

CANADA / JUDGMENT

Kim v. Norton Rose Fulbright Canada LLP

2023 BCSC 1251

COURT

Supreme Court of British Columbia

DECIDED

20 July 2023

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2023 BCSC 1251 Kim v. Norton Rose Fulbright Canada LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kim v. Norton Rose Fulbright Canada LLP,

2023 BCSC 1251

Date: 20230720

Docket: S213894

Registry: Vancouver

Between:

Grant Kim, Yasuyo Yamazaki and Stephen Willey

Plaintiffs

And

Norton Rose Fulbright Canada LLP and Andrew McCoomb

Defendants

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

September 12-16 and

December 2, 2022

Written Submission of the Defendants:

July 6, 2023

Written Submission of the Plaintiffs:

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Place and Date of Judgment:

Vancouver, B.C.

July 20, 2023

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Introduction

- [1] The defendants seek an order:
- a) Striking out the Notice of Civil Claim pursuant to Rule 9-5(1)(a), (b) or (d) of the Supreme Court Civil Rules, without leave to amend; or, in the alternative,
 - b) Dismissing this action pursuant to s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA].

- [2] This application raises issues of:
- a) The scope of absolute privilege in the law of defamation;
 - b) What constitutes an "expression relate[d] to a matter of public interest" for purposes of s. 4(1)(b) of the PPPA; and
 - c) The balancing exercise mandated by s. 4(2)(b) of the PPPA, which requires the court to consider whether the public interest in continuing this defamation action outweighs the public interest in protecting the expression that underlies this action.
- [3] I must also consider whether it is appropriate to join an application pursuant to Rule 9-5(1) with an application under s. 4 of the PPPA, given that s. 5(1) of the PPPA provides that if a s. 4 application is made, "no party may take further steps in the proceeding" until the PPPA application (including any appeals) has been finally resolved.

Background Facts

- [4] This is one of a number of court proceedings arising from a heated battle for control of a British Columbia public company known as Axion Ventures Inc. ("Axion"). That battle has played out both in the boardroom and in this court since mid-2020. Given the multiple proceedings, I will refer to the present action as the "Defamation Action".

Axion Ventures

- [5] Axion was originally incorporated in 2011. It was given its current name in May 2016, at which time it became listed on the TSX Venture Exchange (under the symbol AXV). At about that time, Todd Bonner became a director and chair of the company.
- [6] Some of the key background was summarized by Justice Ross in a judgment he gave in a related oppression proceeding (Vancouver Action No. S209078, to which I will refer as the "Oppression Proceeding"), which is indexed at *Bonner v. Axion Ventures Inc.*, 2021 BCSC 963 (the "Initial Oppression Judgment"):
- [12] Axion is in the business of developing videogames and related technologies. It develops games and technologies on its own as well as through subsidiaries and joint ventures. It also maintains share holdings in other innovative technology companies. As discussed below, one of the technologies that it is developing relates to "In Game Advertising" or "IGA".
- [13] The petitioner Mr. Bonner is the leader of one side in the proxy fight. He is the co-founder and a director of Axion. He was the chief executive officer ("CEO") from May 26, 2016, until July 14, 2020. He has standing to bring the application for an independent chair because of his position as a director of Axion.

- [14] Mr. Bonner does not own shares in Axion. However, he has close relationships with a number of shareholders and creditors of Axion. In another proceeding, he alleges that he was wrongfully terminated from his position as CEO by the board at a meeting on July 14, 2020.
- [15] The petitioner Ms. Nithinan Boonyawattapisut is Mr. Bonner's wife. In the pleadings and submissions of both sides she is referred to by the name "Jess". For ease of reference, I will use that name in these reasons. I mean no disrespect by using this form of address. The petitioners allege that Jess beneficially holds, or held, a large shareholding position in Axion through a companies named Cern One and Red Anchor. Cern One and Red Anchor have loaned a significant portion of the \$9 million to Axion. Those amounts comprise the "Bonner Family Loans" which I describe in more detail below. The respondents dispute Jess's shareholding in those companies. Other litigation revolves around that issue.
- [16] In addition, Jess held a controlling interest in a privately held company, "Hot Play, Inc.". According to the petitioners, Hot Play, Inc. was also involved in the development of In Game Advertising technology.
- [17] The respondents Grant Kim, Stephen Willey and Yasuyo Yamazaki are directors of Axion. They represent the opposing side in the proxy fight.
- [18] There was a further director of Axion, Mr. Obata. He resigned in 2020 and is not a party to this litigation.
- [7] For convenience, I will adopt the same terminology as did Ross J.
- [8] It appears that Axion functions primarily as a holding company, with specific business activities undertaken by various subsidiaries and joint ventures. While the extent of Axion's ongoing interests in some of these is in dispute, they appear to include:
- a) Axion Games Limited, a Cayman Islands company, in which it asserts a 54.22% interest and which has an online video game development and publishing business;
 - b) Axion Interactive Inc., a BVI company said to be wholly owned by Axion, which holds interests in a number of entities, including a 60% interest in a joint venture with a Thai company known as True Corporation to develop a video game academy and development studio in Thailand, for which purposes the joint venturers established a Thai company known as True Axion Interactive Ltd;
 - c) Longroot Limited, another Cayman Islands company, in which Axion has asserted a 55% interest, and which indirectly owns certain portals established to facilitate the raising of funds through the offering of digital assets. A series of transactions in November 2020 may have diluted Axion's interest in Longroot Limited; and

- d) Red Anchor Trading Corp., another BVI company, in which Axion has asserted a 15% interest. Red Anchor at one time held a 50% interest in a BVI company called HotPlay Enterprise Ltd., which was said to own certain IGA technology. The material before the court indicated that Red Anchor may have sold its interest in HotPlay Enterprise in June 2021 to a NASDAQ company called Monaker Group Inc. ("Monaker").
- [9] In early 2020, Mr. Bonner brought in a new investor, Kuni Umi Asset Management Co. ("KUAM"), which invested US\$500,000 in order to purchase 2 million shares at \$0.35 per share, and was to engage in further capital-raising efforts for which it would receive a finder's fee. The Axion board approved a memorandum of understanding with KUAM. Its principal, Mr. Yamazaki, who is one of the plaintiffs in the Defamation Action, replaced Mr. Bonner as chair of Axion.
- [10] The other two plaintiffs in the Defamation Action are:
 - a) Mr. Kim, who got to know Mr. Bonner while working in Hong Kong from 2004 to 2012, and who after returning to Vancouver became a director of Axion in July 2016; and
 - b) Mr. Willey, a professional engineer practicing in Ontario, who has been a director of Axion since May 2016.
- [11] In the first half of 2020, Axion was delayed in filing audited financial statements and other documents required of it as a reporting issuer. In June 2020, it advised the British Columbia Securities Commission ("Securities Commission") that it was implementing a Management Cease Trade Order ("MCTO"). The Securities Commission implemented the MCTO, which barred members of Axion management from trading shares in the company and prevented Axion from issuing new shares to insiders, including Mr. Bonner.
- [12] On June 5, 2020, without advising the Axion board, Mr. Bonner and others entered into a letter of intent with Monaker (the "Monaker LOI"). It was described in the Initial Oppression Judgment as follows:
- [28] Monaker is publicly traded on the Nasdaq exchange. Under the terms of the Monaker LOI, there would be a share swap:
 - a) Mr. Bonner, Jess, Cern One, and other allied shareholders would trade their shares in Axion in exchange for shares in Monaker.
 - b) In addition, Jess would vend her interest in the privately held company, Hot Play, Inc., into Monaker. (Based on the respondents' calculations, the deal with Monaker valued Jess' interest in Hot Play, Inc. at twice the cumulative value of the Axion shares swapped by Mr. Bonner and his allies.)
 - c) In order to complete the Monaker LOI, Mr. Bonner would attempt to convince the board of Axion to convert the Bonner Family Loans into shares in Axion at \$.17US per share.

- d) At the completion of the deal, as envisioned in the Monaker LOI, Mr. Bonner and the related parties would become the majority shareholders in Monaker. Further Monaker would become the majority shareholder in Axion.
- [29] The petitioners [i.e. Bonner and Jess] describe the Monaker LOI as a non-binding agreement between members of the Bonner family (plus some allied shareholders) and Monaker. They submit that the Monaker LOI contemplated a series of transactions pursuant to which Monaker would acquire Axion shares held by Jess, Cern One, Red Anchor and some allied shareholders, in exchange for Monaker shares. According to the Monaker LOI, somewhere between 40 and 60 percent of the total issued shares in Axion (as of June 2020) would be exchanged for a minority interest in Monaker. However, with the interest in Hot Play, Inc. vended in, Mr. Bonner and his allies would hold a controlling interest in Monaker.
- [13] Justice Ross went on to describe Mr. Bonner's explanation of events in June and July 2020 as follows:
- [32] Mr. Bonner further says that, leading up to July 2020, he was looking to increase the capitalization of Axion. He proposed to do that in one of two ways:
- a) He wanted to get the company listed on an exchange other than the TSX venture exchange.
- b) He wanted to erase some of the \$9 million of Bonner Family Loans from the balance sheet to make the company will look more attractive to investors.
- [33] He says that it was in furtherance of the first goal that he entered into discussions with Monaker and, ultimately, the Monaker LOI.
- [34] Mr. Bonner says that, in order to pursue the second strategy (erasing the loans), he put forward a proposal to the Directors of Axion wherein the Bonner Family Loans would be converted into equity in the Axion. His first proposal was that the debt be converted in exchange for shares at \$0.14 per share. He later increased that offer to \$0.15. He refers to this proposal as "cleaning up the balance sheet". This conversion of debt to shares, if completed, would result in the issuance of approximately 60 million new shares in Axion. I am informed that the total issued and outstanding shares in the company as at June 2020 was approximately 218 million. Hence, this issuance would have increased the outstanding shares to approximately 278 million, of which the newly issued shares would represent approximately 21.6%.
- [14] On July 8, 2020, a lawyer wrote to the Axion board on behalf of Red Anchor, Cern One, Jess and Mr. Bonner, asking that Axion adopt an attached resolution by which some US\$7.75 million of debt would be exchanged for Axion shares at \$0.14 per share. Mr. Bonner followed up on that letter with emails to the other board members, and warned that if the proposal was not accepted, the Bonner Family Loans would be called. The other directors did not agree to sign the resolution that had been proffered. Mr. Bonner then called a board meeting for July 14, 2020.

- [15] As of July 2020, the members of the Axion board were Mr. Bonner, Mr. Obata, and the three plaintiffs in the Defamation Action (Grant Kim, Yasuyo Yamazaki and Stephen Willey).

The July 14, 2020 Board Meeting and its Aftermath

- [16] The board meeting took place by video-conference at 8:00 am Eastern time. The meeting was recorded, and a transcript of the meeting has been in the record of the various court applications that have arisen since. In the first part of the meeting, the directors discussed the proposal to convert the Bonner Family Loans to equity and voted against the proposed resolution. Mr. Bonner abstained from that vote.
- [17] Following that vote, Mr. Willey advised the board he had received an anonymous email with an apparent "whistleblower" complaint against Mr. Bonner. Mr. Bonner was asked to leave the meeting, and the remainder of the directors continued the meeting in camera. The complaint, in essence, advised the board of the Monaker LOI (which had not previously been disclosed to the board by Mr. Bonner). After discussion, and without further input from Mr. Bonner, the board voted to terminate Mr. Bonner's role as CEO of Axion and appointed Mr. Kim as interim CEO and corporate secretary.
- [18] On July 23, 2020, Monaker issued a press release announcing what Ross J. described as "a modified version of the Monaker LOI to swap the Axion shares and debt for Monaker shares": Initial Oppression Judgment at para. 51.
- [19] On July 27, 2020, Mr. Kim called a further meeting of the Axion board. All directors other than Mr. Bonner participated. While there was initially some dispute about whether Mr. Bonner received notice of the meeting, Ross J., in the series of judgments he gave with respect to the oppression proceeding, ultimately concluded that Mr. Bonner did receive an email advising him of the meeting.
- [20] At the July 27, 2020 meeting, the Axion board resolved to issue 35 million units, with each unit to include a share at \$0.20 and a warrant at \$0.20.
- [21] On August 4, 2020, the Securities Commission imposed a cease trade order (the "August CTO") as a result of Axion's failure to make the required filings.
- [22] On August 7, 2020, a Mr. Pasparakis of Norton Rose Fulbright Canada LLP ("Norton Rose") wrote to the Axion board demanding conversion of the Bonner Family Loans into Axion shares no later than end of day on August 11, 2020. On August 11, 2020, a Mr. MacKenzie of Boughton Law responded to Norton Rose requesting copies of any loan agreements and Axion board resolutions in respect of the alleged loans. Some documents were provided on August 17, 2020, which led to further correspondence from Mr. MacKenzie on August 27, 2020, raising concerns about the documents, including as to the authority of the persons said to have signed the documents, and whether the documents were contemporaneous or recently created.

- [23] In materials filed in this action (and in related proceedings), Mr. Kim raised concerns about the validity of the Bonner Family Loans and, in particular, whether they had ever been approved by the Axion board.
- [24] In the meantime, on August 14, 2020, Mr. Bonner wrote a lengthy email to two officials of True Corporation to express his "serious concerns about the illegal and unethical conduct of a subset of the AXV board in a blatant attempt to wrest control from my family". True Corporation was the second-largest shareholder of Axion and, as noted above, was involved in a joint venture with Axion in Thailand. Mr. Bonner asked that True Corporation grant him a proxy for its 20 million shares, which he would then use to remove and replace the current board members.

Litigation Arising

- [25] On September 8, 2020, Mr. Bonner and Jess filed a petition in the British Columbia Supreme Court commencing the Oppression Proceeding. It alleged oppression by the Axion board, and named as respondents Messrs. Kim, Willey and Yamazaki. It was the Oppression Proceeding which led to Ross J. issuing the Initial Oppression Judgment from which I have quoted above, as well as two subsequent judgments. Counsel of record for the petitioners was Andrew McCoomb of Norton Rose.
- [26] Six days later, on September 14, 2020, Vancouver Action No. S209245 (the "Debt Action") was commenced by Mr. Bonner, Jess, Cern One, Red Anchor and a Michael Bonner, seeking judgments in respect of the Bonner Family Loans which were said to total US\$9,132,023.52. Counsel of record for the plaintiffs was Andrew McCoomb of Norton Rose.
- [27] In October, 2020, Monaker issued two news releases. The first, on October 6, confirmed the Axion share exchange transaction was going ahead, as a result of which Monaker expected to control approximately 33% of Axion. The second, on October 28, announced that the agreement was being amended and the completion was being extended to November 30. As noted in the Initial Oppression Judgment:
- [56] On November 18, 2020, Monaker issued a press release announcing that it had acquired a 33% equity interest in Axion (the "Monaker Acquisition"). This agreement constituted a modified version of the Monaker LOI and did not purport to bind Axion.
- [57] In respect of voting at the AGM, Axion has taken the position that the Monaker Acquisition cannot be effective because of the August CTO. Hence, Axion says that shares cannot be voted at the AGM.
- [28] On November 3, 2020, Mr. Bonner commenced Vancouver Action No. S2011626 (the "Disclosure Action") against Mr. Willey, seeking to obtain the name of the "whistleblower" who provided the information to Mr. Willey. Counsel of record for the plaintiff was Kaitlin Smiley of Norton Rose.

- [29] Also on November 3, 2020, Mr. Bonner in his capacity as a director of Longroot Limited signed a resolution to issue further shares, giving notice to all existing shareholders of their right to participate pro rata. That same day, he gave instructions to a Mr. Bagguley, who was at the time a signing officer for Axion Interactive Incorporated, to decline to participate. In his email to Mr. Bagguley, Mr. Bonner asserted that "Axion is inadequately capitalized to participate in this call, having many obligations that take precedence". Axion alleges the newly issued shares were all acquired by another shareholder, Mr. Morton, and then sold by him to Monaker.
- [30] On November 9, 2020, Mr. Obata ceased to be a director of Axion.
- [31] On November 16, 2020, counsel on behalf of Axion wrote to various corporate service firms in jurisdictions such as the Cayman Islands and BVI, seeking to confirm that directors of various entities were as mandated by the Axion board. It appears some of these organizations refused to take instructions from anyone other than Mr. Bonner. On November 17, 2020, Axion's litigation counsel (Mr. Sullivan) wrote to Mr. McCoomb demanding that Mr. Bonner and Jess stop claiming to represent Axion or its subsidiaries with respect to these agencies.
- [32] On November 25, 2020, Mr. Kim made a lengthy and detailed affidavit in the Oppression Proceeding. In that affidavit, Mr. Kim asserted that Mr. Bonner had "lied to the Board about a self-interested transaction" (para. 105), set out his concerns about validity of the Bonner Family Loans, and raised issues with respect to the Monaker transaction that was said (in filings by Monaker) to have been completed.
- [33] On November 28, 2020, Messrs. Kim, Willey and Yamazaki filed a petition response alleging, among other things, that Mr. Bonner engaged in "secret conduct, in clear breach of his fiduciary duties to Axion driven by Bonner's personal and family interests".
- [34] A further board meeting was held on December 4, 2020, as summarized in the Initial Oppression Judgment:
- [58] On December 4, 2020, the respondent directors (without Mr. Bonner) met and approved the issuance of \$20 million in shares to Kumi Yumi at \$0.20 a share (i.e., up to 100 million shares). The announcement of that deal is said to replace the July 27, 2020 issuance.
- [59] It is common ground that the directors did not provide notice of the December 4, 2020 directors' meeting to Mr. Bonner. It is evident that, after July 14, 2020, the remaining directors treated Mr. Bonner as though he was no longer involved in the management of the company.
- [35] I note parenthetically that, in his affidavit in this matter, Mr. Kim stated he emailed notice of the meeting to Mr. Bonner's axionventures.com email address and did not receive a bounce-back message. For purposes of matters before me, nothing turns on whether notice of the meeting was emailed to Mr. Bonner.

- [36] The minutes of the December 4 board meeting indicate that a new director was appointed to fill the vacancy left by the resignation of Mr. Obata. The new director was a Mr. Prapakamol, who was an official with True Corporation. In addition, the board removed Mr. Bonner from Axion's audit committee and appointed a litigation committee. These matters were announced by Axion by way of a press release issued January 15, 2021.
- [37] On December 31, 2020, Axion applied to the Securities Commission for a partial revocation of the August CTO to permit Axion to enter into the agreement with KUAM that had been approved at the December 4 board meeting. That application was opposed by Mr. Bonner.
- [38] On January 15, 2021, Axion commenced Vancouver Action No. S210438 (the "Conspiracy Action") against Mr. Bonner, Jess, Monaker, Mr. Kerby (a principal of Monaker), Cern One, Red Anchor and others. This action asserts that the various defendants conspired to steal the assets of Axion, including its ownership of Longroot and the IGA technology held through its various subsidiaries. The filing of the Conspiracy Action was announced the day before (January 14, 2021) via a press release issued by Axion.
- [39] On January 20, 2021, Mr. Bonner issued press releases to respond to the January 14 and 15, 2021 Axion press releases. He asserted that Axion had not held a board meeting since July 14, 2020, and alleged Axion's board had refused to commit to holding an AGM. He further asserted Axion had not appointed Mr. Prapakamol as a director, and stated that he would vigorously defend the allegations in the Conspiracy Action.
- [40] On January 26, 2021, Monaker and Cern One delivered a requisition for an AGM. The cover letter asserted that Monaker owned 71.9 million Axion shares, and that Cern One owned 16.8 million shares.
- [41] On January 27, 2021, Red Anchor, Jess and Mr. Bonner issued a press release asserting that Axion's claim to ownership of IGA technology called HotPlay was false, and that:

Axion's shareholders should be troubled to see that Axion, under the current leadership of Kim, Yamazaki and Willey, would resort to the misguided strategy of apparently seeking to misappropriate Red Anchor's technology and intellectual property through baseless litigation. Such tactics are doomed to fail and are a waste of precious resources and expose Axion to significant risk.

- [42] Axion held a board meeting on January 27, 2021, at which formal resolutions were passed to remove Mr. Bonner and Jess from the boards of all Axion subsidiaries.
- [43] On February 1, 2021, Bonner and Jess filed a notice of application in the Oppression Proceeding seeking an order for an independent chair, and an order that Axion call an annual general meeting ("AGM") not later than April 15, 2021. The application materials refer to further alleged improper conduct of the Axion board since the filing of the Oppression Proceeding.

- [44] On February 11, 2021, Axion issued a notice of AGM for April 15, 2021. As noted in the Initial Oppression Judgment:
- [61] In preparation for the AGM, a slate of directors was proposed by Axion. A different slate (the "dissident slate") was proposed by the Monaker/Bonner group
- [45] The above narrative sets out the state of affairs leading up to the sending of the letter which is the subject matter of the Defamation Action. An AGM had been scheduled, four court actions had been commenced (the Oppression Proceeding, the Debt Action, the Disclosure Action and the Conspiracy Action), and a hearing of the Oppression Proceeding, including the application for an independent chair, was pending and anticipated to occur prior to the AGM.

The February 22 Letter

- [46] On February 22, 2021, Mr. McCoomb wrote on Norton Rose letterhead to Mr. Watee Powtong, senior general counsel at True Corporation (the "February 22 Letter"). The letter was sent by email, with that email copied to two other in-house counsel at True Corporation; however, Mr. McCoomb received bounce-back messages indicating that the emails to those two others did not go through.
- [47] It is this letter that is the subject of the present action. In it, Mr. McCoomb identified himself as legal counsel to Red Anchor, Mr. Bonner and "various related entities", and advised that he was writing "on our clients' behalf to advise True Corporation about numerous problematic activities undertaken by several directors of the board of Axion".

- [48] Mr. McCoomb provided the following context in the letter:

As you are no doubt aware, there has developed significant conflict between Mr. Bonner and his fellow directors Grant Kim, Yasuyo Yamazaki and Stephen Willey since Mr. Bonner's unlawful termination as Axion's CEO on July 14, 2020. That termination is the subject of oppression litigation in the Supreme Court of British Columbia that is tentatively scheduled to proceed to a hearing in the week of March 15, 2021.

- [49] The February 22 Letter asserted generally that Messrs. Kim, Yamazaki and Willey had "presided over Axion's board in an abusive fashion with disregard to the pressing needs of Axion's various business interests", and accused them of "neglect and misconduct" which is said to damage Axion's credibility. It then went on to make seven specific allegations which are said to constitute a "non-exhaustive list" of such conduct.

- [50] Those allegations include:

- a) An allegation that the July 27 board meeting was called "on two hours' notice in the middle of the night" for the purpose of authorizing a private placement to be subscribed by Mr. Yamazaki;

- b) An allegation that Mr. Kim swore a "false affidavit on Court proceedings". The falsity is said to be Mr. Kim's evidence that the Bonner Family Loans had not been authorized by the Axion board. With respect to this alleged false evidence, Mr. McCoomb goes on to posit that:

We expect that the Court will conclude that Mr. Kim has given false testimony and that finding alone will cause significant damage to the company as a result.

- c) An allegation that Mr. Kim has claimed to be the sole director of Uniq Ventures Ltd., when he was removed from that role on July 16, 2020;
- d) An allegation that Mr. Kim's educational credentials, as listed on a personal information form completed in 2016, were inaccurate;
- e) An allegation that since July 31, 2020, the Axion board has repeatedly declined Mr. Bonner's requests to hold a board meeting to discuss the company's financial position, then held a board meeting on December 4, 2020, without giving him notice;
- f) An allegation that Axion, in the Conspiracy Action and in a press release announcing the Conspiracy Action, made false allegations against Mr. Bonner and related entities, that the in-game advertising technology is owned by HotPlay Thailand and not Axion, and that Axion "should not be using its limited cash resources on foolish and baseless legal claims that are likely to only result in public embarrassment for the company"; and,
- g) An allegation that, while this has been ongoing, "Messrs. Kim, Yamazaki, Willey and Prapakamol have completely neglected Axion's investment businesses" which are having difficulty paying employees and continuing development activities.

[51] In the letter, Mr. McCoomb asserts that Mr. Bonner expects to shortly file "an action in a state court against Messrs. Kim, Yamazaki, Willey and Prapakamol seeking damages of up to US\$100 million for tortious interference with economic relations, among other claims".

[52] The letter concludes as follows:

As noted above, our purpose in writing this letter, in addition to advising True Corporation of the conduct above, is to caution True Corporation against engaging with Messrs. Kim, Yamazaki and Willey as they attempt to seize control over Axion through unlawful means, by providing a fuller picture of the conduct of those individuals. Unlike Mr. Bonner and True Corporation, those persons do not own significant Axion shares, and there is no basis to believe that they are interested in maximizing Axion's value.

Our clients control a significant portion of Axion's shares and have also lent a considerable amount of money to Axion over the past few years with low or no interest and no security. Our clients necessarily must defend their interests against the attempts by Messrs. Kim, Yamazaki and Willey to seize control of the company. They have made considerable sacrifices to help Axion's development and the projects of its investment businesses, and have demonstrated consistent dedication to Axion's partnership with True Corporation. Our clients have always been aligned with True Corporation as to their interest in developing Axion and hope to continue to

have a constructive and open dialogue with True Corporation going forward.

On the basis of that continued dedication, we invite True Corporation's leadership and legal team to contact the undersigned to discuss how our clients may best continue to work together to maximize the value of their investments in Axion for the benefit of the company and its shareholders.

[53] The letter was provided by Mr. Powtong to Mr. Prapakamol, who in turn passed it on through Axion senior management to Messrs. Kim, Willey and Yamazaki.

Events Following the February 22 Letter

[54] On February 24, 2021, Mr. McCoomb wrote to the Securities Commission opposing Axion's application for a partial revocation of the August CTO, asserting that the application reflected a desire on the part of a select group of Axion's current directors to affect the control of Axion during a contentious dispute with Mr. Bonner and to improperly influence the outcome of the upcoming AGM.

[55] Also on February 24, 2021, Axion filed a notice of application seeking an injunction in the Conspiracy Action. That led to a consent order made March 5, 2021, by which:

- a) Mr. Bonner and others were not to hold themselves out as directors or otherwise authorized to act with respect to the affairs of Axion Interactive Inc., Axion Entertainment Holdings Ltd., Axion Games Limited and True Axion Interactive Co. Ltd., and
- b) Until the AGM had been held, Axion would not permit any of the companies to issue shares or incur further debt other than in the ordinary course of business.

[56] On March 31, 2021, Cern One and Mr. Bonner issued a "Concerned Shareholders' Proxy Circular", advocating for their proposed slate of directors.

[57] In April 2021, two actions were commenced by Japanese citizens (the "Investor Actions") claiming that shares held by Cern One were held for their benefit.

[58] The Oppression Proceeding went to a hearing beginning on April 6, 2021. As described in the Initial Oppression Judgment:

[3] This hearing proceeded on April 6-8, 2021, as both the hearing of the petition and the petitioners' application for an order appointing an independent chair at the AGM. However, time constraints forced the partition of the application from the hearing of the petition. As discussed below, the primary time constraint arose because the AGM was scheduled for April 15, 2021. The parties needed to determine whether an independent chair would be ordered. The hearing re-convened on April 13 to complete submissions on that issue alone.

[4] At the close of the day on April 13, I provided my decision dismissing the application for the appointment of an independent chair, with reasons to follow.

- [59] The Initial Oppression Judgment, giving reasons for that decision, was issued on May 20, 2021.
- [60] At the AGM on April 15, 2021, the slate of directors put forward by the existing board was elected. Messrs. Kim, Willey and Yamazaki continued on the board, while Mr. Bonner did not.
- [61] The Defamation Action was commenced on April 19, 2021, four days after the AGM. The defendants filed their Response to Civil Claim on July 19, 2021, and the plaintiffs filed a reply on August 25, 2021.
- [62] The hearing of the remaining issues in the Oppression Proceeding continued on August 4-5, 2021. On October 1, 2021, Ross J. issued further reasons dismissing the balance of the relief sought. On June 8, 2022, he issued a judgment with respect to costs, granting Messrs. Kim, Yamazaki and Willey a partial award of special costs, and ordering costs for the remainder of the proceeding be awarded to the respondents on tariff Scale C.
- [63] Justice Walker was assigned by the Chief Justice to manage and hear the Conspiracy Action, the Debt Action, the Investor Actions and the various other proceedings that have been commenced (other than the Oppression Proceeding and the Defamation Action). At the time I heard the present application, those various proceedings had been scheduled for an 80-day trial commencing December 11, 2023.
- [64] The trial of the Defamation Action is scheduled for three weeks commencing November 20, 2023, which is the three weeks immediately preceding the trial scheduled before Justice Walker. A notice of trial was filed on May 16, 2022 - the day before the defendants filed the notice of application which ultimately came before me in the fall of 2022, seeking to have the Defamation Action struck out or dismissed.
- [65] At the time this application initially came before me, Mr. McCoomb and Norton Rose continued to be counsel of record for Mr. Bonner and related entities in the various proceedings before Justice Walker. In mid-November 2022, they withdrew as counsel from those proceedings.

Pleadings in the Defamation Action

- [66] As can be seen from the style of cause, the plaintiffs in the Defamation Action are three directors (Messrs. Kim, Willey and Yamazaki), and the defendants are Norton Rose and Mr. McCoomb. While Mr. Bonner and related entities are referenced in the pleadings, they are not parties to this action.
- [67] In the Notice of Civil Claim, the plaintiffs set out a brief summary of some of the background set out above, then note that:

19. The Bonner Parties retained Norton Rose and McCoomb to represent them in connection with legal proceedings against Axion and the plaintiffs, including in respect of a proxy fight in which Bonner and Nithinan attempted to gain control of the Board at the AGM conducted on April 15, 2021.
20. For the purpose of obtaining the support of shareholders of Axion for the Bonner Parties' slate of directors of Axion sought to be elected at the AGM, including Bonner, the defendants sent the February 22 Letter described below.
- [68] The Notice of Civil Claim asserts that True Corporation was the second largest single shareholder of Axion, notes that the letter sent on February 22 was on Norton Rose letterhead, and then sets out the text of the letter in its entirety. It goes on to assert that the allegations made in the seven numbered paragraphs of the letter are untrue, and that those statements were, in their natural and ordinary meaning, understood to mean that the plaintiffs had acted dishonestly, had knowingly made false allegations in the Conspiracy Action, were not qualified or fit to act as directors, had no interest in advancing the interests of Axion or its shareholders, and were in the midst of an unlawful attempt to take control of Axion. It is also asserted that the statements were meant to suggest Mr. Kim had committed perjury by swearing a false affidavit.
- [69] It then goes on to assert that Mr. McCoomb and Norton Rose knew the statements in the letter would be repeated, reprinted or republished, and that they acted "maliciously with the intent to cause injury to the plaintiffs' reputations". It alleges the plaintiffs have suffered mental distress, anxiety, humiliation, depression, loss of self-worth and loss of opportunity. The plaintiffs seek general, aggravated and punitive damages as well as special costs.
- [70] The Response to Civil Claim pleads that Mr. McCoomb and Norton Rose were at all material times legal counsel to Mr. Bonner and others in ongoing legal proceedings in the Supreme Court of British Columbia and before the Securities Commission, and that in the underlying litigation their clients have made "wide-ranging allegations against the plaintiffs".
- [71] The Response to Civil Claim pleads that the February 22 letter was delivered to legal counsel without any expectation it would be repeated, reprinted or republished. It goes on to plead that the letter was written on an occasion of absolute privilege, including that it was made:
- to a representative of a significant shareholder in Axion, with reference and in reasonable relation to, in preparation for, during and in the course of, in the context of, and/or incidental to the facts alleged and issues raised in the Underlying Litigation and with sufficient proximity to the Underlying Litigation, in which Axion and its shareholders, including True Corporation, were directly or potentially affected
- [72] Alternatively, the Response to Civil Claim pleads that the letter was written on an occasion of qualified privilege, including as a matter of public interest, that Mr. McCoomb and Norton Rose acted in good faith and with an honest belief in the truth of the communications, that they acted in accordance with the standards of responsible communications, that the letter

constituted a fair and accurate report of issues arising in the underlying litigation or that it was fair comment, being an opinion expressed in good faith and without malice, on a matter of public interest (i.e., the management, operation and finances of a public company).

The Oppression Proceeding

[73] The Oppression Proceeding was specifically referenced in the opening paragraphs of the February 22 Letter, and was identified at the hearing before me as a key part of the underlying litigation referenced in the Response to Civil Claim in this action.

The Petition

[74] As noted above, the Oppression Proceeding was commenced on September 8, 2020. In the Petition filed that date, Mr. Bonner and Jess sought orders setting aside the July 14, 2020 resolution that terminated Mr. Bonner as CEO of Axion and restoring him to that position, as well as orders setting aside any resolutions passed at the July 27, 2020 meeting, including the authorization of the private placement. They also sought a declaration that Messrs. Kim, Willey and Yamazaki (who were named parties and identified as the "Respondent Directors") had breached their fiduciary duties to Axion.

[75] The Petition alleged the Respondent Directors had appointed Mr. Kim as interim CEO, "despite the fact that he has no qualifications to justify his appointment as CEO of a publicly traded company".

[76] The Petitioners also alleged they had a reasonable expectation that Axion would not "issue shares via a non-arm's length, highly dilutive private placement to its executive chairman without Board approval and while a management cease trade order was in place".

[77] With respect to the Bonner Family Loans, the Petition asserted that:

The Respondent Directors' refusal to agree to, or meaningfully discuss the merits of, the conversion of the Bonner Family Loans, was unreasonable, and not in the best interest of the Company or the shareholders. The Petitioners submit it is part of the overall strategy and conduct of the Respondent Directors to oppress and unfairly prejudice them.

[78] The Petition provided details of what were said to be unreasonable steps leading to the in camera session on July 14, 2020, in the absence of Mr. Bonner, and resulting in his termination as CEO. It asserted in particular that the alleged complaint was not provided to him in advance, and that he was given no opportunity to address the "unsubstantiated allegations".

[79] With respect to the July 27, 2020 meeting, the Petition alleged that board members had been given less than two hours' notice which arrived in the middle of the night where Mr. Bonner lives.

The Initial Oppression Judgment

- [80] I have already cited several excerpts from the Initial Oppression Judgment, which reflected some of the facts found by Ross J. based on the materials before him.
- [81] Justice Ross also drew several conclusions about the positions advanced by the parties. At paras. 42-49, he dealt with the Monaker LOI:
- [42] The whistle blower complaint against Mr. Bonner advised the board of the Monaker LOI.
- [43] As noted, the terms and effect of the Monaker LOI are significantly in dispute in this proceeding. Mr. Bonner's counsel described the Monaker LOI as an exchange of his family's shares for Monaker shares. The respondents disagree. They say that the Mr. Bonner's proposal to convert debt to shares was a part of a transaction that would result in the take-over of control of Axion by Mr. Bonner and allied shareholders. Further, the respondents submit that deal would benefit Mr. Bonner and disadvantage the other shareholders.
- [44] The petitioners say that the Monaker LOI was not meant to be secret. They say that Mr. Bonner had tried to contact the other directors in June 2020 but they had not taken, or returned, his call. However, the petitioners concede that, until the lawyer's letter and Mr. Bonner's email on July 8, he did not attempt to notify the other directors in writing.
- [45] The respondents point out that:
- a) the July 8 lawyer letter makes no reference to the Monaker LOI;
 - b) apart from some alleged phone calls, Mr. Bonner made no other attempt to advise the board of his pending agreement with Monaker;
 - c) the board considered, and rejected, Mr. Bonner's request for the debt/equity swap at the July 14 meeting before being advised (by Mr. Willey, via the whistle blower complaint) of the Monaker LOI.
- [46] Hence, the respondents submit that if Mr. Bonner had any intention to advise the other directors, he would have done so before they voted on the debt conversion resolution. The inference, they submit, is obvious. Mr. Bonner was hiding the Monaker LOI. I accept that submission.
- [47] The respondents describe the Monaker LOI as harmful to the company and its shareholders. They submit that, since learning of the Monaker LOI, they have been taking steps to protect Axion from Mr. Bonner's manoeuvres. In turn, those steps form the basis of Mr. Bonner's oppression allegations.
- [48] With respect to the terms of the Monaker LOI, the respondents say that, in signing the Monaker LOI, Mr. Bonner sought to bind Axion to significant future obligations. He did so without any authority. Further, they argue that Mr. Bonner and Jess negotiated the Monaker LOI for personal gain to the detriment of the company and its shareholders.

- [49] Having reviewed the document, I accept the respondents' position that the Monaker LOI created significant cause for concern among the respondent directors:
- a) It was signed by Mr. Bonner in his capacity as CEO of Axion, thus appearing to be an agreement with Axion.
 - b) It allowed Monaker to review the confidential information of Axion. Given the fact that it is in the business of software development, Axion had a significant interest in keeping its confidential information.
 - c) The shares in Hot Play, Inc. would be converted to 40 million shares in Monaker. The target price of Monaker, post completion, was \$1.25US. Hence, Hot Play Inc. was nominally valued at more than \$40 million US.
 - d) Axion shares would be converted for Monaker shares at a value of \$.17US. At that value the value of all the issued and outstanding shares in Axion was less than \$40 million US.
 - e) Hence, the Monaker LOI placed a value on Hot Play, Inc. that was greater than the total value of Axion.
 - f) Although the total number of Axion shares to be acquired was not determined, the agreement required "Sufficient (Axion) shares shall be acquired so that (Monaker's) effective ownership of Axion shall be within the Target Ownership Range."
 - g) Further, Mr. Bonner's demand to the directors was to approve the exchange of the Bonner Family Loans at \$0.15US per share. The Monaker LOI provides that the Axion shares would be exchanged at \$0.17US per share. Hence, if the directors had acceded to Mr. Bonner's demand to convert the \$9 million in Bonner Family Loans into shares at \$0.15US, Mr. Bonner and his related companies would have made a secret profit of approximately \$180,000US upon flipping the shares to Monaker.

The October 2021 Judgment

- [82] The balance of the Oppression Proceeding was decided by Ross J. with reasons for judgment issued October 1, 2021, and indexed at 2021 BCSC 1899. He noted at para. 7 of those reasons that the remaining allegations of oppressive conduct were those set out in paras. 51(a) and (c) of the Initial Oppression Judgment, specifically:
- a) At the July 14, 2020 directors meeting, the directors asked Mr. Bonner to excuse himself from the meeting. Then, upon learning of the Monaker LOI from Mr. Willey (in camera), the directors resolved to terminate Mr. Bonner as CEO. The petitioners say that act was taken without proper process and was not in line with proper corporate procedure.

- c) In an apparent response to that announcement, the directors of Axion met on July 27, 2020, and resolved to issue \$30 million in shares (plus warrants to double that amount) shares to Kumi Yuni. That meeting was scheduled on extremely short notice. Mr. Bonner says he did not receive the notice. (Whether he received notice is in dispute.)
- [83] With respect to the first of these allegations, he concluded:
- [45] The first part of the test relates to the reasonable expectations of the parties. The submissions of the petitioners focus on the reasonable expectations of Jess and Mr. Bonner in relation to the continued employment, or thoughtful dismissal, of Mr. Bonner.
- [46] However, I find that the petitioners' formulation of their reasonable expectation ignores the most important context. That context is:
- a) immediately before the July 14 meeting, Jess and Mr. Bonner executed the Monaker LOI that, if completed, would effectively take over control of Axion;
 - b) they negotiated and signed that deal in secret; and
 - c) Mr. Bonner then put into play the (planned) forced conversion of the Bonner Family Loans at \$.17 per share.
- [47] In my opinion, having taken those steps, in secret, it is inconceivable that Jess and Mr. Bonner did not reasonably expect dire consequences if the Majority Directors discovered the existence of the Monaker LOI. Put simply, the fact that the petitioners kept the existence of the Monaker LOI secret from the Majority Directors establishes that they expected negative consequences if it was disclosed. That inference is inescapable.
- [84] In dealing with the second allegation, he noted the comments of Justice Berger in *Teck Corporation Ltd. v. Millar* (1972), 33 D.L.R. (3d) 288, 1972 CanLII 950 (B.C.S.C.) at 314-315, then concluded:
- [67] I find all of the comments of Berger J. to be apposite in the circumstances of this case. The Majority Directors discovered the existence of the Monaker LOI. They were immediately concerned for the best interests of the company and its shareholders. They took steps, including the resolution to make a private placement of shares (a "poison pill") to fight off the potential takeover of the company.
- [68] On that basis, I find that the Majority Directors had an honest belief that the Monaker LOI would have a negative impact on Axion and its shareholders. They had reasonable grounds for that belief. As anticipated in *Teck*, they took steps toward a poison pill private placement that were within the purview of the board.
- [69] On that basis, the evidence establishes that the directors were acting in good faith. There is no evidence of bad faith. I have already found that there were reasonable grounds for their actions. Hence, the respondents fit within the parameters of acceptable conduct described in *Teck*.

[85] Having drawn these conclusions, Ross J. dismissed the Oppression Proceeding and invited submissions as to costs.

The Costs Ruling

[86] In a judgment as to costs issued June 8, 2022, and indexed at 2022 BCSC 945, Ross J. noted by way of introduction that:

[1] Following my dismissal of the petitioners' claim, the respondents seek special costs for defending this proceeding. They point to allegations in the petition that were not borne out on the facts, as well as sworn testimony that was proven to be false. They say that the litigation was brought for an ulterior motive: to improve the petitioners' chances of taking over the respondent Axion Ventures Inc. ("Axion"), a publicly traded company. The respondents say that the petitioners' actions in this case were reprehensible and deserving of punishment.

[2] In response, the petitioners submit that the respondents have overstated the import of the petitioners' acts. They submit that, when viewed from their perspective at the time the pleadings were filed, the facts, as they understood them, provided a basis for the claims made. They argue that this litigation constituted the regular 'hurly-burly' of a proxy fight. They also point to evidence tendered by the respondents that, they submit, was either misleading or not factual. They submit that, in these circumstances, an award of party and party costs at Scale "B" would be appropriate, if not each party bearing its own costs.

[87] With respect to the allegations generally, he noted:

[23] ... the petitioners submit that this litigation was all part of the "hurly-burly" of the proxy fight. Mr. Bonner's counsel concedes that not all of his evidence was supportable (by which I expect he means "true"). However, the petitioners point to portions of the evidence tendered by the respondents suggesting that their evidence was also "unsupportable". On that point, I find that I am unable to determine the ultimate bona fides of the totality of the evidence tendered by the parties

[88] He went on to acknowledge that the evidence in the Oppression Proceeding was "compiled in short order" and that there was other ongoing litigation with respect to ownership of Axion assets and intellectual property, then ultimately concluded with regard to the claims argued before him, that there was no evidence proffered by either party which could lead to a finding of reprehensible conduct on the part of the petitioners.

[89] Justice Ross took a different view with respect to the allegation that Messrs. Kim, Willey and Yamazaki had breached their fiduciary duties to Axion:

[29] I made a finding regarding this allegation in [the Initial Oppression Judgment]:

[9] The respondents submit, and I accept, that the pleadings alleging that the respondent directors breached their fiduciary duties to Axion constituted serious allegations against the respondents in their positions as directors of this public company. Those allegations were

withdrawn by the petitioners, without any hearing on the issue, on the first day of the hearing of the petition. That withdrawal by the petitioners constituted a significant shift in their position. In other words, although the petitioner's commenced this proceeding making serious allegations of breach of fiduciary duty, there was no, or insufficient, factual basis for that allegation and they were withdrawn.

- [90] Having reviewed the applicable legal principles, and the arguments made by the parties, Ross J. concluded an award of special costs was appropriate in respect of the allegations of breach of fiduciary duty:
- [37] In considering the petitioners' submissions on this point, I note that there is further context that is in play. The additional context is that the petitioners were attempting to take over Axion. Put another way, the petitioners cannot rely on their perception of the context of Mr. Yamakazi's actions, and ignore the context of their own actions:
- a) The full context of this litigation includes the petitioners attempting to gain control of Axion through secret means by reaching an agreement with Monaker.
 - b) At the time the petitioners made the allegations against the respondent directors and Mr. Yamakazi, the petitioners knew that the July 27, 2020 share placement resolution was a defensive step by the respondent directors to thwart the petitioners' secret takeover bid.
 - c) The allegation of a breach of fiduciary duties, as against directors of a publicly traded company, is a very serious matter.
 - d) The petitioners rely, to some extent, on the understanding that this type of litigation being both strategic and rough (i.e., the "hurly-burly"). However, that position is a double-edged sword. A party engaging in the "hurly-burly" cannot insulate itself from the consequences of the pleadings it files. It is implicit in the concept of the "hurly-burly" of litigation that ulterior motives are involved. The parties will play rough in the litigation in order to obtain an advantage in the proxy fight. That is an ulterior motive.
 - e) In this case, I cannot ignore the context that the petitioners were attempting a secret takeover of the controlling interest in Axion. One step they took along that path was alleging that the other directors had breached their fiduciary duties to the company. The obvious inference is that they made that allegation for strategic (i.e., ulterior) purposes within the proxy fight.
- [38] I accept the petitioners' submission that allegations made in pleadings, if not pursued at a hearing, will not automatically result in an award of special costs. However, in this case, the petitioners levelled the allegations and then waited until the morning of the initial hearing, April 6, 2021, before indicating that they were not pursuing the fiduciary breach allegations. As noted above, I found that there was no evidence to support the allegation.

- [39] I find that, in the full context of the litigation, the petitioners' allegation of fiduciary breaches as against the respondent directors constituted reprehensible conduct in the litigation.
- [40] The effect of the petitioners' conduct was dampened, to some extent, by the fact that they did not pursue that allegation at the hearing. However, the allegation was on the record for some seven months, during which time Mr. Bonner was trying to convince the shareholders that his group was the better option at the upcoming AGM. I find that there was an ulterior motive for making the allegations. The allegation itself, in the full context of the proxy fight, was reprehensible. Those circumstances constitute the basis of an award for special costs.
- [41] On that basis, the respondent directors are entitled to special costs for defending the allegations of breach of fiduciary duty from September 8, 2020, to April 6, 2021.

Positions of the Parties

- [91] As stated in the introduction, the defendants have applied for orders that the Defamation Action be either:
- a) Struck out pursuant to Rule 9-5(1)(a), (b) or (d), without leave to amend, or
 - b) Alternatively, dismissed pursuant to the PPPA.
- [92] I will summarize at this point the positions advanced by the parties with respect to the application pursuant to Rule 9-5(1). I will deal with positions advanced in respect of the PPPA application in the course of dealing with the issues arising on that application.

The Defendants

- [93] The defendants say that the Notice of Civil Claim is deficient on its face and cannot be remedied, because the defendants have absolute immunity based on the doctrine of absolute privilege. They submit that the letter on which the claim is based is a communication made in the course of, or incidental to, judicial proceedings, and that absolute privilege provides a complete defence to the action.
- [94] Specifically, the defendants argue that at the time the letter was written, the plaintiffs on the one hand, and the various Bonner entities on the other, were engaged in a variety of proceedings reflecting disputes over their respective conduct in relationship to the interests and control of Axion, including:
- a) The Oppression Proceeding;
 - b) The Debt Action;
 - c) The Disclosure Action; and
 - d) The Conspiracy Action.

- [95] Norton Rose and Mr. McCoomb were counsel to various of the Bonner entities at the time of the February 22 Letter, which raised issues that were central to the underlying litigation, and the letter was written in the course of their duties as counsel.
- [96] The defendants' position on absolute privilege is summarized in their submissions as follows:
86. At the material time, the [defendants] represented the Bonner parties in their efforts to defend against the [plaintiffs'] allegedly damaging conduct in order to protect Axion and the Bonner Parties' investments. True Corporation had an interest in, and could be immediately or potentially affected by, the [plaintiffs'] conduct and the outcome of the Underlying Litigation, including loss or damage to its investment in Axion.
87. The [defendants] were acting within the scope of their duty to pursue and protect the interests of the Bonner Parties by communicating with True Corporation about the disputes and the Underlying Litigation. There is no doubt that the Letter was sufficiently related to the Underlying Litigation so as to be protected by absolute privilege.
88. The [defendants] were acting in the course of their duty as litigation counsel in the course of ongoing judicial proceedings, which is an occasion entitling them to the protection of absolute privilege. Even if the [defendants] were seeking shareholder support for the Bonner Parties' slate of directors as alleged, or if any parts of the Letter constituted overreach or malice by the [defendants], which is denied, the immunity is not nullified. The Letter was written on an occasion of absolute privilege and the [defendants] are protected against the Defamation Action.
- [97] For purposes of this application only, the defendants do not dispute that the Notice of Civil Claim in the present action sets out allegations that include the necessary elements of a defamation claim. However, the defendants argue that absolute privilege provides them a complete defence. They rely in particular on the discussion of absolute privilege and its application in *Hamouth v. Edwards & Angell*, 2005 BCCA 172.
- [98] The defendants say, to the extent the court is required to consider the purpose of a communication for purposes of determining whether absolute privilege applies, it can determine on the face of the letter whether it is made "in the course of", "in the context of" or "incidental to" a judicial or quasi-judicial proceeding.
- [99] The defendants say the Defamation Action is thus bound to fail per Rule 9-5(1)(a), that it is unnecessary, scandalous, frivolous or vexatious per Rule 9-5(1)(b), and that it is an abuse of the process of the court per Rule 9-5(1)(d). [As I will discuss below, they also argue that, given that absolute privilege provides a complete defence to the action, the plaintiffs cannot establish that the defendants have no valid defence as required by s. 4(2)(a)(ii) of the PPPA.]
- [100] With respect to the allegation the claim is an abuse of process, the defendants argue that:

- a) The Defamation Action improperly pulls Norton Rose into the fray of the disputes between their clients and their clients' adversaries where there is no legitimate reason for doing so;
- b) The statements in the letter clearly pertain to the ongoing disputes and litigation between the Bonner parties, the plaintiffs, and Axion;
- c) Those matters are properly resolved in the context of the underlying litigation, not in a defamation action against counsel; and
- d) There is a real risk that the defendants will be prevented from fully and freely defending themselves in the Defamation Action because of solicitor-client privilege.

The Plaintiffs

[101] The plaintiffs argue that absolute privilege is not applicable and thus there is no basis for the Notice of Civil Claim to be struck out.

[102] The plaintiffs submit that, where a defendant seeks to strike the plaintiff's claim on the basis of the defence of absolute privilege under Rule 9-5(1), the defendant will only be successful if they establish:

- a) Under Rule 9-5(1)(a), that it is plain and obvious - solely on the facts pleaded by the plaintiff, which are assumed to be true - that there is no reasonable cause of action because the occasion of the impugned expression is protected by absolute privilege, because:
 - (1) There are extant or contemplated judicial proceedings, and
 - (2) If the impugned statements were made out of court and not by or to a witness, the statements were directly connected to the proceedings and sufficiently related to the objects of the litigation; and
- b) Under Rule 9-5(1)(b) or (d), based on admissible evidence, that it is plain and obvious that absolute privilege protects the occasion of the expression. If it is not plain and obvious that the impugned expression was directly connected to the proceeding, and sufficiently related to the objects of the litigation, the defendant will not succeed.

[103] The plaintiffs note that absolute privilege has arisen from protection granted to statements made in court and that, while it now extends more broadly, there are limits. The plaintiffs rely on what they say is a clear and accurate statement of the law in *Lawrence v. Sandilands*, 2003 BCSC 211 at paras. 90-92. That is, that absolute privilege applies to all communications made by counsel "in the course of, or incidental to, the processing and furtherance of judicial and quasi-judicial proceedings", to "the content of all pleadings, documents and testimony offered in evidence, and to all actions taken preliminary but necessary to the institution or processing of the action or essential to the judicial review of or execution upon judgment or decision". The plaintiffs say none of these circumstances apply to the February 22 Letter.

- [104] The plaintiffs rely upon Alberta authority (*Dechant v. Stevens*, 2001 ABCA 39 [Dechant] at para. 49, and *Liboiron v. Majola*, 2007 ABCA 18 [Liboiron] at para. 13) which suggests that for absolute privilege to apply, the communication in issue must fall within a recognized step of the proceeding.
- [105] The plaintiffs say the statements giving rise to this action are not made in court; rather, they are out of court statements made to someone not directly involved in litigation. They argue the court must be cautious in considering general statements of principle made in cases dealing with claims arising from statements made in court, and that in cases involving out-of-court statements, the court must consider all of the circumstances to consider the connection between the defamatory statement and the court proceeding said to give rise to the absolute privilege. Where the occasion is not obvious, a contextual analysis of all facts is necessary for the court to determine whether the occasion attracts privilege. The plaintiffs say this entails consideration of the purpose of the communication.
- [106] The plaintiffs further argue that the purpose of the communication must be sufficiently related to the proceeding, in that it must be directly concerned with that proceeding, and the connection cannot be remote. In this case, they note that no explanation has been tendered by Mr. McCoomb or from his former clients as to the intent and purpose of the letter. Rather, the defendants have brought their application supported by an affidavit from a legal assistant attaching, without comment, the pleadings from the various other proceedings that are said to constitute the underlying litigation.
- [107] The plaintiffs say that when the court considers the full context, the February 22 Letter was sent with the intention of advancing a private dispute over who should control the board of Axion. Its purpose was not related to the lawsuits; rather, its true purpose was an attempt to destroy the plaintiffs' reputations in the hope that True Corporation would give Mr. Bonner its proxy. The plaintiffs also note the February 22 Letter does not seek any assistance from the recipient in any way related to either the Oppression Proceeding or the Conspiracy Action, or state that anything in the letter had any relevance to either the Oppression Proceeding or the Conspiracy Action. The Debt Action and the Disclosure Action were not mentioned at all.
- [108] Further, the letter follows up on emails that Mr. Bonner wrote to True Corporation officials in August 2020 (before the Oppression Proceeding had even been commenced) and on November 1, 2020. The plaintiffs say the February 22 Letter simply sought to add weight and credibility to what Mr. Bonner had previously said, using the letterhead of a prominent international law firm. Like the previous emails, the letter was aimed at obtaining a proxy, rather than at doing anything to advance any of the ongoing court proceedings.

- [109] The plaintiffs argue that it is not sufficient, to establish absolute privilege, that the battle for control of Axion had given rise to the Oppression Proceeding. The fact that both the February 22 Letter and the Oppression Proceeding are aimed at advancing the Bonner group's interests in its battle for control of Axion does not mean that the February 22 Letter was for purposes of the Oppression Proceeding.
- [110] The plaintiffs submit, given the lack of connection between the February 22 Letter and the judicial proceedings said to give rise to a privilege, the circumstances would, at best, give rise to a qualified privilege. Unlike absolute privilege, which would apply regardless of whether the defendants had acted with malice, qualified privilege can be defeated if the maker of a defamatory statement acted with malice.
- [111] The plaintiffs submit that the nature of the statements in the February 22 Letter are such that the court would most likely find malice. They note malice can be established by a reckless disregard for the truth, and that lawyers are duty-bound to undertake a reasonable investigation as to the accuracy of a defamatory statement: *Bent v. Platnick*, 2020 SCC 23 [Bent] at para. 136. They say this is a case in which it would be appropriate to hold the defendants to such a standard, and require them to justify the statements made in order to claim any privilege with respect to the February 22 Letter. In that regard, they submit that I should infer that, by February 22, Mr. McCoomb knew all the facts relied on by Ross J. in April to dismiss the petition, yet still sent the letter.
- [112] I note parenthetically that, although the defendants pleaded qualified privilege in the Response to Civil Claim, they have not relied upon it as a basis for their Rule 9-5(1) application, nor have they "put it in play" for purposes of the PPPA application.
- [113] Finally, the plaintiffs referred to cases in which lawyers had sent pleadings to media for purposes not related to the litigation, and in which the court had concluded that only qualified privilege was available to the lawyers.

The Rule 9-5(1) Issues

- [114] As the arguments were framed before me, the defendants advanced their primary argument based on Rule 9-5(1). As a result, it is my view that I should begin by considering whether it is appropriate to bring on an application pursuant to Rule 9-5(1) concurrently with an application under s. 4 of the PPPA.
- [115] If I decide that it is, then I will go on to consider the arguments made with respect to Rule 9-5(1). If not, then I will proceed directly to consider the issues raised under s. 4 of the PPPA.

Hearing a PPPA and a Pleadings Application Together

- [116] Section 5 of the PPPA provides that:

No further steps

5 (1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.

(2) Subsection (1) does not apply to an application for an injunction.

[117] Although neither party raised the application of s. 5, and how it may impact the ability of the court to consider a Rule 9-5(1) application at the same time as a PPPA application, it is my view that this issue is jurisdictional in nature, there is very limited authority on the question in British Columbia, and thus it should be considered.

Positions of the Parties

[118] The defendants submit that an application to strike pleadings pursuant to Rule 9-5(1) should not be considered a "step in the proceeding". They argue this is the long-established interpretation of very similar language in the former Arbitration Act, R.S.B.C. 1996, c. 55, where a series of authorities concluded that because an application to strike is a step taken to negate or curtail litigation, rather than to affirm the litigation process for resolving the dispute, it is not a "step in the proceedings".

[119] The defendants argue that their concurrent Rule 9-5 application does not advance the proceeding toward trial, nor is it an "extraneous tactical step" that might be used to undermine the efficiency of the process, and thus does not run afoul of the legislative intent underlying s. 5 of the PPPA.

[120] They say the hearing of applications to dismiss an action on two concurrent bases (Rule 9-5(1) and s. 4 of the PPPA) gives proper regard to the goals of efficiency and economy, and is consistent with the object of the Rules to secure the just, speedy and inexpensive determination of every proceeding, and to conduct the proceeding in accordance with the principle of proportionality. Any concerns about efficiency can be dealt with through the court's inherent jurisdiction to determine the order in which the respective applications can be addressed.

[121] They also suggest that a motion to narrow or strike out pleadings can be justified as a step within the PPPA motion itself, as it narrows and focuses the issues to be decided under the PPPA.

[122] In support of this position, the defendants rely on Ontario authorities which suggest it is appropriate for a court to hear and determine a summary judgment application or an application to strike pleadings at the same time as a PPPA application, notwithstanding Ontario's comparable statutory provision. Section 137.1 of the Ontario Courts of Justice Act, R.S.O. 1990, c. C.43 [OCJA], which was adopted in 2015, is worded in a very similar manner to British Columbia's PPPA, which was adopted in 2019.

- [123] At the time this application was argued, there was authority in the Ontario Superior Court of Justice [Boyer v. Callidus Capital Corp., 2022 ONSC 3772], which the defendants acknowledged was contrary to their position. They argued that the authority was not binding and should not be followed by this court; rather, the court can and should exercise its discretion to hear the two applications together and avoid a potentially cumbersome and inefficient process. As I will discuss below, that authority was subsequently negated by the Ontario Court of Appeal. In further submissions on this point, the defendants urged the court that hearing the applications together serves the goals of efficiency and economy.
- [124] While the plaintiffs initially agreed with the defendants that it is appropriate to decide both the Rule 9-5(1) application and the PPPA application at the same time, in supplementary submissions regarding four recent appellate decisions they submitted it would be necessary for the court to first decide the PPPA application, and then, if it fails, to decide the application under Rule 9-5(1). This appears to be premised, in part, on the fact the 9-5(1) application had been fully argued. They acknowledge that s. 5, on its face, does not allow for the bringing of multiple applications.

Legal Context

- [125] As I stated, there is little British Columbia authority on the interpretation of s. 5 of the PPPA, and whether it prevents the concurrent bringing of an application to dismiss under Rule 9. Much of the existing authority, as relied on by the defendants, comes from the interpretation of s. 137.1(5) of the OCJA, which is the Ontario equivalent to s. 5 of the PPPA, and provides that once a motion under s. 137.1 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".
- [126] In *Lang v. Neufeld*, 2022 BCSC 130, the respondent Neufeld applied to dismiss the petition under both Rule 9-5(1) and s. 4 of the PPPA. At paras. 50-51, I noted the "likelihood that a R. 9-5 application would constitute a further step" under the PPPA, and thus "directed the parties to focus on the PPPA application". The petition was ultimately dismissed pursuant to the PPPA, so the question of whether s. 5 prevented concurrent consideration of the application under Rule 9-5(1) became moot.
- [127] In *Waterton Global Resource Management, Inc. v. Bockhold*, 2022 BCSC 499, Justice Murray heard and decided applications brought by certain defendants seeking dismissal of the claims against them under s. 4 of the PPPA or, alternatively, under Rule 9-6 (summary judgment). She dismissed both applications. The question of whether s. 5 prevented the bringing of a summary judgment application at the same time as the PPPA application does not appear to have been raised before her, although she did comment that the bringing of the PPPA application had prevented the parties from engaging in further discovery after the application was filed, which impacted the appropriateness of granting summary judgment.

- [128] I turn now to the first of the Ontario cases grappling with a very similar issue arising from s. 137.1(5). In *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 904 [United Soils], the defendant had filed a motion under s. 137.1, following which she filed a statement of defence and counterclaim. The plaintiff applied to strike out the statement of defence and counterclaim, arguing that their filing constituted a "further step" taken in the proceeding. Justice Penny allowed an appeal from a Master and struck out the defence and counterclaim, commenting:
- [15] In my view, the Master erred in law when he interpreted s. 137.1(5) of the Act to include an exception to the prohibition against taking any "further steps" in the proceeding, as long as the step in the proceeding would produce relevant information or information that is desirable, necessary or would be of assistance to the Court in its disposition of the motion.
- [16] Section 137.1 is plain enough. Once the anti-SLAPP motion is brought, no party may take any further step in the proceeding until the motion is finally disposed of. The prohibition makes good sense given the purpose of the legislation, as it prevents the use of "extraneous tactical steps" that might be used to undermine the efficiency of the intended process. The provision contains no exceptions and, importantly, the court is afforded no power to grant relief from the prohibition in any circumstances.
- [17] The Master correctly found that filing a pleading in the action is a "further step" in the proceeding. Having made that finding, the only choice was to set that step aside.
- [18] I come to this conclusion with the greatest of respect to Master Muir because I entirely share the Master's concerns about the importance of the merits, and specifically, whether the defendant has a valid defence to the action (s. 137.1(4)) and the need for evidence or information about the merits in order to properly decide the main motion on its merits.
- [19] I part company with the Master, however, on the need for a statement of defence to be filed in the proceeding in order for the defendant to put material before the court on the validity of her defence.
- [20] The Master, at some points in his analysis, glosses over the difference between taking steps in the proceeding as opposed to taking steps in the motion. It seems to me clear, reading the anti-SLAPP provisions of the Act as a whole, that a distinction is and must be made between taking steps or filing material in relation to the motion and taking further steps in the proceeding. The former is permitted, the latter is not.
- [129] The reference by Penny J. to "extraneous tactical steps" in para. 16 is presumably a reference to the October 2010 report of the Anti-Slapp Advisory Panel Report to the Attorney General, made to the Attorney General of Ontario. In the report, the panel recommended at paras. 40 and 42 that:

40. It is essential that remedies against inappropriate litigation affecting public participation be available quickly. The defendant may have few resources and little expertise in legal matters. The intimidation effect of a lawsuit for a large amount and the actual costs of fighting it should be minimized.
42. Until the motion for a remedy is decided, no other step in the action may be taken except possibly an injunction in the discretion of the court where the plaintiff can establish the fact or serious threat of irreparable harm, and the established special tests for injunctions restraining communicative activity are met. The suspension of other interlocutory proceedings is required to ensure that the efficiency of the special procedure is not undermined by extraneous tactical steps pending the motion's disposition.
- [130] The appropriateness of referring to this report was confirmed by Justice Côté in the leading case of 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 [Pointes Protection] at paras. 6-14. She referred to the panel's report as the "APR" in various parts of her judgment - some of which are quoted below.
- [131] Justice Penny's reasoning, and in particular the distinction between taking steps in relation to the motion as opposed to steps in the proceeding, was referenced by Murray J. at para. 34 of Galloway v. A.B., 2019 BCSC 1417, where she ordered disclosure of certain documents in advance of the hearing of an application under s. 4 of the PPPA, having noted at para. 40 that:
- [40] The question is how much disclosure to order. I am of the view that the disclosure that may be ordered on a dismissal application is confined to matters that relate to that application only.
- [132] Justice Murray's order was upheld by the Court of Appeal in Galloway v. A.B., 2020 BCCA 106. Chief Justice Bauman described the jurisdictional basis and rationale for such an order at paras. 46-51:
- [46] At the threshold is the question of the court's authority to contemplate the making of document disclosure orders as part of the process leading to the hearing and disposition of a dismissal application under s. 4 of the PPPA.
- [47] That authority cannot be doubted. It is expressly conferred by Rule 22-1(4)(c). It is an independent discretion to order production whether or not it is requested in the context of a cross-examination on a deponent's affidavit.
- [48] This is important to note because A.B. stresses the jurisprudence in this province prescribing a limited jurisdiction for ordering production of documents on the cross-examination of an affiant: Kapelus v. U.B.C., 2002 BCSC 741 at para. 29, cited in Casavant v. Cash Money Cheque Cashing Inc., 2008 BCSC 1556; and Cantile v. Canadian Heating Products Inc., 2016 BCSC 660.

[49] These cases do not discuss the independent authority for the court to require the production of documents on an interlocutory application given by Rule 22-1(4)(c).

[50] That rule (as A.B. does point out) was considered by Master Grist in *Wilkie Garment Company Ltd. v. Interlock Holdings Ltd.*, [1993] B.C.J. No. 2604. This has been recognized as the "leading case" on the rule: *Royal Bank of Canada v. British Columbia*, 2016 BCSC 2195 at para. 46. Master Grist (as he then was) said this at para. 9 of Rule 52(8)(c), now Rule 22-1(4)(c):

Rule 52(8)(c) has particular relevance to this application. The Rule is discretionary and should be applied weighing the degree of relevance to the issues arising on the application and factors of comparative prejudice. In the context of the continuing proceedings under the Mareva injunction, the issues arising would seem to be the likelihood of removal of exigible assets from the jurisdiction, the sufficiency of security and the prejudice to the defendant through the freezing of assets. In my view full disclosure of material is necessary to permit the full cross-examination ordered by the Chief Justice. The material can be made available with little prejudice to the defendants and accordingly the order should be allowed.

[51] So there is discretion to order production of documents in the context of the dismissal application and I agree that it should be exercised "weighing the degree of relevance to the issues arising on the application and factors of comparative prejudice".

[133] The other recent British Columbia authority considering s. 5 of the PPPA is *Orlando v. Boylan*, 2023 BCCA 51. *Orlando* involved an application for leave to appeal a procedural order made in Supreme Court chambers. The judgment of the chambers judge has not been published, although it was described by Justice Bennett in the course of her judgment on the leave application. At the Supreme Court level, the defendant had failed to attend an examination for discovery, which led to the court ordering the defendant to attend a discovery. Just before the newly scheduled discovery date, the defendant filed an application under s. 4 of the PPPA and took the position that pursuant to s. 5 of the PPPA, the discovery could not proceed. The decision of the chambers judge was described by Bennett J.A. as follows:

[14] She observed there was no caselaw considering how s. 5 might apply in the context of obligations that pre-dated a PPPA Application, especially where those obligations, as in this case, had already been confirmed by an order of the BC Supreme Court with a view to enforcing compliance with the Supreme Court Civil Rules.

[15] The Chambers Judge concluded Ms. Orlando's attempted use of the PPPA in this way would be an abuse of the process of the court, allowing litigants to sidestep existing court orders by making a PPPA application. In her words, "Ms. Orlando's position would permit a party to use the PPPA as a shield to avoid extant obligations under the Rules and under court orders"

- [16] She held that if no examination appointment had been taken out in the BCSC Proceeding prior to the PPPA Application being filed, s. 5(1) would be engaged so as to halt the examination. In this case, the appointment pre-dated the PPPA Application so s. 5(1) did not apply and the examination should go forward.
- [134] In her consideration of the merits of the proposed appeal, Bennett J.A. commented:
- [45] there is merit to the submission that the Chambers judge erred in ordering Ms. Orlando to proceed with her existing discovery obligations in the debt and defamation claims. Section 5(1) of the PPPA states that once an application has been made, "no party may take further steps in the proceeding" until the application has been heard. I consider it arguable that compelling Ms. Orlando to attend a discovery appointment, even one that was previously scheduled, constitutes a "further step" in the proceeding contrary to s. 5(1).
- [135] However, Bennett J.A. denied leave to appeal on the basis that, while the appeal had some merit, granting leave would hinder proceedings in the Supreme Court.
- [136] With reference to what may be considered a "step in the proceedings", the defendants drew my attention to authorities arising in the context of the former Arbitration Act. The first of these decisions is *Seidel v. Telus Communications Inc.*, 2009 BCCA 104, rev'd on other grounds 2011 SCC 15. At para. 26, Justice Tysoe commented that:
- [26] Section 15(1) of the Commercial Arbitration Act specifically deals with the timing of stay applications. It provides that the application may be made by a party to legal proceedings "before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings". TELUS has not delivered a statement of defence, and the provision of the list of defences did not constitute a step in the proceeding. TELUS did apply to strike out certain of Ms. Seidel's claims but such an application is not a step in the proceedings: see *Fathers of Confederation Buildings Trust v. Pigott Construction Co.* (1974), 44 D.L.R. (3d) 265 (P.E.I.S.C.).
- [Emphasis added.]
- [137] The *Fathers of Confederation Buildings Trust* case, referenced in *Seidel*, contains, at pp. 269-273, a lengthy review of the interpretation of this language in arbitration statutes, dating back to 1894. In that context, the cases indicate the court will treat steps that are aimed at furthering the action as constituting a step in the proceeding, but not steps that are aimed at smothering it or preventing it from proceeding.
- [138] As I read those cases, they reflect an underlying policy that where a party appears to have elected to proceed with court proceedings, and communicated that election through some sort of step which confirms the election, it will be deemed to have attorned to the court's jurisdiction and be prevented from subsequently changing its position. The underlying rationale for this conclusion is in the nature of an estoppel.

[139] In *Bodnar v. Payroll Loans Ltd.*, 2009 BCSC 1205, Justice Griffin (as she then was) commented that:

[51] The decision in *Seidel* is consistent with previous jurisprudence, which has found that purely defensive measures taken to parry or smother an action do not constitute steps in the proceedings, but filing a statement of defence, and thus submitting to the court's jurisdiction, does constitute such a step. A step that has the purpose of advancing a party's defence of the action is a step in the proceeding within the meaning of s. 15(1) of the CAA, whereas a step that is for the purpose of protecting a parties' rights may be an "interim measure or protection" within the meaning of s. 15(4): *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.*, 31 B.C.A.C. 126, 81 B.C.L.R. (2d) 359 at para. 23 and *Globe Union Industrial Corp. v. G.A.P. Marketing Corporation*, [1995] 2 W.W.R. 696, 100 B.C.L.R. (2d) 241.

[Emphasis added.]

[140] I turn now to a series of more recent Ontario cases dealing with s. 137.1(5) of the OCJA.

[141] In *Labourers' International Union of North America, Local 183 v. Castellano*, 2019 ONSC 506, aff'd 2020 ONCA 71 [Castellano], several plaintiffs commenced a defamation action against Mr. Castellano, a former member of the union who had been expelled in 2015. The plaintiffs filed a summary judgment motion, seeking judgment in respect of their claims. The defendant then filed an application to have the action dismissed pursuant to s. 137.1. The plaintiffs argued that a s. 137.1 motion is not available to the defendant once a motion for summary judgment is pending. They argued that s. 137.1 is intended as a threshold screening mechanism, and should not be resorted to once the case on the merits is before the court. The chambers judge concluded that there was no merit to this argument, given that s. 137.2 provided that an application under s. 137.1 could be brought at any time.

[142] The Court of Appeal confirmed this ruling, commenting that:

[7] ... There is no statutory or other prohibition against proceeding in this manner and it was within the discretion of the motion judge to determine the order in which the motions would be addressed.

[8] Moreover, the purpose of s. 137.1 could be undercut if the bringing of a summary judgment motion precluded a defendant from bringing a s. 137.1 motion. While mindful that the efficacy of s. 137.1 could be undermined if the motion is not brought on a timely basis, there is no statutory timeline for its hearing.

[9] There should be no hard and fast rule dictating when such a motion should be brought; otherwise, the inherent discretion of a motion judge to manage the proceedings before him or her would be fettered

[143] It does not appear to have been argued in *Castellano* that s. 137.1(5) prevented the court from considering the summary judgment motion until after the s. 137.1 motion had been disposed of.

- [144] In *Zoutman v. Graham*, 2020 ONCA 767, Mr. Graham posted negative reviews about Dr. Zoutman on RateMDs.com. Dr. Zoutman commenced an action for defamation in March 2015. In July 2018, he served a motion seeking summary judgment in respect of his claims, returnable in November 2018. In October 2018, Mr. Graham served his own motion, seeking to have the action dismissed pursuant to s. 137.1. The procedural background is thus very similar to that in *Castellano*. The chambers judge heard the two applications together, dismissing Mr. Graham's application and granting summary judgment in the amount of \$50,000 in favour of Dr. Zoutman, noting as he did so that the summary judgment motion had been served and filed more than two months before the s. 137.1 motion was filed.
- [145] The Court of Appeal dismissed the appeal, noting that:
- [16] Although not pressed in oral submissions, the appellant submits that the motions judge had no jurisdiction to rule on the summary judgment motion once the appellant brought his anti-SLAPP motion due to the language of s. 137.1(5). Section 137.1(5) provides that once a s. 137.1 motion is made, no further steps may be taken in the proceeding until the anti-SLAPP motion, including any appeal, has been finally disposed of.
- [17] However, the respondent brought and scheduled his summary judgment motion well before the appellant brought his motion under s. 137.1. Furthermore, the two motions were ordered to be heard at the same time, and the appellant did not seek to appeal that decision. In this context, the respondent did not take any further step within the meaning of s. 137.1(5). It will not be every case that the presence of a motion for summary judgment precludes a s.137.1 motion: see *Labourers' International Union of North America, Local 183 v. Castellano*, 2020 ONCA 71, at para. 9. However, given the constellation of facts in this case, it was open to the motions judge to decline the s.137.1 relief on the basis of its timing.
- [18] That said, as discussed, the motions judge nonetheless addressed the merits of the appellant's motion
- [146] In *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125, several document disclosure applications were made while an application under s. 137.1 was outstanding. The applications were resisted on grounds of privilege. Justice Boswell also considered the "jurisdictional issue" of whether the disclosure applications were barred by s. 137.1(5). He commented at para. 196, with reference to *United Soils*, that despite the paucity of caselaw on s. 137.1(5):

its purpose is clear. The prohibition on any further steps in a proceeding once an anti-SLAPP motion has been served prevents parties from engaging in extraneous litigation that may undermine the efficiency of the process established by s. 137.1 or otherwise compound the mischief the anti-SLAPP provisions are designed to prevent."

- [147] Justice Boswell noted that the plain wording of s. 137.1(5) makes it apparent that it is non-discretionary and permits no exceptions; however, he noted that it may not apply to steps taken for purposes of a pending s. 137.1 motion. At paras. 200-202, he concluded:
- [200] It seems to me that any discretion to permit interlocutory motions within an anti-SLAPP motion must be exercised having regard to the aspirations of the legislation in terms of efficiency and economy. A multiplicity of interlocutory steps, or steps that fail to pass muster on a costs/benefits assessment ought to be avoided.
- [201] The concept of proportionality is another means of expressing the essence of the costs/benefits analysis. It has taken on increasing prominence in the interpretation of the Rules of Civil Procedure over the past decade. It is a concept that, in my view, is of vital concern to the management of anti-SLAPP motions. Interlocutory steps that are disproportionate to the requirements of the anti-SLAPP motion(s) and the circumstances of the parties should be discouraged.
- [202] To summarize, I accept Justice Penny's distinction, in *United Soils*, between steps in the proceeding and steps within the anti-SLAPP motion itself. The former are stayed. The latter are permissible, in the court's discretion. That discretion must be exercised having regard to the purposes and goals of the anti-SLAPP statutory regime - principally efficiency and economy. Accordingly, any proposed interlocutory steps must be subject to a costs/benefits analysis. Those steps found to be disproportionate to the needs of the anti-SLAPP motion or the circumstances of the parties should not be permitted.
- [148] In *Boyer v. Callidus Capital Corporation*, 2022 ONSC 3772, rev'd 2023 ONCA 233 [Boyer], the plaintiff claimed for wrongful dismissal. The defendant employer made a counterclaim for damages, alleging misconduct in employment. The plaintiff applied to dismiss the counterclaim under s. 137.1, and as part of the same motion applied to strike out the counterclaim on the grounds that it was frivolous, vexatious and an abuse of process and discloses no reasonable cause of action. That application was brought under the Ontario equivalent of British Columbia's Rule 9-5(1). The chambers judge, after a careful review of s. 137.1(5), concluded that the applications to strike the counterclaim should be adjourned. He reviewed the cases I have reviewed above, and distinguished *Zoutman* and *Castellano* on the basis that in those cases, the s. 137.1 applications were brought in response to pending applications. He concluded, at para. 27, that he had no discretion to allow the motion to strike the claim to proceed. He then proceeded to decide the s. 137.1 application, dismissing it on the basis that the plaintiff had failed to establish that the counterclaim arose from an expression made by him.
- [149] On appeal, Justice Benotto determined that the chambers judge was in error in concluding that the counterclaim did not arise from an expression made by the plaintiff, and that the various requirements of s. 137.1 were met in the circumstances. She thus granted the application to dismiss the counterclaim pursuant to s. 137.1.

[150] In obiter, she went on to comment on the conclusion of the trial judge with respect to the application to strike out the counterclaim:

[60] The motion judge distinguished this case because in Zoutman, the summary judgment motion was brought first and then combined with the s 137.1 motion. I do not agree that is a requirement. To sequence motions in this fashion would add expense and delay to an already expensive process. This was confirmed in [Castellano] at paras. 7-9:

we agree with the appellant's position that the motion judge made no error in hearing the s. 137.1 motion at the same time as the summary judgment motion. There is no statutory or other prohibition against proceeding in this manner and it was within the discretion of the motion judge to determine the order in which the motions would be addressed.

Moreover, the purpose of s. 137.1 could be undercut if the bringing of a summary judgment motion precluded a defendant from bringing a s. 137.1 motion. While mindful that the efficacy of s. 137.1 could be undermined if the motion is not brought on a timely basis, there is no statutory timeline for its hearing.

There should be no hard and fast rule dictating when such a motion should be brought; otherwise, the inherent discretion of a motion judge to manage the proceedings before him or her would be fettered. We do not read para. 50 of [Zoutman] as purporting to set down as general principle anything to the contrary.

[61] Moreover, the goals of efficiency and economy would be lost if the motions are not heard together. The procedure was meant to be efficient and inexpensive. As Pepall J.A. said in Park Lawn at para. 40:

I would also add that the cost of litigation is a plague that has infected our system of justice and serves to undermine its efficacy. Here the Legislature enacted a provision designed to help people avoid a costly defamation lawsuit and preserve the opportunity for public discourse and expression, but at the same time allow legitimate actions to proceed. The procedure was to be efficient and inexpensive. Ironically, a procedure intended to avoid costly, unmeritorious, protracted defamation lawsuits has developed into a platform for sometimes costly, unmeritorious and protracted litigation. This is not to say that [s. 137.1] motions should not be brought, but rather the parameters of the ensuing litigation should be limited in scope.

[62] While a motion judge has discretion to organize the conduct of a motion, the principles animating the discretion should be based on efficiency and economy. Section 137.1(5) does not preclude the motions in the present case from being heard and decided together.

[151] Park Lawn Corporation v. Kahu Capital Partners Ltd., 2023 ONCA 129, does not involve consideration of s. 137.1(5), but it does contain pointed comments with respect to issues that have arisen with motions under s. 137.1. Justice Pepall noted at paras. 33-34 that the process under that section was intended to be efficient and economical, but that "the practice has evolved into quite a different state than that anticipated by the Legislature" and by cases such as Pointes Protection. At para. 35, she cited with approval concerns expressed

by a chambers judge in *Tamming v. Paterson*, 2021 ONSC 8306 that:

These motions tend to be complex and expensive proceedings. Although they are not intended to involve a deep dive into the merits or even a detailed review akin to a motion for summary judgment, they usually do represent virtually the entire trial being played out in advance .

Despite the Legislature's intention to create a preliminary hurdle, the process advanced in practice is more like a marathon. To that end, the mandatory 60-day time limit for resolving these motions is routinely ignored. Counsel on both sides usually need more time and, in Toronto at least, motion appointments are backlogged by far more than 60 days.

We are seeing an ever-increasing volume of anti-SLAPP motions in Toronto. The powerful remedy and the costs protections for the moving defendants make these motions attractive. The size of the endeavour can also be seen as an incentive for abusive SLAPP plaintiffs and others with incentive to expand proceedings.

[Emphasis that of Pepall J.A.]

[152] It was in that context that Pepall J.A. made the comments quoted in Boyer. She continued at para. 41 to reiterate the 60-day time parameter, commenting that:

The timeframe for these motions should act as a reminder that they are meant to be limited in scope.

Analysis

[153] It cannot be said in this case that the purpose of the Rule 9-5(1) application is to narrow the issues for purposes of the PPPA application. The relief sought is to strike out the claim in its entirety. It seeks dismissal of the action on independent grounds and based on different tests. If the relief sought was granted, it would not advance the PPPA application - it would render it moot.

[154] As noted above, s. 5(1) of the PPPA provides that, if an application under s. 4 is served, "no party may take further steps in the proceeding" until the application is decided. This gives rise to the question whether an application to dismiss an action pursuant to Rule 9-5(1) is a further step in the proceeding.

[155] I begin with the submission based on the interpretation of "step in the proceeding" in the commercial arbitration context. I do not find the cases cited to me, which interpret similar language in a different context, to be of assistance. I note that the language of the statutory provision in those cases was more extensive; it required that an application to stay an action pending arbitration be brought:

before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings.

- [156] In my view, the interpretation of the words "any other step in the proceeding" in that context is influenced by the words leading up to them. The statute contains specific words followed by general words at the end of the sentence. As I read the historical cases, it appears that the courts have applied what has been described by Professor Sullivan as the "limited class rule" (which was historically described by the Latin term *ejusdem generis*), by which those general words at the end take their colour from the specific items that precede them. The general words are limited to the genus of the narrow enumeration that precedes it: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022), at §8.07. There are no such specific items or narrow enumeration preceding the general words in s. 5 of the PPPA.
- [157] The interpretation of that phrase in the Arbitration Act is also heavily influenced by reference to its purpose. Specifically, the provision is aimed at preventing unfairness where a party has elected to participate in a court proceeding, and should be prevented (or estopped) from later changing its mind. Because that is its purpose, it does not apply to steps in the proceeding that are aimed at smothering or preventing the court proceeding from going ahead, as steps of that sort cannot be read as an election in favour of the court proceeding.
- [158] The purpose of s. 5 of the PPPA is substantially different. It is intended to prevent the use of extraneous litigation steps that might undermine the efficiency and economy of what is intended to be an expedited process, or otherwise compound the mischief the PPPA is designed to prevent. In my view, the policy underlying this and other provisions of the PPPA, including s. 9(3), which provides that an application under s. 4 must be heard "as soon as practicable", is that proceedings be heard quickly, efficiently and economically.
- [159] This analysis accords with the comments of Pepall J.A. in *Park Lawn*, and emphasizes that the parameters of a motion under s. 4 of the PPPA should be limited in scope.
- [160] I acknowledge the comments of the Ontario Court of Appeal in *Boyer*. While comments by that court, even in obiter, are appropriately treated with careful consideration, they are not binding on this Court. In my view, the approach of the British Columbia Court of Appeal, as reflected in both *Galloway* and *Orlando*, is to carefully circumscribe the extent of litigation between the time a PPPA application is filed and the time it is ultimately decided. It is more consistent with the approach reflected in the comments of Penny J. in *United Soils* and *Boswell J. in Catalyst Capital*, which I find persuasive.
- [161] In my view, there are significant distinctions between an application under s. 4 of the PPPA, an application to dismiss an action pursuant to Rule 9-5(1)(a), an application to dismiss an action pursuant to Rule 9-5(1)(b), (c) or (d), an application to dismiss an action pursuant to Rule 9-6 (summary judgment) and an application to dismiss an action pursuant to Rule 9-7 (summary trial).

- [162] A motion under s. 4 of the PPPA was meant to fulfil a different purpose than other motions like an application to strike pleadings or for summary judgment: *Pointes Protection* at para. 38. One of the key differences is that the court, on an application under s. 4 of the PPPA, can prevent a plaintiff with a valid cause of action from proceeding with their claim: *Neufeld v. Hansman*, 2021 BCCA 222 at para. 5 (confirmed on this point at 2023 SCC 14, para. 51).
- [163] The Supreme Court of Canada, in *Pointes Protection* at paras. 16, 38 and 52, noted many differences between a summary judgment motion and an application under s. 137.1 of the OCJA. These include the earlier stage of the proceeding, the limited evidentiary record and corresponding procedural limitations.
- [164] With respect to the present applications, those brought pursuant to Rule 9-5(1) require the application of different legal tests and legal standards to the analysis of the claims. The application pursuant to Rule 9-5(1)(a) requires the court to ignore the evidence that has been filed, with limited exceptions, and to apply a legal analysis based on the assumption that the facts asserted in the Notice of Civil Claim are true. It requires consideration of whether a claim or defence is novel or bound to fail. Applications pursuant to Rule 9-5(1)(b) require consideration of legal concepts such as whether a claim is "unnecessary", "scandalous" or "vexatious". Rule 9-5(1)(d) requires analysis of the concept of abuse of process.
- [165] It should be obvious from the summary of the parties' positions above that a not insignificant part of the six days over which the hearing occurred was devoted to consideration of the various different tests brought into play by the Rule 9-5(1) application. A standalone PPPA application would have not required such a lengthy hearing.
- [166] The PPPA also has special rules as to costs. Whereas on most applications a successful party is awarded costs pursuant to a tariff, s. 7 of the PPPA provides for full indemnity costs "unless the court considers that assessment inappropriate in the circumstances". This provides a "starting point" for the analysis of costs on a PPPA motion: *Hobbs v. Warner*, 2021 BCCA 290 [Hobbs] at para. 104. In my view, this special provision as to costs is premised upon the PPPA application being conducted in the streamlined manner contemplated in the PPPA.
- [167] In my view, it is inimical to the intent of the legislation to allow the coupling of PPPA motions, as a matter of course, to applications to strike pleadings, for summary judgment, or to otherwise advance alternative bases on which to dismiss or circumscribe an action. Because a PPPA application inherently requires some consideration of the merits of the claim, it will be a rare case in which it could not be argued that there is some degree of crossover or commonality of one or more issues between the PPPA application and some potential application under any one or more of Rules 9-5, 9-6 and 9-7. However, the fact there is one or more issues as to which there is a degree of commonality does not overcome the strong public policy reflected in the PPPA that such applications are to be limited in scope and heard and disposed of quickly, efficiently and economically.

[168] In my view, the court should not entertain the defendants' Rule 9-5(1) application concurrently with their PPPA application. The application is adjourned generally. In accordance with s. 5 of the PPPA, it should not be brought on again until the time for bringing of an appeal from this judgment has passed. If an appeal is taken from this judgment, then it should not be brought on until the appeal has been determined.

The PPPA Issues

[169] For purposes of this application, the defendants do not dispute that there are grounds to believe the proceeding has substantial merit. Nor do the plaintiffs dispute that the proceeding arises from an expression made by the defendants. This relieves the court of the need to consider two matters typically in issue on an application pursuant to s. 4 of the PPPA.

[170] There remain three issues for decision with respect to s. 4 of the PPPA:

- a) Whether the expression from which this proceeding arises "relates to a matter of public interest" (s. 4(1)(b));
- b) Whether there are "grounds to believe" that "the applicant has no valid defence in the proceeding" (s. 4(2)(a)(ii)); and
- c) Whether "the harm likely to have been suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression" (s. 4(2)(b)).

A Matter of Public Interest

[171] Section 4(1) provides that:

In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- (a) the proceeding arises from an expression made by the applicant, and
- (b) the expression relates to a matter of public interest.

[172] It is common ground that this proceeding arises from an expression made by the defendants. The issue for determination is whether the defendants have established that the expression contained in the February 22 Letter "relates to a matter of public interest".

Positions of the Parties

[173] The defendants submit that the subject matter of the letter is the management, governance and financial position of a publicly traded corporation, which is a matter of public interest. Axion is a publicly traded company, and the letter raised concerns about potential damage to Axion and its business interests to True Corporation, which was a member of the investing public and the second largest single shareholder in Axion. True Corporation was

thus a member of a segment of a community that had a genuine interest and stake in receiving information on that matter of public interest. It was a recipient with an obvious and direct interest in the concerns set out in the letter.

[174] The plaintiffs argue the expression contained in the February 22 Letter does not relate to a matter of public interest, noting that:

- a) Axion is a holding company, that does not provide services directly to the public; and
- b) The letter was sent to only one person.

While the plaintiffs acknowledge that does not prevent it from being found to be "related to a matter of public interest" they submit that the broader the circulation, the more likely a matter of public interest, and that an expression made to a single private actor cannot be said to have been made to a "segment of the public".

[175] The plaintiffs argue that, at best, the February 22 Letter simply "makes reference to" a matter of public interest. The authorities require the court to consider at a fundamental level what the communication is really about. The plaintiffs say that in this case, any public interest at play was merely ancillary, and the true purpose of the February 22 Letter was not to engage the public in Axion's governance; rather, it was to defame the plaintiffs in order to obtain a proxy for Mr. Bonner.

[176] The plaintiffs acknowledge that, in some of the authorities, expressions in respect of public corporations have been found to relate to matters of public interest. They say, however, that cases in which statements about a public corporation have been found to be matters of public interest have typically involved communication made in the context of public discourse on the topic of management of public companies, and often include public figures such as journalists or commentators. In this case, the February 22 Letter was not a public statement, made by a public commentator, about a corporation of significance, on a topic of clear public interest. Nor was it intended to educate or caution the public at large.

[177] The plaintiffs argue that communications about private matters are not converted into matters of public interest where those expressions happen to concern individuals in public positions, or who attract the public's attention. They say the court should consider what the expression in this case is really about, and should conclude that the letter is really about a private commercial dispute.

Legal Context

[178] The onus with respect to this issue is on the defendants/applicants.

[179] The approach to determining whether an expression "relates to a matter of public interest" was explained by Côté J. in *Pointes Protection* at paras. 26-31:

- [26] These words should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1(3). Indeed, the APR clearly stated that a "broader test will ensure that the full scope of legitimate participation in public matters is made subject to the special procedure" (at para. 31) and that therefore a "broad scope of protection" is preferable (para. 29).
- [27] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a "matter of public interest". The same principles apply in the present context. The expression should be assessed "as a whole", and it must be asked whether "some segment of the community would have a genuine interest in receiving information on the subject" (paras. 101-2). While there is "no single 'test'", "[t]he public has a genuine stake in knowing about many matters" ranging across a variety of topics (paras. 103 and 106). This Court rejected the "narrow" interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, "[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence" (para. 106).
- [28] The statutory language used in s. 137.1(3) confirms that "public interest" ought to be given a broad interpretation. Indeed, "public interest" is preceded by the modifier "a matter of". This is important, as it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest -- there is no qualitative assessment of the expression at this stage. The question is only whether the expression pertains to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one.
- [29] Nonetheless, expression that relates to a matter of public interest must be distinguished from expression that simply makes reference to something of public interest, or to a matter about which the public is merely curious. Neither of the latter two forms of expression will be sufficient for the moving party to meet its burden under s. 137.1(3) (see *Torstar*, at para. 102).
- [30] Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about. The animating purpose of s. 137.1 should not be forgotten: s. 137.1 was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that is public participation in democracy. If the bar is set too high at s. 137.1(3), the motion judge will never reach the crux of the inquiry that lies in the weighing exercise at s. 137.1(4)(b). Thus, in light of the legislative purpose and background of s. 137.1, it is important to interpret an "expression" that "relates to a matter of public interest" in a generous and expansive fashion.

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

[Emphasis in original.]

[180] At para. 27, Côté J. referenced the discussion of matters of public interest in *Grant*. Two comments in *Grant* are useful in understanding the approach taken in determining this issue. At para.102 of *Grant*, Chief Justice McLachlin said:

[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.

At para. 106, she noted that:

[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" 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.

[181] In *Lyncaster v. Metro Vancouver Kink Society*, 2019 BCSC 2207, Justice Mayer compiled a useful summary of the principles in *Grant* at para. 26:

- a) A matter of public interest must be distinguished from a matter about which the public is merely curious or has a prurient interest.
- b) The phrase "public interest" must be given a broad, although not unlimited, interpretation.
- c) The public interest is to be determined objectively, having regard to the context in which the expression was made and the entirety of the relevant communication.

- d) An expression can relate to a matter of public interest without engaging the interest of the entire community, or even a substantial part of the community. It is enough that some segment of the community would have a genuine interest in the subject matter of the expression.
- e) The characterization of the expression as a matter of public interest will usually be made by reference to the circumstances as they existed when the expression was made.
- f) Neither the merits of an expression, nor the motive of the author in making it, should be taken into account in determining whether an expression relates to a matter of public interest.
- g) 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 to which considerable notoriety or controversy has attached.

([Grant] at paras. 103-106; Pointes [ONCA] at paras. 57-65; Walsh v. Badin, 2019 ONSC 689 at para. 32).

See also the comments of Justice Dunphy in Able Translations Ltd. v. Express International Translations Inc., 2016 ONSC 6785 at para. 26, aff'd 2018 ONCA 690 at para. 22.

[182] It is the character of the expression and not the scope of dissemination that determines whether the expression relates to a matter of public interest: Lang v. Neufeld, 2022 BCSC 130 at para. 123.

[183] The motivation behind the communication - that is, why the impugned expression occurred - is a subjective consideration not relevant to determining the objective nature of the expression for purposes of s. 4(1). The quality or merits of the expression and the manner in which it is conveyed are similarly irrelevant at this stage: Sokoloff v. Tru-Path Occupational Therapy Services Ltd., 2020 ONCA 730 at paras. 24-25.

[184] In para. 29 of Pointes Protection, Côté J. highlighted a distinction between expression that "relates to" a matter of public interest, and expression that "simply makes reference to" something of public interest. That distinction was taken up by Justice MacNaughton in Cheema v. Young, 2021 BCSC 461 at paras. 85-90. In that case, the defendant's tweets included comments on the transition to a municipal police force in Surrey, as well as comments implicating Mr. Cheema in improper influence, bullying, abuse of power and financial malfeasance. Justice MacNaughton commented that those tweets:

make reference to a matter of public interest in a veiled effort to target Mr. Cheema, a private individual. In the result, Mr. Young has not established that his comments about Mr. Cheema are with respect to a matter of public interest, even given the expansive and generous interpretation of that term in Pointes Protection.

- [185] *Grist v. TruGrp Inc.*, 2021 ONCA 309, involved a dispute amongst private companies. The comments of the court in that case provide insight into the key distinction between public and private disputes:
- [18] The scope of s. 137.1's protection is set using the concept of the public interest. This is a concept that many have found difficult to apply. The most detailed exploration of the concept is provided in *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R. 640, in the analogous context of the law of defamation. That case emphasizes that the public interest is not a descriptive concept: it is not a matter of ascertaining what the public, or any subgroup, believes to be interesting, entertaining, or worth their attention: at para. 102. Instead, "there is necessarily a normative aspect to what is 'genuinely' a matter of public interest": Sokoloff, at para. 18. That is, the statement must address an issue "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": *Grant*, at para. 105, citing Raymond E. Brown, *The Law of Defamation in Canada*, loose-leaf, (2008-Rel. 3) 2nd ed. (Scarborough: Carswell, 1999), vol. 2, at pp. 15-137 and 15-138. Again, the fact of notoriety or controversy is not sufficient in itself -- one must assess the reason for the notoriety.
- [19] The public interest includes such matters as the establishment, use, allocation, and maintenance of shared public goods, and therefore protects discussion and advocacy about the distribution of benefits and burdens of social life. But the public interest is not necessarily limited to matters of shared public life: *Grant*, at para. 106. There is, after all, a public interest in maintaining peaceful relations between persons in society and in drawing attention to acts of injustice. But 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: Sokoloff, at para. 19.
- [186] *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 7957, aff'd 2023 ONCA 381, involved companies that were described as "significant players in the Canadian private equity and financing markets", and actions that "had their genesis in" articles published in the *Wall Street Journal* and tweets published by a *Wall Street Journal* reporter, Mr. Copeland. The articles were based on whistleblower complaints filed with the Ontario Securities Commission, and included accusations of fraud and other inappropriate financial dealings on the part of Catalyst. The Catalyst parties argued the expressions did not "relate to" a matter of public interest, but rather, merely "made reference" to a matter of public interest.
- [187] Justice McEwan's judgment contains a helpful review of cases considering what "relates to a matter of public interest" in expressions regarding the management of publicly traded companies:
- [94] I begin with *Pointes* and *Bent*. There, it will be remembered, the Supreme Court held that the phrase "relates to a matter of public interest", should be given a "liberal", "broad", and "generous and expansive" interpretation: *Pointes*, at paras. 26, 28, and 30; *Bent*, at para. 81.

Citing its previous decision in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 103, 106, the Court in *Pointes* stressed that "the public has a genuine stake in knowing about many matters' ranging across a variety of topics" and that the key question is whether "some segment of the community would have a genuine interest in receiving information on the subject": at para. 27.

[95] Consistent with the Supreme Court of Canada's call for an expansive interpretation of s. 137.1(3), Ontario courts have confirmed that expressions involving commercial topics will often relate to matters of public interest. For example, in *Thompson v. Cohodes*, 2017 ONSC 2590, Justice Kristjanson held - and the plaintiff conceded - that expression relating to the management of a publicly traded corporation was a matter of public interest.

[96] More recently, in *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1, Doherty J.A., speaking for a unanimous Court of Appeal for Ontario, held that a defendant's "tweets" - which touched on a commercial topic in that they sought to alert the public to potentially risky real estate investments - related to a matter of public interest. At para. 40, Justice Doherty explained:

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

[97] Interestingly, in March 2018 Justice Conway dealt with a situation where Catalyst was seeking an urgent interim injunction to prevent *The Globe and Mail* from publishing a portion of a Catalyst Confidential Update to its investors. Justice Conway dismissed Catalyst's motion and held, amongst other things, that, even though Catalyst is a private company, its activities were a matter of public interest.

[98] In *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587, at paras. 31-33, Justice De Sa provided the following helpful remarks:

Comments or conversations relating to corporations or businesses will more obviously have a public dimension to them. Members of the public or at least segments of the community will have an interest in knowing something about the companies that offer them services. This is true not only from the perspective of the "quality" of the services offered, but also from the perspective of whether or not a member of the public would want to contribute funds to the business/corporation.

In this respect, a company's business practices, the conduct of its management, and even the company's activities in the community will often have significance to the community.

Accordingly, I am satisfied that the Plaintiff has met its onus of demonstrating that the conversations address an issue of public interest.

[188] Justice McEwan concluded, at paras. 101-103, that the expression at issue related to a matter of public interest. He noted the "threshold burden" is not intended to be particularly onerous. He further noted, among other factors, that the expression in the case before him involved both private and public corporations of significance, and that at the very least, certain segments of the public (i.e., those who have an interest in investing with or have already invested with the parties) would find this expression to be of interest.

Analysis

[189] I begin by considering the circumstances as they existed at the time of the February 22 Letter.

[190] By that date, battle lines had been drawn. There were four distinct court actions outstanding, with the hearing of the Oppression Proceeding shortly to occur. There was also the possibility of further litigation. Ownership of key business assets held by what were said to be Axion subsidiaries was in issue. There was an upcoming AGM at which shareholders would be presented with two competing slates of directors and have to make a key decision for the company.

[191] The letter in this case had limited exposure. It was directed to the chief legal officer of one shareholder. One could infer from the letter a hope that it would come to the attention of more senior management, possibly with commentary from the company's legal department. However, there is no indication the letter itself was intended to be shared more broadly than that. That said, the cases make clear that it is the nature of the matters discussed, rather than the scope of publication, that determine whether the statements in the letter relate to a matter of public interest. In some cases, where the nature of the statements is not clear, it might be possible to draw an inference from limited publication. In this case, it is my view that the nature of the statements is clear.

[192] I note that it is not legally relevant at this point in the PPPA analysis 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 Protection* at para. 28; *Bent* at para. 84.

[193] In my view, assessing the February 22 Letter "as a whole", the matters on which it is focused are the proper management of Axion. The letter is aimed at persuading the reader that Mr. Bonner and his associates are best positioned to manage Axion for the benefit of its shareholders, and that the steps taken by the plaintiffs (which are the subject matter of the Oppression Proceeding and also include the Conspiracy Action) are not in the best interests of Axion and its shareholders. That is a matter of interest to a segment of the public - being those of the investing public who follow the affairs of publicly traded companies. Had the primary focus of the letter been a different matter - for example, the validity of the Bonner

Family Loans - the conclusion might have been different. However, that is not how I read the letter. The letter relates to a matter that is of interest to a segment of the community that has a genuine interest in receiving information on this topic.

[194] The plaintiffs urge the court to focus not on the subject matter of the letter writ large, but on what they say is the strategic purpose of the letter, which they say was to defame the plaintiffs in order to obtain a proxy for Mr. Bonner. To take such a narrow approach separates out the strategic purpose from its clear subject matter, and is contrary to the broad approach recognized in and mandated by *Pointes Protection*. It is also inappropriate to limit the PPPA to comments made by recognized public commentators.

[195] I conclude that the February 22 Letter is an expression relating to a matter of public interest. The defendants have thus met their burden under s. 4(1) of the PPPA.

Grounds to Believe - No Valid Defence

Legal Context - The Grounds to Believe Standard

[196] Section 4(2) provides that:

- (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
 - (a) there are grounds to believe that
 - (i) the proceeding has substantial merit, and
 - (ii) the applicant has no valid defence in the proceeding, and
 - (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[197] The burden is on the responding party (i.e., the plaintiffs) to satisfy the motion judge of all three requirements: *Pointes Protection* at para. 33. If any one of the three is not met, then the proceeding should be dismissed.

[198] For purposes of s. 4(2)(a)(ii), although the burden is on the plaintiff to rebut a defence, the defendant/applicant must first "put in play" the defences it intends to present, following which the plaintiff/respondent must show there are grounds to believe those defences are not valid: *Pointes Protection* at para. 56; *Bent* at para. 103. In this case, the only defence that has been put in play for purposes of this application is absolute privilege.

[199] The meaning of the words "grounds to believe" was discussed in *Pointes Protection* at paras. 36-39:

- [36] The words "grounds to believe" plainly refer to the existence of a basis or source (i.e. "grounds") for reaching a belief or conclusion that the legislated criteria have been met. In the context of a s. 137.1 motion, that basis or source must be anchored in the nature of the procedure and record contemplated by the legislative scheme. It must be borne in mind that a s. 137.1 motion can be brought at "any time" after a proceeding has commenced (see s. 137.2(1)).
- [37] Accordingly, in determining whether there exist grounds to believe at the s. 137.1(4)(a) stage, courts must be acutely aware of the limited record, the timing of the motion in the litigation process, and the potentiality of future evidence arising. Introducing too high a standard of proof into what is a preliminary assessment under s. 137.1(4)(a) might suggest that the outcome has been adjudicated, rather than the likelihood of an outcome. To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence.
- [38] Section 137.1(4)(a) may therefore be interpreted by distinguishing a motion made under s. 137.1 from a motion to strike and a motion for summary judgment, both of which are tools that remain available to parties notwithstanding the existence of s. 137.1. The very fact that the legislature created s. 137.1 as a mechanism indicates that a s. 137.1 motion was meant to fulfil a different purpose than these other motions. While a summary judgment motion allows parties to file a more extensive record and a motion to strike is adjudicated solely on the pleadings, s. 137.1 contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that lends itself to the inquiry mandated under s. 137.1(4)(a). Thus, although the limited record at this stage does not allow for the ultimate adjudication of the issues, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record (the extent of such consideration will be explored further in the next section).
- [39] Accordingly, I conclude that "grounds to believe" requires that there be a basis in the record and the law -- taking into account the stage of litigation at which a s. 137.1 motion is brought -- for finding that the underlying proceeding has substantial merit and that there is no valid defence.

[Emphasis in original.]

- [200] How a court takes into account the stage of the proceeding was discussed in *Pointes Protection* at para. 52:
- [52] It is therefore important to recognize how s. 137.1 motions differ from summary judgment motions, as briefly touched on in the preceding section. Section 137.1 motions are made at an earlier stage in the litigation process, with much more limited evidence and corresponding procedural limitations (see s. 137.2). As a result, a motion judge deciding a s. 137.1 motion should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the

evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced. This might also include a preliminary assessment of credibility -- indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a de facto summary judgment motion, which would be insurmountable at this stage of the proceedings.

- [201] The application of these principles to the question of whether there are grounds to believe there is no valid defence is discussed in *Pointes Protection* at paras. 58-59:
- [58] The word no is absolute, and the corollary is that if there is any defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. As with the substantial merit prong, the motion judge here must make a determination of validity on a limited record at an early stage in the litigation process -- accordingly, this context should be taken into account in assessing whether a defence is valid. The motion judge must therefore be able to engage in a limited assessment of the evidence in determining the validity of the defence.
- [59] I interpret the query on validity under s. 137.1(4)(a)(ii) as mirroring the query on substantial merit under s. 137.1(4)(a)(i). Fundamentally, both entail an assessment by the motion judge of the strength of the claim or of any defences as part of an overall assessment under s. 137.1(4)(a) of the prospect of success of the underlying claim. Having (i) and (ii) mirror each other to the extent possible makes sense given the fact that a prototypical s. 137.1 motion will be made in relation to a defamation or tort action and that affirmative defences to such an action normally involve well-articulated tests. The legislative drafting that nests both (i) and (ii) under s. 137.1(4)(a) confirms this interpretation. Indeed, in a defamation action, for example, a claim must be made out, and then the burden shifts to the defendant to identify any affirmative defences to the claim. The way that (i) and (ii) are nested under (a) reflects this: the substantial merit of the claim is analyzed and then the validity of any potential defences. For this reason, I interpret (ii) as an extension of (i), and I would analyze both in a similar fashion whereby the motion judge must first determine whether the plaintiff's underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success, and must then determine whether the plaintiff has shown that the defence, or defences, put in play are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. In other words, "substantial merit" and "no valid defence" should be seen as constituent parts of an overall assessment of the prospect

of success of the underlying claim.

- [202] Justice Côté's judgment in Bent demonstrates the application of these principles in the context of a defamation action in which the defence of qualified privilege was put in issue. As noted at para. 103:
- [103] 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).
- [203] These principles were applied at para. 135, where Côté J. concluded:
- [135] In light of the foregoing, and even assuming arguendo that Ms. Bent's communication was protected under an occasion of qualified privilege, there is a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the scope of any qualified privilege was exceeded in this case. That basis is legally tenable and supported by evidence reasonably capable of belief, such that the defence cannot be said to weigh more in favour of Ms. Bent. Thus, there are grounds to believe that the defence of qualified privilege is not "valid".

Positions of the Parties

- [204] For purposes of this application only, the defendants do not dispute that the first of the elements of s. 4(2)(a) - that the plaintiffs have pleaded a claim in defamation that has substantial merit - is met. Rather, the defendants focused their submissions on arguing the plaintiffs cannot meet the onus to establish the other two elements. For purposes of this application, they have put in play the defence of absolute privilege. Although other defences such as qualified privilege have been pleaded in the response to civil claim, they have not been put in play on this application.
- [205] The parties also made submissions with respect to absolute privilege in respect of the Rule 9-5(1) application. I have set out the positions taken with respect to absolute privilege in the context of that application earlier in this judgment and will not repeat them here.
- [206] Applying this in the PPPA context, the defendants say the defence of absolute privilege provides complete immunity, and as a result, it cannot be said that there are grounds to believe the defendants have no valid defence. The defendants say it is clear on an

appropriate and limited assessment of the evidence that the defence of absolute privilege is a tenable defence that weighs more in favour of the defendants, and that there is a real prospect that the defence of absolute privilege will succeed and the Defamation Action will be dismissed. Accordingly, they say the plaintiffs fail to meet their burden, and the defendants must succeed on the PPPA application even before the "weighing" that is part of the third stage.

- [207] The plaintiffs submit that absolute privilege has no application given that the letter was not written in the course of or incidental to any extant or contemplated legal proceedings. They reiterate in this context their argument that the defendants have tendered no evidence from a person with direct knowledge of matters in issue. They submit that it would be inappropriate for the court to conclude, based simply on the pleadings of other court actions, that there are grounds to believe that absolute privilege can arise in the circumstances of this case. They assert that the evidence of the various plaintiffs is uncontroverted, and that absolute privilege has no possible application in this case.
- [208] The plaintiffs further submit, even if the court was to determine the application of absolute privilege in circumstances such as this might be legally "novel", so as to survive a challenge under Rule 9-5(1)(a), a court should be reluctant to conclude that this meets the "grounds to believe" standard for purposes of s. 4(2)(a)(ii).

Legal Context - Absolute Privilege

- [209] Letters written, and other documents "published" by lawyers in the course of their representation of a client, will often be protected by privilege. In some cases, they will be protected by absolute privilege; in others, the privilege will be a qualified privilege. Absolute privilege applies to those occasions where public policy dictates that the publication must, in the public interest, be protected at all events. If absolute privilege applies, then the lawyer may not be sued in defamation - even if the publication may have been actuated by malice. If the occasion is one of qualified privilege, then the privilege may be lost by proof of malice or by the publication extending beyond what is reasonably necessary to discharge the lawyer's duty to advance the client's interests.
- [210] On this application, the defendants assert that absolute privilege applies to the February 22 Letter. Although qualified privilege is pleaded in the Response to Civil Claim, the defendants have not put that defence in play for purposes of this application. The plaintiffs have pleaded that the defendants were actuated by malice, and if qualified privilege was in issue on this application, there would have to be some degree of exploration of the question of malice.
- [211] One of the leading cases in British Columbia with respect to absolute privilege is *Hamouth v. Edwards & Angell*, 2005 BCCA 172 [Hamouth]. In *Hamouth*, Justice Levine described the public policy underlying absolute privilege by reference to two other judgments:

[37] Granting absolute privilege to lawyers when they act in the course of their duties to their clients is for the public benefit. It frees lawyers from fear that in advocating their client's cause they will be sued if what they say on behalf of a client is found not to be true. The principle was stated broadly by Brett, M.R., in *Munster v. Lamb* (at pp. 603-604):

If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes - judge, witness, and counsel - it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct.

[38] The principle was stated in more modern language in *Big Pond Communications 2000 Inc. v. Kennedy* (2004), 236 D.L.R. (4th) 727 at para. 19 (O.S.C.J.):

Counsel have a professional duty to pursue their client's interests, within the law, to the fullest extent possible. At times, a lawyer finds himself or herself advocating unpopular causes. Our system of justice depends upon courageous lawyers undertaking cases that may be distasteful to the public at large, and to the lawyer personally. Nonetheless, the Bar does so, often without thanks from society that does not appreciate the importance of this task. But it is this professional responsibility to argue the law that ensures our democratic freedoms continue. Our system of law would be rendered ineffectual if counsel was required to look behind them for fear of a lawsuit as a result of presenting his client's case. This is the mischief that the privilege seeks to prevent.

[212] As noted in *Dechant* at para. 33:

[33] The availability of absolute privilege at common law and the extent of any privilege is not clear. Absolute privilege in a judicial context dealing with defamation finds its origin in the early development of the common law. It is based on considerations of public policy which attempt a balance between the right to an "unsullied reputation" and the interest of the judicial system in free and open disclosure. The rationale was explained in the following, often quoted, passage by V.V. Veeder, "Absolute Immunity in Judicial Proceedings" (1909), 9 Col. L. Rev. 463 at 469-70, as cited in Raymond E. Brown *The Law of Defamation in Canada*, 2nd ed., looseleaf (Toronto: Carswell, 1999) at 12-27:

Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. Freedom from vexatious litigation for honest participants is so important that the law will not take the risk of subjecting them to such danger in order that a malicious participant may be mulcted in damages. The true doctrine of absolute immunity is that, in the public interest, it is not desirable to inquire whether utterances on certain occasions are malicious or not. It is not that there is privilege to be malicious, but that, so far as it is a privilege of the individual, the privilege is to be exempt from all inquiry as to malice; the reason being that it is desirable that persons who occupy certain positions, as judges, jurors, advocates, or litigants, should be perfectly free and independent, and that to secure their independence, their utterances should not be brought before civil tribunals for inquiry on the mere allegation that they are malicious. The rule exists, not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely and maliciously: it is not a desire to prevent actions from being brought in cases where they ought to be maintained, but the fear that if the rule were otherwise, numerous actions would be brought against persons who were acting honestly in the discharge of duty.

[213] Part of the purpose of absolute privilege is to protect the substance of what is put before the court from collateral attack in other proceedings, and to avoid a multiplicity of actions in which the truth of matters would be tried over again: *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 [Elliot], at para. 119. Although the statement in Elliot was made in the context of the protection given by absolute privilege to witnesses, in my view it is of broader application.

[214] Whether absolute privilege applies depends not on the nature of the words used, but on the occasion. Saying exactly the same words will be either actionable or not depending on the occasion on which they are said: *Elliott* at para. 114; *Duncan v. Lessing*, 2018 BCCA 9 at para. 53; *Oei v. Hui*, 2020 BCCA 214 at para. 45. The task of the court is to characterize the "gist and essence" of the claim, or its essential character, and to determine whether it is

"based on, or otherwise sufficiently connected to, some potential occasion": Elliott at para. 122.

[215] Where a valid claim of absolute privilege is made, there is clear benefit to determining the availability of that privilege at an early stage. In *McDaniel v. McDaniel*, 2009 BCCA 53, the plaintiff brought defamation claims against his brother, who had provided evidence to the lawyer who represented an insurer in other litigation brought by him, and also against the lawyer. Justice Bauman (as he then was) noted at para. 43:

[43] Much of the force of Brian McDaniel's submission lies in the traditionally conservative approach to applications under Rules 19(24) and 18(6). The tests to win a dismissal under these Rules are stringent. But for the privilege of witness immunity to function properly, it is critical that one be able to invoke it early in the proceedings before significant irrecoverable costs are incurred. Such actions, if the immunity is properly available, should be "throttled at the birth" in the words of the editors of George Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed. (London: Butterworth, 1923) at p. 346. In the case before us, the evils of proceeding against the insurer's lawyer and a potential witness are quite evident. The proceeding seriously compromises the lawyer's ability to act in the insurance litigation and she is hamstrung as well by solicitor/client privilege in defending herself in this proceeding.

[216] The application of these principles is not always straightforward. The traditional approach was described in *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.), as summarized in *G.W.E. Consulting Group Ltd. v. Schwartz* (1990), 72 O.R. (2d) 133, 1990 CanLII 6831 (S.C.):

In *Lincoln* at pp. 257-8, Devlin L.J. divided the matter of privilege in connection with legal proceedings into three categories as follows:

The first category covers all matters that are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M'Ewan*, [1905] A.C. 480, in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice extended to the precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings. In *Beresford v. White* (1914), 30 T.L.R. 591, the privilege was held to attach to what was said in the course of an interview by a solicitor with a person who might or might not be in a position to be a witness on behalf of his client in contemplated proceedings.

At p. 260 of that decision, Devlin L.J. said:

I turn now to the third category. It is obvious that unless there were a category of this sort, the absolute privilege granted for matters said and done coram judice might be rendered illusory.

What he was referring to, of course, was the obligation of a solicitor to investigate any claim being put forward by his client. There would be no claims to put forward if solicitors were not protected to some degree by privilege in the course of their investigations. The issue here is the extent of that privilege.

At p. 263, Devlin L.J. said:

It is not at all easy to determine the scope and extent of the principle in *Watson v. M'Ewan*. I have come to the conclusion that the privilege that covers proceedings in a court of justice ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from a flank attack.

[217] A conservative approach to delineating the extent of the privilege is reflected in two judgments of the Alberta Court of Appeal. In *Dechant*, Justice Conrad commented at para. 46 that "the occasions attracting absolute privilege should be limited", explaining at para. 49:

[49] For instance, in the case of judicial proceedings, the mere fact of an ongoing law suit does not attract absolute privilege for every statement made to anyone during the course of the law suit. It is the occasion on which the statements are made that attracts the privilege. The statement must be made within a step recognized as affording the privilege. A statement made during an examination for discovery would be privileged, but if defamatory statements are repeated outside of the discovery room and in circumstances not part of the judicial proceeding, those statements would not receive the benefit of the privilege. Thus, facts and how they fit in the particular process are critical.

[Emphasis added.]

[218] The applicable test was arguably further narrowed in *Liboiron*. The defendant Majola had not contested a speeding ticket, but in a letter to the court registry sent with payment of the fine, he complained about racism on the part of the charging officer, Liboiron, who commenced a claim in defamation. Justice Fruman referenced *Dechant* in stating at para. 13 that:

[13] The communication must also fall within a recognized step of the proceeding. In other words, it must take place during, incidental to, and in the processing and furtherance of the proceeding. The existence of a lawsuit or a criminal prosecution does not attract absolute privilege for every statement made to anyone during its course. Whether the statement is privileged depends upon the occasion on which it is made and the facts surrounding the statement. It is therefore necessary to consider exactly how the statement fits into the judicial proceeding, and whether it was "made within a step recognized as affording the privilege"

[Emphasis added.]

- [219] The plaintiffs assert that the court should apply this requirement in the present case - that the statement said to be protected by absolute privilege must be made "within a step in the proceeding". They say that such an approach is reflected in the summary of the law in *Lawrence v. Sandilands*, 2003 BCSC 211:
- [89] The pleadings allege that the claims advanced by the defendant solicitors and their clients in the civil proceedings "have brought the plaintiffs into public scandal, odium and contempt" and, with respect to Mr. Lawrence, caused injury to "his character, credit and reputation "
- [90] Even assuming that the pleadings disclosed a separate cause of action for defamation, there is no plausible claim in law. That is because the defendant solicitors, as counsel advocating a position on behalf of their clients, are protected from claims alleging their conduct during the civil proceedings was defamatory. There is an absolute privilege for all communications made by counsel "in the course of, or incidental to, the processing and furtherance of judicial and quasi-judicial proceedings" (R.E. Brown, *The Law of Defamation in Canada* (2d ed.) (Toronto: Carswell, 1994) at p. 17).
- [91] Whether the communications are made by parties, counsel or witnesses, they are made on an occasion of absolute privilege and no civil action will lie for what is alleged (*Geyer v. Merritt and Gouge* (1979), 16 B.C.L.R. 27 (BCSC) at page 32; affirmed (1980), 26 B.C.L.R. 347(BCCA)).
- [92] The protection extends to "the content of all pleadings, documents and testimony offered in evidence, and to all actions taken preliminary but necessary to the institution or processing of the action or essential to the judicial review of or execution upon judgement or decision" (*The Law of Defamation in Canada* (2d ed.) *supra*).
- [220] In *Lawrence*, the plaintiff had founded his action against a law firm on what were said to be defamatory statements in pleadings filed by that law firm in a previous proceeding. The claim thus fell squarely within the second category identified by Devlin L.J. in *Lincoln*, and there was no need for the court in *Lawrence* to look beyond the traditional bounds of absolute privilege.
- [221] The defendants advance their reliance on absolute privilege on more recent judgments, including the judgment in *Hamouth*. In that case, the Court of Appeal considered an appeal from a refusal by a master, and by a chambers judge on appeal, to strike out a statement of claim filed by a Vancouver businessman, Mr. Hamouth, against a Florida law firm. The law firm had written a letter on behalf of its client, Smart Video Technologies Ltd., to Mr. Hamouth's stockbrokers in Vancouver, suggesting that Mr. Hamouth was violating rules of the U.S. Securities and Exchange Commission ("SEC") regarding the sale of shares and various filings.
- [222] Justice Levine described the context of the case as follows:

- [2] The dispute is whether the letter referred to in the statement of claim was written on an occasion of absolute privilege. There is no dispute that a lawyer is protected by absolute privilege regarding statements made in a court proceeding, and that the privilege extends to communications made in the course of inquiry with respect to or in preparation for judicial proceedings: see *Munster v. Lamb* (1883), 11 Q.B. 588 at 600 and 604 (C.A.); *Web Offset Publications Limited v. Vickery* (1999), 43 O.R. (3d) 802 at 804 (C.A.); *Gatley on Libel and Slander*, 9th ed. (London: Sweet & Maxwell, 1998) at paras. 13.12 -13.13; *John G. Fleming, The Law of Torts*, 9th ed. (Sydney: LBC Information Services) at 618-19. The privilege also extends to such statements made with respect to quasi-judicial proceedings of a tribunal: see *Sussman v. Eales* (1985), 33 C.C.L.T. 156 at 157 (Ont. H.C.J.), appeal allowed in part (1986), 25 C.P.C. (2d) 7 (Ont. C.A.); applied by this Court in *Hung v. Gardiner* (2003), 13 B.C.L.R. (4th) 298 (C.A.), 2003 BCCA 257 at paras. 6-9, and *Schut v. Magee* (2003), 15 B.C.L.R. (4th) 250, 2003 BCCA 417 at paras. 15-18.
- [3] There is also no dispute that absolute privilege provides immunity against suit. If the alleged defamatory statement was made on an occasion of absolute privilege, the statement of claim may be struck out under Rule 19(24)(a) as "it discloses no reasonable claim": see *Web Offset Publications* at 803; *Gatley* at para. 13.1.
- [4] The question in this case is whether the impugned statements were made in the context of judicial or quasi-judicial proceedings such that they were within the ambit of absolute privilege.
- [223] At para. 22, Levine J.A. set out the issues for consideration in the following terms:
- [22] There are two issues to be determined with respect to that question. First, is the SEC inquiry a "quasi-judicial proceeding" to which absolute privilege applies? Second, is the purpose of the communication sufficiently related to the proceeding to attract the privilege?
- [224] After considering the first of these issues, she concluded at para. 28 that the SEC is a public body exercising quasi-judicial functions, and that this was sufficient to create an occasion for which:
- absolute privilege applies to communications made with reference to and in the course of such proceedings.
- [Emphasis added.]
- [225] She then turned to the second issue, stating at paras. 29-30:
- [29] Was the letter of March 29 sufficiently related to the SEC inquiry to be within the ambit of absolute privilege?

[30] In my opinion, there can be no doubt that it was. Smart Video, Mr. Hamouth and the brokers were all immediately or potentially affected by the inquiry and could be subject to sanctions by the SEC if it determined that they had, were presently or were about to violate any provision of the securities laws of the United States. The law firm was acting on behalf of Smart Video, which had a responsibility to its shareholders to limit its exposure to investigation and sanctions that could affect the company's business.

[Emphasis added.]

[226] It is noteworthy that Hamouth was an appeal from an application to strike out the plaintiff's claim pursuant to what is now Rule 9-5(1)(a). On such an application, no evidence is permissible. It seems clear that, to the extent the court was required to delve into what Levine J.A. termed in para. 22 as "the purpose of the communication", she was able to draw any necessary inferences as to that purpose from the wording of the letter itself.

[227] Following para. 30, Levine J.A. explained her conclusion through reference to a number of authorities. She noted at para. 32 that various cases had been cited in which there were issues as to whether communications made before a proceeding had been commenced were protected by absolute privilege, but commented that those judgments were not directly applicable, given that the impugned statement before her was made in the course of quasi-judicial proceedings.

[228] She then turned to cases in which there was outstanding litigation at the time of the impugned statement:

[33] In *G.W.E. Consulting*, a lawyer sent a letter to clients of the plaintiff requesting copies of contracts relevant to an action for wrongful dismissal about to be commenced against the plaintiff. The Court applied the reasoning of Chief Judge Latchum of the U.S. District Court in *Hoover v. Van Stone*, 540 F. Supp. 1118 (U.S. Dist.Ct. 1982). In that case, Hoover sued the defendant brokerage firm for alleged violations of federal securities laws. The defendant counterclaimed, alleging, among other things, defamation arising from Hoover's disclosure of the existence of his complaint by a letter from his lawyer to 220 of the defendant's customers and by personal contact by Hoover with seven customers. The U.S. Court considered whether the communications were within the scope of absolute privilege and concluded that they were as they were made during the course of a judicial proceeding "to a limited and discrete group for the purpose of obtaining evidence for trial."

[34] Similar conclusions were reached in *Fuss*, where a lawyer had written letters to the plaintiff's actual or suspected creditors for the purpose of obtaining evidence for a fraudulent conveyance action; in *Construction Distribution*, where a lawyer sent a letter demanding compliance with his client's demands not only to the defendants, former employees and their present employer, in a proposed action for breach of contractual and fiduciary duties, but also to a third party, Dow Corning, who had advised the lawyers that it was subsidizing the remuneration of the former employee by the new employer; and in *Lubarevich*, where a lawyer sent a letter to a bank alleging that certain account transfers

involving a company in which her client was a principal had been fraudulent and demanding that the bank refuse to permit any further withdrawal of funds from the company's account.

- [35] In these cases, the courts decided that the lawyers were acting within their duties to their clients in seeking relevant information or alerting potential witnesses or parties to the proceedings.
- [36] Similarly, in this case, the law firm was acting within the scope of its duties to its client in alerting the brokers, who were potential witnesses or parties, to the SEC inquiry.
- [229] Justice Levine then referenced, at paras. 37-38, the statements of principle in *Munster v. Lamb* and *Big Pond Communications 2000 Inc. v. Kennedy*. Those paragraphs are quoted above. Having cited those excerpts, she concluded:
- [39] These principles apply to these lawyers. They are entitled to the protection of absolute privilege because they were acting in the course of their duties to their client in the course of a quasi-judicial proceeding.
- [230] In *Peak Innovations Inc. v. Pacific Rim Brackets Ltd.*, 2009 BCSC 1034, a lawyer for Pacific Rim sent a cease and desist letter to Peak and to its distributor, Home Depot, as well as to Home Depot's worldwide trademarks counsel. Pacific Rim subsequently commenced infringement proceedings in the Federal Court and a passing off action in the Supreme Court against both Peak and Home Depot. Peak then commenced an action against Pacific Rim and its lawyers, claiming the cease and desist letter was defamatory and was published to Home Depot. The defendants applied to dismiss the action on a summary trial, asserting the letter was protected by absolute privilege.
- [231] Justice Groves, having referenced *Hamouth*, noted at para. 26 that the basis for absolute privilege is to permit a free adversarial atmosphere to flourish, which is essential to our system of justice. He referenced, at para. 27, the following statement from Fleming, *The Law of Torts*, 7th ed. (1987) at 535:
- The [absolute] privilege is not confined to statements made in court, but extends to all preparatory steps taken with a view to judicial proceedings... But the statement or document must be directly concerned with actual contemplated proceedings; not just remotely so, like a factual report containing allegations which merely might provide a ground for future prosecution.
- [232] He then summarized the applicable law at paras. 28-30:
- [28] The privilege should not be confined to proceedings in court, if the statements made outside the court are made to achieve the objects of the litigation: *Brown in The Law of Defamation in Canada*) at 12-143.

[29] According to Restatement of the Law of Torts Second, Vol. 3, para. 587, as quoted in *Moseley-Williams v. Hansler Industries Ltd.* (2004), 32 C.C.L.T. (3d) 266 at para. 29 (Ont. Sup. Ct. J.), aff'd [2005] O.J. No. 997 (C.A.):

A party to a private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding.

[30] Absolute privilege protects both the solicitor and the client: *G.W.E. Consulting Group Ltd. v. Schwartz*.

[233] He noted that:

[35] I find that the circumstances that gave rise to the writing and distribution of the Letter in the case at bar were substantially the same as in the above noted cases. As in the *Construction Distribution* case, Smart & Biggar "were asserting their client's right as they are bound to do as solicitors" (para. 161). Additionally, the distribution of the Letter was not "an indiscriminate publication to an otherwise uninterested party" but rather it was sent "to a very limited and discrete group" (para. 13). It was sent to the very parties who were being asked to stop the alleged infringing conduct and the lawyer who is understood to deal with trade-marks issues for one of the alleged infringing parties.

[234] In *Monument Mining Limited v. Balendran Chong & Bodi*, 2012 BCSC 1769 [Monument], Monument claimed against a Malaysian law firm ("BCB") and its clients (Baker & Sim) for defamation and slander of title. There was ongoing litigation in Malaysia in which both Monument and Baker & Sim advanced competing claims to a gold mine located in Malaysia. BCB wrote to Monument, which was a publicly traded company, suggesting it should have disclosed the litigation in public filings. Having had no response, BCB then wrote to Monument's lawyer, investment advisors and investor relations firm. The investment advisors "grey listed" Monument for a period of time, which impacted its efforts to seek further financing.

[235] Justice Goepel (as he then was) dismissed the action after trial. He did so on two grounds: that the only publication of the letter was to Monument and its agents, and also on the basis of absolute privilege. With respect to absolute privilege, he began by noting:

[100] In Canada, the general rule is that absolute privilege attaches to communications which take place during, incidental to and in the processing and furtherance of judicial or quasi-judicial proceedings: *Raymond E. Brown, Brown on Defamation: Canada, United Kingdom, Australia, New Zealand and United States* 2nd ed. (Toronto: Carswell loose-leaf to 2011 at 12-45.) ("Brown").

[236] After referring to *Hamouth* and *Peak Innovations*, he continued:

- [105] Hamouth and Peak Innovations both involved letters sent in advance of litigation
- [237] I interject to note that, as I read Hamouth, Levine J.A. considered the SEC inquiry to be existing litigation, and distinguished the situation before her from case involving pre-litigation steps. However, I do not see this as taking away from the analysis of Goepel J., which continued:
- [105] In *Romero v. Prince* (1973), 85 N.M. 474, 513 P.2d 717, the defendant lawyer wrote a letter to the tenant of a ranch in New Mexico, informing the tenant that the ranch was the subject of litigation between his client and the client's sister, Romero. Romero alleged the letter was defamatory, and could not be afforded privilege because it was written after the legal action had been instituted and because the letter was sent to a third party (the tenant) who had no connection to the legal proceedings.
- [106] The court ruled that the letter was protected by absolute privilege, and it was not necessary that the defamation occur in open court to enjoy the benefits of the privilege. The court ruled that the letter was subject to absolute privilege if it was reasonably related to the judicial proceedings in the course of which the statement was made. The court held that the defamatory letter was made during the course of and as part of a judicial proceeding and it was reasonably related to that proceeding and, accordingly, was subject to absolute privilege.
- [107] The D8 Petition had been commenced in October 2000 and the action remained outstanding when the Letters were sent. Mr. Kumar sent the Letters after learning that Monument had purportedly purchased the Gold Mine which was at the heart of the D8 Petition. The Letters were written to those involved with Monument's acquisition of the Gold Mine to give notice that Ms. Sim was in fact the owner of Selinsing Mining.
- [108] I find that the Letters were reasonably related to the claims in the D8 Petition. Mr. Kumar wrote the Letters on behalf of his clients to protect their rights in the D8 Petition and based on his professional judgment that it was appropriate and necessary to do so. I find that the Letters were written and delivered on an occasion of absolute privilege. The privilege extends to Mr. Kumar and his client. The fact that the Letters were written on an occasion of absolute privilege provides a complete defence to Monument's defamation claims.
- [238] In *Hansra v. Joss*, 2021 BCSC 805, a law firm defending a personal injury action wrote to 16 individuals who had some involvement in the plaintiff's past employment, seeking answers to questions pursuant to Rule 7-5 (Pre-Trial Examination of Witnesses). The questions asked included some which were said to be defamatory (for example, were you aware of the plaintiff's arrest for driving a truck containing cocaine). The plaintiff argued that the true purpose of the letter was to malign him and to "witness tamper" with prospective witnesses. The defendants applied to dismiss the action pursuant to Rule 9-5(1).
- [239] Justice Harvey noted at para. 55 that the plaintiff relied on para. 49 of *Dechant*, which I have quoted above, and commented with respect thereto:

[56] Dechant, in fact, is an Alberta Court of Appeal decision based on legislative enactments, specifically the Legal Professions Act, S.A. 1990, c. L-9.1. In any event, the decision is not binding on me. Here, the B.C. Court of Appeal has adopted as correct the principles from *Munster v. Lamb* (1883), 11 Q.B. 588 (Eng. C.A.), which were cited and applied in *Hamouth* at para. 37.

[240] He referenced paras. 37-41 of *Hamouth*, and then commented:

[58] I find similar circumstances here. In writing to the former employers of the plaintiff, the Law Firm was acting in the course of pursuing its client's interest and thus is protected by absolute privilege. The second publication, the filed pleadings underlying the application to examine the former employers, is similarly protected by absolute privilege.

He dismissed the action.

[241] Before concluding this review of the authorities, I will briefly mention *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59, a case referenced by the plaintiffs. In that case, a lawyer (Mr. Manning) held a press conference on the steps of Osgoode Hall in Toronto, wearing his barrister's robe, and accompanied by representatives of the Church of Scientology. He read from, and commented on, a notice of motion he was about to file by which the Church of Scientology intended to commence criminal contempt proceedings against Mr. Hill, a Crown attorney. The contempt proceedings were subsequently found to be without foundation, and Mr. Hill commenced a defamation action. The jury awarded a substantial verdict to Mr. Hill. Although much of the analysis of the Supreme Court of Canada is dedicated to issues arising from s. 2(b) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter], there are some comments with respect to qualified privilege. There is no discussion in the judgment of absolute privilege. With respect to qualified privilege, Justice Cory concluded:

[155] it is my conclusion that Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.

[156] The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested

in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion.

Analysis

- [242] The defendants have put in play the defence of absolute privilege. The issue for consideration is whether the plaintiffs have met the onus on them to establish that there are grounds to believe that the defence is not valid.
- [243] In considering that question, I will begin by considering the connections between the assertions in the February 22 Letter and those in the underlying litigation.
- a) The letter referenced "significant conflict" between Mr. Bonner and the plaintiffs since what is said to be Mr. Bonner's "unlawful termination", which termination is the subject of oppression litigation. The Oppression Proceeding asserted that the termination of Mr. Bonner was oppressive conduct, and was done without due diligence and proper governance, while the February 2022 application for an independent chair asserted that Axion's board was "operating unlawfully and is dysfunctional";
 - b) The letter referenced the plaintiffs having "presided over Axion's board in an abusive fashion with disregard to the pressing needs of Axion's various business interests". With respect to the Oppression Proceeding:
 - i. The petition asserted that the refusal to agree to, or at least meaningfully discuss, the conversion of the Bonner Family Loans was unreasonable and not in the best interests of Axion, that the proposed private placement adopted on July 30, 2020, was not properly approved and was adopted without consideration of alternatives, and that the plaintiffs had intentionally excluded Mr. Bonner and Mr. Obata from the board and refused to discuss Axion business with them;
 - ii. The application for an independent chair asserted generally that the board was operating unlawfully, and made reference to actions subsequent to the filing of the petition including the refusal to call a meeting when requested by Mr. Bonner in September 2020, the failure to complete the company's audit or share information on the audit process with members of the audit committee, and changes to Axion's board and committees said to have been made without notice to Mr. Bonner despite him being a director;
 - c) The letter alleged a lack of notice for the July 27, 2020 board meeting, which is also asserted in the Oppression Proceeding;

- d) The letter asserted Mr. Kim swore an affidavit stating that Axion's board did not approve the Bonner Family Loans, and that this affidavit was false. The petition in the Oppression Proceeding (which was commenced before the alleged false affidavit was filed) asserted that the loans had been validly made, that over US\$9 million was outstanding, that the loans allowed Axion to continue to operate, and that the loans were adversely affecting Axion's balance sheet. The notice of application seeking appointment of an independent chair asserts that Yamazaki, Kim and Willey:

have falsely alleged in their response to this Petition to the Court that the Board was not aware of documentation for the Bonner Family Loans and that the loans were not approved by the Board, when certain of the loans were expressly included in Axion's public financial disclosure and the funds were received by Axion and its subsidiaries

With respect to this issue, the petition response filed in the Oppression Proceeding indicated at paras. 91-161 that, among other things, the loans were not approved by the board and that the underlying agreements, even if made, were not enforceable. All of these assertions were repeated in the pleadings filed in the fall of 2020 in the Debt Action;

- e) The letter asserted that Mr. Kim, in an affidavit sworn in the underlying litigation, claimed to be a director of Uniq Ventures Ltd. (a shareholder of Axion), when in fact he had been removed as such on July 16, 2020. While this issue does not appear to be specifically raised in the Oppression Proceeding, Mr. Kim did assert in his November 2020 affidavit in the Oppression Proceeding (at paras. 115-116) that he is the sole director of Uniq and had no knowledge that Uniq had entered into an agreement with Monaker;
- f) The letter asserted that Mr. Kim had misrepresented his qualifications to act as a director, while the petition in the Oppression Proceeding alleged generally that Mr. Kim was not qualified to act as CEO of a publicly traded company like Axion. The petition in the Oppression Proceeding further asserted a reasonable expectation that the board would only elect qualified persons to the role of CEO, and only after properly reviewing their qualifications. The petition did not specifically refer to Mr. Kim's educational qualifications. That said, in his affidavit filed on the present application, Mr. Kim states there were inadvertent inaccuracies in the initial personal information form he filed with the TSX in 2016, which were corrected through the filing of an amended personal information form a week after the initial one had been filed;
- g) Paragraph 5 of the letter asserted failure to give notice of board meetings from July 2020 onward. The petition in the Oppression Proceeding alleged a failure to give notice of the July 27, 2020 meeting, while the February 2021 application for an independent chair asserted that the board was announcing things that had never been approved by the board (but that were said by Axion in its materials to have been approved at a duly called board meeting in January 2021) - it is clear from subsequent materials as well as from the various judgments in the Oppression Proceeding that concerns about notice continued to be an issue until the AGM;

- h) Paragraph 6 of the letter asserted that the allegations made in the Conspiracy Action and in the press releases in relation to it are false, and that the bringing of the action is not in the best interests of Axion. This assertion directly relates to the contents of the Conspiracy Action;
- i) Paragraph 7 of the February 22 Letter asserted that "while all of the above has been ongoing", Axion's investment businesses have suffered while being neglected. This is not specifically referenced in the petition in the Oppression Proceeding, but arguably is in the nature of a further comment on the allegations set out earlier in the letter; and
- j) The paragraph following the seven numbered paragraphs in the February 22 Letter asserts that the plaintiffs were attempting to "seize control over Axion through unlawful means".

[244] In my view, on a fair reading of the February 22 Letter, the various allegations made are all connected with, incidental to and within the scope of the underlying litigation and in particular, the Oppression Proceeding. While the petition may not expressly say, for example, that the plaintiffs were attempting to seize control of Axion through unlawful means, the petition asserts various steps said to be contrary to the governing statutes and bylaws and the reasonable expectations of the parties, and sets out actions said to be wrongful that would result in additional financings which would dilute the interests of Bonner-related entities and increase the ownership level of Mr. Yamazaki and related entities. Similarly, issues such as the validity of the Bonner Family Loans, and whether it was accurate to say they had not been approved by the Axion board, as well as the extent of Mr. Kim's qualifications to act as CEO, were all clearly in issue in the underlying litigation.

[245] In substance, the February 22 Letter was a communication alerting True Corporation as to what were, in substance, the matters that were in issue in the Oppression Proceeding, the Conspiracy Action and the Debt Action. At the time the letter was sent, True Corporation had a significant and legitimate interest in the question of whether the plaintiffs on the one hand, or Mr. Bonner on the other, were truly acting in the best interests of Axion and its shareholders.

[246] There is no doubt that the question of who was truly acting in the best interests of Axion and its shareholders was of significance to True Corporation, as it had a significant investment in Axion, and would shortly be faced with consideration of who to support at the upcoming AGM. Those same issues were at the heart of the Oppression Proceeding and the Conspiracy Action.

[247] It is important to keep in mind that the existence of absolute privilege is not determined by who is ultimately successful in the underlying litigation. In Monument, for example, Monument was ultimately successful in obtaining control of the subject gold mine. That did not prevent the letters written by the lawyers, BCB, from being protected by absolute privilege.

- [248] In my view, the judgments in *Hamouth* and *Monument* adopt a broader scope of absolute privilege with respect to communications related to existing litigation than that adopted in Alberta. Absolute privilege is not limited to communications that are a recognized step in the litigation. Nor is it limited to steps that advance the litigation itself (such as requests for information from witnesses). Rather, the privilege appears to extend to situations where a person with a legitimate interest in the subject matter of the litigation is provided with information with respect to the issues therein. In such circumstances, a communication is considered to be "incidental to" the proceeding and protected by absolute privilege.
- [249] It seems clear from *Hamouth* that the letter does not need to specifically seek assistance from the person to whom it is addressed. Rather, it is sufficient if the letter simply alerts those with an interest in the subject matter as to what is in issue. In both *Hamouth* and *Monument*, the recipients each had a legitimate basis for receiving the information as their own interests were impacted by the matters in issue in the underlying litigation. The cases all reflect a limited publication to those with a legitimate interest in those issues - distinguishing the situation from cases like *Hill* where the dissemination of allegations made in litigation was broad and indiscriminate, and the lawyer making the statements was able to look only to qualified privilege.
- [250] While the facts in *Hansra* are different from those in *Hamouth* and *Monument* - given that the letters sent in that case were specifically aimed at collecting information for trial purposes - Harvey J. recognized that the law in British Columbia has taken a different path from the law in Alberta.
- [251] It is important to keep in mind, when dealing with a communication made by a lawyer on behalf of a client, that the primary question is whether the communication is to be protected by absolute privilege or qualified privilege. If the former, then no claim in defamation can be made; if the latter, the privilege can be defeated by malice or unreasonable publication. The boundary between these two privileges is clarified by *Hamouth* and subsequent judgments of this court. On the basis of the boundary as established in those cases, the present case appears to fall on the side of absolute privilege. The benefit from freeing a lawyer in the position of the defendants from having to join issue on the question of malice outweighs the detriment to a defamed party who is unable to protect their reputations through the bringing of a claim in defamation.
- [252] In my view, this conclusion is consistent with a number of the interests underlying the doctrine of absolute privilege, as identified in the cases referenced above. It promotes fearless advocacy on the part of counsel in respect of litigation in which they act. Particularly in cases where litigation is already in existence, it is in the public interest that parties contest the issues (including any incidental protection of their reputations) in the litigation itself. This also prevents defamation litigation from being used as a collateral attack on any decisions in the underlying litigation. That is, of course, less of a concern in the context of the present case, but it is noteworthy that the Defamation Action was commenced prior to any of the judgments of Ross J. in the Oppression Proceeding, and

concerns about finality would be more imperative had Ross J. ruled differently.

[253] Significantly, the application of absolute privilege in a case like the present avoids the many complexities that will arise in the context of actions against lawyers for positions taken in connection with litigation. The existence of an action in defamation may well compromise the ability of the lawyer-defendant to continue to act as a lawyer-advocate in the original litigation. If the lawyer is required to rebut a claim of malice, it may be difficult to do so without the lawyer's client in the first action agreeing to waive privilege - which it would be under no obligation to do. If malice is in issue, it may be impossible to "throttle" the action at an early stage.

[254] All of these considerations support the application of absolute privilege in the present case. It is possible, given the existence of a different approach in Alberta, and given the caution expressed in many judgments with respect to expanding the boundaries of absolute privilege, that an appellate court might someday reconsider the scope of absolute privilege in British Columbia. However, it is my view that the cases I have cited above, including in particular Hamouth and Monument, establish that the current law in British Columbia entitles the defendants to claim the benefit of absolute privilege.

[255] In my view, the plaintiffs have failed to meet the onus on them to establish there are grounds to believe, based on the record and the law, that absolute privilege is not a valid defence.

Weighing the Public Interest

[256] Section 4(2)(b) requires the court to consider whether "the harm likely to have been suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression".

Positions of the Parties

[257] With respect to the weighing exercise, the defendants say the court should conclude the following on the basis of the plaintiffs' materials:

- a) Such harm as is alleged is not a result of the expression - that is, there is no causal nexus between the expression and the alleged harm, and
- b) The harm is not of such a serious nature that the public interest in allowing the Defamation Action to continue outweighs the public interest in protecting the expression.

[258] With respect to the first of these points, the defendants point to the allegations in the Oppression Proceeding petition and the various other pleadings that had been filed prior to the February 22 Letter, all of which were a matter of general public record. The defendants say that the February 22 Letter simply communicated to one representative of a significant shareholder information about the corporate governance of Axion that was already alleged

in the underlying litigation. Presumably, given that True Corporation had a representative on the board of Axion throughout the material time, it already knew of the allegations made and issues raised in the underlying litigation prior to receiving the letter. Thus, any damage arising from the February 22 Letter, given that the allegations it made were already a matter of public record, is nominal at best.

- [259] While the defendants acknowledge that defamation is a cause of action that is actionable without proof of damages, and that nominal damages will suffice to create a complete cause of action, they say that when weighing the public interest, the magnitude of the harm is fundamentally important in determining whether it is sufficiently serious that the public interest in permitting the proceeding to continue outweighs that of protecting the expression. They say that nominal presumed damage does not render the alleged harm serious enough to have meaningful weight for purposes of this analysis. In this case, the letter was sent to only one person, whose position was such that one might expect him to be reviewing and evaluating threats to the investments of True Corporation. In this case, despite having received the February 22 Letter, True Corporation continued to support the plaintiffs as directors. The defendants say that an inference can be drawn from this evidence that no actual damage to the plaintiffs' reputations resulted from the February 22 Letter.
- [260] The defendants submit that, while the scope of dissemination is not relevant to the threshold determination of whether the communication "relates to a matter of public interest", it is relevant to the weighing exercise under s. 4(2)(b).
- [261] The defendants further say that assertions of each plaintiff as to their subjective belief that they have suffered reputational harm are simply bald assertions of harm which are not sufficient under s. 4(2)(b) to establish serious harm.
- [262] The defendants further submit that the net effect of the three judgments of Ross J. in the Oppression Proceeding is to vindicate the reputations of the plaintiffs.
- [263] The defendants argue there is a significant public interest in protecting communications by lawyers in the course of carrying out their duties on behalf of clients. They say that what the plaintiffs seek to do by this proceeding, through the inquiry arising from their allegation of malice, is to delve into the state of mind of the defendants, including what information they had at the time the letter was written and the advice given to and instructions received from their clients. The defendants say this action was brought against opposing counsel in ongoing litigation who are in the untenable position of being prevented from fully and freely defending themselves without a waiver of solicitor-client privilege, which is a privilege held by their clients. Although the defendants have now withdrawn as counsel in the underlying litigation, they say this has no impact on the fundamental problems faced by counsel whose evidence and defence of the claims against them depend on a waiver of privilege by their clients, with potential prejudice to the clients.

- [264] They submit that in light of this dynamic, the court should conclude that this lawsuit has been commenced as a weapon in the ongoing litigation between the plaintiffs and the Bonner group.
- [265] The plaintiffs argue there is a strong public interest in protecting directors of public companies from scandalous attacks, and little public interest in protecting gratuitous attacks on such directors for the purposes of obtaining control of corporations. They say they are professional people who, other than the present litigation, do not operate in the public realm.
- [266] The plaintiffs argue that defamatory statements are very tenuously related to freedom of expression, and there is limited public interest in protecting them. The right to free expression does not confer a licence to ruin reputations. They say that in balancing the public interests, the court should consider the quality of the expression and the motivation behind it. Deliberate falsehoods and gratuitous personal attacks should not find much purchase at this stage.
- [267] They submit that the harm arising from the expression in the February 22 Letter far outweighs the limited public interest in protecting what they say are maliciously false and defamatory statements and gratuitous personal attacks. They rely on the following factors:
- a) The value of the expression in the letter is at best negligible, being deliberate falsehoods and personal attacks, including what the plaintiffs say is, in effect, an allegation of the criminal offence of perjury (the swearing of a false affidavit);
 - b) The expression is of very low importance;
 - c) The motivation behind the expression is not one of public interest, but of a private commercial gain for the defendants' clients, the Bonner Parties;
 - d) This action meets none of the indicia of a SLAPP lawsuit;
 - e) The expression was made in the context of, but not in the course of or for, the purpose of litigation between the Bonner Parties and the plaintiffs;
 - f) The action will have no broader or collateral effects on matters of public interest or future expression by anyone; and
 - g) The defendants have no history of activism or advocacy in the public interest, and were not engaged in such pursuits in publishing the letter.
- [268] The plaintiffs acknowledge they have not tendered evidence of general or specific damages, and say that, in a case of defamation, damages are presumed and this presumption is sufficient for purposes of a PPPA application. They argue this is a case of harm to reputation, and reputation is one of the most valuable assets a person can possess - particularly in the world of international business. They submit that the extent and sufficiency of harm can be inferred from the nature of the allegations.

- [269] The plaintiffs go on to argue that the statements in the letter are remarkable for a letter written by a lawyer, on the letterhead of a major international law firm. The statements do not purport to simply repeat allegations made in legal proceedings. Rather, they are an all-out attack on the plaintiffs' honesty, competence, integrity, motives and abilities. The plaintiffs say they are a plain and simple attempt to destroy the reputations of the plaintiffs, and that there can be no doubt on reading the letter that it was written with malice.
- [270] The plaintiffs argue it would be inappropriate to consider the various judgments in the Oppression Proceeding as having vindicated the plaintiffs and restored their reputations in the eyes of True Corporation. They argue that Ross J. was concerned with applying principles of corporate law, and not with their reputations. They further say that there are some items - such as the validity of the Bonner Family Loans, and the validity of Mr. Kim's concerns about those loans - that were not decided in the Oppression Proceeding. As a result, they submit that the judgments that have been given cannot be seen as a substitute for an award of damages in the Defamation Action, and the full vindication the plaintiffs seek thereby. While the judgments of Ross J. are no doubt helpful to the plaintiffs, they submit that they do not diminish the importance of the Defamation Action.

Legal Context

- [271] In *Pointes Protection*, at paras. 61-62, Côté J. described the public interest balancing mandated by s. 4(2)(b) as being the "crux of the analysis" and the "core of [s. 4]". She noted, at para. 77, that the weighing exercise under this provision may be informed by jurisprudence under s. 2(b) of the Charter, and that such inquiries might:

look to the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing.

- [272] At para. 80, she set out additional factors that may also prove useful, including:

- [80] 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.

- [273] At paras. 70-71, she commented on the question of magnitude of harm; noting that that given that this stage is:

- [70] in effect, a weighing exercise, there is no threshold requirement for the harm to be sufficiently worthy of consideration. The magnitude of the harm becomes relevant when the motion judge must determine whether it is "sufficiently serious" that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. In other words, the magnitude of the harm simply adds weight to one side of the weighing exercise.
- [71] This does not mean that the harm pleaded by the plaintiff should be taken at face value or that bald assertions are sufficient. But I would not go so far as to require a fully developed damages brief, nor would I require that the harm be monetized, as the question here relates to the existence of harm, not its quantification. The statutory language employed in s. 137.1(4)(b) is "harm likely to", which modifies both "be" and "have been"; this indicates that the plaintiff need not prove harm or causation, but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link
- [Emphasis in original.]
- [274] The importance of causation was emphasized in Bent at para. 150:
- [150] 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.
- [275] In *Pointes Protection*, Côté J. concluded that:
- [81] Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit -- a fundamental value in its own right in a democracy -- affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy.
- [82] In conclusion, under s. 137.1(4)(b), the burden is on the plaintiff -- i.e. the responding party -- to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a s. 137.1 motion.

- [276] In *Levant v. DeMelle*, 2022 ONCA 79, at paras. 67-68 and 71, the court acknowledged that some level of damage to one's reputation may be presumed from a defamatory statement, and that while this may be sufficient to establish the existence of damages, it is not sufficient to establish that "the harm likely to be or have been suffered by the [appellants] as a result of [the respondent's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression". See also *Hansman v. Neufeld*, 2023 SCC 14 at para. 67.
- [277] In *Mawhinney v. Stewart*, 2022 BCSC 1243, various members of the board of a municipal political organization brought an action against the then-mayor for comments made in a press release. In terms of harm (as summarized at para. 60), most of the plaintiffs asserted harm such as having to "justify himself in business and socially", having to constantly defend himself in public, and having suffered a "significant loss of reputation". Justice Baker concluded with respect to those plaintiffs:
- [66] In the present case, the majority of the plaintiffs have not established harm. With the exception of Mr. Mussio and Mr. Isidorou, the plaintiffs have made vague and bald assertions of harm they think they might have experienced. I am not satisfied their evidence is sufficient under s. 4(b) of the PPPA.
- [278] These cases can be distinguished from *Bent*, in which the plaintiff gave evidence of a loss of business, supported by an expert report estimating a direct financial impact of \$578,949 (para. 145), he was found to have suffered significant reputational harm as a professional (paras. 146-148), as well as "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" (para. 149).

Analysis

- [279] I begin by considering the evidence advanced by the plaintiffs with respect to the harm suffered:
- a) Mr. Kim says he "suffered great psychological stress" on reading the February 22 Letter, and that his wife was also very distressed when she learned of it. He deposes that he believes that his reputation has been significantly harmed, and he is pursuing this action to recover damages for that harm.
 - b) Mr. Willey deposed that he was shocked and surprised when he saw the letter, that it was "particularly disturbing to [him] that the letterhead of an international law firm was used", which he felt "could give added weight and credibility to the content of the letter", and that he believes the letter "caused great harm to [his] reputation".
 - c) Mr. Yamazaki repeated many of Mr. Willey's comments, and expressed "no doubt that the February 22 letter has damaged my reputation".

- [280] In my view, while I would have no doubt that it was upsetting to each of the plaintiffs to read the February 22 Letter, I do see not the evidence as establishing the sort of harm that would be of significance in the weighing exercise under s. 4(2)(b).
- [281] While each of the plaintiffs deposes to a belief their reputations were harmed by the letter, in my view, the evidence is inconsistent with there being any causal connection between the letter and significant reputational harm on the part of the plaintiffs. The allegations in the letter were already a matter of public record, and would most likely have been known to the responsible officials of True Corporation. The reaction of Mr. Powtong to receipt of the letter speaks volumes. He passed it on to Mr. Prapakamol who then shared it with the plaintiffs. Mr. Prapakamol continued to sit on the board. A few weeks after the letter, True Corporation's votes were cast in support of the plaintiffs continuing as directors.
- [282] The letter in this case was communicated to one person. It clearly had little or no impact on that person's views of the reputations of the plaintiffs.
- [283] It is also of significance that the three judgments of Ross J. deal with the great majority of the allegations made. They reflect, in a very public manner, that the allegations of breach of fiduciary duty were not pursued at the hearing, and provide an award of special costs, commenting (as previously quoted above) that:
- [38] in this case, the petitioners levelled the allegations and then waited until the morning of the initial hearing, April 6, 2021, before indicating that they were not pursuing the fiduciary breach allegations. As noted above, I found that there was no evidence to support the allegation.
- [39] I find that, in the full context of the litigation, the petitioners' allegation of fiduciary breaches as against the respondent directors constituted reprehensible conduct in the litigation.
- [284] The defence of absolute privilege recognizes an important public interest in protecting communications by lawyers in circumstances that fall within the privilege. In my view, the Defamation Action unnecessarily puts the defendants as lawyers into the fray of the underlying litigation in their own capacities, and bears the possibility of significant negative consequences given its impact on the ability of the lawyers to continue as counsel and the potential impact on matters of solicitor-client privilege.
- [285] It is my view the disputes between the plaintiffs and the Bonner group are properly resolved in the course of the underlying litigation.
- [286] In coming to this conclusion, I do not want to be taken as approving the form of expression of the February 22 Letter. The letter was written on the letterhead of a major international law firm and the assertions made within were not couched in the language of what counsel had been "instructed", or what had been "alleged". It could certainly be read as asserting that Mr. McComb and the international law firm he represented considered the allegations to be true. As noted, many of the allegations were subsequently either

withdrawn or determined by Ross J. not to be made out.

[287] Notwithstanding these concerns, and in light of the nature and extent of the harm likely to have been suffered by the plaintiffs, it is my view the public interest in protecting the expression in this case outweighs the public interest in allowing the proceeding to continue.

Conclusion

[288] The plaintiffs have not met the onus on them under either s. 4(2)(a)(ii) or s. 4(2)(b). As a result, the court "must make a dismissal order". The action is dismissed pursuant to s. 4 of the PPPA.

[289] As noted in Hobbs at paras. 97-104, s. 7 provides a starting point for the decision as to costs, but that is subject to an overriding judicial discretion to ultimately impose the order that is appropriate in all the circumstances. In my view, the parties should be given the opportunity to make submissions with respect to costs in light of my findings in this judgment. If the parties are not able to resolve costs directly, I would direct that the defendants provide their submissions as to costs not later than August 18, 2023, with the plaintiffs to respond by September 8, 2023, and any reply submission to be provided by September 15, 2023.

"Veenstra J."

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