsable soulevée pour contrer des accusations de diffamation, il traitait également de la définition à donner à l’expression « questions d’intérêt public ». Les mêmes principes s’appliquent au présent contexte. Cette expression devrait être analysée « dans son ensemble », et il s’agit ultimement de savoir si « un segment de la population [a] un intérêt véritable à recevoir l’information s[e] rapportant [au sujet donné] » (par. 101-102). Bien qu’il n’existe pas de « “test” unique » en cette matière, « [l]e public a véritablement intérêt à être au courant d’un grand éventail de sujets » (par. 103 et 106). Cette Cour a rejeté l’interprétation « étroite » donnée à la notion d’intérêt public en Australie, en Nouvelle-Zélande et aux États-Unis; elle a plutôt déclaré que, au Canada, « [l]’intérêt démocratique pour que se tiennent des débats publics sur une gamme de sujets de cette ampleur doit se traduire dans la jurisprudence » (par. 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

[28] Le libellé du par. 137.1(3) confirme qu’il faut interpréter de manière large la notion d’« intérêt public ». En effet, la mention de l’« intérêt public » y est précédée du modificatif « *une affaire [de]* ». Cette précision importe, car, du point de vue juridique, il n’est pas pertinent de savoir si l’expression est souhaitable ou néfaste, ou encore utile ou vexatoire ni si elle sert ou lèse l’intérêt public. À cette étape de l’analyse, le tribunal n’effectue aucune évaluation qualitative de l’expression; il doit uniquement déterminer si l’expression se rapporte à quelque affaire d’intérêt public que ce soit, définie en termes larges. L’historique législatif confirme d’ailleurs que le fardeau de preuve prévu par ce paragraphe est délibérément peu onéreux.

[29] Il y a toutefois lieu de distinguer l’expression d’une personne *relativement* à une affaire d’intérêt public d’une expression qui *fait* simplement *référence* à un sujet d’intérêt public ou à une question qui suscite seulement la curiosité du public. Ni l’une ni l’autre de ces deux dernières formes d’expression ne suffira pour que l’auteur de la motion réussisse à s’acquitter du fardeau que lui impose le par. 137.1(3) (voir *Torstar*, par. 102).

[30] Ultiment, l’analyse à effectuer est contextuelle, et consiste fondamentalement à se demander sur quoi porte réellement l’expression. Il ne faut pas perdre de vue l’objectif de l’art. 137.1, à savoir limiter les instances qui ont des conséquences néfastes sur l’expression de personnes relativement à des affaires d’intérêt public, de manière à protéger cette expression et à défendre la valeur fondamentale qu’est la participation de la population à la démocratie. Si le par. 137.1(3) fixait la barre trop haut, le juge des motions ne parviendrait jamais à l’essentiel de l’analyse qui réside dans l’exercice d’évaluation requis par l’al. 137.1(4)(b). Aussi importe-t-il, au regard de l’objet et du contexte de l’adoption de l’art. 137.1, d’interpréter l’énoncé « expression » « relative [. . .] à une affaire d’intérêt public » de manière large et libérale.

[31] En conclusion, le par. 137.1(3) impose le fardeau de preuve initial à l’auteur de la motion de démontrer, selon la prépondérance des probabilités : (i) que l’instance sous-jacente découle bel et bien

nature of the proceeding, and (ii) that such expression relates to a matter of public interest, defined broadly. To the extent that this burden is met by the moving party, then s. 137.1(4) will be triggered and the burden will shift to the responding party to show that its underlying proceeding should not be dismissed. I proceed to analyze that provision below.

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

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

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

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

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

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

[33] As the text of this provision makes explicit, the burden is on the *responding party* (i.e. the plaintiff in the underlying proceeding) to satisfy the motion judge of *both* (a) *and* (b). Therefore, if *either* (a) *or* (b) is not met, then this will be fatal to the plaintiff² discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both (a) *and* (b) are met, then the proceeding will be allowed to continue.

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.

du fait de son expression, sans égard à la nature de l'instance en question; et (ii) que cette expression est relative à une affaire d'intérêt public, entendue au sens large. Dès lors que l'auteur de la motion s'acquitte de ce fardeau, le par. 137.1(4) entre en application, et le fardeau se déplace sur la partie opposée, qui doit démontrer que l'instance sous-jacente qu'elle a intentée ne devrait pas être rejetée. Je passe maintenant à l'analyse de cette disposition.

B. Paragraphe 137.1(4) — Déplacement du fardeau vers la partie intimée

[32] Pour plus de commodité, je reproduis ici le par. 137.1(4) :

(4) Un juge ne doit pas rejeter une instance en application du paragraphe (3) si la partie intimée le convainc de ce qui suit :

a) il existe des motifs de croire :

(i) d'une part, que le bien-fondé de l'instance est substantiel,

(ii) d'autre part, que l'auteur de la motion n'a pas de défense valable dans l'instance;

b) le préjudice que la partie intimée subit ou a subi vraisemblablement du fait de l'expression de l'auteur de la motion est suffisamment grave pour que l'intérêt public à permettre la poursuite de l'instance l'emporte sur l'intérêt public à protéger cette expression.

[33] Comme le libellé de cette disposition l'indique clairement, c'est à la *partie intimée* (c.-à-d. le demandeur dans l'instance sous-jacente) qu'il incombe de convaincre le juge des motions qu'elle satisfait à *la fois* à l'étape de l'al. a) *et* à celle de l'al. b). Par conséquent, le défaut de satisfaire à *l'une ou l'autre* des étapes décrites à ces alinéas sera fatal à la capacité du demandeur² de se décharger de son fardeau de preuve, ce qui entraîne le rejet de la demande.

² Dans les présents motifs, je vais faire référence à l'« auteur de la motion » en parlant du « défendeur », et à la « partie intimée » en parlant du « demandeur » de manière interchangeable. Je le ferai par souci de commodité et de clarté; cette approche ne doit toutefois pas être interprétée dans les causes futures comme restreignant la portée du libellé de la loi.

[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.

[39] J’en arrive donc à la conclusion que la norme des « motifs de croire » nécessite qu’il se trouve un fondement, dans le dossier et le droit — et prenant en considération le stade de l’instance auquel la motion fondée sur l’art. 137.1 est présentée —, pour conclure que le bien-fondé de l’instance est substantiel et qu’il n’existe pas de défense valable.

[40] Cette conclusion s’accorde avec l’interprétation faite par cette Cour, dans d’autres contextes, de l’expression « motifs de croire ». En effet, celle-ci renvoie à une norme qui exige « davantage qu’un simple soupçon, mais rest[e] moins stricte que la prépondérance des probabilités » (*Mugesera c. Canada (Ministre de la Citoyenneté et de l’Immigration)*, 2005 CSC 40, [2005] 2 R.C.S. 100, par. 114). Cette interprétation a été retenue également dans un contexte réglementaire (voir, p. ex., *Ontario (Alcohol and Gaming Commission) c. 751809 Ontario Inc.*, 2013 ONCA 157, 115 O.R. (3d) 24, par. 18-24; *Ontario (Environment and Climate Change) c. Geil*, 2018 ONCA 1030, 371 C.C.C. (3d) 149).

[41] Du reste, il importe de souligner que l’évaluation fondée sur l’al. 137.1(4)a doit se faire du point de vue du juge des motions. Avec égards, j’estime que la Cour d’appel de l’Ontario a erré en écartant l’évaluation de la preuve faite par le juge des motions, pour lui préférer celle, théorique, d’un [TRANSDUCTION] « juge des faits raisonnable » (par. 82). Le texte clair du par. 137.1(4) exige que « le juge » saisi de la motion détermine s’il existe « des motifs de croire ». Ainsi, le fait de s’en remettre à un éventuel « juge des faits raisonnable » pour l’application de cette norme revient à éliminer indûment le pouvoir discrétionnaire et la compétence expressément conférés au juge des motions par le texte de la disposition. Le test est donc subjectif, dans la mesure où il repose sur l’appréciation du juge des motions.

[42] Tout bien considéré, l’al. 137.1(4)a vise en fait à déterminer si le juge des motions est d’avis, d’après son appréciation du dossier et compte tenu du contexte dans lequel s’insère la poursuite du demandeur, qu’il existe un fondement, en fait et en droit, pour appuyer la conclusion que le bien-fondé de celle-ci est substantiel, et que le défendeur n’a pas de défense valable dans l’instance.

(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,

b) Sous-alinéa 137.1(4)a)(ii) — Absence de défense valable

[55] Le sous-alinéa 137.1(4)a)(ii) exige de la partie intimée (c.-à-d. le demandeur) qu’elle convainque le juge des motions de l’existence de « motifs de croire » que l’auteur de la motion (c.-à-d. le défendeur) « n’a pas de défense valable » dans l’instance sous-jacente.

[56] Bien que le fardeau ait été transféré au demandeur en application du par. 137.1(4), il serait déraisonnable que le sous-al. 137.1(4)a)(ii) alourdisse encore davantage cette charge en l’obligeant à prévoir tous les moyens de défense susceptibles d’être invoqués par le défendeur et à ensuite les réfuter. Le sous-alinéa 137.1(4)a)(ii) opère plutôt un transfert de fardeau *de facto*, de telle sorte que l’auteur de la motion (c.-à-d. le défendeur) doit *d’abord* identifier les moyens de défense qu’il compte faire entrer en jeu, et la partie intimée (c.-à-d. le demandeur) doit *ensuite* démontrer qu’il existe des motifs de croire à l’absence de validité de ces moyens.

[57] Autrement dit, une fois que l’auteur de la motion identifie un moyen de défense, le fardeau de preuve retombe sur la partie intimée (c.-à-d. le demandeur), qui doit alors établir l’existence de motifs de croire qu’il n’y a « pas de défense valable ».

[58] Le mot *pas* a un caractère absolu; il a pour conséquence que, si *une* défense, *quelle qu’elle soit*, est jugée valable, le demandeur, dès lors, ne se sera pas acquitté de son fardeau, et sa demande sous-jacente devra être rejetée. Comme c’est le cas pour le volet de l’évaluation du bien-fondé substantiel, le juge des motions doit décider ici de la validité sur la base d’un dossier limité et à un stade précoce du litige; d’où la nécessité de prendre en compte ce contexte au moment d’évaluer si une défense est valable ou non. Le juge des motions doit par conséquent pouvoir procéder à une évaluation limitée de la preuve pour pouvoir trancher la question de la validité de la défense présentée.

[59] À mon avis, l’évaluation de la *validité* prévue au sous-al. 137.1(4)a)(ii) est le miroir de l’analyse du bien-fondé substantiel prévu au sous-al. 137.1(4)a)(i).

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.

Essentiellement, les deux volets demandent au juge des motions d'évaluer la solidité, de la demande et des moyens de défense, en tant qu'éléments constitutifs de l'analyse globale de la possibilité de succès de la demande sous-jacente, suivant l'al. 137.1(4)a). Mettre ainsi en correspondance, autant que possible, les sous-al. (i) et (ii) apparaît logique si l'on considère que l'exemple type d'une motion fondée sur l'art. 137.1 visera une action en diffamation ou en responsabilité délictuelle, et que les moyens de défense affirmatifs qui y sont opposables sont habituellement régis par des tests clairement formulés. D'ailleurs, le choix du législateur de réunir les sous-al. (i) et (ii) sous l'unique al. 137.1(4)a) confirme cette interprétation. En effet, dans le cadre d'une action en diffamation, par exemple, la validité de la demande doit d'abord être établie, après quoi il revient au défendeur de présenter tout moyen de défense affirmatif qu'il souhaite opposer à l'action. Le positionnement des sous-al. (i) et (ii) sous l'al. a) reflète cet ordre : l'analyse porte d'abord sur le bien-fondé substantiel de la demande, puis sur la validité des éventuels moyens de défense. C'est pour cette raison que je conçois le sous-al. (ii) comme un prolongement du sous-al. (i), et que je procèderais de la même façon pour effectuer l'analyse pertinente à chacun de ces deux volets. Ainsi, le juge des motions doit d'abord déterminer si la demande sous-jacente du demandeur est juridiquement défendable et si elle prend appui dans des éléments de preuve raisonnablement dignes de foi, de sorte qu'il est permis d'affirmer qu'elle a une possibilité réelle de succès. Il doit ensuite décider si le demandeur a démontré que le ou les moyens de défense invoqués ne sont pas juridiquement défendables, ou ne prennent pas appui sur des éléments de preuve raisonnablement dignes de foi, de sorte qu'il est permis d'affirmer que ces moyens n'ont aucune possibilité réelle de succès. Autrement dit, les expressions « bien-fondé [. . .] substantiel » et « pas de défense valable » doivent être considérées comme les éléments constitutifs d'une évaluation globale de la possibilité de succès de la demande sous-jacente.

[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

[60] En résumé, le sous-al. 137.1(4)a)(ii) opère un transfert de fardeau : dans un premier temps, l'auteur de la motion (c.-à-d. le défendeur) doit identifier

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

ses moyens de défense possibles en jeu; et, dans un deuxième temps, la partie intimée (c.-à-d. le demandeur), pour se décharger du fardeau qui retombe alors sur elle, doit établir qu’*aucun* de ces moyens n’est valable. À l’instar du volet relatif au « bien-fondé [...] substantiel » — suivant lequel il doit démontrer qu’il existe des motifs de croire que sa demande a une possibilité réelle de succès —, le demandeur, à qui la loi impose ce fardeau, doit démontrer qu’il existe des motifs de croire que les moyens de défense invoqués n’ont aucune possibilité réelle de succès. Cette interprétation tombe sous le sens puisque, lu dans son ensemble, l’al. 137.1(4)a) porte fondamentalement sur la solidité de l’instance sous-jacente.

(2) Alinéa 137.1(4)b) — Étape relative à l’intérêt public

[61] J’arrive enfin au nœud de l’analyse. L’alinéa 137.1(4)b) précise que la partie intimée doit, pour éviter le rejet de l’instance, convaincre le juge des motions que

le préjudice que la partie intimée subit ou a subi vraisemblablement du fait de l’expression de l’auteur de la motion est suffisamment grave pour que l’intérêt public à permettre la poursuite de l’instance l’emporte sur l’intérêt public à protéger cette expression.

[62] Ainsi que je l’ai maintes fois souligné dans les présents motifs, cette disposition constitue l’essence de l’art. 137.1. En effet, l’objet de l’art. 137.1 est de servir comme mécanisme pour empêcher les poursuites en justice qui limitent indûment l’expression relativement à des affaires d’intérêt public par l’identification de ces actions et leur rejet avant la tenue d’un procès. Tandis que l’al. 137.1(4)a) exige que le juge porte une attention particulière au bien-fondé de l’instance et à l’existence d’une défense valable afin d’assurer que l’instance est bien fondée, l’al. 137.1(4)b) le ramène plus largement au principal problème que cette loi, et les lois contre les poursuites-bâillons en général, cherche à résoudre en évaluant les implications touchant l’intérêt public et la participation aux affaires publiques. C’est ainsi que l’al. 137.1(4)b) constitue l’élément clé de l’analyse fondée sur l’art. 137.1, puisqu’il existe en

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, at 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))

tant que solide filet de sécurité qui permet au juge des motions de rejeter des demandes, même bien fondées sur le plan technique, si l’intérêt public à protéger l’expression qui donne naissance à l’instance l’emporte sur l’intérêt public à permettre que l’instance suive son cours.

[63] L’interprétation statutaire est un exercice contextuel qui requiert qu’une disposition soit examinée en regard des autres dispositions et à la lumière de celles-ci : par conséquent, si le seuil fixé aux sous-al. 137.1(4)a)(i) ou (ii) est trop élevé, le juge des motions ne pourra jamais passer au volet suivant de l’analyse, prévu à l’al. 137.1(4)b) — ce qui n’est certainement pas ce qu’envisageait le législateur d’après l’historique législatif et la volonté exprimée relativement à l’adoption de l’art. 137.1. Le législateur a souligné à plusieurs reprises l’importance du principe de la proportionnalité lorsqu’il s’agit de décider de l’opportunité de rejeter une poursuite. L’évaluation du droit à la liberté d’expression et du droit à la participation aux affaires publiques en regard de l’intérêt public à l’égard de la protection d’une demande fondée est un thème clé qui traverse la genèse législative de la disposition, et cela indique comment l’art. 137.1 doit être interprété par les tribunaux.

[64] L’importance de l’al. 137.1(4)b) ressort nettement du contexte de l’adoption de l’art. 137.1. Par exemple, le Rapport formulait la mise en garde suivante : « Il ne devrait y avoir aucune mesure de prévention spéciale contre le recours abusif. L’équilibre entre les intérêts au cœur du recours favoriserait le règlement approprié des instances » (Résumé des recommandations, par. 20 (je souligne)). Cet objectif d’équilibre a été repris lors des lectures du projet de loi devant l’Assemblée législative de l’Ontario. En deuxième lecture, la procureure générale de l’Ontario a fait les remarques suivantes :

L’équilibre est un thème qui revient sans arrêt : le besoin d’établir un équilibre qui mettra fin aux poursuites abusives tout en autorisant des actions légitimes. Je peux vous assurer que nous avons entendu tout ce qu’on nous a dit. L’équilibre est une caractéristique clé de ce projet de loi.

(Assemblée législative de l’Ontario (2014), p. 1971 (l’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

L’équilibre a maintes fois été abordé par différents députés de tous partis confondus (Assemblée législative de l’Ontario (2014), p. 1972-1974 (M. Lorenzo Berardinetti); p. 1974 (M. Chris Ballard); p. 1975 (l’hon. Madeleine Meilleur)); voir aussi, Assemblée législative de l’Ontario (2015), p. 6017 (l’hon. Madeleine Meilleur); p. 6021 (M. Lorenzo Berardinetti); p. 6025-6027 (M. Jagmeet Singh)).

[65] J’ouvre ici une parenthèse pour expliquer ce que j’entends par « exercice d’évaluation » et pour répondre brièvement à la question de savoir s’il existe une différence fondamentale entre l’exercice d’évaluation et l’exercice de *mise en balance*, et lequel est requis pour l’analyse fondée sur l’al. 137.1(4)(b). Il s’agit d’une question qu’a soulevée l’Association des libertés civiles de la Colombie-Britannique, qui a comparu en sa qualité d’intervenante devant la Cour.

[66] En l’espèce, la disposition prévoit *expressément* qu’un intérêt l’« emporte sur » l’autre. À mon avis, cet exercice diffère fondamentalement de celui qu’il aurait fallu réaliser si la loi avait requis la *mise en balance* des deux intérêts. Cette différence peut être illustrée de manière quantitative : lorsqu’un facteur doit l’*emporter* sur l’autre, le rapport entre eux doit être minimalement de 51/49; en revanche, la *mise en balance* signifie qu’un rapport de 50/50, ou même de 45/55, peut être suffisant pour permettre au juge de favoriser le premier des deux facteurs. Le terme « l’emporte » écarte nécessairement cette conclusion.

[67] Je n’entends pas déterminer de façon définitive la différence entre la mise en balance et l’évaluation qui doit être appliquée à toutes les lois, mais le fait que la loi examinée *dans le cadre du présent pourvoi* exige qu’un intérêt l’emporte sur l’autre — et non simplement qu’ils soient mis en balance — est pertinent pour le juge des motions lorsqu’il doit décider si le demandeur s’est acquitté du fardeau que lui impose l’al. 137.1(4)(b).

(a) *Analyse du préjudice*

[68] Le préjudice est un élément central dans le fardeau dont le demandeur doit s’acquitter suivant

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

l'al. 137.1(4)(b). La disposition statutaire vise expressément l'évaluation du *préjudice* subi par la partie intimée *du fait de* l'expression de l'auteur de la motion en regard de l'intérêt public à protéger cette expression. Comme conditions préalables à l'exercice d'évaluation, le texte de la disposition exige donc deux éléments : (i) l'existence d'un préjudice et (ii) un lien de causalité — le préjudice doit être subi *du fait de* l'expression de l'auteur de la motion.

[69] Le préjudice, qu'il soit de nature monétaire ou non, est pertinent pour établir le premier élément, soit (i). Je partage l'opinion exprimée lors de la deuxième lecture par celle qui était la procureure générale de l'Ontario à l'époque du débat sur le projet de loi, selon laquelle [TRADUCTION] « la réputation d'une personne ou d'une entreprise constitue l'un des atouts les plus précieux qu'elle possède » (Assemblée législative de l'Ontario (2014), p. 1971 (l'hon. Madeleine Meilleur)). Par conséquent, le préjudice n'est pas nécessairement limité à celui de nature monétaire et, quelle qu'en soit la nature, aucun type n'est plus important que l'autre. Le préjudice n'est pas non plus synonyme des dommages allégués. Le texte de la disposition ne vise pas un *type* de préjudice, mais renvoie expressément et uniquement à un *préjudice* en général.

[70] En outre, puisque l'al. 137.1(4)(b) constitue, en soi, un exercice d'évaluation, il n'est pas nécessaire que le préjudice réponde à un seuil minimal pour être digne de considération. L'ampleur du préjudice est pertinente lorsque le juge des motions doit décider si le préjudice est « suffisamment grave » pour que l'intérêt public à permettre que l'instance suive son cours l'emporte sur l'intérêt public à protéger l'expression. En d'autres termes, l'ampleur du préjudice n'a pour incidence que de faire pencher la balance lors de l'exercice d'évaluation.

[71] Cela ne veut pas dire qu'il faille tenir pour avérées les allégations de préjudice du demandeur ni que de simples affirmations suffisent. Je n'irais toutefois pas jusqu'à exiger la production d'un mémoire complet des dommages-intérêts ni l'attribution d'une valeur pécuniaire, car il est question ici de l'*existence* du préjudice, et non de sa quantification. À l'alinéa 137.1(4)(b), on parle d'un préjudice

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.

« vraisemblablement » subi, et cet adverbe modifie les verbes « subit » et « a subi ». Cela nous indique que le demandeur n’est pas tenu de *prouver* le préjudice ou le lien de causalité, mais doit simplement présenter des éléments de preuve qui permettront au juge des motions de tirer une conclusion quant à la probabilité d’existence du préjudice et du lien de causalité pertinent. Le fardeau de présentation d’éléments de preuve pourrait dépendre de la nature des règles de fond appliquées, en ayant toutefois à l’esprit qu’une motion fondée sur l’art. 137.1 ne constitue pas une décision sur le bien-fondé de la poursuite sous-jacente. Par exemple, dans le cas d’une action en diffamation, le préjudice (et, par conséquent, les dommages-intérêts généraux) est présumé, mais le demandeur aurait tout de même à étayer une réclamation de dommages-intérêts particuliers. Il importe toutefois de préciser qu’aucune décision définitive sur le préjudice ou le lien de causalité n’est requise.

[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.

[72] J’ajoute que, naturellement, la preuve d’un lien de causalité entre l’expression et le préjudice est particulièrement importante dans un cas où il peut y avoir des sources autres que l’expression du défendeur susceptibles d’avoir causé un préjudice au demandeur (motifs de la C.A., par. 92). Toutefois, le lien de causalité n’est pas une affaire de tout ou rien, en ce sens que même si ce lien entre le préjudice subi par le demandeur et l’expression du défendeur peut être plus faible pour *certain*s éléments du préjudice subi, il peut néanmoins être fort pour d’*autres* éléments de ce préjudice. Il s’agit d’une enquête au cas par cas entreprise par le juge des motions.

(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.

b) *Évaluation de l’intérêt public*

[73] Dès lors qu’est établi le préjudice et son lien de causalité avec l’expression, l’al. 137.1(4)(b) exige que le préjudice et l’intérêt public correspondant à permettre la poursuite de l’instance soient évalués *en regard* de l’intérêt public à protéger l’expression. Par conséquent, comme c’est aussi le cas pour l’analyse fondée sur le par. 137.1(3), l’intérêt public joue un rôle crucial dans l’analyse en cause ici.

[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

[74] Or, le terme « intérêt public » n’est pas employé de la même façon au par. 137.1(3) et à l’al. 137.1(4)(b). Dans le cas du par. 137.1(3), il

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.

faut chercher à savoir si l'expression est faite relativement à une *affaire* d'intérêt public. L'évaluation qui y est visée n'est pas qualitative — c.-à-d. qu'il n'importe pas de savoir si l'expression sert l'intérêt public ou si elle lui nuit. En revanche, dans le cas de l'al. 137.1(4)b), le législateur a expressément voulu que l'intérêt public entre en ligne de compte dans la réalisation d'objectifs précis : à savoir, celui de permettre la poursuite de l'instance et celui de protéger l'expression attaquée. Par conséquent, les affaires d'intérêt public ne seront pas *toutes* jugées pertinentes. C'est plutôt la *qualité* de l'expression ainsi que ce qui l'a *motivée* qui importe à cette étape-ci de l'analyse.

[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).

[75] Il va de soi qu'une [TRADUCTION] « déclaration qui comporte des faussetés délibérées [ou] des atteintes personnelles injustifiées [. . .] pourrait tout de même être une expression liée à une affaire d'intérêt public. Toutefois, l'intérêt public à protéger ces propos n'aura pas l'importance qu'il aurait pu avoir si le même message avait été dénué de mensonges [ou] de virulence » (motifs de la C.A., par. 94, citant *Able Translations Ltd. c. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, par. 82-84 et 96-103, conf. par 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).

[76] Bien que les juges doivent se garder de faire le procès de la moralité et du mauvais goût dans leur analyse, cette Cour a reconnu, dès son arrêt *R. c. Keegstra*, [1990] 3 R.C.S. 697, que les expressions ne sont pas toutes égales : « Si nous devons veiller à ne pas juger l'expression en fonction de sa popularité, il est tout aussi néfaste pour les valeurs inhérentes à la liberté d'expression, et pour les autres valeurs sous-jacentes à une société libre et démocratique, de considérer que toutes les sortes d'expressions revêtent la même importance au regard des principes qui sont au cœur de l'al. 2b) » (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

[77] L'exercice d'évaluation qu'exige l'al. 137.1(4)b) peut donc être guidé par la jurisprudence de la Cour relative à l'al. 2b) de la *Charte canadienne des droits et libertés*, qui assujettit le degré de protection à la nature de l'expression (*R. c. Sharpe*, 2001 CSC 2, [2001] 1 R.C.S. 45, par. 181). Par exemple, l'examen pourrait reposer sur les grandes valeurs

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.

qui sous-tendent la liberté d’expression, comme la recherche de vérité, la participation à la prise de décision politique et la diversité des formes d’enrichissement et d’épanouissement personnels (*Sharpe*, par. 182; *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877, par. 24). Plus l’expression se rapprochera de l’une ou l’autre de ces grandes valeurs, plus l’intérêt public à la protéger sera important.

[78] J’énonce ci-après d’autres facteurs qui pourraient être utiles pour l’exercice d’évaluation de l’intérêt public que requiert l’al. 137.1(4)b). Je note aussi que dans *Platnick c. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, par. 99, le juge Doherty a signalé la présence [TRADUCTION] « d’indices de poursuites-bâillons » reconnus (italique omis). Il en a retenu quatre en particulier : (1) « le nombre de fois où le demandeur a intenté des poursuites, ou menacé d’en intenten, pour réduire les critiques au silence »; (2) « un déséquilibre financier ou un rapport de force nettement favorable au demandeur »; (3) « une fin punitive ou vindicative motivant le demandeur à intenter la poursuite »; et (4) « le tort minime ou symbolique causé au demandeur » (par. 99). Selon le juge Doherty, la présence de ces indices justifie la décision de faire droit à la motion fondée sur l’art. 137.1 et de rejeter l’instance sous-jacente. Depuis qu’elle a rendu cette décision, la Cour d’appel de l’Ontario a appliqué ces indices dans un grand nombre d’affaires (voir, p. ex., *Lascaris c. B’nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211).

[79] À mon avis, ces quatre facteurs sont utiles pour l’analyse *seulement dans la mesure* où ils sont liés au texte de la loi et aux considérations explicitement envisagées par le législateur. Il en est ainsi parce que l’étape de l’al. 137.1(4)b) consiste essentiellement en un exercice d’évaluation de l’intérêt public et non simplement en un examen des caractéristiques d’une poursuite-bâillon. En conséquence, pour cette raison, les seuls facteurs susceptibles d’être pertinents aux fins de guider cet exercice d’évaluation sont ceux qui sont liés au texte de l’al. 137.1(4)b), qui commande un examen du préjudice que le demandeur subit ou a vraisemblablement subi, de l’intérêt public correspondant à permettre la poursuite de l’instance et de l’intérêt public à protéger l’expression sous-jacente.

[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

[80] Dans ces conditions, des facteurs additionnels peuvent aussi se révéler utiles. Par exemple, les facteurs suivants, présentés sans ordre particulier d'importance, peuvent éclairer le juge des motions : l'importance de l'expression, le résumé des litiges passés entre les parties, l'existence d'effets indirects ou à plus grande échelle produits sur *d'autres* expressions relativement à des affaires d'intérêt public, l'effet paralysant potentiel pour l'expression d'une partie ou d'autres personnes *dans l'avenir*; le résumé des activités militantes ou de défense de l'intérêt public menées par le défendeur antérieurement, toute disproportion entre les ressources mises à contribution dans la poursuite et le préjudice causé ou l'octroi éventuel de dommages-intérêts et la question de savoir si l'expression ou la demande pourrait être à l'origine d'hostilités à l'endroit d'un groupe reconnu comme étant vulnérable ou d'un groupe protégé par l'art. 15 de la *Charte* ou par une loi sur les droits de la personne. Je répète que la pertinence des facteurs mentionnés précédemment doit être liée au texte de l'al. 137.1(4)(b) et aux considérations explicitement envisagées par le législateur pour effectuer l'exercice d'évaluation.

[81] Essentiellement, la vaste portée de l'al. 137.1(4)(b) donne au tribunal les moyens d'apprécier les tenants et aboutissants de l'affaire dont il est saisi : grâce à l'al. 137.1(4)(b), le juge des motions peut mesurer les conséquences de sa décision de permettre à une personne ou à une organisation d'ester en justice — une valeur fondamentale en soi dans une démocratie — sur la liberté d'expression et la manière dont elle influence le débat public et la participation au sein d'une démocratie pluraliste.

[82] Pour conclure, s'agissant de l'al. 137.1(4)(b), il incombe au demandeur — c.-à-d. à la partie intimée contre qui la motion est présentée — d'établir, selon la prépondérance des probabilités, qu'il a subi ou subira vraisemblablement un préjudice, que ce préjudice est subi *du fait de* l'expression préalablement démontrée en application du par. 137.1(3), et que l'intérêt public correspondant à permettre la poursuite de l'instance sous-jacente *l'emporte sur* les effets préjudiciables causés à la liberté d'expression et à la participation aux affaires publiques. Cet exercice d'évaluation constitue le nœud ou l'essence

(c) *Weighing of the Public Interest*

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

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

(4) Conclusion on the Application of the Framework

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

V. Conclusion

[128] The appeal is dismissed.

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

c) *Évaluation de l'intérêt public*

[125] Ainsi que je l'ai mentionné, le préjudice que 170 Ontario subit ou a vraisemblablement subi est des plus limités, et il en est donc de même de l'intérêt public à permettre la poursuite de l'instance. En revanche, l'intérêt public à protéger l'expression de Pointes Protection est des plus élevés.

[126] À l'évidence, 170 Ontario ne peut établir, suivant la prépondérance des probabilités, que le préjudice subi du fait de l'expression de Pointes Protection est suffisamment grave pour que l'intérêt public à permettre la poursuite de l'instance *l'emporte sur* l'intérêt public à protéger cette expression.

(4) Conclusion sur l'application du cadre

[127] Pour les motifs qui précèdent, je suis d'avis d'accueillir la motion présentée par Pointes Protection en application de l'art. 137.1 sur l'un ou l'autre des fondements indépendants que le bien-fondé de l'action intentée par 170 Ontario n'est pas substantiel et que celle-ci est incapable de démontrer que l'évaluation de l'intérêt public favorise la poursuite de l'instance. La Cour d'appel de l'Ontario a donc eu raison de rejeter l'action sous-jacente de 170 Ontario pour bris de contrat.

V. Conclusion

[128] Le pourvoi est rejeté.

[129] En ce qui a trait aux dépens, le législateur a expressément envisagé un régime applicable aux motions présentées en application de l'art. 137.1. En effet, le par. 137.1(7) prévoit le droit aux dépens comme une règle par défaut si la motion fondée sur l'art. 137.1 est accueillie, à moins que le juge décide que « l'adjudication de ces dépens n'est pas appropriée dans les circonstances. » Ce n'est pas le cas en l'espèce. Je suis donc d'avis d'adjuger simplement les dépens entre parties aux intimés, comme le veut la pratique habituelle de la Cour.

Maia Bent *Appellant*

v.

Howard Platnick *Respondent*

- and -

Lerners LLP *Appellant*

v.

Howard Platnick *Respondent*

and

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

INDEXED AS: BENT v. PLATNICK**2020 SCC 23**

File No.: 38374.

2019: November 12; 2020: September 10.

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

Maia Bent *Appelante*

c.

Howard Platnick *Intimé*

- et -

Lerners LLP *Appelante*

c.

Howard Platnick *Intimé*

et

**British Columbia Civil Liberties Association,
Greenpeace Canada,
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CTV, une division de Bell Média inc.,
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Limited Partnership,
Réseau de télévision des peuples autochtones et
Postmedia Network Inc.** *Intervenants*

RÉPERTOIRÉ : BENT c. PLATNICK**2020 CSC 23**

N° du greffe : 38374.

2019 : 12 novembre; 2020 : 10 septembre.

Présents : Le juge en chef Wagner et les juges Abella,
Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et
Kasirer.

(1) Section 137.1(3) — Threshold Burden

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

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

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

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

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

[83] In a broader sense, however, Ms. Bent’s email raises concerns regarding the truthfulness, reliability, and integrity of medical reports filed on behalf of insurers in the arbitration process. In turn, her email raises concerns regarding the integrity of the

(1) Paragraphe 137.1(3) — Fardeau initial

[78] Le courriel envoyé par M^e Bent constitue une expression relative à une affaire d’intérêt public, et l’action en diffamation intentée par D^r Platnick découle du fait de cette expression. En conséquence, je souscris à l’opinion du juge de la motion et de la Cour d’appel portant que M^e Bent s’est acquittée du fardeau que lui impose le par. 137.1(3).

[79] En premier lieu, le courriel de M^e Bent répond à la définition du terme « expression » qui se trouve au par. 137.1(2) : « Toute communication, que celle-ci soit faite verbalement ou non, qu’elle soit faite en public ou en privé et qu’elle s’adresse ou non à une personne ou à une entité. » Comme je l’ai affirmé dans l’arrêt *Pointes Protection*, il s’agit d’une définition « large » : par. 25. Le paragraphe 137.1(2) vise toute communication, même si elle est *non* verbale, et même si elle est faite *en privé*. Le courriel de M^e Bent entre dans la définition de la loi.

[80] En second lieu, il est évident que l’instance sous-jacente « découle du fait » de cette expression, puisque le courriel de M^e Bent est le fondement de la poursuite en diffamation du D^r Platnick. Comme dans l’affaire *Pointes Protection*, il y a un « lien manifeste » en l’espèce entre l’instance et l’expression : par. 102.

[81] La seule véritable question qui se pose est de savoir si ce courriel est relatif à une affaire d’intérêt public. En l’espèce, je suis d’avis que c’est le cas. Comme il est indiqué dans l’arrêt *Pointes Protection*, notre Cour privilégie une interprétation « large et libérale » de l’intérêt public : par. 26.

[82] Dans un sens restreint, le courriel de M^e Bent porte apparemment sur une éventuelle inconduite professionnelle dans les arbitrages en matière d’assurance et vise à encourager ses collègues de l’OTLA à « obtenir les dossiers de l’évaluateur et de Sibley ».

[83] Cependant, dans un sens plus large, le courriel de M^e Bent soulève des préoccupations concernant la véracité, la fiabilité et l’intégrité des rapports médicaux déposés pour le compte d’assureurs dans le processus d’arbitrage. Du coup, son courriel soulève

arbitration process itself and the proper administration of justice writ large. Further, the email is directed at a not insignificant number of individuals, who, more importantly, have a special interest in exactly that, as part of their broader mandate as members of the OTLA to steadfastly represent victims of motor vehicle accidents, a public interest in itself.

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

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

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

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

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

[88] I elaborate here that, in effect, this means that any basis in the record and the law will be sufficient.

des préoccupations concernant l'intégrité du processus d'arbitrage lui-même et la saine administration de la justice en général. De plus, le courriel s'adresse à un nombre de personnes non négligeable qui, fait à souligner, ont un intérêt particulier à cet égard en tant que membres de l'OTLA constamment appelés à représenter les intérêts des victimes d'accidents d'automobile, ce qui constitue en soi un intérêt public.

[84] La question de savoir si les allégations ou les préoccupations de M^e Bent sont fondées est sans importance, car « [à] cette étape de l'analyse, le tribunal n'effectue aucune évaluation qualitative de l'expression » : *Pointes Protection*, par. 28. De fait, il se peut très bien qu'une expression soit diffamatoire sur le plan de la responsabilité délictuelle, tout en étant relative à une affaire d'intérêt public pour l'application du par. 137.1(3).

[85] En conséquence, je suis convaincue, selon la prépondérance des probabilités, que le courriel de M^e Bent constitue une expression relative à une affaire d'intérêt public et que l'action en diffamation du D^r Platnick découle du fait de cette expression.

(2) Alinéa 137.1(4)a — Étape du bien-fondé

[86] Puisque M^e Bent s'est acquittée de son fardeau sur la question préliminaire, il incombe maintenant au D^r Platnick de démontrer, d'une part, qu'il existe des motifs de croire au bien-fondé substantiel de son action en diffamation et, d'autre part, que M^e Bent n'a pas de défense valable à lui opposer.

[87] Dans l'arrêt *Pointes Protection*, notre Cour a précisé que, contrairement au par. 137.1(3), qui exige une démonstration selon la prépondérance des probabilités, l'al. 137.1(4)a prévoit expressément une norme de « motifs de croire » : par. 35. Cela suppose qu'il se trouve un fondement, dans le dossier et le droit — eu égard au stade de l'instance —, pour conclure que le bien-fondé de l'instance sous-jacente est substantiel et qu'il n'existe pas de défense valable : par. 39.

[88] J'ajoute ici que, concrètement, cela veut dire que *n'importe quel* fondement, dans le dossier et le

of the prospect of success of the underlying claim”: para. 59.

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

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

[104] Ms. Bent has appropriately “put in play” the defences of justification and qualified privilege through her Statement of Defence: *Pointes*

De fait, les expressions « bien-fondé substantiel » et « pas de défense valable » sont les « éléments constitutifs de l’analyse globale de la possibilité de succès de la demande sous-jacente » : par. 59.

[102] Cette interprétation est logique parce qu’elle tient compte de la manière dont les actions en diffamation, comme celle en l’espèce, sont généralement instruites. Au procès, le demandeur doit d’abord faire la preuve *prima facie* qu’il y a eu diffamation. C’est ce à quoi correspond le « bien-fondé substantiel » : *Pointes Protection*, par. 59. Le fardeau est alors renversé et le défendeur doit invoquer un moyen de défense pour éviter d’être tenu responsable : *Torstar*, par. 28-29. C’est ce à quoi correspond l’expression « pas de défense valable » : *Pointes Protection*, par. 59.

[103] Par conséquent, comme l’explique notre Cour dans l’arrêt *Pointes Protection*, par. 56, le sous-al. 137.1(4)a(ii) « opère [. . .] un transfert de fardeau *de facto* » : le défendeur doit *d’abord* présenter les moyens de défense qu’il compte faire entrer en jeu, après quoi le fardeau de la preuve passe effectivement au demandeur, à qui la loi impose ce fardeau. Il faut donc déterminer s’il existe des « motifs de croire » que M^e Bent n’a « pas de défense valable ». D^r Platnick est, de fait, tenu de démontrer qu’il se trouve *un* fondement, dans le dossier et le droit — eu égard au stade de l’instance —, pour conclure que les moyens de défense invoqués par M^e Bent ne tendent pas à pencher *davantage* en sa faveur à elle. Le syllogisme est clair : (i) D^r Platnick doit démontrer qu’il existe des motifs de croire que les moyens de défense invoqués par M^e Bent n’ont aucune possibilité réelle de succès (*Pointes Protection*, par. 60); (ii) cela suppose l’existence de motifs de croire que les moyens de défense ne tendent pas à pencher davantage en faveur de M^e Bent (par. 49); (iii) selon la définition de l’expression « motifs de croire », il s’ensuit qu’il doit se trouver un fondement, dans le dossier et le droit — eu égard au stade de l’instance —, pour conclure que les moyens de défense ne tendent pas à pencher davantage en faveur de M^e Bent (par. 39).

[104] Dans sa défense, M^e Bent a dûment « fai[t] entrer en jeu » les moyens de défense de justification et d’immunité relative : *Pointes Protection*,

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

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

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

(i) Justification

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

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

par. 56-57. Je reconnais qu'elle y a aussi soulevé les moyens de défense de la communication responsable et du commentaire loyal. Toutefois, M^e Bent semble depuis les avoir abandonnés, puisqu'ils n'ont pas été plaqués devant notre Cour. Par conséquent, je n'examinerai que les moyens de défense de justification et d'immunité relative que M^e Bent a fait entrer en jeu, que je considère aussi comme ses plus solides.

[105] J'estime qu'il existe des motifs de croire que ni l'un ni l'autre n'est valable. Autrement dit, j'estime qu'il se trouve *un* fondement, dans le dossier et le droit — eu égard au stade de l'instance —, pour conclure que les moyens de défense ne tendent pas à pencher *davantage* en faveur de M^e Bent, tout en reconnaissant qu'il incombe au D^r Platnick d'en faire la démonstration.

[106] J'entreprends ci-dessous l'analyse des moyens de défense de justification et d'immunité relative, et j'explique pourquoi il existe des motifs de croire que ces derniers ne sont pas valables. Avant de le faire, je tiens à préciser que toute conclusion que je tire quant aux moyens de défense de M^e Bent se limite expressément à la présente motion fondée sur l'art. 137.1.

(i) Justification

[107] Lorsqu'une preuve *prima facie* de diffamation a été faite, les propos reprochés sont présumés faux : *Torstar*, par. 28. Pour établir une défense de justification, « le défendeur doit démontrer que l'énoncé était substantiellement vrai » : par. 33. Le défendeur a le fardeau de prouver la vérité substantielle de [TRA-DUCTION] « “l'aspect offensant”, ou l'idée maîtresse, des propos diffamatoires » : Downard, §1.6 (note en bas de page omise). Autrement dit, « [l]a défense de justification échouera s'il est démontré que la publication en cause contenait des faits exacts, mais que la véracité des propos offensants n'a pas été établie » : Downard, §6.4.

[108] Le fait que la vérité partielle ne constitue pas une défense revêt une importance particulière en l'espèce. Si une partie importante de la défense de justification échoue, la défense échoue

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

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

[110] In effect, then, the truth of just one of Ms. Bent’s statements will be insufficient for the defence to succeed. For example, even if her first allegation that Dr. Platnick misrepresented a medical consensus is true, Ms. Bent would still have to prove the truth of her second statement, that Dr. Platnick “changed” a doctor’s decision. This is so because, in my view, there are grounds to believe that the statements are not severable, but instead are constituent parts of the same sting of professional misconduct.

au complet : R. E. Brown, *Brown on Defamation : Canada, United Kingdom, Australia, New Zealand, United States* (2^e éd. (feuilles mobiles)) (« *Brown on Defamation* »), p. 10-88 à 10-90. Cependant, il est possible qu’un défendeur puisse justifier seulement une partie des propos diffamatoires [TRADUCTION] « si cette partie est distincte du reste et peut en être dissociée » : p. 10-89 (note en bas de page omise). Il faut pour cela que l’allégation soit distincte et autonome, plutôt qu’un « élément ou une partie d’un tout cohérent » : p. 10-90 (note en bas de page omise).

[109] Appliquant ce qui précède aux faits de l’espèce, les « propos offensants » sont l’allégation d’inconduite professionnelle. Dans son courriel, M^e Bent soutient essentiellement que D^r Platnick a présenté de façon inexacte ou qu’il a altéré les opinions des autres experts médicaux dans le but de priver une victime d’accident d’automobile du statut de déficience invalidante auquel elle avait droit. M^e Bent allègue en effet un comportement malhonnête et une inconduite professionnelle grave. Comme je l’ai déjà mentionné, elle semble admettre qu’il s’agit là de « l’aspect offensant » ou du « sous-entendu » des propos tenus dans son courriel. En conséquence, elle devrait présenter une preuve établissant que l’allégation d’inconduite professionnelle est substantiellement vraie pour que sa défense de justification soit reçue au procès. En l’espèce, dans le cadre d’une motion fondée sur l’art. 137.1, D^r Platnick doit établir l’existence de motifs de croire que M^e Bent n’a aucune possibilité réelle de réussir à faire cette preuve.

[110] Par conséquent, la véracité d’une seule des affirmations de M^e Bent sera, dans les faits, insuffisante pour que la défense soit retenue. Par exemple, même si la première allégation de M^e Bent selon laquelle D^r Platnick a donné l’image trompeuse d’un consensus médical était vraie, M^e Bent devrait quand même prouver la véracité de sa deuxième affirmation, à savoir que D^r Platnick a « changé » la décision d’un médecin. Il en est ainsi parce qu’à mon avis, il existe des motifs de croire que les affirmations ne sont pas dissociables, mais qu’elles sont plutôt des parties constituantes des mêmes propos offensants relatifs à l’inconduite professionnelle.

[120] In conclusion, I find that there are grounds to believe that Ms. Bent’s defence of justification has no real prospect of success. As I established above, she would in fact have to justify *both* of the statements she made, as both would appear to make up constituent parts of the “sting”, which is that Dr. Platnick is guilty of professional misconduct. As I noted, there are grounds to believe that the statements are not severable, not only in light of a common sense inference that ties them to a single sting, but also in light of Ms. Bent’s express language connecting them. Insofar as there is a basis in the record to support a finding that Ms. Bent’s second statement — that Dr. Platnick “changed [another] doctor’s decision from a marked to a moderate impairment” — is not substantially true, and in light of my conclusion that such a basis exists, then the defence of justification is foreclosed *at this stage*. It must be borne in mind here that “grounds to believe” simply requires *a* (single) basis in the record and the law to support this finding. The Dua Letter provides such a basis in addition to the evidentiary record that existed prior to that letter.

(ii) Qualified Privilege

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

[120] En conclusion, j’estime qu’il existe des motifs de croire que la défense de justification de M^e Bent n’a aucune possibilité réelle de succès. Comme je l’ai exposé plus tôt, il faudrait de fait que M^e Bent justifie *les deux* affirmations qu’elle a faites, puisque les deux semblent former les parties constitutives des « propos offensants » selon lesquels D^r Platnick est coupable d’inconduite professionnelle. Comme je l’ai fait remarquer, il existe des motifs de croire que les affirmations sont indissociables, non seulement à la lumière d’une inférence fondée sur le bon sens qui les rattache aux seuls et mêmes propos offensants, mais aussi à la lumière des mots que M^e Bent a expressément employés et qui les associaient. Dans la mesure où il se trouve dans le dossier un fondement pour conclure que la deuxième affirmation de M^e Bent — selon laquelle D^r Platnick a « changé la décision [d’un autre] médecin, faisant passer la déficience de marquée à moyenne » — n’est pas substantiellement vraie, et compte tenu de ma conclusion selon laquelle un tel fondement existe, la défense de justification est exclue *à cette étape*. Il faut garder à l’esprit ici que les « motifs de croire » requièrent simplement qu’il se trouve *un* (seul) fondement, dans le dossier et le droit, pour conclure en ce sens. La lettre de D^{re} Dua constitue un tel fondement en plus de la preuve au dossier qui existait avant cette lettre.

(ii) Immunité relative

[121] Il existe une situation d’immunité relative si l’auteur d’une communication a [TRADUCTION] « un devoir juridique, social, moral ou personnel de — ou un intérêt à — diffuser l’information en cause à la personne à qui il la diffuse », *et* si les destinataires de cette communication ont « un devoir de — ou un intérêt réciproque à — la recevoir » : Downard, §9.6 (note en bas de page omise). Fait important, « [l]’immunité relative se rattache aux circonstances entourant la communication, et non à la communication elle-même » : *Hill*, par. 143; *Botiuk*, par. 78. Lorsqu’on établit qu’il y a immunité, « la bonne foi du défendeur est présumée et ce dernier est alors libre de publier en toute impunité des remarques sur le demandeur, qui peuvent être diffamatoires et inexacts » : *Hill*, par. 144; *Botiuk*, par. 79. Toutefois, l’immunité est *relative* en ce sens qu’elle peut cesser d’exister. Ce sera le cas en particulier dans deux situations : lorsque les propos sont

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

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

[123] Here, there is a spectrum of possible characterizations for the occasion to which the privilege might attach. For instance, the language in Ms. Bent’s email indicates a potentially limited scope: “I wanted to alert you, my colleagues, to always get the assessor’s and Sibley’s files.” However, Ms. Bent has argued for a broader scope of privilege, indicating that she was “educating fellow plaintiff side personal injury lawyers about the need to obtain full documentary disclosure and advocating for MVA victims and the integrity of the automobile insurance dispute process by highlighting particular instances where insurer assessors have not provided independent and unbiased opinions”: A.R., vol. III, at p. 4. For its part, the OTLA Listserv itself limits the occasion insofar as its “Undertaking and Indemnity” Agreement (“Listserv Agreement”) limits what OTLA members have an interest or duty to send or receive. The use of the OTLA Listserv is “restricted to issues arising on ongoing files in relation to existing or contemplated litigation and for the purpose of obtaining counsel, advice and assistance in connection therewith”: A.R., vol. IV, at p. 48 (emphasis added). With respect to my colleague, it is important to consider this *entire* excerpt in order to contextualize what “issues arising on ongoing files” must *relate to* in order for a communication to come within the expressly contemplated use of the Listserv: *contra*, para. 227.

principalement motivés par la malveillance, comme lorsque l’auteur des propos était insouciant quant à la véracité des propos tenus, ou lorsque la portée de la situation d’immunité a été outrepassée (Downard, §1.9; voir aussi *Hill*, par. 145-147; *Botiuk*, par. 79-80).

[122] Pour ce motif, il est essentiel de caractériser la « situation » avec précision, puisque c’est cette situation qui crée l’immunité relative et qui en trace les contours, lesquels servent à leur tour de jalons pour évaluer si l’on outrepassé ou si l’on transgresse la situation d’immunité.

[123] En l’espèce, il existe une foule de façons de caractériser la situation à laquelle l’immunité relative pourrait se rattacher. Par exemple, les mots employés par M^e Bent dans son courriel indiquent une portée potentiellement limitée : [TRADUCTION] « je voulais vous avertir, chers collègues, de toujours obtenir les dossiers de l’évaluateur et de Sibley ». Toutefois, M^e Bent a soutenu que l’immunité avait une portée plus large, affirmant qu’elle « sensibilisait ses collègues avocats de la partie demanderesse dans les affaires de préjudice personnel concernant la nécessité d’obtenir la communication complète des documents, et défendait les victimes d’accidents d’automobile et l’intégrité du processus de règlement des litiges en matière d’assurance automobile en attirant l’attention sur des situations particulières où les évaluateurs des assureurs n’ont pas fourni des opinions indépendantes et impartiales » : d.a., vol. III, p. 4. Pour sa part, le serveur de liste de l’OTLA limite lui-même la situation dans la mesure où l’entente « Engagement et garantie » (« Entente relative au serveur de liste ») limite le type de publications que les membres de l’OTLA ont un devoir de — ou un intérêt à — transmettre ou recevoir. L’utilisation du serveur de liste de l’OTLA est [TRADUCTION] « réservée aux questions découlant de dossiers en cours en lien avec des litiges existants ou envisagés et visant à obtenir des conseils, des avis et de l’aide à cet égard » : d.a., vol. IV, p. 48 (je souligne). Avec égards pour ma collègue, il est important de tenir compte de la *totalité* de cet extrait pour bien comprendre avec quoi les « questions découlant de dossiers en cours » doivent *être en lien* pour qu’on puisse conclure qu’une communication relève d’une utilisation expressément prévue par le serveur de liste : *contra*, par. 227.

deleterious effects on expression and public participation”: *Pointes Protection*, at para. 82 (emphasis in original).

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

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

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

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

[145] I am of the view, and only for the purposes of deciding this s. 137.1 motion, that the harm here is extensive and quite serious, as Dr. Platnick has put into evidence an estimate of significant monetary harm that is more than just a bald assertion: *Pointes Protection*, at para. 71. The motion judge erred when he characterized the harm to Dr. Platnick as “quite general and imprecise”: Sup. Ct. reasons, at para. 121. Dr. Platnick has estimated a direct financial impact of \$578,949 and has supported this figure with a copy of a report prepared by an accountant. This number was not simply one derived out of thin air. Dr. Platnick has put into the evidentiary record that he typically had between 20 and 30 insurers’ examinations booked per week and approximately 100 assessments booked per month. He has shown that after Ms. Bent’s November 2014 email, he had

poursuite de l’instance sous-jacente *l’emporte sur* les effets préjudiciables causés à la liberté d’expression et à la participation aux affaires publiques » : *Pointes Protection*, par. 82 (en italique dans l’original).

a) *Préjudice allégué et intérêt public à permettre la poursuite de l’instance*

[142] Avant d’entreprendre l’exercice d’évaluation prévu à l’al. 137.1(4)b), il faut d’abord que D^r Platnick établisse : (i) l’existence d’un préjudice (ii) qui a été subi *du fait* de l’expression de M^e Bent (*Pointes Protection*, par. 68).

[143] Tout d’abord, D^r Platnick a-t-il subi ou vraisemblablement subi un préjudice?

[144] Dans les actions en diffamation, les dommages-intérêts généraux sont présumés et cela suffit pour constituer un préjudice : *Pointes Protection*, par. 71; *Torstar*, par. 28. Cependant, l’ampleur du préjudice est importante pour évaluer si celui-ci est suffisamment grave pour que l’intérêt public à permettre que l’instance suive son cours l’emporte sur l’intérêt public à protéger l’expression : *Pointes Protection*, par. 70. Généralement, le préjudice qui ne donnerait lieu qu’à des dommages-intérêts généraux de nature symbolique ne sera pas suffisant pour cette fin.

[145] Je suis d’avis, et ce, uniquement pour statuer sur la présente motion fondée sur l’art. 137.1, que le préjudice en l’espèce est considérable et assez grave, puisque D^r Platnick a mis en preuve l’estimation d’un préjudice pécuniaire important qui dépasse la simple affirmation : *Pointes Protection*, par. 71. Le juge de la motion a commis une erreur en qualifiant le préjudice subi par D^r Platnick [TRADUCTION] « [d’]assez général et vague » : motifs de la C.S., par. 121. D^r Platnick a estimé un impact financier direct de 578 949 \$ et a appuyé ce montant avec un exemplaire d’un rapport préparé par un comptable. Ce montant n’est pas sorti de nulle part. D^r Platnick a versé au dossier une preuve indiquant qu’il avait habituellement de 20 à 30 examens d’assureurs prévus par semaine et environ 100 évaluations par mois. Il a établi qu’après le courriel de M^e Bent envoyé en novembre 2014,

only 35 assessments booked in December 2014 and only 11 in January 2015. He states that he was informed by vendor companies he had been placed on a “blacklist” by insurance companies. As a result, his practice incurred “mass cancellations” with “entire days cancelled by multiple vendors”, which “had never occurred” in his 20 years of practice: A.R., vol. VI, at p. 15. Eventually, out of the 40 or so insurance companies in Ontario, all but one ceased using his services. Thus, in light of the foregoing, and the fact that neither a “definitive determination of harm” nor a “fully developed damages brief” is required, I am of the view that Dr. Platnick has sufficiently demonstrated the existence of substantial monetary harm supported by the evidentiary record here for the purposes of s. 137.1(4)(b): *Pointes Protection*, at para. 71.

[146] In addition, reputational harm is eminently relevant to the harm inquiry under s. 137.1(4)(b). Indeed, “reputation is one of the most valuable assets a person or a business can possess”: *Pointes Protection*, at para. 69 (citing “agreement” with the words of the Attorney General of Ontario at the legislation’s second reading). This Court’s jurisprudence has repeatedly emphasized the weighty importance that reputation ought to be given. Certainly, “[a] good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society’s laws”: *Hill*, at para. 107; see also *Botiuk*, at paras. 91-92.

[147] The import of reputation is only amplified when one considers *professional* reputation. In *Hill*, this Court remarked specifically on the “particular significance reputation has for a lawyer”, noting that it is the “cornerstone of a lawyer’s professional life”. As I mentioned earlier in these reasons, I see no principled reason to draw a distinction between lawyers and other professionals, such as doctors, when it comes to the protection of reputation. Both the legal profession and medical profession are comprised of

il n’avait que 35 évaluations prévues en décembre 2014, et seulement 11 en janvier 2015. Il affirme avoir été informé par des compagnies vendeuses que les compagnies d’assurance l’avaient inscrit sur une [TRADUCTION] « liste noire ». En conséquence, son cabinet a fait l’objet d’« annulations massives » où des « journées entières étaient annulées par plusieurs vendeurs », du « jamais vu » au cours de ses 20 ans de pratique : d.a., vol. VI, p. 15. Parmi les 40 et quelques compagnies d’assurance en Ontario, toutes sauf une ont fini par cesser de faire appel aux services du Dr Platnick. Ainsi, compte tenu de ce qui précède, et parce que ni une « décision définitive sur le préjudice » ni un « mémoire complet des dommages-intérêts » ne sont nécessaires, je suis d’avis que Dr Platnick a suffisamment démontré, preuve au dossier à l’appui, l’existence du préjudice pécuniaire important visé à l’al. 137.1(4)(b) : *Pointes Protection*, par. 71.

[146] De plus, le tort causé à la réputation est tout à fait pertinent pour l’analyse du préjudice en application de l’al. 137.1(4)(b). En effet, la « réputation d’une personne ou d’une entreprise constitue l’un des atouts les plus précieux qu’elle possède » : *Pointes Protection*, par. 69, où notre Cour dit « partager » l’opinion exprimée par la procureure générale de l’Ontario lors de la deuxième lecture du projet de loi. Notre Cour a maintes fois souligné la grande importance qu’il convient d’accorder à la réputation. Certes, « [une] bonne réputation, [. . .] se rattache étroitement à la valeur et à la dignité innées de la personne. Elle est un attribut qui doit, au même titre que la liberté d’expression, être protégé par les lois de la société » : *Hill*, par. 107; voir aussi *Botiuk*, par. 91-92.

[147] La réputation revêt encore plus d’importance quand il s’agit de la réputation *professionnelle*. Dans l’arrêt *Hill*, notre Cour a souligné « l’importance particulière que revêt la réputation pour l’avocat », la qualifiant de « pierre angulaire de sa vie professionnelle ». Comme je l’ai mentionné précédemment, je ne vois aucune raison de principe de faire une distinction entre les avocats et les autres professionnels, notamment les médecins, pour ce qui est de la protection de la réputation. La profession juridique

professionals who rely on their individual expertise to succeed within their respective professions. This was expressly contemplated in *Botiuk*, where this Court wrote that “[i]t should be recognized that these observations [regarding the legal profession] will be equally applicable to other professions and callings”.

[148] Thus, not only must the monetary harm pleaded by Dr. Platnick be considered in determining whether the harm is sufficiently serious, but so too must the reputational harm to Dr. Platnick’s professional reputation be considered, even if it is not quantifiable at this stage: *Pointes Protection*, at para. 71. Indeed, the damaging effects that a defamatory remark may have on a plaintiff’s “position and standing” in the professional community exacerbate the harm suffered as a result: Downard, at §14.10; see also *Young v. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680 (C.A.); *Awan v. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401. As “[t]he purpose of the general damages award is to compensate the plaintiff for loss of reputation and injury to the plaintiff’s feelings, to console the plaintiff, and to vindicate the plaintiff so that the plaintiff’s reputation may be re-established” (Downard, at §14.2 (footnote omitted)), the record supports the inference that Dr. Platnick’s general damages are significant, rather than merely nominal.

[149] Beyond harm to his professional reputation, Dr. Platnick has also explained that he has suffered humiliation, shame, disgrace, and embarrassment that have left him anxious, nervous, and sleep-deprived, all of which has had a devastating impact on his marriage and his relationship with his four children. These “intangible and subjective elements” factor into the assessment of the harm suffered by a plaintiff: *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, at p. 111 (C.A.); see also Downard, at §14.12 (observing that “injured feelings or the psychological impact” of defamation are relevant to the assessment

et la profession médicale sont constituées toutes les deux de professionnels qui s’appuient sur leurs compétences individuelles pour réussir dans leurs professions respectives. Cette réalité a été expressément mentionnée dans l’arrêt *Botiuk*, où notre Cour a écrit qu’« [i]l y a lieu de reconnaître que ces observations [concernant la profession juridique] seront également applicables à d’autres métiers et professions ».

[148] Par conséquent, pour trancher la question de savoir si le préjudice est suffisamment grave, il faut prendre en considération non seulement le préjudice pécuniaire que Dr Platnick allègue avoir subi mais aussi le tort causé à sa réputation professionnelle, même s’il n’est pas quantifiable à ce stade-ci : *Pointes Protection*, par. 71. De fait, les effets préjudiciables qu’un propos diffamatoire pourrait avoir sur [TRADUCTION] « la situation et le statut » d’un demandeur dans la communauté professionnelle exacerbent le préjudice subi en conséquence : Downard, §14.10; voir aussi *Young c. Toronto Star Newspapers Ltd.* (2005), 77 O.R. (3d) 680 (C.A.); *Awan c. Levant*, 2016 ONCA 970, 133 O.R. (3d) 401. Étant donné que [TRADUCTION] « [l’]attribution de dommages-intérêts généraux vise à indemniser le demandeur pour l’atteinte à sa réputation et pour l’humiliation qu’il a subie, à lui apporter du réconfort et à le défendre de sorte que sa réputation puisse être réétablie » (Downard, §14.2 (note en bas de page omise)), le dossier étaye l’inférence selon laquelle les dommages-intérêts généraux accordés au Dr Platnick doivent être substantiels, et non simplement symboliques.

[149] Hormis le tort causé à sa réputation professionnelle, Dr Platnick a aussi expliqué qu’il avait souffert d’humiliation, de honte, de déshonneur, qu’il avait été plongé dans une situation embarrassante génératrice d’anxiété, de nervosité et de problèmes de sommeil, et enfin que tout cela avait eu un effet dévastateur sur sa vie de couple et sur sa relation avec ses quatre enfants. Ces [TRADUCTION] « éléments intangibles et subjectifs » entrent en compte dans l’évaluation du préjudice subi par le demandeur : *Walker c. CFTO Ltd.* (1987), 59 O.R. (2d) 104, p. 111 (C.A.); voir aussi Downard, §14.12 (qui fait

of damages). It must be recalled that for the purposes of s. 137.1(4)(b), harm need not be monetized, as both “monetary harm or non-monetary harm can be relevant to demonstrating” the existence of harm: *Pointes Protection*, at paras. 68-71.

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

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

remarquer que « les blessures morales ou l’impact psychologique » de la diffamation sont pertinents dans l’évaluation des dommages-intérêts). On se souviendra que pour l’application de l’al. 137.1(4)(b), il n’est pas nécessaire d’attribuer une valeur pécuniaire au préjudice, car « [l]e préjudice, qu’il soit de nature monétaire ou non, est pertinent pour établir » l’existence d’un préjudice : *Pointes Protection*, par. 68-71.

[150] Au final, on s’intéresse ici à l’*existence* d’un préjudice, et non à la question de savoir si celui-ci a été infligé ou subi de façon justifiable. Une fois l’existence du préjudice établie, il s’agit de savoir si ce préjudice a été subi *du fait* de l’expression du défendeur. Il ne faut pas perdre de vue l’objet sous-jacent de l’al. 137.1(4)(b) : essentiellement, le demandeur doit établir qu’une raison légitime le pousse à intenter une poursuite fondée sur un préjudice légitime qu’il cherche à réparer, et ce afin d’atténuer les risques qu’il se serve de l’action en justice comme d’un outil pour censurer l’expression du défendeur et le réduire au silence. Ce n’est pas le cas en l’espèce.

[151] Je passe donc à la question suivante — celle de savoir si le préjudice a été subi *du fait* de l’expression : *Pointes Protection*, par. 68. En l’espèce, la réponse dépend en fait de deux sous-questions subordonnées l’une à l’autre : (1) M^e Bent peut-elle être tenue responsable du préjudice qui a pu résulter de la fuite subséquente et/ou de la reproduction de son courriel — c’est-à-dire la republication; et dans la négative, (2) un préjudice suffisamment grave a-t-il été causé par le courriel initial de M^e Bent, ou le préjudice subi est-il *uniquement* attribuable à la republication subséquente du courriel? D’ailleurs, ma collègue souscrit à l’opinion du juge de la motion pour dire que « [l]’essentiel du préjudice [. . .] était toutefois attribuable à la *fuite* du courriel » : par. 256 (en italique dans l’original). La réponse à la première sous-question est cruciale pour répondre à la seconde, parce que si l’on répond à la première question par l’affirmative, et que M^e Bent *peut* être tenue responsable de la fuite et/ou de la reproduction de son courriel, il n’y a aucune raison de distinguer le préjudice causé par la republication de celui qui est causé par la publication initiale, puisque M^e Bent aura engagé sa responsabilité pour la diffusion dans

Glen Hansman *Appellant*

v.

Barry Neufeld *Respondent*

and

Attorney General of British Columbia, QMUNITY, Skipping Stone Scholarship Foundation, Canadian Human Rights Commission, Canadian Civil Liberties Association, Community-Based Research Centre, Canadian Centre for Gender & Sexual Diversity, West Coast Legal Education and Action Fund, B.C. General Employees' Union, Egale Canada and Centre for Free Expression *Interveners*

INDEXED AS: HANSMAN v. NEUFELD**2023 SCC 14**

File No.: 39796.

2022: October 11; 2023: May 19.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts — Dismissal of proceeding that limits debate — Defamation — Public interest weighing exercise — Valid defence — Fair comment — British Columbia framework for dismissal of strategic lawsuits against public participation (SLAPPs) — Defamation action concerning statements made by defendant in response to school board trustee plaintiff's opposition to sexual orientation and gender identity initiative dismissed under provincial anti-SLAPP legislation by chambers judge — Whether chambers judge erred in public interest weighing exercise — Whether chambers judge erred in finding that plaintiff did not show grounds to believe defendant had no valid fair comment defence — Protection of Public Participation Act, S.B.C. 2019, c. 3, s. 4(2).

Glen Hansman *Appellant*

c.

Barry Neufeld *Intimé*

et

Procureur général de la Colombie-Britannique, QMUNITY, Skipping Stone Scholarship Foundation, Commission canadienne des droits de la personne, Association canadienne des libertés civiles, Community-Based Research Centre, Centre canadien de la diversité des genres et de la sexualité, West Coast Legal Education and Action Fund, B.C. General Employees' Union, Egale Canada et Centre for Free Expression *Intervenants*

RÉPERTORIÉ : HANSMAN c. NEUFELD**2023 CSC 14**

N° du greffe : 39796.

2022 : 11 octobre; 2023 : 19 mai.

Présents : Le juge en chef Wagner et les juges Karakatsanis, Côté, Rowe, Martin, Jamal et O'Bonsawin.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Tribunaux — Rejet d'une instance limitant les débats — Diffamation — Évaluation de l'intérêt public — Défense valable — Commentaire loyal — Cadre britanno-colombien de rejet des poursuites stratégiques contre la mobilisation publique (SLAPP) — Rejet par le juge en cabinet en application de la loi provinciale anti-SLAPP d'une action en diffamation visant des déclarations faites par le défendeur en réaction à l'opposition du conseiller scolaire demandeur à une initiative sur l'orientation sexuelle et l'identité de genre — Le juge en cabinet a-t-il commis une erreur dans l'évaluation de l'intérêt public? — Le juge en cabinet a-t-il conclu à tort que le demandeur n'avait pas démontré l'existence de motifs de croire que le défendeur ne disposait pas d'une défense valable de commentaire loyal? — Protection of Public Participation Act, S.B.C. 2019, c. 3, art. 4(2).

A. *Section 4 of the PPPA*

[46] A SLAPP is a tactical action that seeks to suppress expression on matters of public interest. The goal of a SLAPP is not necessarily a legal victory, but a political one: to intimidate and suppress criticism with the threat of costly litigation (V. Pelletier, *Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)*, August 2008 (online), at para. 4). A key feature of a SLAPP is thus the strategic use of the legal system to silence contrary viewpoints. Binnie J. aptly described the problem posed by such litigious tactics in *WIC Radio*:

The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. . . . When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course “chilling” false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements. [Emphasis in original; para. 15.]

[47] SLAPPs first emerged in the United States as a tendency of some powerful businesses to use the threat of litigation to frustrate public mobilization efforts against them (R. A. Macdonald, P. Noreau and D. Jutras, *Les poursuites stratégiques contre la mobilisation publique — les poursuites-bâillons (SLAPP)* (2007), at p. 2). Because of these origins, the archetypal SLAPP is generally described as a powerful or wealthy plaintiff, who has suffered only nominal damage, using litigation against a comparatively under-resourced defendant to silence criticism

A. *L'article 4 de la PPPA*

[46] Une poursuite-bâillon ou SLAPP est une action stratégique qui vise à réprimer l'expression d'opinions sur des questions d'intérêt public. Une poursuite-bâillon ne vise pas nécessairement à obtenir une victoire juridique, mais plutôt une victoire politique, en intimidant et en étouffant les critiques par la menace de poursuites coûteuses (V. Pelletier, *Les poursuites stratégiques contre la mobilisation publique — les poursuites-bâillons (SLAPP) (et autres poursuites abusives)*, août 2008 (en ligne), par. 4). L'une des principales caractéristiques des poursuites-bâillons est le recours stratégique au système de justice pour faire taire ceux qui ont un point de vue contraire. Le juge Binnie décrit avec justesse le problème posé par de telles tactiques judiciaires dans l'arrêt *WIC Radio* :

La fonction du délit de diffamation est de permettre le rétablissement de la réputation, mais de nombreux tribunaux ont conclu qu'il faudrait peut-être modifier les éléments constitutifs traditionnels de ce délit pour faire plus de place à la liberté d'expression. On redoute en effet que, par crainte des coûts de plus en plus élevés et des problèmes engendrés par les poursuites en diffamation, les diffuseurs passent sous silence des questions d'intérêt public. [. . .] Inévitablement, lorsqu'il y a controverse, il y a souvent poursuite, non seulement pour des motifs sérieux (comme en l'espèce), mais simplement à des fins d'intimidation. Bien sûr, il n'est pas intrinsèquement mauvais que les propos faux et diffamatoires soient « réprimés », mais lorsque le débat sur des questions d'intérêt public *légitimes* est réprimé, on peut se demander s'il n'y a pas censure ou autocensure indues. La controverse publique a parfois de rudes exigences, et le droit doit respecter ses exigences. [En italique dans l'original; par. 15.]

[47] Les poursuites-bâillons ont vu le jour aux États-Unis en tant que tendance de certaines entreprises puissantes de brandir la menace de poursuites judiciaires pour neutraliser les efforts de mobilisation publique contre elles (R. A. Macdonald, P. Noreau et D. Jutras, *Les poursuites stratégiques contre la mobilisation publique — les poursuites-bâillons (SLAPP)* (2007), p. 2). En raison de ces origines, l'auteur type d'une poursuite-bâillon est généralement dépeint comme un demandeur puissant ou riche qui n'a subi qu'un préjudice insignifiant et qui recourt

(see *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99).

aux tribunaux contre un défendeur qui ne dispose en comparaison que de ressources limitées en vue de faire taire les critiques (voir *Platnick c. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, par. 99).

[48] But SLAPPs do not always embody the hallmarks of the archetype. A SLAPP may be initiated by the rich and powerful, but not always. Similarly, the plaintiff may not have a history of using litigation or the threat of litigation to silence critics. In any case, however, the consistent defining feature of a SLAPP is that the proceeding acts to silence the defendant, and more broadly, to suppress debate on matters of public interest, rather than to remedy serious harm suffered by the plaintiff.

[48] Mais les poursuites-bâillons n'incarnent pas toujours les caractéristiques de cet archétype. Une poursuite-bâillon peut être intentée par des personnes riches et puissantes, mais pas toujours. De même, le demandeur n'a pas nécessairement l'habitude de recourir aux tribunaux ou de menacer d'y recourir pour faire taire les critiques. Mais, en tout état de cause, une poursuite-bâillon se caractérise invariablement par le fait qu'elle vise à réduire le défendeur au silence et, plus largement, à réprimer le débat sur des questions d'intérêt public, plutôt qu'à réparer un préjudice grave subi par le demandeur.

[49] Anti-SLAPP legislation, such as the *PPPA*, creates a procedure for screening proceedings arising from expression on matters of public interest at an early stage. Legislative anti-SLAPP solutions have now been passed into law in British Columbia, Ontario, and Quebec. In Ontario, the *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23, s. 3, amends the province's *Courts of Justice Act*, R.S.O. 1990, c. C.43, by adding s. 137.1, which introduces a pretrial screening mechanism designed to weed out SLAPPs. This Court recently analyzed s. 137.1 in two decisions released concurrently: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, and *Platnick v. Bent*, 2020 SCC 23, [2020] 2 S.C.R. 645.

[49] Une loi anti-SLAPP telle la *PPPA* instaure un mécanisme de filtrage préliminaire des instances découlant de l'expression sur des affaires d'intérêt public. Des mesures législatives anti-SLAPP ont été adoptées en Colombie-Britannique, en Ontario et au Québec. En Ontario, la *Loi de 2015 sur la protection du droit à la participation aux affaires publiques*, L.O. 2015, c. 23, art. 3, a modifié la *Loi sur les tribunaux judiciaires*, L.R.O. 1990, c. C.43, de la province en y ajoutant l'art. 137.1, qui crée un mécanisme d'examen préalable au procès visant à éliminer les poursuites-bâillons. Notre Cour a récemment analysé l'art. 137.1 dans deux décisions rendues simultanément : *1704604 Ontario Ltd. c. Pointes Protection Association*, 2020 CSC 22, [2020] 2 R.C.S. 587, et *Platnick c. Bent*, 2020 CSC 23, [2020] 2 R.C.S. 645.

[50] British Columbia's *PPPA* was modelled after the *Uniform Protection of Public Participation Act* (2017), May 1, 2017 (online), adopted by the Uniform Law Conference of Canada, which, in turn, is based on Ontario's statute. Like s. 137.1 of Ontario's *Courts of Justice Act*, s. 4 of the *PPPA* creates a pretrial screening procedure that enables a defendant to apply to the court to dismiss a proceeding against them, provided certain criteria are satisfied. Section 4 reads:

[50] La *PPPA* de la Colombie-Britannique s'inspire du modèle de la *Loi uniforme sur la protection de la participation publique* (2017), 1^{er} mai 2017 (en ligne), qui a été adoptée par la Conférence pour l'harmonisation des lois au Canada et qui s'inspirait elle-même de la loi ontarienne. À l'instar de l'art. 137.1 de la *Loi sur les tribunaux judiciaires* de l'Ontario, l'art. 4 de la *PPPA* crée un mécanisme d'examen préalable au procès qui permet à la partie défenderesse de demander au tribunal d'ordonner le rejet d'une instance introduite contre elle, à condition de satisfaire à certains critères. L'article 4 dispose :

contrast, contemplates that parties will put forward a record beyond the pleadings, though a limited one, given that an anti-SLAPP motion is not the place for an ultimate adjudication of the issues (*Pointes*, at para. 38). The *PPPA* provides that evidence must be given by affidavit and the affiant may be called for limited cross-examination (see s. 9(4) and (5)).

[56] Absent reviewable error, an application judge's determination on a s. 4 motion is entitled to deference (*Bent*, at para. 77, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8 and 36).

B. *Issue 1: Public Interest Weighing*

[57] The key issue in the appeal before us is whether the chambers judge erred in the public interest weighing exercise under s. 4(2)(b). This issue was the most contentious in this Court, and invited considerable attention from parties and interveners, alike. Accordingly, although the chambers judge addressed the issues in a different order, I evaluate his findings as to the public interest weighing exercise before turning to his conclusion that Mr. Hansman had a valid defence in the proceeding.

[58] Even when a plaintiff shows the proceeding has substantial merit and the defendant has no valid defence, "it remains vulnerable to summary dismissal as a result of the public interest weighing exercise . . . , which provides courts with a robust backstop to protect freedom of expression" (*Pointes*, at para. 53). *Pointes* described this weighing exercise as the core of the analysis, as it allows the court to strike an appropriate balance between the protection of individual reputation and freedom of expression, the competing values at the heart of anti-SLAPP legislation.

un dossier exhaustif, alors qu'une motion en radiation est tranchée sur la base des seuls actes de procédure. Par contraste, l'art. 4 envisage la production par les parties d'un dossier qui va au-delà des actes de procédure, mais est néanmoins limité, étant donné que ce n'est pas dans le cadre d'une motion fondée sur une disposition anti-SLAPP que sont tranchées définitivement les questions en litige (*Pointes*, par. 38). Selon la *PPPA*, la preuve doit être soumise sous forme d'affidavits, et les auteurs de ces affidavits peuvent faire l'objet d'un contre-interrogatoire limité (voir par. 9(4) et (5)).

[56] Sauf erreur susceptible de contrôle, la déférence s'impose à l'égard de la décision rendue par le juge sur la motion présentée en vertu de l'art. 4 (*Bent*, par. 77, citant *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 8 et 36).

B. *Première question : l'évaluation de l'intérêt public*

[57] La principale question à trancher dans le présent pourvoi est de savoir si le juge en cabinet a commis une erreur dans l'évaluation de l'intérêt public en application de l'al. 4(2)b). Cette question était la plus controversée soumise à notre Cour, et a reçu beaucoup d'attention autant de la part des parties que des intervenants. Par conséquent, bien que le juge en cabinet ait traité des questions dans un autre ordre, je vais évaluer les conclusions qu'il a tirées à l'issue de l'évaluation de l'intérêt public avant de passer à sa conclusion suivant laquelle M. Hansman avait une défense valable à faire valoir dans l'instance.

[58] Même lorsque le demandeur démontre que le bien-fondé de l'instance est substantiel et que le défendeur n'a pas de défense valable, « [l'instance] demeure vulnérable au rejet sommaire en raison de l'exercice d'évaluation de l'intérêt public [. . .], qui fournit aux tribunaux un solide filet de sécurité pour assurer la protection de la liberté d'expression » (*Pointes*, par. 53). L'arrêt *Pointes* décrit cet exercice d'évaluation comme l'essence de l'analyse, car il permet au tribunal de trouver le juste équilibre entre la protection de la réputation de la personne et la liberté d'expression, les valeurs opposées au cœur de toute loi anti-SLAPP.

[59] Section 4(2)(b) requires the plaintiff to prove on a balance of probabilities that — due to “the harm likely to have been or to be suffered” by the plaintiff as a result of the defendant’s expression — the public interest in allowing the proceeding to continue outweighs the proceeding’s “deleterious effects on expression and public participation” (*Pointes*, at para. 82).

[60] In *Pointes*, this Court outlined several factors that may help judges undertake the weighing exercise, provided those factors can be “tethered to the text of [the provision] and the considerations explicitly contemplated by the legislature to conduct the weighing exercise” (para. 80):

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. [Emphasis in original; para. 80.]

[61] The chambers judge found that Mr. Neufeld had not shown harm substantial enough to outweigh the significant public interest in Mr. Hansman’s expression. The Court of Appeal held that the chambers judge had erred both in his analysis of the harm to Mr. Neufeld and in his assessment of the public interest in protecting Mr. Hansman’s expression. Specifically, the Court of Appeal found the chambers judge ought to have considered as part of the harm analysis “the potential chilling effect on future expression by” potential plaintiffs who might wish to engage in highly charged public debates, but would opt not to “for fear of being inveighed with negative labels

[59] L’alinéa 4(2)b) oblige le demandeur à établir, selon la prépondérance des probabilités, qu’en raison du préjudice qu’il « subit ou a subi vraisemblablement » du fait de l’expression du défendeur, l’intérêt public dans la poursuite de l’instance l’emporte sur les « effets préjudiciables [de l’instance] à la liberté d’expression et à la participation aux affaires publiques » (*Pointes*, par. 82).

[60] Dans l’arrêt *Pointes*, notre Cour a énuméré plusieurs facteurs qui peuvent aider les juges à entreprendre l’exercice d’évaluation, à condition que ces facteurs soient « lié[s] au texte de [la disposition] et aux considérations explicitement envisagées par le législateur pour effectuer l’exercice d’évaluation » (par. 80) :

Par exemple, les facteurs suivants, présentés sans ordre particulier d’importance, peuvent éclairer le juge des motions : l’importance de l’expression, le résumé des litiges passés entre les parties, l’existence d’effets indirects ou à plus grande échelle produits sur *d’autres* expressions relativement à des affaires d’intérêt public, l’effet paralysant potentiel pour l’expression d’une partie ou d’autres personnes *dans l’avenir*; le résumé des activités militantes ou de défense de l’intérêt public menées par le défendeur antérieurement, toute disproportion entre les ressources mises à contribution dans la poursuite et le préjudice causé ou l’octroi éventuel de dommages-intérêts et la question de savoir si l’expression ou la demande pourrait être à l’origine d’hostilités à l’endroit d’un groupe reconnu comme étant vulnérable ou d’un groupe protégé par l’art. 15 de la *Charte* ou par une loi sur les droits de la personne. [En italique dans l’original; par. 80.]

[61] Le juge en cabinet a conclu que M. Neufeld n’avait pas démontré que le préjudice qu’il avait subi était suffisamment grave pour l’emporter sur l’important intérêt public dans l’expression de M. Hansman. La Cour d’appel a jugé que le juge en cabinet avait commis une erreur dans son analyse du préjudice causé à M. Neufeld et dans son examen de l’intérêt public à protéger l’expression de M. Hansman. Plus précisément, la Cour d’appel a estimé que le juge en cabinet aurait dû tenir compte, dans le cadre de l’analyse du préjudice, de [TRADUCTION] « l’effet paralysant potentiel sur l’expression future » d’éventuels demandeurs qui pourraient vouloir participer à

(a) *Evidence of Harm and Causation*

[64] Mr. Neufeld pleaded generally that he suffered reputational harm and associated emotional distress due to Mr. Hansman’s statements. He contended that these assertions were corroborated by a few examples of steps taken against him by other entities: the Chilliwack School Board sought his resignation and directed him to stay away from schools (he refused and continued to serve as a trustee); he was uninvited from an annual trustee meeting; and he was uninvited from delivering high school commencement addresses. Mr. Neufeld also argued that harm could be inferred based on circumstantial factors, including the identity of the accuser, the breadth, and distribution of the statements, and the republication of the statements (Chambers Judge’s Reasons, at para. 155).

[65] The chambers judge recognized that Mr. Neufeld was not expected to present a fully developed damages brief on a s. 4 application (para. 157). Still, he found that Mr. Neufeld had presented only “bare assertions” of harm, leaving him with “precious little evidence” to weigh on Mr. Neufeld’s side of the equation under s. 4(2)(b) (paras. 147 and 152). He found further that, “apart from one paragraph in his affidavit”, Mr. Neufeld presented no evidence that would link the minimal harm he alleged to Mr. Hansman’s statements (para. 158).

[66] The Court of Appeal found two errors with the chambers judge’s analysis. First, the chambers judge failed to give effect to the general principle that damages are presumed in defamation law (para. 51). The Court of Appeal also noted that Mr. Neufeld had alleged examples of reputational harm and argued that harm could be inferred based on circumstantial factors (paras. 57-58). Second, the chambers judge erred by assuming causation would be difficult to

a) *Preuve du préjudice et de l’existence d’un lien de causalité*

[64] Monsieur Neufeld a plaidé de façon générale qu’il avait subi une atteinte à sa réputation et souffert de trouble émotionnel en raison des déclarations de M. Hansman. Il a soutenu que ces affirmations étaient corroborées par quelques exemples de mesures prises contre lui par d’autres entités : le conseil scolaire de Chilliwack a réclamé sa démission et l’a sommé de se tenir à l’écart des écoles (il a refusé et a continué à agir comme conseiller scolaire); et il s’est vu retirer des invitations à participer à une assemblée annuelle des conseillers scolaires et à prendre la parole lors de cérémonies de remise de diplômes d’études secondaires. Monsieur Neufeld a également soutenu que l’on pouvait déduire un préjudice des facteurs circonstanciels, notamment l’identité de l’accusateur, l’ampleur et la diffusion des déclarations et la republication des déclarations (motifs du juge en cabinet, par. 155).

[65] Tout en reconnaissant que M. Neufeld n’était pas tenu de soumettre un dossier exhaustif sur les dommages subis dans le cadre d’une demande fondée sur l’art. 4 (par. 157), le juge en cabinet a estimé que M. Neufeld n’avait présenté que [TRADUCTION] « de vagues affirmations » de préjudice, de sorte qu’il disposait de « bien peu d’éléments » penchant en faveur de M. Neufeld au titre de l’al. 4(2)b) (par. 147 et 152). Il a également conclu que, [TRADUCTION] « à part un paragraphe de son affidavit », M. Neufeld n’avait présenté aucun élément de preuve permettant d’établir un lien entre le préjudice minime qu’il affirmait avoir subi et les déclarations de M. Hansman (par. 158).

[66] La Cour d’appel a conclu que l’analyse du juge en cabinet était entachée de deux erreurs. En premier lieu, le juge en cabinet n’avait pas donné effet au principe général suivant lequel on présume en droit de la diffamation qu’il y a lieu d’accorder des dommages-intérêts (par. 51). La Cour d’appel a également relevé que M. Neufeld avait cité des exemples d’atteintes à la réputation et affirmé que l’on pouvait déduire l’existence d’un préjudice à partir

establish because others had made similar statements about Mr. Neufeld (paras. 51-59). I disagree.

des facteurs circonstanciels (par. 57-58). Ensuite, le juge en cabinet avait commis une erreur en présumant qu'il serait difficile d'établir l'existence d'un lien de causalité parce que d'autres personnes avaient fait des déclarations semblables au sujet de M. Neufeld (par. 51-59). Je ne suis pas de cet avis.

[67] Although general damages are presumed in defamation law, s. 4(2)(b) prescribes a weighing exercise which requires that the harm to the plaintiff be serious enough to outweigh the public interest in protecting the defendant's expression. While the presumption of damages can establish the *existence* of harm, it cannot establish that the harm is "serious" (see, e.g., *Lachaux v. Independent Print Ltd.*, [2019] UKSC 27, [2020] A.C. 612, at para. 13; see also *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, 23 C.E.L.R. (4th) 11, at para. 22; *Levant v. DeMelle*, 2022 ONCA 79, 79 C.P.C. (8th) 437, at para. 68). To hold otherwise would be to presumptively tip the scales in favour of the plaintiff in defamation cases and effectively gut the weighing exercise. Rather, to succeed on the weighing exercise, a plaintiff must provide evidence that enables the judge "to draw an inference of likelihood" of harm of a magnitude sufficient to outweigh the public interest in protecting the defendant's expression (*Pointes*, at para. 71; *Bent*, at para. 154). Presumed general damages are insufficient for this purpose, as are bare assertions of harm.

[67] Même si, en droit de la diffamation, on présume qu'il y a lieu d'adjudger des dommages-intérêts généraux, l'al. 4(2)b) prescrit une démarche d'évaluation qui oblige le demandeur à démontrer que le préjudice qu'il a subi est suffisamment grave pour l'emporter sur l'intérêt public dans la protection de l'expression du défendeur. Bien que la présomption relative aux dommages-intérêts puisse établir l'*existence* d'un préjudice, elle ne permet pas d'établir que ce préjudice est « grave » (voir, p. ex., *Lachaux c. Independent Print Ltd.*, [2019] UKSC 27, [2020] A.C. 612, par. 13; voir aussi *United Soils Management Ltd. c. Mohammed*, 2019 ONCA 128, 23 C.E.L.R. (4th) 11, par. 22; *Levant c. DeMelle*, 2022 ONCA 79, 79 C.P.C. (8th) 437, par. 68). Conclure autrement reviendrait à faire pencher par le jeu d'une présomption la balance en faveur du demandeur dans les affaires de diffamation et à vider de sa substance la démarche d'évaluation. Pour obtenir gain de cause à l'issue de cette démarche, le demandeur doit plutôt présenter des éléments de preuve qui permettent au juge « de tirer une conclusion quant à la probabilité » de l'existence d'un préjudice d'une ampleur suffisante pour l'emporter sur l'intérêt public dans la protection de l'expression du défendeur (*Pointes*, par. 71; *Bent*, par. 154). La présomption relative aux dommages-intérêts généraux n'est pas suffisante à cette fin, pas plus que ne le sont de vagues affirmations de préjudice.

[68] Even where the extent of harm suffered by the plaintiff is serious, however, the legislation also requires some evidence that enables the judge to infer a causal link between the defendant's expression and the harm suffered (*Pointes*, at para. 71). Where the defendant is not the only one speaking out against the plaintiff, inferring a causal link between the defendant's expression and the harm suffered by the plaintiff becomes both more important (para. 72), and more difficult.

[68] Toutefois, même lorsque le préjudice qu'il a subi est grave, la loi oblige aussi le demandeur à soumettre au juge des éléments de preuve permettant à ce dernier de conclure à l'existence d'un lien de causalité entre l'expression du défendeur et le préjudice subi (*Pointes*, par. 71). Lorsque le défendeur n'est pas la seule personne à avoir dénoncé le demandeur, l'inférence d'un lien de causalité entre l'expression du défendeur et le préjudice subi par le demandeur devient à la fois plus importante (par. 72) et plus difficile.

commenced after Mr. Hansman’s statements was needed to prove a causal link.

[72] Given the dearth of evidence from Mr. Neufeld on harm, the chambers judge did not err in concluding that Mr. Neufeld had adduced “almost no evidence of damage suffered” as a result of Mr. Hansman’s statements. Absent extricable error, his findings are entitled to deference (*Bent*, at para. 77).

(b) *The Chilling Effect on the Plaintiff and Others Similarly Situated*

[73] The Court of Appeal also held that the chambers judge erred in not considering the “chilling effect” dismissing the proceeding would have on “others who might wish to engage in debates on . . . highly charged matters of public interest” (para. 65). The court hypothesized that people may “withdraw or not engage in public debate for fear of being inveighed with negative labels and accusations of hate speech with no opportunity to protect their reputation” (para. 65). Given the “serious reputational harm” accusations of hate speech might inflict, the court determined that the chambers judge erred in overlooking the “collateral effect that preventing Mr. Neufeld from defending himself from such serious accusations could have on other individuals’ willingness to express themselves on issues of public interest in [the] future” (para. 68).

[74] This reasoning runs counter to precedent, and is not “tethered to the text of [the relevant provision]” (*Pointes*, at para. 80). To begin, s. 4(2)(b) defines “the public interest in continuing the proceeding” with reference to “the harm likely to have been or to be suffered by the respondent as a result of the applicant’s expression”. The harm relevant to the public interest

contexte de la présente affaire, je suis d’avis de ne pas modifier la conclusion du juge en cabinet suivant laquelle, pour prouver l’existence d’un lien de causalité, il fallait plus qu’une affirmation sommaire selon laquelle le préjudice avait commencé après les déclarations de M. Hansman.

[72] Compte tenu du peu d’éléments de preuve présentés par M. Neufeld au sujet du préjudice, le juge en cabinet n’a pas commis d’erreur en concluant que M. Neufeld n’avait présenté « presque aucune preuve du préjudice qu’il avait subi » du fait des déclarations de M. Hansman. Faute d’erreur isolable, ses conclusions commandent la déférence (*Bent*, par. 77).

b) *L’effet paralysant sur le demandeur et d’autres personnes se trouvant dans une situation semblable*

[73] La Cour d’appel a également conclu que le juge en cabinet avait commis une erreur en ne tenant pas compte de [TRADUCTION] « l’effet paralysant » que le rejet de l’instance aurait sur « d’autres personnes qui pourraient vouloir participer à des débats sur [. . .] [des] questions d’intérêt public très délicates » (par. 65). La Cour d’appel a émis l’hypothèse que des gens puissent [TRADUCTION] « se retirer ou refuser de débattre de ces questions dans l’espace public par crainte de se voir affublés d’étiquettes négatives et d’être accusés de discours haineux sans avoir la possibilité de protéger leur réputation » (par. 65). Étant donné la [TRADUCTION] « grave atteinte à la réputation » que des accusations de discours haineux étaient susceptibles de porter, la Cour d’appel a conclu que le juge en cabinet avait commis une erreur en négligeant « l’effet indirect que le fait d’empêcher M. Neufeld de se défendre contre des accusations aussi graves pourrait avoir sur la volonté d’autres personnes de s’exprimer à l’avenir sur des questions d’intérêt public » (par. 68).

[74] Ce raisonnement va à l’encontre de la jurisprudence et n’est pas « lié au texte de [la disposition applicable] » (*Pointes*, par. 80). Tout d’abord, l’al. 4(2)(b) définit [TRADUCTION] « l’intérêt public dans la poursuite de l’instance » en fonction du « préjudice que l’intimé subit ou a subi vraisemblablement du fait de l’expression du requérant ». Le préjudice

by the media to present a counter-perspective within an ongoing debate), and the motivation behind it (to combat discriminatory and harmful expression and to protect transgender youth in schools) are all deserving of significant protection. Given Mr. Neufeld's failure to establish harm serious enough to outweigh that substantial public interest, the chambers judge did not err in concluding that the weighing exercise under s. 4(2)(b) mandates dismissal of the underlying action.

C. Issue 2: No Valid Defence

[94] While the weighing exercise may be the core of the anti-SLAPP legislation, the chambers judge first grounded his dismissal of the action in the finding that Mr. Hansman had a valid fair comment defence. Section 4(2)(a)(ii) provides that a court must make a dismissal order unless the plaintiff satisfies the court that there are grounds to believe that the defendant has no valid defence in the proceeding. The defendant must first point to any defences they intend to raise at trial, after which the burden shifts to the plaintiff. "[G]rounds to believe" means "something more than mere suspicion, but less than . . . proof on the balance of probabilities" (*Pointes*, at para. 40, quoting *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114). To satisfy this burden, a plaintiff must show the defences advanced by the defendant "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" (*Pointes*, at para. 59).

(1) Fair Comment Defence

[95] In support of his s. 4 application, Mr. Hansman advanced the defence of fair comment. The right of fair comment is "a basic safeguard against irresponsible political power" (C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at p. 668). The fair comment defence is premised on

forme qu'il a choisie pour se prononcer (en réponse à une invitation des médias de présenter un point de vue opposé dans le cadre d'un débat en cours) et la motivation sous-jacente (lutter contre l'expression d'idées discriminatoires et préjudiciables et protéger les jeunes transgenres dans les écoles) méritent tous une protection importante. Comme M. Neufeld n'a pas réussi à établir qu'il a subi un préjudice suffisamment grave pour l'emporter sur cet important intérêt public, le juge en cabinet n'a pas commis d'erreur en concluant que la démarche d'évaluation prévue à l'al. 4(2)b) commandait le rejet de l'action sous-jacente.

C. Deuxième question : l'absence de défense valable

[94] Bien que l'exercice d'évaluation puisse constituer l'essence de la loi anti-SLAPP, le juge en cabinet a tout d'abord fondé son rejet de l'action sur la conclusion que M. Hansman avait une défense de commentaire loyal. Selon le sous-al. 4(2)a)(ii), le tribunal doit rendre une ordonnance de rejet, sauf si le demandeur le convainc qu'il existe des motifs de croire que le défendeur n'a pas de défense valable dans l'instance. Le défendeur doit d'abord faire état de tout moyen de défense qu'il entend invoquer au procès, après quoi le fardeau passe au demandeur. L'expression « motifs de croire » signifie « davantage qu'un simple soupçon, mais rest[e] moins stricte que la prépondérance des probabilités » (*Pointes*, par. 40, citant *Mugesera c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2005 CSC 40, [2005] 2 R.C.S. 100, par. 114). Pour s'acquitter de ce fardeau, le demandeur doit démontrer que les moyens de défense invoqués par le défendeur « ne sont pas juridiquement défendables, ou ne prennent pas appui sur des éléments de preuve raisonnablement dignes de foi, de sorte qu'il est permis d'affirmer que ces moyens n'ont aucune possibilité réelle de succès » (*Pointes*, par. 59).

(1) La défense de commentaire loyal

[95] À l'appui de sa demande fondée sur l'art. 4, M. Hansman invoque la défense de commentaire loyal. Le droit de faire des commentaires loyaux constitue [TRADUCTION] « une protection fondamentale contre le pouvoir politique irresponsable » (C. Sappideen et P. Vines, dir., *Fleming's The Law of Torts* (10^e éd.

the idea that citizens must be able to openly declare their real opinions on matters of public interest without fear of reprisal in the form of actions for defamation (*Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1086, quoting *Slim v. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497, at p. 503 (C.A.)). This democratic discourse is a defining feature of a free and open society. Thus, the defence aims to keep the equilibrium in defamation law between two competing values: the protection of individual reputation from unwarranted attack, on one side, and the free debate “that is said to be the ‘very life blood of our freedom and free institutions’” on the other (*WIC Radio*, at para. 1, quoting *Price v. Chicoutimi Pulp Co.* (1915), 51 S.C.R. 179, at p. 194). The task of courts in interpreting the defence is to reconcile these two values, not to prefer one over the other (*WIC Radio*, at para. 2).

[96] The fair comment defence has five elements. First, the “comment must be on a matter of public interest” (*Grant*, at para. 31). Second, it must be “based on fact” (para. 31). Third, “though it can include inferences of fact, [it] must be recognisable as comment” (para. 31). Fourth, it must satisfy an objective test: “could any person honestly express that opinion on the proved facts?” (para. 31). Finally, even if the above elements are met, “the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice” (para. 31). Consideration of the elements of the fair comment defence requires an assessment of the defamatory words used in the full context surrounding their use (*WIC Radio*, at paras. 55-56). In this appeal, the only elements at issue are the second and third elements of the defence, along with the question of malice.

[97] When invoked at trial, the defendant must prove the elements of the fair comment defence before the onus switches to the plaintiff to defeat the defence by establishing malice by the defendant (para. 52). On a s. 4 application, however, the onus is on the plaintiff

2011), p. 668). La défense de commentaire loyal repose sur l’idée que les citoyens devraient pouvoir exprimer librement leur véritable opinion sur des questions d’intérêt public sans crainte de subir des représailles sous forme d’une action en diffamation (*Cherneskey c. Armadale Publishers Ltd.*, [1979] 1 R.C.S. 1067, p. 1086, citant *Slim c. Daily Telegraph Ltd.*, [1968] 1 All E.R. 497, p. 503 (C.A.)). Ce débat démocratique est une caractéristique déterminante d’une société libre et ouverte. Ainsi, en matière de diffamation, la défense de commentaire loyal vise à concilier deux valeurs concurrentes : la protection de la réputation de l’individu contre des attaques injustifiées, d’une part, et la liberté de débat, « dont on a dit qu’elle constitue [TRADUCTION] “l’élément vital de notre liberté et des institutions libres”, d’autre part » (*WIC Radio*, par. 1, citant *Price c. Chicoutimi Pulp Co.* (1915), 51 R.C.S. 179, p. 194). Le tribunal chargé d’interpréter ce moyen de défense a pour tâche de concilier ces deux valeurs, et non pas d’en privilégier une par rapport à l’autre (*WIC Radio*, par. 2).

[96] La défense de commentaire loyal comporte cinq éléments. Premièrement, le « commentaire doit porter sur une question d’intérêt public » (*Grant*, par. 31). Deuxièmement, le commentaire doit être « fondé sur des faits » (par. 31). Troisièmement, « le commentaire peut comprendre des conclusions de fait, mais doit être reconnaissable en tant que commentaire » (par. 31). Quatrièmement, il doit répondre au critère objectif suivant : « est-ce que n’importe qui pourrait honnêtement exprimer cette opinion vu les faits prouvés? » (par. 31). Enfin, même si le commentaire répond à tous ces éléments, « la défense peut échouer si le demandeur prouve que le défendeur était animé par la malice » (par. 31). L’analyse des éléments de la défense de commentaire loyal exige une évaluation des propos diffamatoires compte tenu de la totalité du contexte dans lequel ils ont été employés (*WIC Radio*, par. 55-56). Dans le présent pourvoi, les seuls éléments en cause sont les deuxième et troisième éléments de la défense, ainsi que la question de la malveillance.

[97] Lorsqu’il invoque cette défense au procès, le défendeur doit prouver les éléments de la défense de commentaire loyal avant que le fardeau de la preuve ne passe au demandeur, à qui il incombe alors d’écarter ce moyen de défense en établissant la malveillance

to show grounds to believe that the defendant cannot establish one or more of its elements and thus the defence has no real prospect of success.

[98] As I explain, the chambers judge also did not err in concluding that Mr. Neufeld failed to challenge the validity of the fair comment defence.

(a) *Was the Expression Based on Fact?*

[99] To constitute fair comment, a factual basis for the impugned statement must be explicitly or implicitly indicated, at least in general terms, within the publication itself or the facts must be “so notorious as to be already understood by the audience” (*WIC Radio*, at para. 34). The defence is unavailable if “the factual foundation is unstated or unknown, or turns out to be false” (para. 31).

[100] There is, however, no requirement that the facts *support* the comment, in the sense of confirming its truth (para. 31). The expression must relate to the facts on which it is based, but the comment need not be a reasonable or proportionate response (paras. 39, 51 and 59). The purpose of this element is not to measure the fairness of expression, but to ensure the reader is aware of the basis for the comment to enable them “to make up their own minds” as to its merit (para. 31).

[101] Here, the chambers judge held that Mr. Neufeld had not shown grounds to believe that the challenged statements were not based in fact, pointing to Mr. Neufeld’s original Facebook post as a basis for the statements (para. 134). Mr. Neufeld argues, and the Court of Appeal agreed, that there were grounds to believe that Mr. Hansman would be unable to establish that certain of the statements were based in fact.

du défendeur (par. 52). Cependant, dans le cas d’une demande présentée en vertu de l’art. 4, c’est au demandeur qu’il incombe de démontrer qu’il existe des motifs de croire que le défendeur n’est pas en mesure d’établir un ou plusieurs de ces éléments de sorte que la défense n’a aucune possibilité réelle de succès.

[98] Comme je l’explique plus loin, le juge en cabinet n’a pas non plus commis d’erreur en concluant que M. Neufeld n’avait pas réussi à contester la validité de la défense de commentaire loyal.

a) *Les propos exprimés étaient-ils fondés sur des faits ?*

[99] Pour constituer un commentaire loyal, la déclaration contestée doit explicitement ou implicitement indiquer, au moins d’une manière générale, quels sont les faits sur lesquels les propos publiés sont fondés, à moins que les faits soient « assez notoire[s] pour être déjà compris par l’auditoire » (*WIC Radio*, par. 34). « Si le fondement factuel n’est pas donné ou s’il est inconnu ou faux », la défense de commentaire loyal ne peut être invoquée (par. 31).

[100] Il n’est toutefois pas nécessaire que le commentaire soit *étayé* par les faits, en ce sens qu’il n’est pas nécessaire que les faits en confirment la véracité (par. 31). Les propos exprimés doivent se rapporter aux faits sur lesquels ils sont fondés, mais point n’est besoin qu’ils représentent une réponse raisonnable ou proportionnelle (par. 39, 51 et 59). Cet élément ne vise pas à déterminer si les propos exprimés sont loyaux, mais à s’assurer que les faits sur lesquels ils sont fondés sont connus du lecteur pour lui permettre « de se faire [sa] propre opinion » de leur valeur (par. 31).

[101] En l’espèce, le juge en cabinet a conclu que M. Neufeld n’avait pas démontré l’existence de motifs de croire que les déclarations contestées n’étaient pas fondées sur des faits, soulignant que les déclarations de M. Hansman faisaient suite au premier message publié sur Facebook par M. Neufeld (par. 134). Monsieur Neufeld soutient — et la Cour d’appel lui donne raison — qu’il y avait des motifs de croire que M. Hansman ne serait pas en mesure d’établir que certaines des déclarations reposaient sur des faits.

Peter Grant and Grant Forest Products Inc. *Appellants/Respondents on cross-appeal*

v.

Torstar Corporation, Toronto Star Newspapers Limited, Bill Schiller, John Honderich and Mary Deanne Shears *Respondents/Appellants on cross-appeal*

and

Ottawa Citizen, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, RTNDA Canada/ Association of Electronic Journalists, Magazines Canada, Canadian Association of Journalists, Canadian Journalists for Free Expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council, PEN Canada, Canadian Broadcasting Corporation, Canadian Civil Liberties Association and Danno Cusson *Intervenors*

INDEXED AS: GRANT v. TORSTAR CORP.

Neutral citation: 2009 SCC 61.

File No.: 32932.

2009: April 23; 2009: December 22.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Torts — Defamation — Defences — Responsible communication on matters of public interest — Newspaper and reporter being sued for libel after article was published concerning proposed private golf course development — Whether traditional defences for defamatory statements of fact are inconsistent with values underlying freedom of expression — Whether law of defamation

Peter Grant et Grant Forest Products Inc. *Appellants/Intimés à l'appel incident*

c.

Torstar Corporation, Toronto Star Newspapers Limited, Bill Schiller, John Honderich et Mary Deanne Shears *Intimés/Appellants à l'appel incident*

et

Ottawa Citizen, Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association, ACDIRT Canada/ Association des journalistes électroniques, Magazines Canada, Association canadienne des journalistes, Journalistes canadiens pour la liberté d'expression, Writers' Union of Canada, Professional Writers Association of Canada, Book and Periodical Council, PEN Canada, Société Radio-Canada, Association canadienne des libertés civiles et Danno Cusson *Intervenants*

RÉPERTORIÉ : GRANT c. TORSTAR CORP.

Référence neutre : 2009 CSC 61.

N° du greffe : 32932.

2009 : 23 avril; 2009 : 22 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

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

Responsabilité délictuelle — Diffamation — Moyens de défense — Communication responsable concernant des questions d'intérêt public — Action en libelle diffamatoire intentée contre un journal et un journaliste ayant publié un article sur un projet de terrain de golf privé — Les moyens de défense classiques applicables à l'égard d'énoncés de fait discriminatoires sont-ils incompatibles

Further, qualified privilege as developed in the cases is grounded not in free expression values but in the social utility of protecting particular communicative occasions from civil liability.

[95] I therefore conclude that the proposed change to the law should be viewed as a new defence, leaving the traditional defence of qualified privilege intact.

[96] A second preliminary question is what the new defence should be called. In arguments before us, the defence was referred to as the responsible journalism test. This has the value of capturing the essence of the defence in succinct style. However, the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets. I agree with Lord Hoffmann that the new defence is “available to anyone who publishes material of public interest in any medium”: *Jameel*, at para. 54.

[97] A review of recent defamation case law suggests that many actions now concern blog postings and other online media which are potentially both more ephemeral and more ubiquitous than traditional print media. While established journalistic standards provide a useful guide by which to evaluate the conduct of journalists and non-journalists alike, the applicable standards will necessarily evolve to keep pace with the norms of new communications media. For this reason, it is more accurate to refer to the new defence as responsible communication on matters of public interest.

public. De plus, le concept d’immunité relative élaborée par la jurisprudence ne procède pas de valeurs liées à la liberté d’expression, mais de l’utilité sociale de ne pas tenir civilement responsables les auteurs de communications faites dans des circonstances particulières.

[95] Je conclus donc qu’il convient de considérer que le changement proposé crée un nouveau moyen de défense et laisse intacte celui classique d’immunité relative.

[96] La deuxième question préliminaire porte sur le nom à donner à ce nouveau moyen de défense. Dans les observations qui nous ont été soumises, on l’appelle le critère du journalisme responsable. Ce nom a le mérite d’exprimer succinctement l’essence du moyen de défense. Cependant, de nouveaux modes de communication (beaucoup d’entre eux en ligne) permettant de traiter de questions d’intérêt public et ne faisant pas appel à des journalistes se greffent rapidement aux médias traditionnels. À moins qu’il n’existe des motifs valables de les exclure, ces nouveaux propagateurs de nouvelles et d’information devraient être soumis aux mêmes règles juridiques que celles auxquelles sont soumis les médias établis. Je partage l’opinion de lord Hoffmann que le moyen de défense peut être [TRADUCTION] « invoqué par quiconque diffuse du matériel d’intérêt public, quel que soit le média » : *Jameel*, par. 54.

[97] Un examen de la jurisprudence récente relative à la diffamation permet de constater que de nombreux recours concernent désormais des articles de blogue ainsi que d’autres médias en ligne dont la portée est susceptible d’être à la fois plus éphémère et plus répandue que celle de la presse écrite. Même si les normes journalistiques établies constituent un guide utile pour évaluer la conduite tant des journalistes que des non-journalistes, les normes applicables évolueront forcément pour suivre l’évolution des nouveaux médias. Il est donc plus juste de désigner ce nouveau moyen sous le nom de défense de communication responsable concernant des questions d’intérêt public.

(2) Formulating the Defence of Responsible Communication on Matters of Public Interest

[98] This brings us to the substance of the test for responsible communication. In *Quan*, Sharpe J.A. held that the defence has two essential elements: public interest and responsibility. I agree, and would formulate the test as follows. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

(a) *Was the Publication on a Matter of Public Interest?*

[99] To be protected by the defence of responsible communication, the publication must be on a matter of public interest.

[100] This is a matter for the judge to decide. To be sure, whether a statement's publication is in the public interest involves factual issues. But it is primarily a question of law; the judge is asked to determine whether the nature of the statement is such that protection may be warranted in the public interest. The judge acts as a gatekeeper analogous to the traditional function of the judge in determining whether an "occasion" is subject to privilege. Unlike privilege, however, the determination of whether a statement relates to a matter of public interest focusses on the substance of the publication itself and not the "occasion". Where the question is whether a particular communication fits within a recognized subject matter of public interest, it is a mixed question of fact and law, and will therefore attract more deference on appeal than will a pure determination of public interest. But it properly remains a question for the trial judge as opposed to the jury.

(2) Définition de la défense de communication responsable concernant des questions d'intérêt public

[98] Cela nous amène à traiter des éléments du test applicable lorsqu'est invoquée la défense de communication responsable. Dans *Quan*, le juge Sharpe a conclu que la défense comporte deux éléments essentiels : l'intérêt public et le caractère responsable. Je partage son point de vue et je définirais ainsi le test applicable. Premièrement, la communication doit concerner une question d'intérêt public. Deuxièmement, le défendeur doit démontrer que la communication était responsable, en ce sens qu'il s'est efforcé avec diligence de vérifier les allégations, compte tenu de l'ensemble des circonstances pertinentes.

a) *La communication concerne-t-elle une question d'intérêt public?*

[99] Pour que la défense de communication responsable s'applique, l'énoncé diffusé doit porter sur une question d'intérêt public.

[100] Il appartient au juge de trancher à cet égard. Naturellement, des considérations factuelles entrent en ligne de compte lorsqu'il s'agit de déterminer si la diffusion d'un énoncé est d'intérêt public, mais la question est principalement juridique. Ainsi, le juge est appelé à déterminer si, de par sa nature, l'énoncé peut justifier l'application d'une protection dans l'intérêt public. Le juge exerce à cet égard une fonction de gardien analogue à celle qu'il remplit lorsqu'il détermine si des « circonstances » donnent lieu à une immunité dans le modèle classique. Toutefois, l'examen visant à déterminer si l'énoncé porte sur une question d'intérêt public, contrairement à celui visant à juger de l'opportunité d'appliquer l'immunité, est axé sur la substance de la communication elle-même, et non sur les « circonstances » dans lesquelles elle s'inscrit. Déterminer si un énoncé en particulier porte sur un sujet reconnu comme étant d'intérêt public, consiste à trancher une question mixte de fait et de droit. En appel, il conviendra donc de faire preuve de davantage de déférence à l'égard de la réponse à une telle question qu'à l'égard du fruit du pur examen de l'intérêt public. Il n'en demeure pas moins que c'est une question qui continue à bon droit à relever du juge et non du jury.

[101] In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation. The judge's role at this point is to determine whether the subject matter of the communication as a whole is one of public interest. If it is, and if the evidence is legally capable of supporting the defence, as I will explain below, the judge should put the case to the jury for the ultimate determination of responsibility.

[102] How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject — say, the private lives of well-known people — is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

[103] The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest (see, e.g., *Gatley on Libel and Slander* (11th ed. 2008), at p. 530). Guidance, however, may be found in the cases on fair comment and s. 2(b) of the *Charter*.

[104] In *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning, M.R., described public interest broadly in terms of matters that may legitimately concern or interest people:

There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect

[101] Pour décider si elle concerne une question d'intérêt public, le juge doit tenir compte de l'ensemble du contenu d'une communication. Il ne doit pas examiner l'énoncé diffamatoire isolément. À ce stade, le rôle du juge consiste à déterminer si le contenu de la communication, dans son ensemble, est d'intérêt public. S'il estime que c'est le cas et que la preuve permet de fonder juridiquement la défense, comme je l'expliquerai ultérieurement, le juge demande alors au jury de se prononcer en dernière analyse sur le caractère responsable.

[102] Comment établit-on qu'une question est d'« intérêt public »? Disons premièrement et fondamentalement que l'intérêt public n'est pas synonyme d'intérêt du public. La soif d'information du public sur un sujet donné — la vie privée de gens célèbres, par exemple — ne suffit pas en soi pour conférer un caractère public, au sens des règles régissant la diffamation, à ce qui est essentiellement privé. Pour trancher cette question, il faut respecter l'attente raisonnable d'une personne en matière de vie privée. À l'inverse, le fait qu'un sujet donné soit loin d'intéresser une majorité de gens ne l'exclut pas de l'intérêt public; il suffit qu'un segment de la population ait un intérêt véritable à recevoir l'information s'y rapportant.

[103] La jurisprudence et la doctrine n'énoncent pas de « test » unique permettant de conclure à l'existence ou non d'un intérêt public, pas plus qu'elles ne dressent une liste établie de sujets relevant de l'intérêt public (voir, p. ex., *Gatley on Libel and Slander* (11^e éd. 2008), p. 530). La jurisprudence relative au commentaire loyal ainsi qu'à l'al. 2b) de la *Charte* peut toutefois nous éclairer.

[104] Dans *London Artists, Ltd. c. Littler*, [1969] 2 All E.R. 193 (C.A.), lord Denning, maître des rôles, qui traitait de la défense de commentaire loyal, a décrit l'intérêt public de façon large, en parlant de sujets qui peuvent légitimement intéresser ou préoccuper les gens :

[TRADUCTION] Les ouvrages ne définissent pas ce qui est d'intérêt public. On n'y trouve qu'une liste d'exemples, et la mention que la question relève du juge et non du jury. Je pense, pour ma part, qu'il ne faut pas enfermer la notion dans des limites étroites. Dès qu'une

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

[105] To be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”: Brown, vol. 2, at pp. 15-137 and 15-138. The case law on fair comment “is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews”: *Simpson v. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, at para. 63, *per* Koenigsberg J. Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

[106] Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a “public figure”, as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

[107] Care must be taken by the judge making this determination to characterize the subject matter accurately. Overly narrow characterization may inappropriately defeat the defence at the outset. For example, characterizing the subject matter in

question touche les gens en général, à tel point qu'ils peuvent légitimement s'intéresser à ce qui se passe ou à ce qui peut leur arriver à eux ou à ce qui peut arriver à d'autres personnes, ou s'en préoccuper, cette question en est une d'intérêt public sur laquelle tout le monde a le droit de faire un commentaire loyal. [p. 198]

[105] Pour être d'intérêt public, une question [TRADUCTION] « doit être soit de celles qui éveillent l'attention publique de façon démontrable ou qui préoccupent sensiblement le public parce qu'elles concernent le bien-être de citoyens, soit de celles qui jouissent d'une notoriété publique considérable ou qui ont créé une controverse importante » : Brown, vol. 2, p. 15-137 et 15-138. La jurisprudence relative au commentaire loyal [TRADUCTION] « fourmille d'exemples où le moyen de défense fondé sur le commentaire loyal a été accueilli à l'égard de sujets allant de la politique aux critiques de restaurants ou de livres » : *Simpson c. Mair*, 2004 BCSC 754, 31 B.C.L.R. (4th) 285, par. 63, la juge Koenigsberg. L'intérêt public peut découler de la notoriété de la personne mentionnée, mais la simple curiosité ou l'intérêt malsain sont insuffisants. Il faut que certains segments de la population aient un intérêt véritable à être au courant du sujet du matériel diffusé.

[106] L'intérêt public n'est pas confiné aux publications portant sur les questions gouvernementales et politiques, comme c'est le cas en Australie et en Nouvelle-Zélande. Il n'est pas nécessaire non plus que le demandeur soit un « personnage public » comme l'exige la jurisprudence américaine depuis *Sullivan*. Dans ces deux cas, l'intérêt public est défini de façon trop étroite. Le public a véritablement intérêt à être au courant d'un grand éventail de sujets concernant tout autant la science et les arts que l'environnement, la religion et la moralité. L'intérêt démocratique pour que se tiennent des débats publics sur une gamme de sujets de cette ampleur doit se traduire dans la jurisprudence.

[107] Le juge appelé à statuer sur cette question doit s'efforcer de définir le sujet avec justesse. Une définition trop étroite peut vouer d'emblée le moyen de défense à l'échec. Par exemple, définir le sujet en l'espèce comme les « relations d'affaires de Peter

this case simply as “Peter Grant’s business dealings” would obscure the significant public interest engaged by the article and thus restrict the legitimate scope of public interest. Similarly, characterizing the subject matter too broadly as “Ontario politics” might render the test a mere rubber stamp and bring unworthy material within the protection of the defence.

[108] The question then arises whether the judge or the jury should decide whether the inclusion of a particular defamatory statement in a publication was necessary to communicating on the matter of public interest. Is this question merely a subset of determining generally whether the publication is in the public interest? Or is it better treated as a factor in the jury’s assessment of responsibility? Lord Hoffmann in *Jameel* took the view that determining whether a defamatory statement was necessary to communicating on a matter of public interest is a question of law for the judge, conceding, however, that this may require the judge to second-guess editorial judgment, and must be approached in a deferential way (para. 51).

[109] In my view, if the publication, read broadly and as a whole, relates to a matter of public interest, the judge should leave the defence to the jury on the publication as a whole, and not editorially excise particular statements from the defence on the ground that they were not necessary to communicating on the matter of public interest. Deciding whether the inclusion of the impugned statement was justifiable involves a highly fact-based assessment of the context and details of the publication itself. Whereas a given subject matter either is or is not in law a matter of public interest, the justifiability of including a defamatory statement may admit of many shades of gray. It is intimately bound up in the overall determination of responsibility and should be left to the jury. It is for the jury to consider the need to include particular defamatory statements in determining whether the defendant acted responsibly in publishing what it did.

Grant » obscurcirait l’importante question d’intérêt public posée par l’article et réduirait ainsi la portée légitime de l’intérêt public. De même, une définition trop large, telle la « politique ontarienne », pourrait transformer l’application du moyen de défense en une simple formalité et aboutir à protéger ce qui n’est pas digne de l’être.

[108] Il faut ensuite se demander qui du juge ou du jury détermine si l’inclusion dans un reportage d’un énoncé diffamatoire était nécessaire à la communication concernant la question d’intérêt public. S’agit-il d’une simple sous-question intervenant dans l’appréciation générale de l’intérêt public de la communication ou d’un facteur dont le jury doit tenir compte en évaluant le caractère responsable? Dans *Jameel*, lord Hoffmann a considéré qu’il s’agissait d’une question de droit qui relevait du juge tout en concédant que son examen pouvait obliger le juge à se substituer après coup au diffuseur et qu’il fallait en conséquence faire preuve de déférence à l’égard du jugement éditorial (par. 51).

[109] À mon avis, si la communication, prise dans son ensemble et analysée de façon large, se rapporte à une question d’intérêt public, le juge doit soumettre le moyen de défense au jury à l’égard de la totalité de la communication et s’abstenir de soustraire par suite d’un choix éditorial certains passages à l’application de la défense pour cause de non-nécessité à la communication d’intérêt public. Pour décider s’il était justifié d’inclure l’énoncé en cause, il faut procéder à une évaluation largement factuelle du contexte et des détails de ce qui a été communiqué. Si, juridiquement, un sujet donné est d’intérêt public ou ne l’est pas, la question de la nécessité de l’inclusion d’un énoncé diffamatoire, elle, n’est pas aussi tranchée. Elle est intimement liée à l’appréciation globale du caractère responsable, et elle devrait être laissée à l’appréciation du jury. Ainsi, c’est au jury qu’il appartient d’examiner la nécessité de l’inclusion d’énoncés diffamatoires donnés pour déterminer si le défendeur a agi de façon responsable en diffusant la communication.

Roger Guignard *Appellant*

v.

City of Saint-Hyacinthe *Respondent***INDEXED AS: R. v. GUIGNARD****Neutral citation: 2002 SCC 14.**

File No.: 27704.

2001: October 3; 2002: February 21.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Freedom of expression — Signs — Sign erected by individual on one of his buildings expressing dissatisfaction with services of insurance company — Individual convicted of contravening municipal by-law prohibiting erection of advertising signs outside industrial zone — Whether by-law infringes freedom of expression — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — City of Saint-Hyacinthe planning by-law No. 1200, ss. 2.2.4 “enseigne” (sign), “enseigne publicitaire” (advertising sign), 14.1.5(p).

Municipal law — By-law — Validity — Signs — Sign erected by individual on one of his buildings expressing dissatisfaction with services of insurance company — Individual convicted of contravening municipal by-law prohibiting erection of advertising signs outside industrial zone — Whether by-law infringes freedom of expression — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — City of Saint-Hyacinthe planning by-law No. 1200, ss. 2.2.4 “enseigne” (sign), “enseigne publicitaire” (advertising sign), 14.1.5(p).

G erected a sign on one of his buildings expressing his dissatisfaction with the services of an insurance company. When he refused to take the sign down, the respondent City charged him with contravening s. 14.1.5(p) of City of Saint-Hyacinthe planning by-law No. 1200, which

Roger Guignard *Appelant*

c.

Ville de Saint-Hyacinthe *Intimée***RÉPERTORIÉ : R. c. GUIGNARD****Référence neutre : 2002 CSC 14.**

N° du greffe : 27704.

2001 : 3 octobre; 2002 : 21 février.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Charte des droits — Liberté d'expression — Affichage — Affiche posée par un citoyen sur un de ses immeubles pour démontrer son insatisfaction à l'égard des services de sa compagnie d'assurance — Citoyen condamné pour avoir enfreint un règlement municipal qui interdit l'installation d'enseignes publicitaires en dehors d'une zone industrielle — Le règlement porte-t-il atteinte à la liberté d'expression? — Dans l'affirmative, l'atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 2b) — Règlement d'urbanisme n° 1200 de la Ville de Saint-Hyacinthe, art. 2.2.4 « enseigne », « enseigne publicitaire », 14.1.5p).

Droit municipal — Règlement — Validité — Affichage — Affiche posée par un citoyen sur un de ses immeubles pour démontrer son insatisfaction à l'égard des services de sa compagnie d'assurance — Citoyen condamné pour avoir enfreint un règlement municipal qui interdit l'installation d'enseignes publicitaires en dehors d'une zone industrielle — Le règlement porte-t-il atteinte à la liberté d'expression? — Dans l'affirmative, l'atteinte est-elle justifiable? — Charte canadienne des droits et libertés, art. 1, 2b) — Règlement d'urbanisme n° 1200 de la Ville de Saint-Hyacinthe, art. 2.2.4 « enseigne », « enseigne publicitaire », 14.1.5p).

G installe sur une de ses propriétés une affiche faisant état de son insatisfaction à l'égard des services d'une compagnie d'assurance. Devant son refus de retirer l'affiche, la ville intimée l'accuse de contrevenir au par. 14.1.5p) du Règlement d'urbanisme n° 1200 de la Ville

The first question is whether the protection conferred by s. 2(b) applies to commercial speech, such as advertising. The argument against applying s. 2(b) to commercial speech rests on the proposition that the *Charter* was not intended to protect economic interests. This argument has been rejected by this Court on the ground that advertising involves more than economics. In *Ford* . . . , the Court noted advertising's intrinsic value as expression, the protection afforded to the recipients of advertising as well as the advertisers, and the importance of fostering informed economic choices to individual fulfillment and autonomy.

See also *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

La première question est de savoir si la protection accordée par l'al. 2b) s'applique au discours commercial comme la publicité. L'argument invoqué contre l'application de l'al. 2b) au discours commercial s'appuie sur la proposition selon laquelle la *Charte* n'était pas destinée à protéger des intérêts économiques. Notre Cour a rejeté cet argument pour le motif que la publicité englobe plus que les intérêts économiques. Dans l'arrêt *Ford* [. . .], la Cour a souligné la valeur intrinsèque de la publicité comme forme d'expression, la protection accordée aux personnes visées par la publicité de même qu'aux annonceurs et l'importance de favoriser des choix économiques éclairés pour l'autonomie et l'épanouissement personnels des particuliers.

Voir aussi *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199.

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The decisions of this Court accordingly recognize that commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising. As we know and can attest, sometimes with mixed feelings, the ubiquitous presence of advertising is a defining characteristic of western societies. Usually, it attempts to convey a positive message to potential consumers. However, it sometimes involves comparisons and may even be negative. On the other hand, consumers also have freedom of expression. This sometimes takes the form of "counter-advertising" to criticize a product or make negative comments about the services supplied. Within limits prescribed by the legal principles relating to defamation, every consumer enjoys this right. Consumers may express their frustration or disappointment with a product or service. Their freedom of expression in this respect is not limited to private communications intended solely for the vendor or supplier of the service. Consumers may share their concerns, worries or even anger with other consumers and try to warn them against the practices of a business. Given the tremendous importance of economic activity in our society, a consumer's "counter-advertising" assists in circulating information and protecting the interests of society just as much as does advertising or certain forms of political expression. This type of communication may be of considerable social importance, even beyond the merely commercial sphere.

La jurisprudence de notre Cour reconnaît ainsi aux entreprises commerciales le droit constitutionnel de se livrer à des activités d'information et de promotion par voie publicitaire. Comme on le sait et comme on l'éprouve, parfois avec des sentiments divers, la publicité commerciale caractérise les sociétés occidentales par son omniprésence. Le plus souvent, elle tente de transmettre un message positif à des consommateurs potentiels. Toutefois, il arrive qu'elle soit comparative, sinon négative. En contrepartie, les consommateurs jouissent aussi d'une liberté d'expression. Elle se manifeste parfois sous la forme d'une contre-publicité destinée à critiquer un produit ou à commenter de façon négative la prestation de services. Dans des limites établies par les principes juridiques relatifs à la diffamation, ce droit appartient à chaque consommateur. Celui-ci peut exprimer sa frustration ou sa déception à l'égard d'un produit ou d'un service. Sa liberté d'expression n'est pas limitée à cet égard à une communication privée destinée au seul vendeur ou fournisseur de services. Il peut partager ses préoccupations, ses inquiétudes ou même sa colère avec les autres consommateurs et chercher à les mettre en garde contre les pratiques d'une entreprise. Vu l'importance majeure de l'activité économique dans notre société, la contre-publicité du consommateur contribue tout autant à l'échange d'information et à la protection d'intérêts sociétaux que la publicité ou certaines formes d'expression politique. Ce type de communication peut avoir une importance sociale considérable, au-delà même du domaine purement commercial.

“Counter-advertising” is not merely a reaction to commercial speech, and is not a form of expression derived from commercial speech. Rather, it is a form of the expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens.

In this respect, simple means of expression such as posting signs or distributing pamphlets or leaflets or, these days, posting messages on the Internet are the optimum means of communication for discontented consumers. The media are still often beyond their reach because of the cost. In *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, this Court stressed the importance of signs as an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources. Signs, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages. Signs, in various forms, are thus a public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns. (See *Ramsden*, at pp. 1096-97; see also *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 198.)

By restricting the right to use this optimum means of expression to certain designated places, the impugned by-law directly infringes freedom of expression. This infringement impacts especially on the freedom of expression of a person who does not have access to substantial financial resources. A limitation of this nature can in fact deprive that person of the only means of expression that are truly accessible to him or her. Even when a legislative or regulatory provision is neutral in appearance, it can have a major impact on the ability of a person or group to engage in expressive activity (see *Irwin Toy*, at pp. 974-75).

E. *Impact of the By-law*

I readily concede that the impugned provisions of the zoning by-law were certainly not

En effet, elle ne se limite pas à une réaction au discours commercial et ne constitue pas une forme d'expression dérivée de celui-ci. Elle représente plutôt une forme d'expression d'opinion importante sur la vie sociale et économique de la société. Elle appartient non seulement au consommateur, mais aussi au citoyen.

À cet égard, les moyens d'expression simples, comme l'affichage ou la distribution de pamphlets ou de feuillets, ou déjà aujourd'hui, les messages sur Internet, constituent pour les consommateurs mécontents des modes privilégiés de communication. En effet, le recours aux médias reste souvent hors de leur portée en raison de leurs coûts. Dans *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084, notre Cour a rappelé l'importance de l'affichage comme moyen de communication efficace et peu coûteux pour les particuliers et les groupes dépourvus de ressources économiques suffisantes. Utilisées depuis des siècles pour communiquer des renseignements de nature politique, artistique ou économique, les affiches transmettent des messages parfois percutants. Sous des formes diverses, l'affichage constitue ainsi une forme d'activité expressive publique, accessible et efficace pour qui ne peut recourir aux campagnes médiatiques (voir *Ramsden*, p. 1096-1097; voir aussi *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, p. 198).

En restreignant à certains endroits désignés le droit d'utiliser ce mode privilégié d'expression, le règlement contesté porte directement atteinte à la liberté d'expression. Cette atteinte affecte particulièrement la liberté d'expression d'une personne qui ne dispose pas de moyens financiers importants. Une telle limitation peut en effet avoir pour conséquence de priver cette personne des seuls moyens d'expression qui lui sont réellement accessibles. Même d'apparence neutre, une disposition législative ou réglementaire peut avoir un impact majeur sur la possibilité d'expression d'une personne ou d'un groupe (voir *Irwin Toy*, p. 974-975).

E. *L'impact du règlement municipal*

Je concède volontiers que les dispositions contestées du règlement de zonage n'ont sûrement pas

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2002 SCC 14 (CanLII)

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COURT OF APPEAL FOR ONTARIO

CITATION: Chaudhary v. Shadid, 2023 ONCA 743

DATE: 20231108

DOCKET: COA-23-CV-0207

BETWEEN

Trotter, Sossin and Monahan JJ.A.

Mirza Chaudhary and Masud Raja

Plaintiffs
(Appellants)

and

Muhammad Shahid

Defendant
(Respondent)

Jonathan Rosenstein, for the appellants

Abdalla Ali Al-Baalawy and Thabang Pebane, for the respondent

Heard: October 31, 2023

On appeal from the order of Justice Marie-Andrée Vermette of the Superior Court of Justice, dated October 13, 2022, with reasons reported at 2023 ONSC 653.

REASONS FOR DECISION

[1] The appellants commenced an action against the respondent for his role in briefly sharing someone else’s arguably defamatory Facebook post. The respondent successfully brought an anti-SLAPP motion to dismiss the defamation action, pursuant to s. 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (“CJA”). The appellants appeal from this ruling. After hearing oral submissions, we

advised counsel that the appeal was dismissed with reasons to follow. These are our reasons.

Background

[2] The underlying facts are complicated. There is little point in attempting to improve on the motion judge's summary, found at paras. 3 to 12 of her reasons:

1. The parties and PTI Canada

[3] The [appellants] and the [respondent] are members of the Pakistani Canadian community in the Greater Toronto Area ("Community").

[4] On October 23, 2007, members of the Pakistani diaspora in Canada registered Pakistan Tehreek-e-Insaf Canada ("First PTI Canada") as a not-for-profit corporation. Pakistan Tehreek-e-Insaf ("PTI") is a political party in Pakistan founded by Imran Khan, who served as Prime Minister of Pakistan.

[5] First PTI Canada was dissolved on July 10, 2016. The [appellants] acted as directors and officers of First PTI Canada during part of its existence. The [respondent] was a member of First PTI Canada from 2010 to 2013. In his affidavit, the [respondent] expresses concerns regarding First PTI Canada's corporate governance and alleged lack of financial disclosure and transparency.

[6] On January 8, 2018, a new not-for-profit corporation named PTI Canada was incorporated ("New PTI Canada"). Based on the Federal Corporation Information for New PTI Canada, the [appellants] are not directors of the new corporation.

2. Dam Fund

[7] In 2018, the Chief Justice of Pakistan (now retired) started an initiative to raise money to build dams in

Pakistan (“Dam Fund”). Overseas Pakistanis were asked to contribute to the Dam Fund.

[8] On October 21, 2018, a “Pakistan Dam Funding Event” was held in Mississauga to support the Dam Fund (“Dam Fundraising Event”). Many members of the Community as well as Canadian Pakistanis from different parts of Canada attended the Dam Fundraising Event. The [respondent] did not attend.

[9] According to the [respondent]: (a) it was widely known in the Community and in the Pakistani diaspora community in other parts of Canada that First PTI Canada board members, including the [appellants], were some of the organizers of the Dam Fundraising Event; and (b) it was reported in many Canadian Pakistani news media outlets that over \$1 million were raised for the Dam Fund at the Dam Fundraising Event.

[10] The Dam Fund has an online registry. In his affidavit, the [respondent] states that members of the Community were concerned after the Dam Fundraising Event about where the funds raised at the event went as there was no payment registered on the Dam Fund registry from Canada in the amount that was purportedly fundraised at the Dam Fundraising Event (i.e. over CAD \$1,000,000).

3. Posts on Facebook

[11] On April 12, 2019, Mr. Irfan Elahi posted an image with added text in Urdu on a Facebook group page called “PTI Supporter”, which has over 47,000 members. The image appears to be an advertisement (in English) for a seminar organized by New PTI Canada. The advertisement contains photographs showing the faces of a number of people, including the [appellants]. The names of the people who appear in the photographs, including the [appellants’] names, do not appear anywhere. While there is no certified translation before me of the text in Urdu that was added above the image of the advertisement, the translation prepared by the [respondent] is as follows: “This is a group of thieves. On

the name of Dam (fund), they have stolen \$1.2 million. They are defaming name of PTI.”

[12] The [respondent's] evidence is that he does not know Mr. Elahi. However, when he saw his post, he decided to share it on his Facebook page, which he did on April 22, 2019 (“Post”). The Defendant states that the Post was not up for more than one and a half hours before he deleted it from his profile. The [respondent] further states that: (a) he did not add any commentary to Mr. Elahi's original post; (b) he did not tag anyone on the Post; (c) no-one liked the Post or made comments on it; and (d) to his knowledge, no one shared or reposted the Post. According to the [respondent], Mr. Elahi's original post was still up on the PTI Supporter Facebook group page at the time the Statement of Defence was served in December 2019 and at the time of the [respondent's] examination for discovery in July 2021. [Emphasis added, footnote omitted.]

[3] As noted, the appellants commenced an action against the defendant seeking \$240,000 in damages, and other relief.

The Application Under s. 137.1(3) of the CJA

[4] The respondent filed an affidavit in support of his motion, on which he was cross-examined. The appellants filed no affidavit evidence. As discussed below, this turned out to be significant.

[5] The motion judge applied ss. 137.1(3) and (4) of the CJA, which provide:

(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.

[6] The motion judge found that the respondent met his burden under s. 137.1(3) – the underlying proceeding arises from his expressive activity that relates to a matter of public interest. Turning to s. 137.1(4)(a)(i), the motion judge found that the appellants had established the underlying action has substantial merit. However, she found that the appellants “barely” met their onus under s. 137.1(a)(ii) concerning the respondent's defences: paras. 54, 57. As for the balancing under s. 137.1(4)(b), the motion judge concluded that the appellants failed to establish that the harm they have suffered or are likely to suffer is sufficiently serious to outweigh the public interest in protecting the expression and public participation. The motion was granted and, as a result, plaintiffs' action was dismissed.

Grounds of Appeal and Discussion

[7] The appellants submit that the motion judge erred in her application of s. 137.1(3) in finding that the respondent discharged his onus to establish that the impugned speech related to a matter of public interest. She also erred in conducting the balancing under s. 137.1(4)(b) by downplaying the reputational harm that the appellants suffered. We do not accept either submission.

(1) A Matter of “Public Interest”

[8] The appellants submits that the motion judge erred in characterizing the content of the Post. Instead of relying upon what the respondent said he intended in his affidavit, the motion judge should have looked at the words themselves and considered what a reasonable person would have understood them to mean. In other words, the motion judge erred by not engaging in an objective assessment.

[9] We see no error in the motion judge’s approach under this branch of the test. Relying on *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 84, the motion judge rightly held that there is no qualitative assessment of the expression at this stage. She interpreted the words in context. As she said, at para. 39:

Interpreted broadly, the Post raises concerns regarding the management of funds raised for a charitable purpose. This is a matter of public interest. I find that some segment of the community, including the Community and those who made donations to First PTI Canada, New PTI

Canada or at the Dam Fundraising Event, would have a genuine interest in receiving information on the subject.

[10] The appellants contend that this would mean that any theft of charitable funds would qualify as a matter of public interest. We are not tasked with testing this general proposition, although it may indeed be true. Nonetheless, we see no error in the trial judge's characterization of the matter in the circumstances of this case, particularly in the communities which she identified – it is a matter of public interest.

(2) Balancing Under s. 137.1(4)(b)

[11] The appellants further submit that the motion judge erred when balancing the harm suffered or likely to be suffered as a result of the impugned speech on the one hand, and the public interest in protecting the expression and public participation, on the other. They submit that she erred in disregarding non-financial harm, and that the vindication of their reputations should have weighed more heavily in the balance. We do not accept these submissions.

[12] The appellants sought substantial damages – at least \$240,000 in damages. It was an important part of their claim. In their pleadings, the appellants claimed: “This has caused significant and irreparable harm to [the appellants’] reputations, both personal and professional. The actual damages will be the subject of a damages report in advance of trial, but are expected to be in the many hundreds of thousands of dollars, if not millions” (emphasis added).

[13] As the motion judge noted, the appellants adduced no evidence of actual harm. All she could rely upon was the presumption of harm. Referring to *Bent* and its consideration of the balancing under s. 137.1(4)(b) at para. 144, she observed: “General damages in the nominal sense will ordinarily not be sufficient for this purpose”: at para. 59.

[14] The motion judge also focused on the lack of an evidentiary link between the respondent’s sharing of the Post, deleted after 90 minutes, and the harm claimed to have been suffered by the appellants. There was no evidence as to how many people would have viewed the Post. At the time of the motion, Mr. Elahi’s post was still active. The motion judge said, at para. 64: “Given this and the absence of any evidence of harm aside from the legal presumption, I have to conclude that the [appellants’] harm is minimal”.

[15] The motion judge conducted this balancing in the context of the broader purposes of s. 137.1 of the *CJA*, and in light of the guidance provided by the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587. We see no error in her approach, nor in the conclusion that she reached.

Disposition

[16] The appeal is dismissed. The respondent is entitled to costs on a partial indemnity basis in the amount of \$7,071.54, inclusive of disbursements and applicable taxes.

“Gary Trotter J.A.”
“L. Sossin J.A.”
“P.J. Monahan J.A.”

COURT OF APPEAL FOR ONTARIO

CITATION: 2110120 Ontario Inc. v. Buttar, 2023 ONCA 539

DATE: 20230816

DOCKET: C70562

Pepall, van Rensburg and Benotto JJ.A.

BETWEEN

2110120 Ontario Inc. o/a Cargo County Group, Randeep Sandhu
 Kiranjit Sandhu, Evandeep Sandhu, Paweldeep Sandhu

Plaintiffs (Respondents)

and

Gurmukhjeet Buttar, Karandip Buttar, Dharamjot Clair, Parbat
 Sangha, Naujawan Support Network, John Doe, and Jane Doe

Defendants (Appellants)

Sean Dewart, Ian McKellar and Amani Rauff, for the appellants

Andrew J. Kania, for the respondents

Jackie Esmonde and Kylie Sier, for the intervener, Workers' Action Centre

Heard: December 15, 2022

On appeal from the order of Regional Senior Justice Leonard Ricchetti of the
 Superior Court of Justice, dated March 21, 2022, with reasons reported at 2022
 ONSC 1766, and from the costs order, dated April 14, 2022.

van Rensburg J.A.:

OVERVIEW

[1] The appellants appeal an order dismissing their motion made pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, (the “CJA”), commonly known as the “anti-SLAPP” provision. If they are unsuccessful in this appeal, they seek to appeal the costs order.

[2] The action was commenced after the appellants, who were former truck drivers for the corporate respondent, initiated a campaign to recover alleged unpaid wages. Legal proceedings in which the appellants claimed that they were entitled to be paid as employees, and not as independent contractors, were underway but had not been concluded. The appellants were supported in their campaign by the Naujawan Support Network (“NSN”), and the Workers’ Action Centre (“WAC”) who organized rallies at the business premises of the corporate respondent and outside the residence of its principals, the personal respondents. The appellants asserted verbally and in signs and flyers distributed at the rallies, that the respondent Randeep Sandhu was a “wage thief” and they made other allegedly harassing and defamatory statements. The same statements were posted on social media, together with Randeep Sandhu’s home address. The appellants and others disrupted Cargo County’s business with a “phone zap” that lasted several days and posted negative reviews of the business online.

anti-SLAPP motion is a screening mechanism and engages a limited review of the merits and defence of the action.

[34] In this appeal, given my conclusion on the s. 137.1(3) issue, I must consider the matter afresh and briefly review the merits and the defences, based on the evidence. Having said that, the weighing exercise leads one to the unmistakable conclusion that the motion should be dismissed.

DISCUSSION

[35] A motion judge's determination on an anti-SLAPP motion is entitled to deference on appeal absent an error of law or palpable and overriding error: *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 77; *Canadian Union of Postal Workers v. B'nai Brith Canada*, 2021 ONCA 529, 460 D.L.R. (4th) 245, at para. 21 ("CUPW"); *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 478 D.L.R. (4th) 514, at para. 42. If such an error has been established, it is up to this court on appeal to consider the matter afresh: *Nanda v. McEwan*, 2020 ONCA 431, 450 D.L.R. (4th) 145, at paras. 47-49.

(1) The motion judge erred in law in concluding that the appellants had not met their burden under s. 137.1(3)

[36] The appellants contend that the motion judge erred in law in his determination that they had not met their burden under s. 137.1(3) in three ways: first, by considering the appellants' motive, the merit of their expression, and the

[45] This court nonetheless dismissed the appeal. While Huscroft J.A. concluded that the motion judge had erred in considering the motive and manner of the expression, he had identified and applied other factors that were legally relevant to the conclusion that the s. 137.1(3) threshold had not been met. The appellant's expression was about the parties' private fee dispute, that did not relate to a matter of public interest simply because the dispute involved a lawyer who owed ethical obligations. As Huscroft J.A. observed, the appellant's expression raised no "general concerns" about the ethical conduct of lawyers, "nor was it directed to anyone with an interest in the respondents' conduct": at para. 35.

[46] In the present case, the motion judge made errors similar to those at first instance in *Sokoloff*. Although he instructed himself on the need to disregard motive, in considering the context of the appellants' expressions, his focus was nonetheless on their "motive, merit and manner" – the "why" and "how" of their expression – rather than on what it was about. The motion judge observed that the expressions were designed to deal with a collection dispute, and not to bring to the public's attention matters of public interest, and that the goal of the expression was not to inform the public or truck drivers about Cargo County's business practices, but to pressure and force Cargo County to disregard the ongoing legal process and to pay the appellants the entire amount claimed: at paras. 99-102. He also noted that the words "thief", "theft" and "stolen" were unnecessary to describe a protest for unpaid wages, and that such words were defamatory, misleading, and

deliberately intended to inflame the public and to force Cargo County to capitulate rather than follow the legal process: at para. 94. None of these considerations, however, are relevant to the analysis under s. 137.1(3).

[47] In the present case, the motion judge's consideration of "what the expression was about" focused on and did not go beyond a consideration of the motives, merits and manner of the appellants' expression, and the fact that the parties were engaged in a dispute about wages. He did not consider whether the expression, without regard to its qualitative features, related to a matter of public interest. This is in contrast to the same judge's decision in *Singh v. Sandhu*, where he concluded that expressions by a driver and NSN about another trucking company and its principals, when considered in the full context, were clearly expressions on a matter of public interest, "of interest to other persons in similar situations, to the public and to the users of the Plaintiffs' services": at para. 84. The motion judge distinguished the two cases on the basis that Cargo County had paid the appellants and there was a legal process underway, while in *Singh* the driver had not been paid for several months despite demands, and that there was no attempt in *Singh* to circumvent any legal process: at paras. 84-85. These distinctions, however, that address the motives behind the expressions and their merits, are not material to the s. 137.1(3) analysis.

[48] In determining "what the expression was about", and whether the expression relates to a matter of public interest, the court must consider the broader picture.

An expression about a private dispute can nevertheless relate to a matter of public interest. Whether an “expression relates to a matter of public interest is determined by consideration of the particular expression in question, not the topic of that expression”: *Echelon*, at para. 11.

[49] In *Nanda*, this court allowed an appeal of the dismissal of an anti-SLAPP motion. The motion judge had dismissed the motion under s. 137.1(3) on the basis that the expression, by a member of a trade union, made disparaging, inflammatory and allegedly defamatory comments about the plaintiff to other local union members to get those other members not to vote for the plaintiff. This court concluded that it was wrong for the motion judge to have focused on the manner in which the expression was made and its purpose. Rather, “what the expression was about” was in fact allegations of corruption and misconduct by a candidate for the office of president of a union. This was an expression of public interest, whether or not it was true, that was sufficient to meet the requirements of s. 137.1(3).

[50] Similarly, in the present case, the expressions were about the business practices of Cargo County and its principals – how they were treating their drivers and whether they were engaging in unfair, exploitative or illegal labour practices. Objectively considered, there was a public interest in the business practices of the respondents, and by extension other businesses engaging vulnerable workers. While the motion judge was correct to consider that the involvement of NSN and the WAC did not transform the private dispute into a matter of public interest, the

involvement of these organizations was part of the overall context of the appellants' expression.

[51] Whether or not the expression itself was accurate, and irrespective of the methods employed in its communication, the expression was about unfair labour practices. Although the genesis of the expression in this case was a wage dispute involving the appellants and Cargo County, and the expression pointed to the appellants' claims and targeted the respondents, when considered in the broader context, the expression went beyond the resolution of a purely private dispute and raised issues about fair labour practices in respect of vulnerable workers, such that it related to a matter of public interest. This distinguishes the result in *Sokoloff* and some other cases involving private disputes, where s. 137.1(3) was not met. See, for example, *Dent-X Canada v. Houde*, 2022 ONCA 414 (simply referring to a matter of public interest – delivery times during the pandemic – did not mean that a single Facebook post by an unhappy customer raised an issue of public interest); *Grist* (a pleading referring to unfair competition was not of significance to anyone other than the parties involved and the institutions established to resolve their disputes); and *Echelon* (a website posting by an employee against a former employer was not of significance to the employer company's customers or other members of the public).

COURT OF APPEAL FOR ONTARIO

CITATION: Gill v. Maciver, 2024 ONCA 126

DATE: 20240222

DOCKET: C70498

Roberts, Paciocco and Monahan JJ.A.

BETWEEN

Dr Kulvinder Kaur Gill* and Dr. Ashvinder Kaur Lamba

Plaintiffs (Appellant*)

and

Dr. Angus Maciver*, Dr. Nadia Alam*, André Picard*, Dr. Michelle Cohen, Dr. Alex Nataros, Dr. Ilan Schwartz, Dr. Andrew Fraser*, Dr. Marco Prado, Timothy Caulfield, Dr. Sajjad Fazel, Alheli Picazo*, Bruce Arthur, Dr. Terry Polevoy, Dr. John Van Aerde, Dr. Andrew Boozary, Dr. Abdu Sharkawy, Dr. David Jacobs, Tristan Bronca, Carly Weeks, The Pointer, The Hamilton Spectator, Société-Radio Canada, the Medical Post

Defendants (Respondents*)

Jeff Saikaley and Albert Brunet, for the appellant, Dr. Kulvinder Kaur Gill

Howard Winkler and Eryn Pond, for the respondent, Dr. Angus Maciver

Andrew MacDonald, for the respondents, André Picard and Carly Weeks

George Pakozdi, for the respondent, Alheli Picazo

Heard: December 12, 2023

On appeal from the order of Justice Elizabeth M. Stewart of the Superior Court of Justice, dated February 24, 2022, with reasons reported at 2022 ONSC 1279, and from the costs order, dated October 31, 2022, with reasons reported at 2022 ONSC 6169.

Monahan J.A.:

(2) The claim against Maciver

[9] The appellant is a medical doctor and has been a member of the OMA Governing Council. She is also a founding member and leader of Concerned Ontario Doctors (“COD”), which operates in part as a platform for the expression of her views, including her criticisms of the OMA.

[10] Maciver is an elderly physician who, although holding no leadership position in the OMA, is a supporter of the OMA and its leadership.

[11] Prior to the impugned statements made by Maciver, the appellant had publicly and repeatedly attacked what she described as the OMA’s “toxic culture of misogyny, bullying and intimidation”. The appellant claimed in various Twitter posts that the leadership of the organization was “vermin”, “corrupt”, hypocrites, a threat to patient care, engaged in bullying and intimidation, and had committed fraud.

[12] In October 2017, Maciver tweeted his disappointment in the fact that the COD was “continuing to fragment the profession in Ontario”. As a result, the appellant blocked him from engaging with her Twitter account. The appellant had similarly blocked the Twitter accounts of other physicians who dissented from her attacks on the OMA.

[13] Because he had been blocked by the appellant, Maciver became increasingly frustrated over the fact that he was not able to respond directly to the

appellant's attacks on the honesty and integrity of the OMA leadership. On September 4, 2018, he tweeted that the appellant (and others in COD) were "corksoakers" and "twats" who had blocked him. In three subsequent tweets posted shortly thereafter, Maciver criticized the appellant and other members of COD for lacking "the qualities we all expect in a physician, let alone a colleague" and for being "an intolerant bunch".

[14] On September 7, 2018 the appellant posted a statement on Facebook in which she claimed that Maciver had called her and Lamba "cock sucking cunts", denounced him for his "racist, sexist and misogynistic comments", and criticized the OMA for "turning a blind eye to such disgusting behaviours". In a September 9, 2018 post on Facebook, the appellant repeated her criticisms of the OMA for failing to take action against Maciver, whom she described as a "harasser" who had engaged in "professional misconduct."

[15] Beginning on September 8, 2018 and on multiple occasions thereafter, Maciver apologized to the appellant both publicly and privately. Those apologies were published throughout the physician community at large, including by Dr. Nadia Alam, the OMA President, in comments that were reported in a September 10, 2018 article in the Medical Post entitled "Physician apologizes for

- (2) The motion judge did not err in finding that the public interest in allowing the appellant's proceeding against the Remaining Defendants to continue did not outweigh the public interest in protecting their expression**

[54] The appellant argues that the motion judge made three errors in considering whether the public interest in permitting her proceeding against the Remaining Defendants to continue outweighed the public interest in protecting their expression, pursuant to s. 137.1(4)(b): first, the motion judge erred by focusing on “damages” instead of “harm”; second, she erred in requiring the appellant to establish a causal link between the harm she had suffered and the particular impugned statements made by the Remaining Defendants; and third, the motion judge erred by not considering the “quality” of the Remaining Defendants’ expression.

[55] In my view, the motion judge made none of the errors alleged.

[56] Considering the first objection, the motion judge did not erroneously require the appellant to adduce evidence of damage, as distinct from harm. The motion judge simply found that the appellant had failed to adduce any evidence of actual harm, apart from the appellant’s bold, conclusory assertion that her reputation had been damaged by the statements made by the Remaining Defendants. Moreover, even this conclusory statement was contradicted by her further claim that she

remains a highly regarded member of the medical profession.

[57] Nor did the motion judge err in requiring the appellant to provide evidence of a causal link between the impugned statements and any alleged harm she may have suffered. In fact, this requirement is expressly mandated by s. 137.1(4)(b) and has been emphasized on numerous occasions by the Supreme Court of Canada as well as by this court, as repeatedly noted above in these reasons: see, for example, *Pointes Protection* at paras. 71-72. The appellant's allegations of harm were completely undifferentiated, without any evidence linking the impugned statements to harm she might have suffered. I see no error in the motion judge's finding that the plaintiff had failed to provide evidence of the necessary causal link between the impugned statements and the alleged harm suffered.

[58] Nor do I agree that the motion judge failed to appropriately consider the "quality of the expression" by the Remaining Defendants in the weighing exercise.

[59] With respect to the impugned statements made by Maciver, the motion judge acknowledged that he had used insulting, unprofessional and ill-advised language in referring to the appellant. But as the Supreme Court of Canada noted in *Pointes Protection*, at paras. 75-76, even speech that contains "deliberate lies or gratuitous personal attacks" may nevertheless be entitled to some modest level of protection, and courts should be wary of descending into a "moralistic taste test" in the weighing exercise under s. 137.1(4)(b).

[60] The motion judge found that, despite the insulting words used by Maciver, his purpose was to point out that the appellant was preventing him from responding directly to her very serious attacks on the honesty and integrity of the leadership of the OMA. It was open to the motion judge to find that there was some degree of public interest in protecting Maciver's right to speak out on this issue, despite the fact that the language he used to communicate his message was insulting. Since the appellant had failed to adduce any evidence of "serious harm" resulting from Maciver's statements, it necessarily followed that she had failed to meet her burden of showing that she had suffered serious harm that outweighed the public interest in protecting Maciver's right to speak on the issue.

[61] Turning to the impugned statements made by Picard, Weeks and Picazo, the motion judge found that there was an extremely high public interest in protecting their right to speak out on the statements made by the appellant regarding COVID-19. As the motion judge pointed out, questions surrounding the development of effective treatments for COVID-19, including the need for vaccines, were matters of great public interest to the medical profession and the public at large. Nor did the language used by any of them in describing the appellant include the use of insults or vitriol. I see no basis for interfering with the motion judge's finding that the public interest in protecting the speech of Picard, Weeks and Picazo far outweighed the appellant's interest in continuing her claim.

(3) Conclusion

[62] The motion judge found that the appellant's defamation claim against the critics of her unorthodox views on effective treatment for COVID-19 was intended to silence those critics. As the motion judge found, correctly in my view, this is precisely the type of proceeding that s. 137.1 was designed to foreclose.

[63] It is unclear why the appellant included the unrelated allegations against Maciver in the proceeding that was otherwise focused on issues related to COVID-19. Maciver had a limited social media profile, his criticisms of the appellant were taken down shortly after they were posted, he apologized publicly and privately to the appellant, and he was subsequently disciplined by the OMA for his comments. The appellant waited nearly two years before commencing a proceeding against Maciver and yet was unable to produce any evidence of reputational or other harm resulting from his tweets. The motion judge did not err in dismissing the appellant's claim against him pursuant to s. 137.1(4)(b) of the CJA.

[64] As noted above, these findings are dispositive of the appeal against the Remaining Defendants, making it unnecessary to consider whether the statements made by Maciver and/or Picazo were defamatory.

(4) The appellant should not be granted leave to appeal the costs award

[65] The appellant seeks leave to appeal the motion judge's costs order, principally on the ground that she awarded what the appellant describes as a

New Dermamed Inc. v. Sulaiman et al.
[Indexed as: New Dermamed Inc. v. Sulaiman]

Ontario Reports

Court of Appeal for Ontario

Doherty, Pardu and Nordheimer JJ.A.

February 25, 2019

144 O.R. (3d) 721 | 2019 ONCA 141

Case Summary

Civil procedure — Summary dismissal of action — Plaintiff suing defendant for damages for defamation after defendant posted reviews on-line stating that dermatological treatments by plaintiff resulted in loss of volume to her face — Motion judge dismissing action pursuant to s. 137.1 of Courts of Justice Act — Motion judge erroneously interpreting s. 137.1(4)(a)(ii) of Courts of Justice Act as requiring plaintiff to show that defence of fair comment could not succeed — Plaintiff only required to show that it was reasonably possible that trier could conclude that defence would not succeed — Plaintiff meeting onus under s. 137.1(4) (a)(ii) as reasonable trier could conclude that defendant's claim of volume loss was statement of fact — Action properly dismissed as plaintiff failed to establish that any harm it suffered was sufficiently serious that public interest in permitting proceeding to continue outweighed public interest in protecting defendant's expression — Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137.1.

The defendant obtained laser resurfacing treatments on her cheeks from the plaintiff. After the defendant posted reviews on-line stating that the treatments resulted in volume loss to her face, the plaintiff sued her for damages for defamation. The defendant moved successfully under s. 137.1 of the *Courts of Justice Act* for summary dismissal of the action. The plaintiff appealed.

Held, the appeal should be dismissed.

The motion judge erroneously interpreted s. 137.1(4) (a)(ii) of the *Courts of Justice Act* as requiring the plaintiff to show that the defendant's defence of fair comment could not succeed. The plaintiff was only required to show that it was reasonably possible that a trier could conclude that the defence would not succeed. The plaintiff had met its burden under s. 137.1(4)(a)(ii) as a reasonable trier could view the defendant's claims of volume loss to her face as statements of fact, not opinion. However, the action was properly dismissed as the plaintiff had not satisfied the requirement under s. 137.1(4)(b) that it establish that any harm that it had suffered at the hands of the defendant was sufficiently serious that the public interest in permitting the proceeding to continue outweighed the public interest in protecting the defendant's expression.

Cases referred to

1704604 *Ontario Ltd. v. Pointes Protection Assn.* (2018), 142 O.R. (3d) 161, [2018] O.J. No. 4449, 2018 ONCA 685, 23 C.P.C. (8th) 312, 79 M.P.L.R. (5th) 179, 426 D.L.R. (4th) 233, 50 C.C.L.T. (4th) 173, 297 A.C.W.S. (3d) 504 (C.A.); *Brad-Jay Investments Ltd. v. Szijjarto*, [2006] O.J. No. 5078, 218 O.A.C. 315, [2007] I.L.R. ÂG-2027, 154 A.C.W.S. (3d) 226 (C.A.) [Leave to appeal to S.C.C. refused [2007] S.C.C.A. No. 92]; *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, [2009] S.C.J. No. 61, 2009 SCC 61, 314 D.L.R. (4th) 1, 397 N.R. 1, J.E. 2010-8, 258 O.A.C. 285, 72 C.C.L.T. (3d) 1, 79 C.P.R. (4th) 407, 204 C.R.R. (2d) 1, [2010] I.L.R. ÂG-2321, 183 A.C.W.S. (3d) 1173, EYB 2009-167615, 2010EXP-17; *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, [2008] S.C.J. No. 41, 2008 SCC 40, 175 C.R.R. (2d) 145, [page722] EYB 2008-135084, J.E. 2008-1350, 56 C.C.L.T. (3d) 1, 293 D.L.R. (4th) 513, 256 B.C.A.C. 1, 80 B.C.L.R. (4th) 1, 66 C.P.R. (4th) 121, 376 N.R. 80, [2008] 8 W.W.R. 195, 166 A.C.W.S. (3d) 792

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137.1, (3), (4), (a)(ii), (b)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 76

APPEAL from the order of P. Cavanagh J., [2018] O.J. No. 2134, 2018 ONSC 2517 (S.C.J.) and from the costs order, [2018] O.J. No. 3005, 2018 ONSC 3454 (S.C.J.).

Ruzbeh Hosseini and *Joan Kasozi*, for appellant.

J. Sebastian Winny, for respondent.

[1] BY THE COURT: -- New Dermamed Inc. appeals from the order of the motion judge that dismissed its claim pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and ordered costs payable in the amount of \$20,000, inclusive of HST and disbursements.

[2] The respondent sought and obtained laser resurfacing treatment on her cheeks from the appellant. The respondent purchased three laser skin resurfacing treatments. After receiving the first treatment, the respondent alleged that she had suffered volume loss to her face. She discontinued the laser resurfacing treatment and replaced her two remaining treatments with a micro-needling treatment. Despite being informed that volume loss is not a side effect of the laser resurfacing treatment she received, the respondent continued to insist that she had suffered volume loss as a result of the treatment.

[3] The respondent wrote and published four different reviews regarding the appellant on a webpage associated with, and maintained by, Google Inc.¹ In her review, the respondent complained that she had experienced volume loss and that her face looked "saggier" and had "melted off". The second, third and fourth reviews were revised versions of the first review. Both the second and third revisions were preceded by letters from the appellant's lawyers

complaining that the reviews were false and libelous. The letters insisted that the respondent permanently delete her comments, otherwise she would be sued. While the respondent revised her review, she did not delete it. [page723]

[4] The respondent was served with the statement of claim in this action in late November 2017. The action was brought under the simplified procedure -- Rule 76, Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The appellant claimed damages of \$500,000.

[5] The motion judge concluded that the comments made by the respondent in her reviews were expressions on a matter of public interest. The motion judge then turned to determine if the exception under s. 137.1(4), to the presumption that the action should be dismissed under s. 137.1(3), applied. The motion judge concluded that it did not because the appellant had failed to establish that the respondent's defence of fair comment was invalid under s. 137.1(4)(a)(ii).

[6] The motion judge heard and decided the s. 137.1 motion before this court released a series of judgments interpreting s. 137.1: see *1704604 Ontario Ltd. v. Pointes Protection Assn.* (2018), 142 O.R. (3d) 161, [2018] O.J. No. 4449, 2018 ONCA 685 (C.A.) and the related cases released simultaneously. As we shall explain, the motion judge applied the wrong test in determining whether the appellant had shown that the respondent had no valid defence to the claim within the meaning of s. 137.1(4)(a)(ii).

[7] The appellant does not now quarrel with the motion judge's conclusion that the comments made by the respondent in her reviews were expressions on a matter of public interest. In any event, the motion judge's conclusion that it was a matter of public interest finds support in the case law. As McLachlin C.J.C. said in *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, [2009] S.C.J. No. 61, 2009 SCC 61, at paras.105-106:

The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews"[]

The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.

(Citations omitted)

[8] Consequently, the action would be presumptively dismissed under s. 137.1(3) unless the appellant could satisfy the court that the exception under s. 137.1(4) applied.

[9] Section 137.1(4) reads:

137.1(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and [page724]

COURT OF APPEAL FOR ONTARIO

CITATION: Raymond J. Pilon Enterprises Ltd. v. Village Media Inc., 2019 ONCA 981

DATE: 20191212

DOCKET: C66891

Juriansz, Brown and Miller JJ.A.

BETWEEN

Raymond J. Pilon Enterprises Ltd.

Plaintiff/Responding Party (Appellant)

and

Village Media Inc., Stacey Van Dyk, Joel Van Dyk, and Andrew Autio

Defendants/Moving Party (Respondents)

Peter J. Doucet, for the appellant

Paul Bragagnolo, for the respondents Stacey Van Dyk and Joel Van Dyk

Brendan Hughes, for the respondents Village Media Inc. and Andrew Autio

Heard and released orally: December 6, 2019

On appeal from the order of Justice Robin Y. Tremblay of the Superior Court of Justice dated April 4, 2019, with reasons reported at 2019 ONSC 2017, and November 28, 2019, with reasons reported at 2019 ONSC 6890.

REASONS FOR DECISION

[1] The appellant, Raymond J. Pilon Enterprises Ltd. (the “Corporation”), advances a single ground of appeal: the motion judge erred in finding that the proceeding arose “from an expression made by the person that relates to a matter of public interest”: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(3).

[2] Whether an expression relates to a matter of public interest involves a question of mixed fact and law that attracts a deferential standard of review. Absent the identification of an extricable error of law or a palpable and overriding factual error, an appellate court will defer to the motion judge's assessment: 1704604 *Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161, at para. 66, leave to appeal granted and appeal heard and reserved November 12, 2019, [2018] S.C.C.A. No. 467.

[3] On this appeal, the Corporation renews its submission that the expressions contained in the post and media article related to nothing more than a private dispute between a customer and staff at its Canadian Tire store in Timmins.

[4] The motion judge rejected that submission. Describing the post as “a customer’s account of an incident of poor customer service at the local Canadian Tire store”, the motion judge concluded that it related “to the issues of customer service and shopping experience at a major retail store” and raised “the question of the appropriateness of a store manager involving the police in such a matter”: 2019 ONSC 2017, at para. 45. The motion judge read the post “as cautioning potential customers of the Canadian Tire in Timmins about the treatment they may receive at that store”: at para. 46.

[5] The motion judge observed, at para. 47, that in *New Dermamed Inc. v. Sulaiman*, 2019 ONCA 141, 144 O.R. (3d) 721, the defendant had written four

webpage reviews about the quality of the laser resurfacing treatment she had received from the plaintiff: 2019 ONCA 141, 144 O.R. (3d) 721, at paras. 3-4. On a s. 137.1 motion, the motion judge found that the comments made by the defendant in her reviews were expressions on a matter of public interest: at para. 5. On the appeal, the appellant did not quarrel with that conclusion, which this court accepted: at para. 7.

[6] In this case, the motion judge concluded that “the Van Dyks’ Facebook post detailing an incident of poor customer service at a major local retail store is an expression that relates to a matter of public interest”: at para. 50.

[7] We see no basis on which to interfere with the motion judge’s analysis and conclusion on this point. The appellant has not identified any extricable error of law or palpable and overriding error in the motion judge’s assessment of the nature of the expression. The appellant simply quarrels with the motion judge’s application of the factors involved in a *Grant v. Torstar Corp.* analysis: 2009 SCC 61, [2009] 3 S.C.R. 640. That is not a sufficient basis to attract appellate intervention.

[8] The appellant does not take issue with the motion judge’s recent disposition of the issues of damages and costs: 2019 ONSC 6890.

DISPOSITION

[9] Accordingly, for the reasons set out above, the appeal is dismissed.

COURT OF APPEAL FOR ONTARIO

CITATION: Dent-X Canada v. Houde, 2022 ONCA 414

DATE: 20220524

DOCKET: C69959

Benotto, Zarnett and Copeland JJ.A.

BETWEEN

Dent-X Canada

Plaintiff (Respondent)

and

Marco Houde, Martin Sirois, and
9021-1962 Quebec Inc. o/a Distribution Ongles D'Or

Defendants (Appellants)

François Sauvageau, for the appellants

Solomon Ross Fischhoff, for the respondent

Heard: May 10, 2022 by videoconference

On appeal from the order of Justice Mohan Sharma of the Superior Court of
Justice, dated November 10, 2021.

REASONS FOR DECISION

[1] The appellants appeal from the order of the motion judge dismissing their motion to dismiss the respondent's defamation action under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "CJA"), Ontario's "anti-SLAPP" provision. They also appeal the motion judge's award of costs of the motion to the respondents.

[2] For the reasons set out below, we are not persuaded that the motion judge erred. We dismiss the appeal on the merits. We grant leave to appeal costs but dismiss the costs appeal.

Did the motion judge err in finding that the statement did not relate to a matter of public interest?

[3] The statement at issue was a single Facebook post created by one of the individual appellants, who was unhappy with the delay in delivery of face masks they had ordered from the respondent. Since it is short, we reproduce the full text of the post:

Dent X Canada Masks Class Action

The purpose of this group is to locate people and companies that have experienced fraud with the company Dent-X Canada.

Dent-X Canada has promised that we would be refunded if they were not able to respect the delivery dates but it's NOT TRUE. They've missed all of the dates for the shipments we had agreed upon and now they don't want to refund me.

All of my dealings with Dent-X Canada have simply been a series of BIG FAT LIES.

Like others, I suspect I have been defrauded. The guy in charge is Mr. James Peter Emms. He was convicted of fraud in the past. I don't understand how a person like Ms. Anaida Deti, Dent-X Canada's president, would let a convicted fraudster run her company. She has been appraised and decorated for helping her community, but she sure is not helping to stop this fraud from happening in broad daylight, in front of her very eyes. Like many, she seems to only want to profit off of Covid-19. I hope

she gets as much (bad) publicity for this as she got for her other achievements.

The lucky ones who haven't yet done business with Dent-X Canada, STOP THINKING ABOUT IT AND GO ANYWHERE ELSE. You will thank me later.

[4] The motion judge accepted that the Facebook post constituted expression by one or more of the appellants; however, he found that reading the statement as a whole, he was not satisfied that it related to a matter of public interest.

[5] In holding that he was not satisfied that the statement related to a matter of public interest, the motion judge correctly instructed himself on the analysis from *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 449 D.L.R. (4th) 1, at paras. 20, 26-31, and *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 99-109.

[6] The motion judge concluded that the nature of the statement as a whole was about a private dispute between businesses, and not related to a matter of public interest. He accepted that the quality of masks may be an issue closely connected to the public interest during a global pandemic. However, he noted that statement only mentioned the word "mask" once, at the outset. He found that there was nothing in the statement that spoke to the issue of quality of the masks, or suggested that the alleged fraud had anything to do with the quality of the masks, or that the alleged fraud put the public at risk. Rather, he found that the alleged fraud, when the post was read as a whole, related to the respondent missing

delivery dates and not honouring a refund. He found that this related to a purely private dispute between businesses. He also found that the personal information in the statement about the reputation and integrity of people who worked at the respondent company was an expression that was personal in nature, and not about the quality of the products produced by the respondent.

[7] The appellants submit that the motion judge committed two errors in finding that the statement at issue did not relate to a matter of public interest. We address each alleged error in turn.

[8] First, the appellants submit that the motion judge “completely ignored” that the statement was, “in part at least, for the purpose of commencing a potential class action”. Relying on the decision of *Das v. George Weston Limited*, 2017 ONSC 5583, at para. 128, aff’d 2018 ONCA 1053, leave to appeal refused, [2019] S.C.C.A. No. 69, the appellants submit that class actions inherently relate to matters of public interest. We pause to note that the appellants’ counsel confirmed at the hearing that no class action was ever commenced.

[9] We reject the appellants’ argument that the motion judge failed to consider the reference to a class action at the outset of the statement. The motion judge was clearly alive to the fact that the title and first sentence of the statement at issue referred to a potential class action. He extracted the whole statement in his reasons (at para. 25). He referred to the title of the post in his reasons, when he

noted that the Facebook post “only mentions the word ‘mask’ once at the outset”. That one mention of masks was in the title, which also referred to the potential class action. Further, in his costs endorsement, reported at 2021 ONSC 7433, the motion judge expressly referred to the mention in the statement of a potential class action, stating:

The underlying dispute was purely a private one. If the reason for the impugned communication was, as [the appellants] argued, to find other clients of [the respondent] for the purpose of a class action, one might expect the content and tone of its communication to be vastly different.

[10] The appellants’ submission confuses an expression referring to a matter of public interest with an expression relating to a matter of public interest. *Pointes* holds that the concept of whether particular expression relates to a matter of public interest must be broadly interpreted, and assessed by looking at the expression as a whole. However, *Pointes* also makes clear that merely referring to something of public interest is not the same as relating to a matter of public interest: *Pointes* at para. 29; see also *Sokoloff v. Tru-Path Occupational Therapy Services Ltd.*, 2020 ONCA 730, 153 O.R. (3d) 20, at paras. 19, 26-35.

[11] The motion judge correctly considered the statement as a whole. He did not ignore the reference to a potential class action. Based on his analysis of the whole of the statement, he found it did not relate to a matter of public interest. We see no basis to interfere with that conclusion.

COURT OF APPEAL FOR ONTARIO

CITATION: Echelon Environmental Inc. v. Glassdoor Inc., 2022 ONCA 391

DATE: 20220516

DOCKET: C69987

Huscroft, Thorburn and George JJ.A.

BETWEEN

Echelon Environmental Inc. and Robert Rainford

Plaintiffs (Respondents)

and

Glassdoor Inc. and John Doe

Defendants (Appellant)

Linda R. Rothstein, Amrita V. Singh, and Ren Bucholz, for the appellant

Christine Lonsdale and William Main, for the respondents

Heard: May 2, 2022

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated October 6, 2021.

REASONS FOR DECISION

[1] The appellant, Glassdoor Inc., appeals the motion judge's order denying his request to dismiss the respondent's defamation action under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c C.43. The appellant argues that the motion judge erred in finding that the expression at issue – publication of an anonymous critical review on the appellant's website by John Doe about his employer, the

for the purpose of s. 137.1: *Sokoloff v. Tru-Path Occupational Therapy Services Ltd.*, 2020 ONCA 730, 153 O.R. (3d) 20, at para. 19.

[5] The essential question is this: Understood in its context, what is the impugned expression really about? The motivation behind the expression is not legally relevant, nor are the merits of the expression and the manner in which the expression is conveyed, as there is no qualitative assessment of expression at this stage: *Pointes*, at para. 28; *Sokoloff* at para. 20.

[6] Whether expression relates to a matter of public interest involves a question of mixed fact and law that attracts a deferential standard of review. Provided that the motion judge made no extricable errors of law and no palpable and overriding errors of fact, the decision is entitled to deference.

[7] The appellant has failed to establish that the motion judge made any such errors, and as a result there is no basis for this court to interfere with his decision.

[8] The motion judge determined that the anonymous review on Glassdoor's website concerned an individual's complaints about such things as the respondent company's pay and benefit levels, work requirements, and the company's infrastructure. These were complaints that, while anonymous, reflected a private dispute with no real impact on others. The respondent company was not engaged in providing services to the public; it was providing specialized services to a small

number of customers. In these circumstances, it was open to the motion judge to conclude that the employee review did not relate to a matter of public interest.

[9] The motion judge did not make qualitative assessments about the expression at issue. He acknowledged this court's instruction in *Sokoloff* that no such assessment was to be made. His comments about the anonymity of the reviewer were made in the context of describing the expression. His finding that the expression did not relate to a matter of public interest was not based on whatever value or merit the review held but rather on the evidence outlined above.

[10] The motion judge was not required to conclude that expression about workplaces is a matter of public interest simply because some courts have concluded that reviews of businesses by consumers are a matter of public interest. This court's decision in *Raymond J. Pilon Enterprises Ltd. v. Village Media Inc.*, 2019 ONCA 981 upholds one such decision on the basis of the deferential standard of review. It does not determine the outcome in this case.

[11] In some cases, employee speech about workplace issues may well be a matter of public interest. But in every case, the burden is on the moving party to establish that its expression relates to a matter of public interest. Whether expression relates to a matter of public interest is determined by consideration of the particular expression in question, not the topic of that expression.

COURT OF APPEAL FOR ONTARIO

CITATION: Sokoloff v. Tru-Path Occupational Therapy Services Ltd.,
2020 ONCA 730
DATE: 20201117
DOCKET: C67387

Huscroft, Zarnett and Coroza JJ.A.

BETWEEN

Wendy Sokoloff and Wendy Sokoloff Professional
Corporation c.o.b. Sokoloff Lawyers

Plaintiffs (Respondents)

and

Tru-Path Occupational Therapy Services Ltd.
and Troy Campbell

Defendants (Appellants)

Shantona Chaudhury and Cristina Senese, for the appellants

Jonathan C. Lisus, Andrew Winton and Vlad A. Calina, for the respondents

Heard: July 20, 2020 by video conference; additional written submissions filed

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated July 25, 2019, with reasons reported at 2019 ONSC 4756.

Huscroft J.A.:

[3] I would dismiss the appeal and would deny leave to appeal costs for the reasons that follow.

BACKGROUND

[4] The alleged defamatory statements were made by the appellant Troy Campbell, president of Tru-Path Occupational Therapy Services Ltd., on two occasions when he stood in the street outside the respondent Wendy Sokoloff's law office, Wendy Sokoloff Professional Corporation ("Sokoloff Lawyers"), holding signs that stated:

SOKOLOFF LAWYERS USED OUR COMPANY'S
REHAB SERVICES TO HELP MANY OF THEIR
CLIENTS' AB CLAIMS BUT WON'T PAY.

OVER \$1.3 MILLION OF OUR REHAB COMPANY'S
PAYMENT IS BEING SEIZED BY SOKOLOFF
LAWYERS.

DEAR SOKOLOFF LAWYERS: YOU HAVE OUR
REHAB COMPANY'S NEARLY \$1.4 MILLION
DOLLARS. PAY YOUR UNDERTAKINGS NOW!

SOKOLOFF LAWYERS IS TAKING MONEY FROM
OUR REHAB COMPANY'S ACCOUNT TO PAY THEIR
CLIENT'S TORT DISBURSEMENT. HOW IS THIS
LEGAL?

[5] The first two statements were alleged to be defamatory. They were made in the context of a dispute over payment of the appellants' fees for services provided

As counsel for the Plaintiffs points out, you cannot be making statements about a matter of public interest if you profess to be indifferent to the public interest.

[24] This, too, was inappropriate. The motion judge could properly consider the entire communication and the context in which it was made. But the motivation behind the communication – *why* the impugned expression occurred – is a subjective consideration that is not relevant to determining the objective nature of that expression. The quality or merits of the expression and the manner in which the expression is conveyed are similarly irrelevant.

[25] Mistakes have sometimes been made in this regard – see *Levant*, at para. 11; *Ontario College of Teachers v. Bouragba*, 2019 ONCA 1028, 51 C.P.C. (8th) 280, at paras. 31-33; and *Nanda*, at para. 37 – so the point bears repeating: Motive, merit, and manner are irrelevant in determining whether expression relates to a matter of public interest under s.137.1(3).

[26] Although the motion judge erred in taking into account irrelevant considerations, he also identified the relevant considerations and, in my view, he reached the correct result. His conclusion that the appellants' expression did not relate to a matter of public interest is amply supported by the relevant considerations in the record.

[27] The parties had a professional relationship that involved referrals. The respondents would refer clients who required occupational therapy to the appellants, who would provide services approved by the client's insurance company. The appellants would be paid by the client's insurance company, but if the insurer denied coverage the appellants might agree to treat the client and the client would be responsible for paying. In the event of a dispute between the insurer and the client, the respondents agreed to protect the appellants' accounts. The respondents would hold funds received from the insurance company in trust and would pay the appellants if the clients did not object or the appellants proved their expenses at a hearing.

[28] The respondents began to question charges made by the appellants and this led to a breakdown in the parties' relationship. The appellants terminated the referral arrangement with the respondents in 2016 and, in 2018, brought an application against the respondents seeking payment of their accounts. The application was converted to an action and is ongoing.

[29] This is the context in which Mr. Campbell's expression occurred. The appellants were pressuring the respondents to pay monies they claim they are owed by their mutual clients. The fact that the parties are members of regulated professions does not make their dispute a matter of public interest, nor does the

fact of unrelated proceedings by the Law Society of Ontario concerning the respondents make it so.

[30] The appellants submit that the public, or an aspect of it, has an interest in the expression because if lawyers are not held to their undertakings to protect the fees of service providers, many involved in motor vehicle accidents would be deprived of rehabilitation services while their disputes are adjudicated. Referring to this Court's decision in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60 (*Platnick (ONCA)*), aff'd 2020 SCC 23 (*Platnick (SCC)*) the appellants argue that because Mr. Campbell's expression relates to a lawyer's undertaking it therefore relates to the public interest in holding lawyers to their undertakings.

[31] Plainly, the public has an interest in the ethical conduct of lawyers. But it does not follow that every lawyer's transactions are a matter of public interest, nor does it follow that expression touching on the ethical conduct of an individual lawyer necessarily relates to the public's interest in the ethical conduct of lawyers.

[32] The task of the motion judge under s. 137.1(3) is to determine "what the expression is really about", bearing in mind the purpose of s. 137.1: protecting expression relating to matters of public interest and safeguarding the fundamental value of public participation in democracy: *Pointes (SCC)*, at para. 30. Again, only expression *relating* to a matter of public interest attracts the statute's protection;

“expression that simply makes reference to something of public interest” does not: *Pointes* (SCC), at para. 29.

[33] Understood in context, the expression at issue in this case is really about a private commercial dispute between the appellants and the respondents. The respondents happen to be lawyers. Mr. Campbell's expression does not relate to a matter of public interest on that account.

[34] Comparison to the Supreme Court's decision in *Platnick* is helpful in illustrating the nature of the public interest under s. 137.1(3). In that case the impugned expression was an email, sent by a lawyer who was the president-elect of the Ontario Trial Lawyers' Association. The email, sent to several hundred members of the Association by a listserv, alleged that a doctor frequently engaged as a medical expert in insurance litigation had engaged in dishonest conduct. The Supreme Court agreed with this court that the expression related to a matter of public interest. In *Platnick* (SCC), Côté J., for the majority stated that the defendant's email:

raises concerns regarding the truthfulness, reliability, and integrity of medical reports filed on behalf of insurers in the arbitration process. In turn, her email raises concerns regarding the integrity of the arbitration process itself and the proper administration of justice writ large. Further, the email is directed at a not insignificant number of individuals, who, more importantly, have a special interest in exactly that... (at para. 83).

[35] The expression in this case and the context in which it occurred are in no way similar. Mr. Campbell's expression raised no general concerns about the importance of lawyers respecting their undertakings, nor was it directed to anyone with an interest in the respondents' conduct. The expression did not relate to a matter of public interest. It was really about the appellants' commercial dispute with the respondents.

[36] In summary, the motion judge did not err in concluding that the impugned expression did not relate to a matter of public interest. Accordingly, the motion failed at the public interest threshold and it is not necessary to proceed to the merits-based hurdle under s. 137.1(4)(a) or the public interest weighing exercise under s. 137.4(b).

LEAVE TO APPEAL COSTS

[37] The motion judge initially awarded the respondents \$75,000 in partial indemnity costs on the basis that they were the successful party. He did not consider s. 137.1(8) of the *CJA* in making this costs award. That section provides:

If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

COURT OF APPEAL FOR ONTARIO

CITATION: Galati v. Toews, 2025 ONCA 568

DATE: 20250731

DOCKET: COA-24-CV-0004

Harvison Young, Zarnett and Favreau JJ.A.

BETWEEN

Rocco Galati

Plaintiff (Appellant)

and

Donna Toews (Aka “Dawna Toews”)*, Kipling Warner*, Canadian Society for the
Advancement of Science and Public Policy*, Dee Gandhi*, Janes and Johns Doe
Defendants (Respondents*)

Paul Slansky, for the appellant

Tim Gleason and Amani Rauff, for the respondents

Heard: January 13, 2025

On appeal from the judgment of Justice William S. Chalmers of the Superior Court
of Justice, dated December 11, 2023, with reasons reported at 2023 ONSC 7508
and from the costs endorsement reported at 2024 ONSC 935.

Zarnett J.A.:**I. Introduction**

[1] The parties to this appeal were, in different ways, interested in litigation
against governments and government officials challenging officially imposed
COVID-19 mandates and restrictions.

The Standard of Review

[44] A motion judge's determination on a s. 137.1 motion is entitled to deference on appeal, absent an error of law or a palpable and overriding error of fact or mixed fact and law: *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 77.

[45] Deference is "particularly appropriate in respect of the motion judge's weighing exercise under s. 137.1(4)(b), which is open-ended and highly discretionary. Only if the motion judge commits a reversible error in conducting that exercise may an appellate court consider the matter afresh": *Burjoski v. Waterloo Region District School Board*, 2024 ONCA 811, at para. 47.

The Threshold Requirement Issue

[46] There are two components of the test that must be met by a moving party seeking to establish that a proceeding arises from an expression that relates to a matter of public interest under s. 137.1(3).

[47] First, the proceeding must arise from an expression made by the moving party. This will be the case, regardless of the cause of action asserted or descriptive tag attached to it, if "[t]he expression is causally connected to the claim; there is a nexus between them; the expression grounds the claim; and the claim targets the expression": *Subway*, at para. 41. As Côté J. explained in *Pointes*, at

COURT OF APPEAL FOR ONTARIO

CITATION: Yates v. Iron Horse Corporation, 2026 ONCA 38

DATE: 20260123

DOCKET: COA-24-CV-0360

Simmons, Rouleau and Pepall JJ.A.

BETWEEN

Robin Yates

Plaintiff
(Appellant)

and

Iron Horse Corporation and Robin St. Martin

Defendants
(Respondents)

Robin Yates, acting in person

Christopher P. Morris and Blake Bochinski, for the respondents

Heard: June 19, 2025

On appeal from the order of Justice Sally A. Gomery of the Superior Court of Justice, dated December 23, 2023, with reasons reported at 2023 ONSC 4195, 94 C.C.L.T. (4th) 254.

Pepall J.A.:

[1] This appeal focuses on the need for a responding party to an anti-SLAPP¹ motion to provide evidence of an inference of harm or the likelihood of harm and

¹ Strategic lawsuits against public participation.

[54] Citing *Pointes*, at para. 80, Karakatsanis J. emphasized that the factors that may be of assistance in the weighing exercise had to be tethered to the text of the statutory provision: *Hansman*, at para. 60. In that regard, she listed the factors given as examples in *Pointes* including the potential chilling effect on future expression by a party. However, she determined that this was an improper consideration in the harm analysis component of the weighing exercise. She stated that “the factor to be considered in favour of the public interest in continuing the proceeding is the likely harm to the plaintiff as a result of the defendant’s expression”: *Hansman*, at para. 63.

[55] She held that to succeed on the weighing exercise, a plaintiff must provide evidence that enables the judge “to draw an inference of likelihood” of harm of a magnitude sufficient to outweigh the public interest in protecting the defendant’s expression: *Hansman*, at para. 67, citing *Pointes*, at para. 71, and *Bent*, at para. 154. Presumed general damages are insufficient for this purpose as are bare assertions of harm: *Hansman*, at para. 67. Additionally, there must be evidence that enables a judge to infer a causal link between a defendant’s, in this case the appellant’s⁹, expression and the harm suffered: *Hansman*, at para. 68.

[56] Thus, in the weighing exercise, the analysis must be tethered to the statutory text. First, this requires that there be evidence of harm or evidence that permits a

⁹ For ease of reference, in the remainder of my reasons, I have described the parties as they appear on this appeal.

judge to draw an inference of the likelihood of harm. Second, the harm or likely harm must be of a sufficient magnitude to outweigh the public interest in protecting the appellant's expression. Third, presumed general damages are insufficient. Fourth, bare assertions of harm are also insufficient. Fifth, there must be evidence that supports an inference of a causal link between the harm suffered by the respondents and the appellant's expression.¹⁰

[57] As for the applicable standard of review, absent reviewable error, a motion judge's determination on a s. 137.1 motion is entitled to deference: *Bent*, at para. 77, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 36; *Hansman*, at para. 56. I am satisfied that there was reviewable error in this case. As mentioned, the motion judge was not referred to the Supreme Court's decision in *Hansman*. Once the reasoning in that decision is applied, the result in this appeal cannot be sustained. This is why.

[58] To start, as already explained, the Supreme Court in *Hansman*, at para. 68, stated that that there must be some evidence that enables the motion judge to infer a causal link between the appellant's expression and the harm suffered. However, the motion judge found that there was an absence of any evidence of a link between the appellant's statements and any losses suffered by the respondents. Additionally, she did not draw an inference of a causal link. She was also of the

¹⁰ Evidence relating to harm and causation may also assist in undermining any suggestion of a strategic objective. Conversely, absence of such evidence may propel such a conclusion.

view that the appellant would realistically prevail with respect to many if not most of the impugned statements and there was no link between the appellant's statements and any losses suffered. Thus, there was nothing to ground a finding of a causal link.

[59] Second, the motion judge stated that she was skeptical about the respondents' ability to prove the damages they claimed. As directed by *Hansman*, at para. 67, presumed general damages are insufficient as are bare assertions of harm. The damages claim advanced by the respondents suffered from these deficiencies as found by the motion judge. To repeat, *Hansman* directs that "the likely harm to the plaintiff as a result of the defendant's expression" is "the factor to be considered in favour of the public interest in continuing the proceeding": at para. 63 (emphasis added). Having concluded that, in essence, the respondents had not met their onus with respect to causation or harm, the motion judge erroneously determined that the weighing exercise favoured the respondents. In light of her findings and the dictates of *Hansman*, this conclusion was not available to her.

[60] Third, she acknowledged that given her findings, and based on these considerations, she would be inclined to dismiss the counterclaim. Although the respondents had a real interest in seeking redress for any damages to their reputation, she found that there was a strong strategic element in their decision to begin a multi-million dollar counterclaim many months after the allegedly

Hansman, at para. 74.¹¹ Karakatsanis J. further explained: “The harm relevant to the public interest weighing exercise is harm to [the respondent] caused by the [appellant’s] statements, not by [the respondent’s] inability to sue. The loss of a right to sue was a possible outcome of the public interest weighing exercise, not an input.”: at para. 74. The chilling effect on public debate has only been considered by courts under the weighing exercise as a reason to protect the moving party’s expression, not as a reason to allow the proceeding to continue: *Hansman*, at para. 76. The consideration of the public interest in continuing the proceeding had to be grounded in harm to the respondent that was caused by the expression of the appellant.

[63] Thus, the first side of the weighing exercise in this case evaluates the harm to the respondents caused by the appellant’s expression. Absent likely harm and causation, the weighing exercise cannot benefit the respondents.

[64] Turning to the other side of the weighing exercise, and again tethering the analysis to the statutory text, Karakatsanis J. stated: “The other side of the weighing exercise evaluates the public interest in protecting the [appellant’s] expression”: *Hansman*, at para. 79. Thus, in this part of the weighing exercise, the level of protection to be afforded to the moving party’s speech is considered. Factors such as a respondent’s inability to sue are not. To consider factors outside

¹¹ Section 137.1(4)(b) of the CJA refers to “the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression”.

of the public interest in protecting the appellant's expression on this "other side of the weighing exercise" would be to impermissibly go beyond the text of the statute.

[65] It follows from *Hansman* that the motion judge's reliance on the respondents' interest in seeking redress absent evidence of harm and causation of harm and on the overlap between the claim and the counterclaim was misplaced. The former ignored the statutory text of the harm analysis. The latter was both unrelated to the harm analysis and to the public interest in protecting the appellant's expression. Standing alone, absent evidence of likely harm and causation, the overlap could not anchor a refusal to dismiss the counterclaim. Indeed, the motion judge's findings, including her determination that the counterclaim had the hallmarks of a SLAPP and that the respondents had a history of using litigation and threats of litigation for strategic purposes, all pointed to a dismissal of the counterclaim. Moreover, discouraging this kind of litigation is expressly contemplated by the purposes enumerated in s. 137.1(1) of the CJA. The mere presence of a counterclaim does not alter that analysis. I would also observe that, as noted by the motion judge, the litigation on the subject matter of the expression will proceed in any event. The respondents will have their day in court; they simply will be unable to pursue the counterclaim for what was found to be a strategic purpose.

[66] The motion judge found that there was no causal link between the respondents' likely harm and the appellant's expression; the hallmarks of a SLAPP were present in the counterclaim; and there was a strong public interest in

COURT OF APPEAL FOR ONTARIO

CITATION: James Bay Resources Limited v. Mak Mera Nigeria Limited, 2025
ONCA 448

DATE: 20250620

DOCKET: COA-24-CV-0045

Gillese, Roberts and Coroza JJ.A.

BETWEEN

James Bay Resources Limited

Plaintiff (Respondent)

and

Mak Mera Nigeria Limited a.k.a. Mak Mera Limited and
Adewale Olorunsola a.k.a. Wale Sola

Defendants (Appellants)

Darryl A. Cruz and Audrey-Anne Delage, for the appellants

Hilary Book and William McLennan, for the respondent

Heard: January 20, 2025

On appeal from the judgment of Justice Eugenia Papageorgiou of the Superior Court of Justice, dated December 4, 2023, with reasons reported at 2023 ONSC 6844.

L.B. Roberts J.A.:

A. OVERVIEW

[1] This appeal involves the correct application of principles of contract interpretation to related agreements. It also turns on the proper assessment of damages for defamation owing to a corporate plaintiff.

(i) The absence of evidence to support the substantial damages award

[78] It was an error to award James Bay substantial damages for defamation absent admissible evidence of harm or impact.

[79] It is well-established that damages are presumed if defamation is established. However, there is no presumption as to the impact or amount of those damages: *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, 53 C.C.L.T. (4th) 1, at para. 22, leave to appeal refused, [2019] S.C.C.A. No. 38592. Moreover, while a corporation may be entitled to general damages beyond nominal damages without proof of specific loss, it is unlikely to obtain a substantial award without proof of special damages or at least of a general loss of business or impact on reputation or goodwill: *Walker*, at pp. 113-14.

[80] As this court further noted in *Walker*, at p. 113: “[U]nlike an individual, a company is not entitled to compensation for injury to hurt feelings or, it follows, to compensation by way of aggravated damages for a loss of this nature.” In the often-cited words of Lord Reid in *Lewis v. Daily Telegraph Ltd.*, [1963] 2 All E.R. 151 (H.L.), at p. 156: “A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.”

[81] As noted earlier, the trial judge founded her substantial damages award principally on her findings of reputational harm and economic loss (the latter

CITATION: Slaven v. Azadian, 2020 ONSC 7571

COURT FILE NO.: CV-20-59501

DATE: 20201229

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Mike Slaven, c.o.b. as Benchwood Builders

Lien Claimant

– and –

Mihran Azadian and Ann Azadian

Owners

Brent Harasym, for the Lien Claimant

Joseph Gottli, for the Owners

HEARD: November 26, 2020 at
St. Catharines

THE HONOURABLE JUSTICE J. R. HENDERSON

REASONS FOR DECISION

INTRODUCTION

[1] The Owners, Mihran Azadian and Ann Azadian (“the Azadians”), are the registered owners of a residential property known as 44 Harmony Drive, Niagara-on-the-Lake, Ontario (“the property”). The Lien Claimant, Mike Slaven (“Slaven”), is a general contractor who carries on business as Benchwood Builders (“Benchwood”).

[2] The Azadians entered into a written contract with Benchwood, signed on December 15, 2018, whereby Benchwood agreed to renovate the property for a stipulated price of \$319,763, plus HST, plus agreed extras, payable in four installments (“the Renovation Contract”).

- [3] The Renovation Contract provided for a completion date of April 1, 2019. Benchwood worked on the property during the winter, spring, and summer of 2019, but Benchwood never completed the renovation work. As of early August 2019, the Azadians had paid to Benchwood a total of \$533,302, inclusive of HST.
- [4] On October 11, 2019, Benchwood registered a claim for lien against the property pursuant to the *Construction Act*, R.S.O. 1990, c.C.30 (“the *Act*”) in the amount of \$201,356. In the claim for lien Benchwood alleged that the last day of work was August 15, 2019.
- [5] The Azadians bring this motion for a declaration that the lien has expired and for an order that the registration of the claim for lien be vacated pursuant to s.45(1) of the *Act*. The Azadians submit that the parties agreed to terminate the Renovation Contract and enter into a new contract in June or July 2019, and therefore any lien for work done pursuant to the Renovation Contract expired long before the registration of the claim for lien. Further, the Azadians submit that the last day worked by Benchwood was August 6, 2019, and therefore the lien expired prior to the registration of the claim for lien in any event.
- [6] Slaven submits that the parties did not terminate the Renovation Contract, and that the last day worked by Benchwood was August 15, 2019. Accordingly, Slaven submits that the lien was preserved by registration before it expired.
- [7] In the alternative, the Azadians request a declaration pursuant to s.47 of the *Act* that the lien is frivolous, vexatious, or an abuse of process, and for an order under s.44(2) that the registration of the claim for lien be vacated upon payment into court of an amount that this court determines to be reasonable. This request is based on the Azadians’ allegation that the amount of the lien is excessive and not supported by the documentation.

THE LAW

- [8] A person who supplies services or materials to an improvement for an owner has a lien upon the interest of the owner in the premises for the price of those services or materials pursuant to s.14 of the *Act*. A lien will expire unless it is preserved under s.34 of the *Act*. Section 34(1)(a) provides that a lien may be preserved at any time before it expires by registration of a claim for lien on the title of the property.
- [9] There are strict time limits for the expiry and preservation of liens. In the present case, there has been no certification or declaration of substantial performance, and therefore pursuant to s.31(2)(b) the lien expires “at the conclusion of the 60-day period next following the occurrence of the earlier of, ... (ii) the date the contract is abandoned or terminated.”

- [55] Still further, the original contract was drafted by Benchwood using a standard form. It is five typed pages long, with Schedules attached, and with handwriting inserted into the form. I do not believe that Slaven would draft the Renovation Contract in such a precise manner and then simply sign a blank page that might contain other terms about the agreement.
- [56] Therefore, I find that the handwritten note was on the page when Slaven signed it and Gail witnessed his signature. Moreover, the note is short and Slaven could have read it completely in a few seconds. The words are very clear. Under those circumstances, I do not accept that Slaven believed that the note was a receipt. I find that Slaven read the note and understood its contents.
- [57] Accordingly, I find that the July 9, 2019, handwritten note is written confirmation of the June 16th oral agreement to change the contractual relationship. The note confirms that the parties agreed to terminate the Renovation Contract, and it supports a finding that they had entered into a new contract. Thus, I find that the Renovation Contract was terminated on June 16, 2019.
- [58] In this decision I will not make any finding as to whether any money was owing on the Renovation Contract as of July 9, 2019. Although the handwritten note refers to this issue, in my view, the very loose arrangements between the parties and the unclear details as to changes, cost overruns, and set-offs limit my ability to determine if any money is in fact owing. The accounting between the parties is a matter for trial.

Has the Lien Expired?

- [59] Because the Renovation Contract was terminated on June 16, 2019, the time for preserving the lien for any work done pursuant to the Renovation Contract lapsed on August 15, 2019. Therefore, the lien for work done pursuant to the Renovation Contract expired. The part of the claim for lien that relates to the Renovation Contract should be discharged.
- [60] Next, having found that Benchwood continued to work on the property under a new contract after June 16, 2019, I must consider whether the lien for any work done pursuant to the new contract has expired. To answer that question, I must determine when the new contract was abandoned or terminated. Again, I find that this is a factual issue that I can resolve on this motion.
- [61] As discussed earlier, I find that Slaven's evidence about the events of June 16, 2019, and July 9, 2019, are implausible. In my view, Slaven's credibility issues extend to his testimony about the last day worked on the job.

- [62] Slaven has no records of the dates he worked on this job or the work that he did on any particular date. There is apparently no Benchwood document that records Slaven's last day on the job. Therefore, one must question how on October 11, 2019, when the claim for lien was registered, Slaven was able to state with confidence that the last day he worked on the job was August 15, 2019, exactly 57 days prior to the registration of the claim for lien. There is no good answer to that question.
- [63] Also, again Slaven's evidence is internally inconsistent. The claim for lien states that August 15, 2019 was the last day worked, but in his affidavit Slaven deposes that August 16, 2019, was the last day worked. There is no explanation for this inconsistency.
- [64] Still further, in his affidavit Slaven provides no information as to the nature of the work that he did on the last day. One would expect some detail about the nature of the work given that Slaven's last day of work is a significant issue in the dispute between the parties. The details, scant as they were, came out on Slaven's cross-examination.
- [65] In my view, on October 11, 2019, when the claim for lien was registered, Slaven knew that the lien may have expired. He did not know when he last worked on the job, and he simply picked a date that was within the lien period, so as to preserve the lien. For these reasons, I cannot accept Slaven's evidence about the last day that he worked on the job.
- [66] The only hard evidence as to the days worked on the job is contained in Benchwood's time sheets. Based on the time sheets, I am prepared to accept that one of Benchwood's employees worked on the job on August 6, 2019. There is no reliable evidence that Benchwood worked on the job thereafter. After August 6, 2019, the Azadians wanted Benchwood to finish the job, but Benchwood had stopped working. I find that by September 4, 2019, the date of the Azadians' lawyer's letter, Benchwood had not returned to the job.
- [67] For these reasons, I find that the work that Benchwood was doing pursuant to the new contract was abandoned on August 7, 2019, the day after the last day on which a Benchwood employee worked on the job. Therefore, the time for preserving the lien for work done pursuant to the new contract lapsed on October 6, 2019. Thus, the lien for this new contract work expired prior to the registration of the claim for lien; that part of the claim for lien should also be discharged.

Is the Lien Frivolous, Vexatious, or an Abuse of Process?

- [68] Given my decision set out above, there is no need for me to consider the alternative issue of whether the lien is frivolous, vexatious, or an abuse of process. There is also no need to determine a reasonable amount to be paid into court to vacate the lien. Moreover, it is

obvious that the parties must engage in more disclosure and accounting before any court could determine what, if any, amount remains owing. Therefore, I decline to make any findings with respect to this issue.

CONCLUSION

- [69] For all of these reasons, I find that the Renovation Contract was terminated on June 16, 2019, at which time the parties entered into a new contract. The new contract was abandoned on August 7, 2019. Therefore, the liens under both the Renovation Contract and the new contract expired prior to the registration of the claim for lien.
- [70] Accordingly, it is ordered that the registration of the claim for lien, and any related certificate of action, be vacated.
- [71] If there are any other issues, including costs, that cannot be resolved, I direct that the party seeking relief shall deliver written submissions to the trial co-ordinator at St. Catharines within 20 days of the release of this decision with responding submissions to be delivered within 10 days thereafter. If no submissions are received within this timeframe, the parties will be deemed to have settled all of the remaining issues as between themselves.

J. R. Henderson J.

Released: December 29, 2020

7 Cal.5th 133
Supreme Court of California.

FILMON.COM INC., Plaintiff and Appellant,
v.
DOUBLEVERIFY INC., Defendant and Respondent.

S244157
|
May 6, 2019

Synopsis

Background: Internet-based entertainment media provider brought action against company which provides authentication services to online advertisers for trade libel, slander, and other business-related torts, alleging it falsely classified provider's websites under the categories "Copyright Infringement-File Sharing" and "Adult Content" in confidential reports to certain clients that subsequently cancelled advertising agreements with media provider. Authentication company filed anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) special motion to strike, claiming the reports addressed issues of widespread public interest. The Superior Court, Los Angeles County, No. BC561987, [Terry A. Green](#), J., granted the motion, and media provider appealed. The Court of Appeal, [13 Cal.App.5th 707](#), [221 Cal.Rptr.3d 539](#), affirmed. Media provider's petition for review was granted.

The Supreme Court, Cuéllar, J., held that under anti-SLAPP statute's catchall provision, courts must consider whether a statement contributes to or furthers the public conversation on an issue of public interest, disapproving of [Rezec v. Sony Pictures Entertainment, Inc.](#), [116 Cal.App.4th 135](#), [10 Cal.Rptr.3d 333](#).

Reversed.

****1158 ***593** Second Appellate District, Division Three, B264074, Los Angeles County Superior Court, BC561987, [Terry A. Green](#), Judge.

Attorneys and Law Firms

Baker Marquart, [Ryan G. Baker](#), [Scott M. Malzahn](#), [Jaime W. Marquart](#), [Christian A. Anstett](#) and [Blake D. McCay](#), Los Angeles, for Plaintiff and Appellant.

Fox Rothschild, [Lincoln D. Bandlow](#), Los Angeles, [Margo J. Arnold](#), Beverly Hills, and Rom Bar-Nissam for Defendant and Respondent.

Davis Wright Tremaine, [Kelli L. Sager](#), [Rochelle L. Wilcox](#), Los Angeles, and [Thomas R. Burke](#), San Francisco, for Motion Picture Association of America, Inc., The Hearst Corporation, Tegna Inc., California News Publishers Association and First Amendment Coalition as Amici Curiae on behalf of Defendant and Respondent.

Opinion

[CUÉLLAR](#), J.

***139 ***594** The Legislature enacted [Code of Civil Procedure section 425.16](#) to address so-called strategic lawsuits against public participation (SLAPP). ([Code Civ. Proc., § 425.16](#) [the anti-SLAPP statute].)¹ This anti-SLAPP statute makes available a special motion to strike meritless claims early in litigation—but only if the claims arise from acts in furtherance of a person's “right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” ([§ 425.16, subd. \(b\).](#)) In a catchall provision relevant to this case, the statute specifies ***140** that such acts include “conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” ([§ 425.16, subd. \(e\)\(4\).](#)) But nowhere does the statute further define these terms.

FilmOn.com Inc. (FilmOn) is a for-profit business entity that distributes web-based entertainment programming. In this case, FilmOn sued DoubleVerify Inc. (DoubleVerify), another for-profit business entity that offers online tracking, verification and “brand safety” services to Internet advertisers. FilmOn alleged that DoubleVerify disparaged its digital distribution network in confidential reports to DoubleVerify's paying clients. DoubleVerify responded by filing an anti-SLAPP motion to strike.

We granted review to decide whether the commercial nature of a defendant's speech is relevant in determining whether that speech merits protection under the catchall provision. To resolve this question, we also clarify how the context of a statement more broadly—including the identity of the speaker, the audience, and the purpose of the speech—informs the same analysis.

What we hold is that the context of a defendant's statement is relevant, though not dispositive, in analyzing whether the statement was made “in furtherance of” free speech “in connection with” a public issue. ****1159** ([§ 425.16, subd. \(e\)\(4\).](#)) In an age of easy public access to previously private information through social media and other means, context allows us to assess the functional relationship between a statement and the issue of public interest on which it touches—deciding, in the process, whether it merits protection under a statute designed to “encourage continued participation in matters of public significance.” ([§ 425.16, subd. \(a\).](#))

In giving effect to this statutory purpose, we find that DoubleVerify's reports—generated for profit, exchanged confidentially, without being part of any attempt to participate in a larger public discussion—do not qualify for anti-SLAPP protection under the catchall provision, even where the topic discussed is, broadly speaking, one of public interest. This is not because confidential statements made to serve business interests are categorically excluded from anti-SLAPP protection. It is instead because DoubleVerify's reports are too tenuously tethered to the issues of public interest they implicate, and too remotely connected to the public conversation about those issues, to merit protection under the catchall provision.

Because the Court of Appeal found DoubleVerify's reports protected under the anti-SLAPP statute, and held that context is irrelevant to the anti-SLAPP analysis under [section 425.16, subdivision \(e\)\(4\)](#), we reverse.

***141 I.**

Internet use has become pervasive in less than a generation, and along with it, advertising through online platforms. (See *****595** Interactive Advertising Bureau, *IAB Internet Advertising Revenue Report* (May 2018) <https://www.iab.com/wp-content/uploads/2018/05/IAB-2017-Full-Year-Internet-Advertising-Revenue-Report.REV2_.pdf> [as of May 2, 2019].)² To ensure their advertising dollars are wisely spent and the ads are placed on sites with content appropriate for their target customers, businesses monitor the websites on which they advertise or may wish to advertise. One company offering such monitoring services—which include collecting and packaging information about a website's content, viewers, and advertising practices—is defendant DoubleVerify.

For its large stable of clients, DoubleVerify gathers and provides information about the websites on which the clients are interested in advertising. The businesses pay for the reports and agree to keep them confidential. In return, they receive from DoubleVerify information on the location of the website's viewers, whether a competitor advertises on the website, where the website displays advertisements, how long the advertisements are shown, and—crucial to this litigation—a description of the

A.

The anti-SLAPP law was enacted “to protect nonprofit corporations and common citizens ‘from large corporate entities and trade associations’ in petitioning government.” (*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 66, 108 Cal.Rptr.3d 466.) Attempting to protect against “lawsuits brought primarily to chill” the exercise of speech and petition rights, the Legislature embedded context into the statutory preamble, “declar[ing] that it is in the public interest to encourage continued participation in matters of public significance.” (§ 425.16, subd. (a).)

In the paradigmatic SLAPP suit, a well-funded developer limits free expression by imposing litigation costs on citizens who protest, write letters, and distribute flyers in opposition to a local project. (See Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, pp. 2–3; Barker, ****1161** *Common-Law and Statutory Solutions to the Problem of SLAPPs* (1993) 26 Loyola L.A. L.Rev. 395, 396.) Identifying the problem as one involving particular litigants, their motivations, and the effects of litigation, the Assembly Committee on Judiciary *****597** observed that approximately 25 percent of SLAPP suits “relate to development and zoning,” while 20 percent “arise out of complaints against public officials and employees.” (Assem. Com. on Judiciary, Analysis of Sen. Bill. No. 1296, *supra*, at p. 3.) The committee recognized that “such lawsuits are often pernicious, masquerading as standard defamation and interference with prospective economic advantage litigation, while really brought by well-heeled parties who can afford to misuse the civil justice system to chill the exercise of free speech ... by the threat of impoverishing the other party.” (*Ibid.*) To curb what it took to be the “disturbing increase” in such lawsuits (§ 425.16, subd. (a)), the Legislature shifted burdens of proof and fees onto the lawsuit filer to “compensat[e] the prevailing defendant for the undue burden of defending against litigation designed to chill the exercise of free speech and petition rights.” (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 328, 212 Cal.Rptr.3d 124, 386 P.3d 788.)

Consistent with the statute's purpose, its text defines conduct in furtherance of the rights of petition and free speech on a public issue not only by its content, but also by its location, its audience, and its timing. (See ***144** § 425.16, subd. (e)(1) [“before a legislative, executive, or judicial proceeding”]; § 425.16, subd. (e)(2) [“in connection with an issue under consideration or review by” a government entity]; § 425.16, subd. (e)(3) [“in a place open to the public or a public forum in connection with an issue of public interest”].) Indeed, we have previously noted that the Legislature “‘equated a public issue with the authorized official proceeding to which it connects,’ ” effectively defining the protected status of the statement by the context in which it was made. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117, 81 Cal.Rptr.2d 471, 969 P.2d 564, italics in original (*Briggs*).)

Admittedly, the catchall provision contains no similar contextual references to help courts discern the type of conduct and speech to protect. (See § 425.16, subd. (e)(4) [“any other conduct in furtherance of the exercise of the constitutional right ... of free speech in connection with a public issue or an issue of public interest”].) But we interpret statutory language within its context, and in light of its structure, analogous provisions, and any other appropriate indicia of its purpose. (See *Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385, 191 Cal.Rptr.3d 551, 354 P.3d 346 [reading the statutory language in the context of its neighboring provisions]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299 [“[T]he words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.”].) Nothing in subdivision (e)(4) or other portions of the statute supports the conclusion that subdivision (e) (4) is the only subdivision where contextual information is excluded from consideration in discerning the type of conduct and speech worthy of procedural protection.

Indeed, that the language of the provision refers to “other conduct in furtherance” supports the inference that this provision encompasses conduct and speech similar to what is referenced in subdivision (e)(1) through (e)(3). (§ 425.16, subd. (e)(4), italics added; see *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342, 64 Cal.Rptr.3d 693, 165 P.3d 488 [explaining that where a statute lists a series of specific categories followed by a catchall category, the catchall is “ ‘restricted to those things that are similar to those which are enumerated specifically’ ”].)

Nor does it seem the Legislature contemplated that outcome when it added [section 425.17, subdivision \(c\)](#). Instead, the relevant legislative history included language observing how the exception allowed certain lobbying activities and marketing to “be viewed in the context of its offering, *just as a speech by a person against the building of a waste facility in the neighborhood.*” (Sen. Judiciary Com., Analysis of Sen. Bill No. 515 (2003–2004 Reg. Sess.) as amended May 1, 2003, pp. 9–10, italics added.) It noted that while the latter “can clearly be seen to have been made in the context of exercising the person’s constitutional right of speech,” the “content and context of the former activities are clearly more in furtherance of business considerations.” (*Id.* at p. 10.)

We do not, as FilmOn urges, sort statements categorically into commercial or noncommercial baskets in analyzing whether they are covered by the catchall provision. We merely conclude that the very contextual cues revealing a statement to be “commercial” in nature—whether it was private or public, to whom it was said, and for what purpose—can bear on whether it was made in furtherance of free speech in connection with a public issue. (§ 425.16, subd. (e)(4).) In other words, context matters under the catchall provision, and commercial context is no exception.

*149 III.

A.

So within the framework of [section 425.16, subdivision \(e\)\(4\)](#), a court must consider the context as well the content of a statement in determining whether that statement furthers the exercise of constitutional speech rights in connection with a matter of public interest. Having established this principle, we now turn to analyzing *how* context should feature in a court’s analysis under the catchall provision, and to applying that framework to the facts of this case.

Our courts have ably distilled the characteristics of “a public issue or an issue of public interest.” (§ 425.16, subd. (e)(4); see ****1165** [Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO](#) (2003) 105 Cal.App.4th 913, 919–924, 130 Cal.Rptr.2d 81 (*Rivero*) [describing three non-exclusive categories of public interest]; [Weinberg v. Feisel](#) (2003) 110 Cal.App.4th 1122, 1132–1133, 2 Cal.Rptr.3d 385 (*Weinberg*) [describing additional attributes of protected conduct].) But they have struggled—understandably—to articulate the requisite nexus between the challenged statements and the asserted issue of public interest—to give meaning, in other words, to the “in connection with” requirement. (§ 425.16, subd. (e)(4).)

Most often, courts strive to discern what the challenged speech is really “about”—a narrow, largely private dispute, for example, or the asserted issue of public interest. (See [Bikkina v. Mahadevan](#) (2015) 241 Cal.App.4th 70, 85, 193 Cal.Rptr.3d 499 [defendant’s speech was “about falsified data and plagiarism in two scientific papers, ***602 not about global warming”]; [World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.](#) (2009) 172 Cal.App.4th 1561, 1572, 92 Cal.Rptr.3d 227 [defendants’ attempts to solicit competitor’s agents and customers were not “about” the public issues of “workforce mobility and free competition” or “the pursuit of lawful employment”]; [Mann v. Quality Old Time Service, Inc.](#) (2004) 120 Cal.App.4th 90, 111, 15 Cal.Rptr.3d 215 [defendants’ statements “were not about pollution or potential public health and safety issues in general, but about [the plaintiffs’] specific business practices”].) This focus on discerning a single topic of speech is less than satisfying; if the social media era has taught us anything, it is that speech is rarely “about” any single issue.

The inquiry under the catchall provision instead calls for a two-part analysis rooted in the statute’s purpose and internal logic. First, we ask what “public issue or [] issue of public interest” the speech in question implicates—a question we answer by looking to the content of the speech. (§ 425.16, subd. (e)(4).) Second, we ask what functional relationship exists ***150** between the speech and the public conversation about some matter of public interest. It is at the latter stage that context proves useful.

The travails of the lower courts demonstrate that virtually always, defendants succeed in drawing a line—however tenuous—connecting their speech to an abstract issue of public interest. (See [Consumer Justice Center v. Trimedica International, Inc.](#) (2003) 107 Cal.App.4th 595, 601, 132 Cal.Rptr.2d 191 [defendants’ advertisements of a [breast enlargement](#) product were

not “about the general topic of herbal supplements” but were instead “commercial speech about the specific properties and efficacy of a particular product”]; *Rivero, supra*, 105 Cal.App.4th at pp. 919, 924, 130 Cal.Rptr.2d 81 [rejecting union's argument that, in publishing statements heralding suspension of a custodial supervisor, it was commenting on the abusive supervision of employees throughout a publicly financed educational institution].)

DoubleVerify is no exception. As it does now, DoubleVerify argued before the appellate court that its reports “concerned” or “addressed” topics of widespread public interest: the presence of adult content on the internet, generally, and the presence of copyright-infringing content on FilmOn's websites, specifically. To support its argument that FilmOn's alleged copyright infringement is a matter of public interest, DoubleVerify offered evidence that FilmOn has been subject to media reports and litigation over its streaming model.⁶ The Court of Appeal agreed, finding that DoubleVerify's reports were made “in connection with” matters of public interest because the company's tags “identif[ied]” content that fell within categories of broad public interest. (*FilmOn, supra*, 13 Cal.App.5th at p. 720, 221 Cal.Rptr.3d 539.)

But the catchall provision demands “some degree of closeness” between the challenged statements and the asserted public interest. (*Weinberg, supra*, 110 Cal.App.4th at p. 1132, 2 Cal.Rptr.3d 385.) So even if adult content on the Internet and FilmOn's ****1166** particular streaming model are in fact issues of public interest, we agree with the court in *Wilbanks* that “it is *****603** not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.” (*Wilbanks, supra*, 121 Cal.App.4th at p. 898, 17 Cal.Rptr.3d 497; see also *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280, 55 Cal.Rptr.3d 544 [“[t]he fact that ‘a broad and amorphous public interest’ can be connected to a specific dispute” is not enough].)

What it means to “contribute to the public debate” (*Wilbanks, supra*, 121 Cal.App.4th at p. 898, 17 Cal.Rptr.3d 497) will perhaps differ based on the state of public ***151** discourse at a given time, and the topic of contention. But ultimately, our inquiry does not turn on a normative evaluation of the substance of the speech. We are not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant—through public or private speech or conduct—participated in, or furthered, the discourse that makes an issue one of public interest. (See *All One, supra*, 183 Cal.App.4th at pp. 1203–1204, 107 Cal.Rptr.3d 861 [finding the “OASIS Organic seal” did not “contribute to a broader debate on the meaning of the term ‘organic’ ”]; *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 375, 127 Cal.Rptr.3d 903 [finding the defendant's conduct “directly related” to an issue of public interest because it “served th[e] interests” of preventing child abuse and protecting children].)

Contrary to DoubleVerify's arguments, the *Wilbanks* rule adds no additional requirement beyond those already in the catchall provision. It is instead a reasonable interpretation of the provision's existing requirement that statements be made “in connection with” an issue of public interest—an interpretation informed by the statutory purpose explicitly articulated in the preamble to the anti-SLAPP statute. Section 425.16, subdivision (a) “declares that it is in the public interest to encourage continued participation in matters of public significance.” Though we have cautioned that statutory preambles do not impose substantive requirements (*Briggs, supra*, 19 Cal.4th at p. 1118, 81 Cal.Rptr.2d 471, 969 P.2d 564), our task when interpreting legislation is to effectuate the statutory purpose—and “statements of purpose in a statute's preamble can be illuminating,” particularly if a statute is ambiguous (*Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098, 1103, 96 Cal.Rptr.3d 723).

We adopted the same approach in *Briggs*, where we construed subdivision (e)(1) and (e)(2) of the anti-SLAPP statute. (*Briggs, supra*, 19 Cal.4th at p. 1118, 81 Cal.Rptr.2d 471, 969 P.2d 564.) We explained in *Briggs* that although the statutory preamble did not impose “an across-the-board ‘issue of public interest’ pleading requirement,” we understood the Legislature to equate statements made in certain official proceedings with matters of “public significance.” (*Ibid.* [“Any matter pending before an official proceeding possesses some measure of ‘public significance’ owing solely to the public nature of the proceeding....”].) Likewise, here, the preamble's reference to “continued participation” in matters of public significance (§ 425.16, subd. (a)) adds no substantive requirement to a defendant's burden to show conduct “in furtherance of” free speech “in connection with a public issue or an issue of public interest” (§ 425.16, subd. (e)(4)). The two are instead coextensive: a statement is made “in connection with” a public issue when it contributes to—that is, “participat[es]” in or furthers—some public conversation on the issue. (See

ANTI-SLAPP ADVISORY PANEL

REPORT TO THE ATTORNEY GENERAL

October 28, 2010

Anti-SLAPP Advisory Panel

INTRODUCTION

The Anti-SLAPP Panel

[1] Strategic litigation against public participation (SLAPP)¹ has been defined as a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest. SLAPPs use the court system to limit the effectiveness of the opposing party's speech or conduct. SLAPPs can intimidate opponents, deplete their resources, reduce their ability to participate in public affairs, and deter others from participating in discussion on matters of public interest.²

[2] The Attorney General created an Advisory Panel on Anti-SLAPP legislation to advise him as to how the Ontario justice system may prevent the misuse of our courts and other agencies of justice, without depriving anyone of appropriate remedies for expression that actually causes significant harm.³ The Panel was chaired by Dean Mayo Moran of the Faculty of Law, University of Toronto, and was also composed of Peter Downard, a partner of the Fasken Martineau law firm, and Brian MacLeod Rogers, a media lawyer in Toronto. This document is the report of the Advisory Panel.

[3] At the outset of its work, the Panel considered a collection of material assembled by the Ministry of the Attorney General, consisting of legal articles, relevant statutes from other jurisdictions and advocacy documents.⁴ The creation of the Panel was announced by a press release and background document⁵ that invited the public to make submissions to the Panel. In addition, the Panel created a list of individuals and organizations likely to have views on the topic and invited them to make submissions. The Panel received written submissions from 31 groups and individuals. It heard oral presentations from eight groups or individuals. A list of those who expressed their views appears at the end of this Report.

[4] Participation by members of the community in matters of public interest is fundamental for democratic society. The very fabric of democracy is woven daily from the acts of citizens who engage in public discussion and contribute in countless ways to creating a civil society alive to the interests and rights of its members. It will always be important to recognize and protect these activities, but more than ever it seems crucial to encourage public participation as voter turnouts decline, society's needs become ever more complex and individuals feel increasingly powerless to effect meaningful change. If anything, public activities by individuals and groups within the community are even more essential in the face of such realities, and yet undertaking them has never been more challenging.

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[22] The Panel intends that the new legislation will be effective and balanced. It recognizes that persons may properly seek legal protection from harm to reputations and to economic and other personal interests that may result from wrongful communications. As a consequence, the Panel is inclined to avoid using the acronym “SLAPP” in the new statute, as its pejorative tone may seem to prejudice the merits of cases subject to review under it. This is especially the case because the Panel recommends, below, that the key evaluation should be the effect, and not the purpose, of the legal action under review. The value of public participation, however, and the early disposition of litigation which inappropriately hampers it, remain essential to the discussion.

[23] The Panel believes that the importance of the legislative message in favour of public participation supports a free-standing statute, with a title such as the “Protection of Public Participation Act”. It may be, however, that the content of that statute consists of amendments to the *Courts of Justice Act*, the *Statutory Powers Procedure Act* and the *Libel and Slander Act* to make the changes proposed in this Report.

[24] With this background in mind, the Report now turns to the terms of reference that the Panel received from the Attorney General.

Issue 1: A test for courts to quickly recognize a SLAPP suit

[25] Devising a test for identifying litigation that will unduly hamper public participation for which the protection of the statute may be invoked raises two issues. First, it must be right in principle. Second, it must be easy to recognize, both for the parties who are considering launching, or who are faced with defending, such a suit (i.e. potential plaintiffs and actual defendants), and for the judges who are called on to decide if the statutory remedy applies.

A new right?

[26] Some groups proposed to the Panel that the law should create a new legal right to public participation that would be protected by the new statute. Some of the impetus for this submission lay in the structure of several American anti-SLAPP laws that expressly protect the exercise of the (U.S.) constitutional right of citizens to petition government. Since Canadian law has no direct equivalent to this right, it is said that the new statute should create a counterpart.

[27] The Panel firmly supports the right of public participation, subject to limits of responsible behaviour. However, the Panel does not recommend the creation of a new legal right. In the Panel’s view, Canadians’ constitutional freedom of expression, and the recognized importance of constitutional values for

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the development of the law applicable in civil litigation, provide a firm foundation for the procedural remedy recommended in this Report. The Panel proposes a new procedure to better enforce a body of existing rights, which will better protect and promote freedom of expression on matters of public interest while having regard to the values at stake on both sides of cases involving such expression.

A narrow or a broad definition?

[28] Even without creating a new 'right', it is necessary to decide how much activity and what kinds of activity should be protected by the new remedy. As mentioned, some American statutes limit their protection to petitions to government. Some of the submissions to the Panel, such as that of the Ontario Bar Association, recommended creating a relatively narrow right such as 'communications made, in good faith, to influence actual or possible government action', in order to assist the speedy disposition of the appropriate cases. In contrast, other submissions, such as that of the Canadian Civil Liberties Association, recommended a very broad definition of the protected activity.

[29] The Panel prefers a broad scope of protection. It does not consider it wise to distinguish between 'public' and 'private' forums of discussion. A conversation among neighbours about a new development and a communication made to influence government both involve expression on matters of public interest. Protecting only communication that targets government is likely to be too narrow. A better test, in the Panel's view, is whether expression is on a matter of public interest. The law has many rules that depend on an evaluation of the public interest, and therefore, the term has a meaning that is traditionally ascertainable in law. This scope of protection is also consistent with recent Supreme Court of Canada case law. For instance, in 2009, the Supreme Court created a defence against defamation actions that applies to 'responsible communication on matters of public interest'.¹² In 2008, the Supreme Court clarified the defence of fair comment, so as to protect comment on a matter of public interest where a person could honestly express the comment in the circumstances.¹³

[30] It seems likely that these particular defences may not apply to all situations in which the new remedy should be available. The communications that need protection from a SLAPP suit may be in the nature of advocacy, which is by definition one-sided. The defence of 'responsible communication' most clearly applies to balanced and verified factual accounts. Similarly, not all suits alleged to be SLAPPs involve comment, fair or otherwise. Further, not all such suits are based on defamation.

[31] While a narrower test may be easier to apply, it could also create significant problems in deciding where to draw the line. Further, the broader test

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will ensure that the full scope of legitimate participation in public matters is made subject to the special procedure the Panel recommends. In the light of the variety of instances in which legitimate public participation may arise, an appropriate protection of public participation should be established on a broad foundation.

Purpose or effect?

[32] Many submissions to the Panel focused on improper motives a plaintiff may have for bringing an action. These may include attempts to punish the defendant for speaking out, to make the defendant stop its criticism, to intimidate others into silence, to give credibility to threats of suit against critics and, more broadly, to silence public debate on matters of public interest.

[33] For example, the British Columbia statute provided for a remedy “if a principal purpose for which the proceeding or claim was brought or maintained is an improper purpose.”¹⁴ The stated purpose of the British Columbia statute is to encourage public participation and to discourage persons from bringing or maintaining proceedings or claims for an improper purpose.¹⁵ It contains a number of indicators of an improper purpose. The Uniform Prevention of Abuse of Process Act includes in its notion of abuse of process “an attempt to restrict public participation by any person.”¹⁶ Quebec’s *Code of Civil Procedure* provides a power to impose sanctions for improper use of procedure, which includes “an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.”¹⁷

[34] The Panel does not believe that the special procedure it recommends should focus on the purpose of the litigation. Judging the motive of a plaintiff is likely to be difficult, and often impossible, in an expedited proceeding. In the Panel’s view, a finding of bad faith or improper motive should not be necessary to dismiss an action without substantive merit brought against expression on a matter of public interest. In addition, the need for expedited review of such actions has led the Panel to recommend (in the next section of this Report) that the review be conducted on the basis of a paper record and oral argument. In the Panel’s view, a focus upon the presence or absence of bad faith or an improper motive, in addition to being unnecessary, is not well suited to expedited adjudication.

[35] The Panel prefers to make the threshold test for application of the special procedure a consideration of the effect that the action is likely to have on expression on matters of public interest. If the action is likely to have an adverse effect on the ability of the defendant or others to participate in discussions on matters of public interest, the special procedure should apply. This question does

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not require the judge to read anyone's mind; it is more readily supported by evidence.

Balancing interests

[36] The fact that a legal action may have an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff's action from proceeding. The protection and promotion of such expression should not be a cover for expression that wrongfully harms reputational, business or personal interests of others.

[37] Conversely, the fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed. If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve. The value of public participation would make any remedy granted to the plaintiff an unwarranted incursion into the domain of protected expression. In such circumstances, the action may also be properly regarded as seeking an inappropriate expenditure of the public resources of the court system. Where these considerations clearly apply, the court should have the power to dismiss the action on this basis.

[38] As a result, the Panel proposes a test with several steps:

- i) Does the expression that is the subject of the lawsuit involve a communication on a matter of public interest? The defendant should have the burden of proving this to the court on the balance of probabilities, failing which the special procedure will have no application.
- ii) If the subject matter of the action is shown by the defendant on a balance of probabilities to be communication on a matter of public interest, the onus should shift to the plaintiff to show that:
 - a. On the factual record before the court, the plaintiff's claim has substantial merit; and
 - b. There are substantial grounds to believe that the defendant has no valid defence.

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attention of the Law Society could be drawn to the lawyers' conduct now. It must also be appreciated that lawyers have a professional duty to be fearless advocates for their clients' interests. That is not a role that should be lightly interfered with. The mere dismissal of an action should not in itself be sufficient to trigger adverse professional consequences for a lawyer.

Issue 3: Appropriate limits to the protection of anti-SLAPP legislation

[56] As noted earlier, the Panel recommends a balanced remedy for responsible public participation. The limits are essentially that the expressive activity must be directed to a matter of public interest and must not cause the plaintiff substantial harm that outweighs the public interest in free expression on such matters.

[57] The Panel does not favour setting out other limits on protected expression. The Uniform Act refers to 'lawful communication or conduct'.²¹ The Panel notes that the existence of the lawsuit itself suggests that the communication or conduct may not be lawful because it is a civil wrong (tort). Presumably the Uniform Act means to say 'otherwise lawful', apart from the allegations of the action.

[58] The B.C. Act excluded from protection communication or conduct that was considered undesirable for a number of reasons.²² It did not apply to communication:

- in respect of which an information has been laid or an indictment has been preferred in a public prosecution;
- that constitutes a breach of the *Human Rights Code*;
- that contravenes any order of any court;
- that cause damage to or destruction of real property or personal property;
- that constitutes trespass to real or personal property;
- that is otherwise considered by the court to be unlawful or an unwarranted interference by the defendant with the rights or property of a person.

[59] The Panel prefers a more flexible approach to the harm that may be caused by the communication. Its test requires the plaintiff to show that it has suffered significant harm from the communication. A technical trespass or even nominal property damage may not require a halt to public participation. The technical lawfulness of the activity is not the key point. It should be up to the court in each case to weigh the competing interests of the parties and the public interest, as courts are often called to do in other cases. Courts by definition are devoted to the rule of law, and can be trusted to ensure that truly harmful lawless behaviour is not encouraged in the name of public participation.

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that larger, more sophisticated (or better legally advised) media would not. In the Panel's view this distinction is untenable. In principle, the size of an organization should not be determinative of its access to a legal procedure intended to protect legal values important to all. The practical significance of providing special protection to smaller or local media outlets may also in many instances be modest, given the widespread ownership of such Ontario media outlets by large corporate conglomerates.

- [64] A defendant media organization may have difficulty in arguing that a plaintiff's action should be dismissed on the basis that the action involves insignificant harm to the plaintiff, where the plaintiff's claim is based on a publication that the media organization has disseminated widely. Nonetheless the Panel believes that if the media defendant's publication relates to a matter of public interest, it should have the opportunity of pursuing a remedy through the proposed special procedure where appropriate.

Issue 5: Methods to prevent abuse of anti-SLAPP legislation

- [65] A number of the anti-SLAPP statutes in the United States have been used in cases that were not anticipated by their drafters. For example, corporations sued by public interest organizations for violating privacy rules have defended on the ground that their right to communicate was being infringed, and thus that the suit was subject to the statutory remedies. Even governments have tried to use such laws to defeat lawsuits aimed at making them comply with other legislation, on the ground that they (the governments) were acting in the public interest.

- [66] As a result, some legislation has had to be amended over time, in a kind of contest between the legislatures trying to protect public interest groups on one side, and on the other, counsel for corporate and other institutional interests seeking loopholes or opportunities in the statutes. California's statute has been amended four times in the past decade.²³

- [67] Here too the Panel does not recommend special measures to prevent abuse. As under Issue 4 above, it believes that the limits to the application of the new remedies – that the defendant has to prove that it is communicating on a matter of public interest, and that the action may continue after review – will suffice to keep abuse to a minimum. The legislation will include a clear statement of its purpose, and latitude will be provided to the sound judgement of the courts, including the costs regime discussed above.

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these suits. The question arises whether this is a way of avoiding the general prohibition against municipal libel actions. The cases almost by definition involve matters of public interest, and the resources of an individual or ratepayers' group against a municipal government funding an individual politician's lawsuit are likely to be unequal.

- [92] The Panel is not prepared to recommend a blanket prohibition on such suits as part of the law of defamation, however. It is prepared to leave such suits to its general remedy for public participation.

Conclusion

- [93] The Panel believes that its recommendations can provide a useful and economical way to reduce the incidence of lawsuits which have an undue adverse impact on public participation. The measures the Panel proposes should encourage freedom of expression on matters of public interest, and discourage use of the courts in ways that unduly limit that freedom. The recommendations are straightforward and are readily applicable to many different situations involving a variety of parties.

- [94] The Panel thanks the Attorney General for the opportunity to engage with this fascinating and important topic. It especially thanks the many individuals and groups that took the time to make submissions on all sides of the issues. They took an opportunity to engage in public participation and did so constructively and very helpfully.

¹ An overview of the phenomenon, with case examples, along with a legal analysis, was published by the Public Interest Advocacy Centre in 2004: "Corporate Retaliation Against Consumers", http://www.piac.ca/consumers/corporate_retaliation_against_consumers.

² Uniform Law Conference of Canada, "Strategic Lawsuits against Public Participation (SLAPPs) (and other abusive lawsuits)" (2008) at 1, online: <http://www.ulcc.ca/en/poam2/SLAPP%20Report.pdf>. ("ULCC Report")

³ Ministry of the Attorney General, *Anti-SLAPP Advisory Panel*, online: http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/ ("Ministry web site")

⁴ Ministry web site, note 3. See the background material and the terms of reference.

⁵ Ministry web site, note 3. See the Ministry's backgrounder document for terms of reference and information about Panel members.

⁶ Environmental Commissioner of Ontario, "Building Resilience: Annual Report 2008 – 2009," 2009, http://www.eco.on.ca/eng/uploads/eng_pdfs/2009/ar2008.pdf at 24.

⁷ Lawyers' Professional Indemnity Company (LawPRO), "Risky business: Pitfalls in practice today" (2010) 9:2 LawPRO Magazine 1 at 3-4, online: http://www.practicepro.ca/LAWPROMag/LawPROMagazine9_2_Sep2010.pdf.

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⁸ *Courts of Justice Act*, R.S.O. 1990, c. C.43 s. 33.1(2), enacted by S.O. 1994, c. 12, s. 13; s. 140(1), enacted by S. O. 1990, c. C.43, s. 140 (1); s. 140(5), enacted by S. O 1990, c. C.43, s. 140 (4, 5); s. 106, enacted by S. O 1990, c. C.43, s. 106.

⁹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 20, enacted by R.O. 284/01, s. 6; Rule 21, enacted by R.O. 1990, Reg. 194, r. 21.01 (3); Rule 25, enacted by R. O. 1990, Reg. 194, r. 25.11. Rule 20.04 provides that the court shall grant summary judgment if “the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.” Rule 21.01(3)(d) provides that a defendant may move to have an action stayed or dismissed on the ground that “the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.” Rule 25.11 provides that the court may strike out a pleading or other document if the pleading or other document is “scandalous, frivolous, or vexatious” or “an abuse of the process of the court.”

¹⁰ ULCC Report, note 2, at 4.

¹¹ Ministry web site, note 3. Citations of and links to these statutes appear on the site.

¹² *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII); *Quan v. Cusson*, 2009 SCC 62 (CanLII).

¹³ *WIC Radio v Simpson*, 2008 SCC 40 (CanLII). The Court here underlined the need for the common law to respect Charter values of freedom of expression, but also of reputation.

¹⁴ *Protection of Public Participation Act*, S.B.C. 2001, c. 19, s. 5(1)(b) (“the B.C. Act”) , repealed by the *Miscellaneous Statutes Amendment Act, 2001*, S.B.C. 2001, c. 32, s. 28 on August 16, 2001.

¹⁵ The B.C. Act, subsections 1(2) (definition) and 2(a) (purpose).

¹⁶ Uniform Law Conference of Canada, *Uniform Prevention of Abuse of Process Act*, 2010, s. 2, definition, clause (e), online:

http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/uniform_abuse_of_process_act.asp

(“Uniform Act”).

¹⁷ *Code of Civil Procedure*, R.S.Q. c. C-25 s. 54.1, enacted by S.Q. 2009 c. 12, s.2.

¹⁸ See, for example, *Bonnard v. Perryman*, [1891-94] All E.R. Rep. 965 at 968 (C.A.), per Lord Coleridge C.J.; *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp.*, [1975] O.J. No. 539, 7 O.R. (2d) 261 at 261-262 (Ont. Div. Ct.), per Stark J.; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] S.C.J. No. 31, [1998] 1 S.C.R. 626 at paras. 48-49 (S.C.C.), per Bastarache J.; *Rapp. v. McClelland & Stewart Ltd.*, [1981] O.J. No. 3145, 34 O.R. (2d) 452 at 456 (Ont. H.C.J.), per Griffiths J.; *Chevalier Chrysler v. Hastings-James*, [2003] O.J. No. 5049, 2003 CanLII 27672 (Ont. S.C.J.).

¹⁹ Bill 138, *Protection of Public Participation Act*, 1st session, 39th Leg, Ontario, 2008.

²⁰ Uniform Act, s. 5(2)(3).

²¹ Uniform Act, s. 2 (definition of ‘public participation’).

²² B.C. Act s. 1(1) (definition of ‘public participation’).

²³ *Code of Civil Procedure*, California, s. 425.16-18. See Jerome I. Braun, “California’s Anti-SLAPP Remedy After Eleven Years” (2002) 34 McGeorge L. Rev. 731 at 735.

²⁴ *Grant v. Torstar Corporation*, above, note 12 at paras. 28-29, per McLachlin C.J.C.

²⁵ See *WIC Radio Ltd. v. Simpson*, 2008 SCC 40.

²⁶ Above, note 12, at para. 33, per McLachlin C.J.C.

²⁷ Above, note 12.

²⁸ See *Grant v. Torstar Corp.*, above, note 12, at para. 30, per McLachlin C.J.C.: “Both statements of opinion and statements of fact may attract the defence of privilege, depending on the occasion on which they were made. Some ‘occasions’, like Parliamentary and legal proceedings, are absolutely privileged. Others, like reference letters or credit reports, enjoy ‘qualified’ privilege, meaning that the privilege can be defeated by proof that the defendant acted with malice.... The defences of absolute and qualified privilege reflect the fact that ‘common convenience and welfare of society’ sometimes requires untrammelled communications.... The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.”

²⁹ In a series of decisions made some 50 years ago, however, the Supreme Court of Canada held that publication in the media was “publication to the world” that would invalidate any defence of qualified

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privilege. As observed in *Grant v. Torstar Corp.*, supra fn. 23, this approach reflected “the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression” (per McLachlin C.J.C., at para. 34).

³⁰ See the decision of the OMB in the Big Bay Point case: *In the matter of s. 97(1) of the Ontario Municipal Board Act ... in respect to applications for costs...*, Order PL050290, January 30, 2009, online: <http://www.omb.gov.on.ca/e-decisions/pl050290-Jan-30-2009.pdf>. (“OMB Decision”)

³¹ OMB decision, note 24, at 4.

³² See <http://www.ontla.on.ca>, Committees, Committee Transcripts, Standing Committee on Government Agencies, 2009. Agency Review: Ontario Municipal Board. 2009-Sep-08. Response to question by Mr Stan Floras at approximately 10:20 a.m.

³³ For example, it might not be appropriate to allow the subject of a professional discipline decision to resist a costs award on the ground that his or her public participation might be affected.

³⁴ *Defamation Act*, 2005, Australia (Qld.), Act No. 55. This Act is a version of a Uniform Act that is in force widely in Australia.

³⁵ *Halton Hills (Town) v. Kerouac*, (2006), 80 O.R. (3d) 577 and *Montague (Township) v. Page*, (2006), 79 O.R. (3d) 515.

³⁶ For example, “Maybe You Heard About The Lawsuit”, Aurora Citizen, October 15, 2010: <http://auroracitizen.ca/2010/10/15/maybe-you-heard-about-the-lawsuit/>.

Submissions

Environmental Groups

- Ecojustice and the Canadian Environmental Law Association
- Greenpeace
- Environmental Defence and multiple groups
- Environmental Defence
- Environmental Commissioner of Ontario

Development Groups

- Building Industry and Land Development Association
- Land Use Council
- Durham Region Federation of Agriculture

Community Associations

- Hintonburg Community Association
- Non-Smokers’ Rights Association
- Stoneybrook Heights/Uplands Residents Association
- Federation of North Toronto Residents’ Association
- One other residents association

Public Interest Groups

- Canadian Civil Liberties Association
- Public Interest Advocacy Centre
- Registered Nurses’ Association of Ontario

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- Institute of Canadian Justice

Legal Groups and Law Firms

- Ontario Bar Association
- Ontario Trial Lawyers Association
- ADR Institute of Ontario
- Davies Ward Phillips & Vineberg LLP

Individuals

- Andrea Horwarth. MPP (re Protection of Public Participation Act, 2010)
- Richard Delaney – Delaney and Associates Inc.
- Henry Freitag
- 9 other individuals

Petition

- University professors

Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada

**Written by
Susan Lott**

**Research by
Rolf Warburton and Brook Land-Murphy**

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Executive Summary

This report examines the phenomenon of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada. SLAPPs are lawsuits or the threat of a lawsuit, directed against consumers or individual citizens when they publicly criticize products or services or advocate for change. The lawsuit usually takes the form of an action for defamation.

The purpose of a SLAPP is to intimidate the target of the lawsuit into silence. By moving a dispute into the legal arena, the consumer is immediately placed on the defensive for exercising a right to complain and faced with the prospect of legal costs as well as potential liability if the suit is lost. As a result, many SLAPPs may fly under the public radar, as the threat of a SLAPP may intimidate its target into withdrawing the public complaint or criticism.

The report describes a number of lawsuits or threats of a lawsuit in Canada that fit the definition of a SLAPP. This evidence suggests that SLAPPs are very much a Canadian phenomenon and have been initiated against consumers for public criticism of products or services as well as against individuals for advocating on environmental issues.

The report briefly analyses the constitutional questions raised by SLAPPs and draws comparisons to the constitutional and judicial treatment of SLAPPs in the United States. Targets of SLAPPs and some legal analysts have suggested that SLAPPs infringe on the freedom of expression rights outlined in the Canadian *Charter of Rights and Freedoms*. Unlike the United States, legal actions between non-governmental parties (which is the form of most SLAPPs) have not had the protection of the *Charter*. The report examines two cases that have made strong statements about the consumer's right of free speech, suggesting that there may be a widening of the application of the *Charter* to cases involving consumer free speech.

A key element of the proper functioning of the marketplace is the ability of consumers to freely exercise their rights to choose between products and services and to express their satisfaction or dissatisfaction with those same products or services through consumer complaint mechanisms. This is one major way in which products or services succeed or fail in the market. SLAPPs effectively undermine the marketplace by strangling or silencing the consumer's ability to properly participate in the market.

The Supreme Court has recently affirmed rights of freedom of expression of consumers “to criticize a product or make negative comments about the services supplied” and has further affirmed that this right may take the form of “counter-advertising” by the consumer in *Roger Guignard v. City of Saint-Hyacinthe*.²

This decision considered the important principle of freedom of expression, which is usually not available for consideration in most SLAPP suits. *Guignard* involved a government actor as a party to the dispute, which meant that the freedom of expression provisions of the *Canadian Charter of Rights and Freedoms*³ could be considered in this case. However, most SLAPPs involve common law litigation between private parties, where the *Charter* has been deemed not to apply.⁴

Unfortunately this decision does not appear to have had any influence on corporate retaliation against consumers exercising their right to complain, as some of the Canadian SLAPP examples indicate.

² *Roger Guignard v. City of Saint-Hyacinthe*, [2002] SCC 14 [Guignard].

³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].

⁴ See *R.W.D.S.U. v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573 and see discussion *infra* this report re Canadian constitutional protections and SLAPPs.