

CANADA / JUDGMENT

Mawhinney v. Stewart

2022 BCSC 1243

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2022 BCSC 1243 Mawhinney v. Stewart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mawhinney v. Stewart,

2022 BCSC 1243

Date: 20220720

Docket: S211145

Registry: Vancouver

Between:

David Mawhinney, Christopher Wilson, David Pasin, Phyllis Tang, Angelo Isidorou, Federico Fuoco and Wesley Mussio

Plaintiffs

And

Kennedy Stewart and City of Vancouver

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiffs:

K. Suprynowicz

Counsel for Defendant, Kennedy Stewart:

D.F. Sutherland, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

April 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 20, 2022

I. Introduction

- [1] On January 28, 2021, the mayor of Vancouver, Kennedy Stewart, issued a press release which made statements regarding the leadership and board of the Non-Partisan Association (the "NPA"), a political party active in Vancouver municipal politics. The plaintiffs were all members of the NPA at the time, and brought a claim in defamation against Mr. Stewart. There are two applications before me stemming from that action. In the first, Mr. Stewart seeks a dismissal of the entire claim, pursuant to s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA], as well as damages and full indemnity costs against the plaintiffs. In the second application, the plaintiffs seek to strike certain paragraphs of an affidavit filed by Mr. Stewart in support of his application for dismissal.
- [2] At the commencement of the hearing, counsel for Mr. Stewart confirmed that the challenged paragraphs and associated exhibits in Mr. Stewart's affidavit were included for a non-hearsay purposes, namely that he found certain articles in the media and he took certain steps based on those media articles. The articles are therefore not adduced to establish the truth of their contents, but simply to provide context for Mr. Stewart's actions. Counsel for the plaintiffs agreed that as long as the articles were received for this non-hearsay purpose, there was no reason to proceed with their application. As a result, the plaintiffs' application to strike certain paragraphs of Mr. Stewart's affidavit was dismissed.

II. Background

- [3] In 2021, Mr. Stewart was the mayor of Vancouver and the plaintiffs were members of the board of directors of the NPA, a Vancouver civic political party.
- [4] The NPA is established and continued under the Societies Act, S.B.C. 2015, c. 18.
- [5] In 2020 and January 2021, a number of media publications expressed views that the NPA was moving to the political right. These include:
- a) August 19, 2020: an opinion in the Vancouver Sun entitled "Former NPA Mayoral Candidate Dumps Party for 2022 Campaign". The article states that a former candidate "worries the current board of directors [of the NPA] isn't aligned with his values, and he's not comfortable with the direction they appear to be headed", and that NPA councillor Rebecca Bligh was "quitting the party to sit as an Independent, citing concerns about the party's shift to the 'far

right". The article also quotes Jane Frost, a recently departed director of the NPA, as stating she would not continue with the NPA because "[i]t's just gone so far right."

- b) December 8, 2020: an opinion in the Vancouver Sun entitled "NPA director's support for anti-maskers, Trump at odds with most Vancouver voters: Recent changes to the NPA leadership suggest a shift further to the right, a move experts say risks alienating voters".
- c) January 21, 2021: a news outlet known as The Tyee published a lengthy article titled "Worries Rise that NPA Board Could Run Extremist Candidates in 2022: Recent appointees add to the number of party directors who've espoused far-right views." The article focussed on a photograph from 2017 of one of the NPA directors allegedly displaying a "white power" hand signal and wearing a MAGA hat, and various details relating to past actions and positions taken by certain NPA directors, including the plaintiffs in this action.

The Tyee article stated "[t]he party has seen an exodus of high-profile members in the past year, with many saying they fear the board has moved too far right. Some are ringing alarms that the NPA is embroiled in a potential political power play by savvy extremists achieving a strong foothold on the board." The article also quotes Ms. Bligh as follows:

NPA voters need to know that it's happening. And it's a growing problem for that party and for the city. What's happening with the board in the NPA poses a great risk to the party. And to Vancouver if NPA supporters do not engage sooner rather than later.

This article named all of the plaintiffs in this action as directors of the NPA.

- d) January 26, 2021: an opinion in the Vancouver Sun entitled "NPA leadership opts not to publicly face serious questions". This article stated, "[a]fter the Non-Partisan Association's board of directors saw a series of controversies throughout last year, the first month of 2021 sees Vancouver's oldest political party facing serious new allegations, and choosing not to respond publicly." The article referenced the above-noted Tyee article, and focussed in part on the photograph from 2017 of one of the NPA directors allegedly displaying a "white power" hand signal.
 - e) January 27, 2021: The Tyee published an opinion entitled "The NPA Board's Attack on the Tyee is Baseless".
- [6] On January 27, 2021, the NPA issued a press release entitled "NPA Board Responds to False and Defamatory Accusations" (the "NPA Press Release"). The NPA Press Release countered the allegations against the NPA board and, in particular, Mr. Isidorou. It also contained the following statement:

It is becoming increasingly clear the smear campaign against the NPA and its Board members are designed to distract from the poor governance of the City of Vancouver under Mayor Kennedy Stewart and his progressive allies from COPE, One City and the Green Party.

- [7] On January 28, 2021, Mr. Stewart drafted and published a press release on the letterhead of the City of Vancouver titled "Statement from Mayor Stewart on extremism within Board of Non-Partisan Association" (the "Stewart Press Release"). The Stewart Press Release contained the following language:

Mayor Kennedy Stewart today issued the following statement following troubling reports of extremism with the Board of the Non-Partisan Association:

"Continuing media reports about the extreme views of Non-Partisan Association board members, including open support for hate groups, are deeply troubling and must be fully denounced and publicly condemned by NPA leaders.

"Vancouver is one of the most diverse cities in the world and it is that diversity that makes us strong. When one group is singled out and attacked, it is an attack on our entire city.

"As alt-right extremism and openly racist politics have taken hold around the world, we in Vancouver cannot take this lightly. Just a few weeks ago, white nationalist posters were plastered along the seawall. Incidents of violence and hate towards the members of the LGBTQ2+ community, women, people of Asian backgrounds, Jewish people, and Indigenous peoples are all on the rise.

"We must work every day to dismantle systems of oppression and lift up the lives and voices of those who have been marginalized. And we must call out hate and racism, whenever and wherever we see it - especially within our politics. Our duty moves beyond just not discriminating, we must all actively fight back against racism, homophobia, [misogyny], and anti-semitism.

"NPA leaders have so far failed to stop hate spreading within their party. These extreme individuals will choose who stands as candidates for the NPA in the next election, their election platform, and from whom they accept donations. These extremely disturbing developments cannot be met with silence and must be fully condemned by all of us, including NPA members and leaders."

- [8] The Stewart Press Release was sent to approximately 20,000 people who followed Mr. Stewart on social media at the time. In an affidavit filed in support of this application, Mr. Stewart states that he was aware of the above-noted articles written in December 2020 and January 2021--and the events and controversy described in them--when he wrote the Stewart Press Release.
- [9] The Stewart Press Release forms the basis of this claim in defamation against Mr. Stewart, which was filed on February 4, 2021.

III. Issues

[10] This application addresses whether the notice of civil claim filed in this action should be dismissed pursuant to s. 4 of the PPPA. Section 4 of the PPPA sets out a test which, if satisfied, requires the Court to dismiss the claim. The plaintiffs concede that this claim is a proceeding that arises from an expression made by Mr. Stewart, within the meaning of s. 4(1)(a) of the PPPA. Therefore, the following issues remain to be addressed on this application:

- a) Does the Stewart Press Release relate to a matter of public interest, within the meaning of s. 4(1)(b) of the PPPA?
- b) Does the proceeding have substantial merit and does Mr. Stewart have no valid defence, within the meaning of ss. 4(2)(a)(i) and (ii) of the PPPA?
- c) Is the harm to the plaintiffs as a result of the Stewart Press Release serious enough that the public interest weighs in favour of continuing the proceeding, within the meaning of s. 4(2)(b) of the PPPA?

A. Does the Stewart Press Release relate to a matter of public interest, within the meaning of s. 4(1)(b) of the PPPA?

[11] The burden is on Mr. Stewart to establish that the Stewart Press Release relates to a matter of public interest: *Galloway v. A.B.*, 2021 BCSC 2344 at para. 10.

[12] Mr. Stewart submits that the Stewart Press Release, when taken as a whole, clearly relates to a matter of public interest. In addition to the news articles described above, Mr. Stewart refers in his affidavit to trends of increasing violence and hate towards identifiable groups in 2020 and leading up to the Stewart Press Release. Mr. Stewart indicates that he often issued press releases in relation to incidents in the community which reflected hate or discrimination, or which supported positive efforts to advance diversity and inclusion.

[13] Mr. Stewart submits that the Stewart Press Release expressed his opinion that the NPA had failed to address the public controversy respecting the serious questions raised in the media, in the context of an environment of increasing hate and violence against targeted groups in the community. In addition, Mr. Stewart submits that the Stewart Press Release responded in part to the NPA Press Release, which stated the media articles were part of a "smear campaign against the NPA and its Board members designed to distract from the poor governance of the City of Vancouver under Mayor Kennedy Stewart and his progressive allies".

[14] In the context of defamation law, the Supreme Court of Canada in *Grant v. Torstar Corp.*, 2009 SCC 61, discussed when a subject matter is properly defined as being in the public interest, stating:

- [105] To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached" Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.
- [15] In 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 [Pointes Protection], the Supreme Court of Canada addressed the parallel Ontario legislation, which is substantively similar to the PPPA. The Court held that the phrase "relates to a matter of public interest" is to be given a large and liberal interpretation": Pointes Protection at para. 26. The expression must be assessed "as a whole" and it must be asked whether "some segment of the community would have a genuine interest in receiving the information on the subject": Pointes Protection at para. 27. Further, "the public has a genuine stake in knowing about matters ranging across a variety of topics": Grant at para. 105.
- [16] The Supreme Court in Pointes Protection further held as follows:
- [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.
- [Emphasis in original.]
- [17] The plaintiffs argue that there can be no public interest in making statements about volunteers of a political party who are not involved in policy making or overseeing matters of public interest. They submit that the NPA bylaws state that candidates and caucus are not bound by any particular policy or agenda. Further, they submit that the rest of the NPA bylaws address primarily administrative matters and so the inner workings of the NPA are not matters of public interest.
- [18] The plaintiffs rely on Cheema v. Young, 2021 BCSC 461, which they say is on all fours with the case at bar. In Cheema, the defendant directed numerous social media comments over a period of approximately 10 days towards the Mayor of Surrey, and also expressly named the plaintiff in these posts. In the posts, the defendant alleged the plaintiff had improper influence over the Mayor and accused him of corruption and dishonesty. The plaintiff was a volunteer campaigner for the "Safe Surrey Coalition", which ran a slate of candidates for the Surrey municipal election. He organized volunteers, knocked on doors, made phone calls to electors, and put up campaign signs. He did not participate in the platform developed for the Safe Surrey Coalition and was not consulted by Mayor McCallum.

[19] The Court in Cheema found as follows:

[88] I accept that some of the tweets refer to those matters. I also accept that the transition to a local police service and the implementation of that transition were subjects of public interest to citizens of Surrey. In that regard, I accept that some of his comments about Mayor McCallum and the council fall within public comment on matters of public interest.

[89] However, on their face, the tweets about Mr. Cheema do not relate to those issues. Gratuitously adding comments about Mr. Cheema, suggesting improper influence and bullying of Mayor McCallum and the council, abuse of power, and financial malfeasance by an unelected person, does not cloak the comments with the protection of public discourse on those matters. Mr. Young's expression does not relate to the public interest issues that he identifies in his notice of application.

[90] On this basis, Mr. Young's application should fail at the first stage of the analysis under s. 4 of the PPPA. His 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*.

[20] I cannot agree with the plaintiffs that Cheema has direct application to the case before me. Mr. Cheema was not a director of a political party and appeared to have no role other than as a private individual.

[21] In the case at bar, I find the plaintiffs are participants in the public sphere by virtue of their role as directors of an established political party in Vancouver municipal politics. Concerns with the leadership of the NPA were clearly of interest to a segment of society in 2020 and 2021, as evidenced by the multiple sources reporting on the issue. Some articles reported on concerns within the NPA membership itself as to a perceived right-wing shift in the party's board. Whether those statements or perceptions are true or not, I find that some parts of the community would have a genuine interest in receiving the information on the subject of the political views of the NPA board in 2020 and 2021.

[22] In the result, I find that Mr. Stewart has met the onus on him imposed by s. 4(1)(b) of the PPPA. The Stewart Press Release is an expression relating to a matter of public interest. Accordingly, the Court must dismiss the claim unless the plaintiffs can establish both of the conditions set out in s. 4(2) of the PPPA.

B. Does the proceeding have substantial merit and does Mr. Stewart have no valid defence, within the meaning of ss. 4(2)(a)(i) and (ii) of the PPPA?

[23] Pursuant to s. 4(2) of the PPPA, the plaintiffs have the onus of establishing that there are grounds to believe that the proceeding has substantial merit, and Mr. Stewart has no valid defence in the proceeding.

1. Does the proceeding have substantial merit?

- [24] In determining whether a proceeding has substantial merit, the plaintiffs must establish that the claim is "sufficiently strong such that terminating the action at this preliminary stage would undermine the legislature's objective of ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim": Galloway at para. 51.
- [25] As stated by the Supreme Court of Canada in *Pointes Protection*:
- [49] Therefore, I conclude from the foregoing exercise of statutory interpretation that for an underlying proceeding to have "substantial merit", it must have a real prospect of success -- in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law -- taking into account the stage of the proceeding -- for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.
- [50] Importantly, this standard is more demanding than the one applicable on a motion to strike, which requires that the claim have some chance of success under the "plain and obvious" test (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). It is also more demanding than requiring that the claim have a reasonable prospect of success, which is a standard that this Court has also used to animate the "plain and obvious" test (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-20). In light of the existence of a record, the substantial merit standard calls for an assessment of the evidentiary basis for the claim -- this is why the claim must be supported by evidence that is reasonably capable of belief. This is consistent with the APR's references to "substantive" merit, which inherently calls for an assessment of the basis or evidentiary foundation for a claim. I reiterate, however, that a claim with merely some chance of success will not be sufficient to prevail. Nor will a claim that has been merely nudged over the line of having some chance of success. A real prospect of success means that the plaintiff's success is more than a possibility; it requires more than an arguable case. As I said in the preceding paragraph, a real prospect of success requires that the claim have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. For a judge undertaking this inquiry, it is critical to recall that a s. 137.1 motion is not a determinative adjudication of the merits of the proceeding and, rather than having to be established on a balance of probabilities, substantial merit is instead tempered by a "grounds to believe" burden.

[Emphasis in original.]

- [26] The plaintiffs submit that they have established their claim has a real prospect of success in meeting the test in a defamation claim. In *Bent v. Platnick*, 2020 SCC 23, the Supreme Court of Canada summarized the test to establish a defamation claim as follows:
- [92] Defamation is governed by a well-articulated test requiring that three criteria be met:

1. The words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;
 2. The words complained of referred to the plaintiff; and
 3. The impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.
- [27] It is clear that the Stewart Press Release was communicated to at least one person other than the plaintiffs. It was transmitted to over 20,000 people via Mr. Stewart's social media account.
- [28] With respect to the second part of the test, can it be said that the words complained of in the Stewart Press Release referred to the plaintiffs, given that none of them are named in it? The Stewart Press Release refers to the board of the NPA, which includes all of the plaintiffs. Whether a reasonable person would understand the Stewart Press Release to be referring to the plaintiffs in this case is a live question.
- [29] The impugned statements include the following:
- a) "Mayor Kennedy Stewart today issued the following statement following troubling reports of extremism with the Board of the Non-Partisan Association";
 - b) "Continuing media reports about the extreme views of Non-Partisan Association board members, including open support for hate groups, are deeply troubling and must be fully denounced and publicly condemned by NPA leaders"; and
 - c) "NPA leaders have so far failed to stop hate spreading within their party. These extreme individuals will choose who stands as candidates for the NPA in the next election, their election platform, and from whom they accept donations."
- [30] I find that the clear implication of these words is that the board of the NPA contains extremists, who openly support hate groups, and are spreading hate within their party. I agree with the plaintiffs that these words tend to lower the reputation of the NPA board within the eyes of a reasonable person.
- [31] Defamation is a strict liability tort, meaning the plaintiffs do not have prove Mr. Stewart was reckless or intended to do harm. The falsity of the statements is also presumed, once a publication harmful to the reputation of the plaintiffs is proven: Cheema at paras. 95-100.
- [32] In addition to the presumption of falsity, the plaintiffs argue that the statements are false in fact. They submit that Mr. Stewart accepted the various media reports at face value, and did no independent investigation to confirm the truth of the reports before he issued the Stewart Press Release.

- [33] The plaintiffs point to the constitution and bylaws of the NPA, which they say contradict Mr. Stewart's statement that the board picks candidates and election platforms. Likewise, they say the bylaws and constitution support the impartial approach of the NPA across all political stripes.
- [34] While there remain issues within the defamation claim pled in this case, the plaintiffs do not have to prove their case on this application. I am satisfied that the claim is legally tenable and is supported by evidence that is reasonably capable of belief. I am satisfied that there are grounds to believe the proceeding has substantial merit.
2. Does Mr. Stewart have a valid defence?
- [35] Pursuant to s. 4(a)(ii) of the PPPA, the plaintiffs have the burden of establishing that Mr. Stewart has "no valid defence in the proceeding". In *Pointes Protection*, the Supreme of Canada stated that 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" (emphasis in original): para. 58.
- [36] The plaintiffs submit that the allegations of hate or extremism in the Stewart Press Release were false, and were a deliberate attack on the character of each and every board member of the NPA for political gain. The plaintiffs argue that there is no cogent evidence of extremism, extreme individuals, support for hate groups, or hate spreading within the NPA or its board.
- [37] The plaintiffs also submit that the Stewart Press Release was false, insofar as it stated the NPA board chose candidates and election platforms. They argue that the constitution and bylaws of the NPA contradict the assertion that the board picks candidate and election platforms, and that these documents were readily available to Mr. Stewart before he issued the Stewart Press Release.
- [38] The plaintiffs argue that the articles in the Vancouver Sun and The Tyee were left-leaning and contain hearsay and double hearsay, and Mr. Stewart ought to have checked the allegations and sources before "running with them".
- [39] In summary, the plaintiffs assert that there is no defence available to Mr. Stewart which would excuse his allegations in the Stewart Press Release.
- [40] In reply, Mr. Stewart asserts a number of defences to the defamation claim. He submits that the Stewart Press Release was not defamatory, contains expressions of opinion that are fair comment on matters of public interest and were made without malice, were published on an occasion of qualified privilege, or were justified.
- a) Stewart Press Release was not defamatory

- [41] I have found that this claim in defamation has substantial merit. It is not for me on this application to determine whether the claim in defamation will succeed. Certainly there is a live issue as to whether the statements made about the NPA board will be determined to be defamatory of the individual plaintiffs, who were not named in the Stewart Press Release.
- [42] Mr. Stewart argues that the meaning properly attributed to the words in the Stewart Press Release was not defamatory. In the alternative, by way of false innuendo in its context, Mr. Stewart submits the meaning of the Stewart Press Release had several nested meanings, a permitted pleading pursuant to *Pizza Pizza Ltd. v. Toronto Star Newspapers Ltd.* (1998), 167 D.L.R. (4th) 748 (Ont. Div. Ct.). See also: *Weaver v. Ball*, 2020 BCCA 119 at paras. 40-41.
- [43] Stewart submits the following nested meanings flow from the Stewart Press Release:
- a) there were grounds for suspicion that the board allowed the spread of hate, would choose unsuitable candidates, would establish a platform based on extremism, and would accept donations from disreputable sources; or
 - b) there were grounds for an investigation into whether the NPA board members were extremist, supported hate groups, were intolerant, racist, homophobic, misogynist or anti-Semitic, or would choose unsuitable candidates, establish a platform based on extremism, or accept donations from disreputable sources.
- [44] In summary, Mr. Stewarts says that the NPA board had not done enough to deny the public imputations of extremism, hate, intolerance, racism, homophobia, misogyny or anti-Semitism among the NPA board members, as published in the news media.
- [45] Mr. Stewart submits that no individual members are named, and the Stewart Press Release points to the inaction of the NPA in the face of allegations set out in widely distributed news media. He submits that a reasonable person would understand the Stewart Press Release to be an exhortation to the NPA board to do more to dispel the allegations and suspicions raised.
- [46] I agree that Mr. Stewart has raised a valid defence as to a non-defamatory meaning of the Stewart Press Release, which may succeed at trial. I am not satisfied the plaintiffs have established grounds to believe that Mr. Stewart has no valid defence on this basis.
- b) Stewart Press Release was fair comment
- [47] In *Grant* at para. 31, the test for a defence of fair comment is outlined:
- [31] a defendant claiming fair comment must satisfy the following test: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. WIC Radio expanded the fair comment defence by changing the traditional requirement

that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it be one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).

- [48] Mr. Stewart submits that at the time the Stewart Press Release was issued, Vancouver was experiencing a rise in hate-related incidents. In other news media in or around the time of the Stewart Press Release, reports were made that members of the NPA board were members of hate groups.
- [49] I have already found that the issue raised in the Stewart Press Release is a matter of public interest. Mr. Stewart submits that, while the truth of the statements made in the other news media is not in issue on this application, the fact that the news reports were made and included allegations against the members of the NPA board is not challenged. Mr. Stewart submits the fact of the media statements themselves is the basis upon which his comments were made. I agree that this is a conclusion which could be reached on the facts as presented to me on this application.
- [50] Mr. Stewart submits that the Stewart Press Release is recognizable as a comment on the fact that the NPA board had not, in his opinion, sufficiently dispelled the allegations in the media reporting. I agree that this is also a conclusion which could be reached on the facts presented on this application. There were numerous media articles written prior to the Stewart Press Release which raised allegations of hate, extremism, intolerance, homophobia, racism, and anti-Semitism within the NPA board. Some of these articles purported to quote concerns articulated by members of the NPA itself. I find that a person reading those media articles could honestly express an opinion that some members of the NPA board appeared to hold such views, and that the NPA board ought to take steps to distance itself from members maintaining them.
- [51] If the plaintiffs can establish that the Stewart Press Release was made by Mr. Stewart with malice, the defence of fair comment will fail. On the material before me I am not satisfied the plaintiffs have established Mr. Stewart was actuated by malice. While the plaintiffs submit that Mr. Stewart ought to have done more due diligence before issuing the Stewart Press Release--in particular, ought to have reviewed the bylaws and constitution which would have demonstrated the board does not write platforms or select candidates--the fact is that certain news articles put these views into the public arena (irrespective of their ultimate veracity). Mr. Stewart was commenting on these media articles. I am not satisfied that the evidence advanced by the plaintiffs on this application is so clear that the requirement to show malice has been established.
- [52] In the result, I find that the plaintiffs have not established grounds to believe Mr. Stewart has no valid defence of fair comment.
- c) Stewart Press Release was published on an occasion of qualified privilege

[53] In *Bent*, the Supreme Court of Canada summarized the test for the defence of qualified privilege.

[121] An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" and the recipient has "a corresponding interest or duty to receive it": Downard, at §9.6 (footnote omitted). Importantly, "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself": Hill, at para. 143; Botiuk, at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": Hill, at para. 144; Botiuk, at para. 79. However, the privilege is qualified in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded (Downard, at §1.9; see also Hill, at paras. 145-47; Botiuk, at paras. 79-80).

[Emphasis in original.]

[54] Mr. Stewart submits that qualified privilege can arise in press releases and press conferences. He asserts that the Mayor may comment through a press release on a controversy surrounding a prominent local political party. He says that the electorate has an interest in issues of hate and intolerance in the City of Vancouver, at a time where there had been rising incidence of hate in the City. In issuing the Stewart Press Release, Mr. Stewart asserts that he had a social or moral duty to the electorate to describe the reports made in the media and demand the leaders of the NPA denounce such behavior or ideas, given the role of the NPA in municipal politics. I agree that Mr. Stewart has established a reasonable basis to advance this defence.

[55] On the material before me, the plaintiffs have not satisfied me that there are grounds to believe that Mr. Stewart has no valid defence of qualified privilege.

d) Stewart Press Release was justified

[56] In *Bent*, the Supreme of Canada set out the following test for the defence of justification:

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

[108] Of particular importance here is the fact that partial truth is not a defence. If a material part of the justification defence fails, the defence fails altogether: *R. E. Brown, Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed.

(loose-leaf)), at pp. 10-88 to 10-90 ("Brown on Defamation"). However, a defendant may justify only part of a libel "if that part is severable and distinct from the rest": p. 10-89 (footnote omitted). This depends on the allegation being separate and self-contained rather than an "ingredient or part of a connected whole": p. 10-90 (footnote omitted).

- [57] Mr. Stewart submits that the "sting" of the Stewart Press Release was that reports in the media about views of the NPA board had not been adequately addressed or investigated by the NPA, and that this allegation is substantially true.
- [58] If Mr. Stewart can prove that main thrust of his statement was the need for the NPA to denounce hate, even if his statements that members of the board were extremists, that hate is spreading in the party, and that the board determines election platforms or choose candidates are all false, he may be able to succeed in the defence of justification. I agree that the thrust of the Stewart Press Release was to denounce hate and extremism, and to exhort the NPA board to do the same in the face of the above-noted media reports in December 2020 and January 2021. As such, I find that Mr. Stewart has established a reasonable basis to proceed with this defence.
- [59] On the material before me, the plaintiffs have not satisfied me that there are grounds to believe that Mr. Stewart has no valid defence of justification.

C. Is the harm to the plaintiffs as a result of the Stewart Press Release serious enough that the public interest weighs in favour of continuing the proceeding, within the meaning of s. 4(2)(b) of the PPPA?

- [60] The plaintiffs submitted affidavits setting out the harm they say they have suffered as a result of the Stewart Press Release. Such harm includes:
- a) Mr. Mussio states that he is not a right-wing extremist, but rather is environmentally focussed, with diverse friends and associates. He strongly denies that he holds anti-social views of minorities or otherwise. As a result of the Stewart Press Release, he says he suffered derogatory comments on social media, voice messages, and emails, and that some friends now avoid him. Mr. Mussio states that his law practice has been negatively affected, with some clients wanting to terminate his services due to his alleged right-wing views. His firm has lost business since January 2021 and he attributes this to the Stewart Press Release. Mr. Mussio is also involved in a map book company and says that business has been negatively affected, as has tickets sales to his hockey team. Mr. Mussio says that he and his wife have relocated to Florida to avoid the negative effects on his character arising from the Stewart Press Release.
 - b) Ms. Tsang is a music teacher and states that she feels she has lost business as a result of the Stewart Press Release.

- c) Mr. Pasin is the president and CEO of In Tech Environmental Canada Corp. and Pink Solutions Canada Corp., both of which provide environmentally safe cleaning solutions to industry and consumers. He says he has had to justify himself in business and socially as a result of the Stewart Press Release, and says he has seen a decline in business.
 - d) Mr. Mawhinney states that he is constantly defending himself in the public since the Stewart Press Release, and he has the impression that he has suffered a significant loss of reputation in the community.
 - e) Mr. Fuoco says that the Stewart Press Release has affected his personal, political and business life for years to come.
 - f) Mr. Wilson states that he is constantly defending himself in the public since the Stewart Press Release. He suggests that while there were other commentators writing about him at the same time--including referencing his opinions and reporting done at Rebel News--the Stewart Press Release came from a person of authority and therefore solidified the views previously expressed by "left wing commentators". He says he has suffered a significant loss of reputation, and has seen a dip in business.
 - g) Mr. Isidorou states that he lost a client who had two files with a marketing firm he worked with because the client thought Mr. Stewart was credible and accurately representing Mr. Isidorou's character. Mr. Isidorou was put on probation by his employer and forced to resign from the NPA board in order to keep his job. Ultimately, he left his job because he clients were hesitant to work with him, and his ability to be assigned clients suffered. Mr. Isidorou received harassment and racism on social media following the Stewart Press Release. He says his employment, reputation, political career, and friendships have been damaged as a result of the Stewart Press Release.
- [61] In *Pointes Protection*, the Supreme Court of Canada found that section 137.1(4) of the Ontario Courts of Justice Act, R.S.O. 1990, c. C.43, which is the equivalent section to s. 4(2) of the PPPA, was a key feature in the proportionality exercise intended by the legislature: para. 63. The Court described this section as the "fundamental crux of the analysis": *Pointes Protection* at para. 18. Accordingly, the Court must determine if the public interest in allowing meritorious lawsuits to proceed outweighs the public interest in protecting expression on matters of public interest.
- [62] Mr. Stewart submits that ss. 4(2)(a)(i), 4(2)(a)(ii), and 4(2)(b) are conjunctive: if the plaintiffs do not satisfy the Court under both ss. 4(a)(i) and 4(a)(ii), there is no need for the Court to make a determination under s. 4(b). In other words, Mr. Stewart submits that the Court only assesses and weighs the harm to the plaintiffs where it has already determined that the proceeding has substantial merit and the applicant has no valid defence.

- [63] In two recent decisions, this Court has adopted the position advanced by Mr. Stewart: *Lang v. Neufeld*, 2022 BCSC 130 at paras. 154-157, and *Durkin v. Marlan*, 2022 BCSC 193 at paras. 31-32. I agree that it is not necessary for me to assess and weigh the harm to the plaintiffs, given my conclusions on the defences available to Mr. Stewart. Nevertheless, I will set out my conclusions on the assessment and weighing of harm in the event it is relevant on an appeal or in relation to costs.
- [64] The harm referred to in s. 4(b) of the PPPA has been interpreted by the Court in *Pointes Protection* to include both monetary and non-monetary harm, and to not be synonymous with damages alleged by the plaintiffs: para. 69. However, the Court also cautions that harm pleaded by the plaintiffs should not be taken at face value and bald assertions of harm are not sufficient: *Pointes Protection* at para. 71. The Court may also consider the causal link between the harm alleged and the expression at issue: *Pointes Protection* at para. 71.
- [65] In weighing the public interest, the Court in *Pointes Protection* found that the weighing exercise can be informed by s. 2(b) of the Canadian Charter of Rights and Freedoms jurisprudence: para. 77. In particular, the Court references "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": *Pointes Protection* at para. 77.
- [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.
- [67] Mr. Mussio makes more specific allegations of harm which he asserts flowed from the Stewart Press Release; however, he does not identify any particular business loss which was objectively tied to the Stewart Press Release. This does suggest to me that causation will be a significant issue for Mr. Mussio, given the many other media stories in circulation which prompted the Stewart Press Release.
- [68] Mr. Isidorou specifically relates the loss of his job to the Stewart Press Release and a client who described the credibility of Mr. Stewart in making the statements in the Press Release. I am satisfied that Mr. Isidorou has established that he may have suffered some harm from the Stewart Press Release.
- [69] Is the likelihood of harm established by Mr. Isidorou, alone among the plaintiffs, sufficient to outweigh the public interest in protecting the expressions contained in the Stewart Press Release? I am not satisfied that it is. The Stewart Press Release is an expression which, by its character, is protected by the Charter. In particular, I find that, while disputed by the plaintiffs, it was nevertheless prompted in some part by Mr. Stewart asking the NPA board to comment on the truth of the allegations made in the various media articles. It was also an expression which raised concerns about the views of the board of a political party and, as such, relates to participation in political decision making--even though the NPA board itself

is not a public decision maker.

- [70] I find that the plaintiffs have not established that the harm suffered, or likely to be suffered, as a result of Mr. Stewart's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression as contained in the Stewart Press Release.

IV. Conclusion

- [71] The application of the defendant, Kennedy Stewart, to dismiss the action of the plaintiffs is allowed. The plaintiffs' claim is dismissed.
- [72] On this application, Mr. Stewart claimed damages and costs. He submitted that both costs and damages should be determined following my determination on whether the claim should be dismissed. As such, I make no determination on costs or damages at this time. If Mr. Stewart intends to pursue these claims, I direct that such application be brought within 90 days of this decision. If that is not possible, the parties may communicate a proposal for an alternate timeline to me through the registry.

"W.A. Baker J."

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