

CANADA / JUDGMENT

Ortt v. The Owners, Strata Plan NES 3039

2024 BCSC 323

COURT

Supreme Court of British Columbia

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2024 BCSC 323 Ortt v. The Owners, Strata Plan NES 3039

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ortt v. The Owners, Strata Plan NES 3039,

2024 BCSC 323

Date: 20240226

Docket: S6870

Registry: Golden

Between:

Glen Ortt and Valley's Edge Park Ltd.

Plaintiffs

And

The Owners, Strata Plan NES 3039,

Denis Holden and Thomas Wade Peterson

Defendants

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Counsel for Plaintiffs (application respondents):

M. Blakley

Counsel for the Individual Defendants (applicants):

B.F. Morley

Counsel for the Strata Corporation (applicants):

G.S. Hamilton

Place and Dates of Hearing:

Cranbrook, B.C.

July 13 and 14, 2023

Place and Date of Judgment:

Cranbrook, B.C.

February 26, 2024

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Introduction

- [1] There are two applications before the Court to dismiss the defamation action filed by the plaintiffs, Glen Ortt and Valley's Edge Park Ltd. ("Valley's Edge"). The first application is filed by the individual defendants to the action, Denis Holden and Thomas Peterson. The second application is filed by the corporate defendant to the action, The Owners, Strata Plan NES 3039 (the "Strata Corporation").
- [2] Both applications are filed pursuant to s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA]. The PPPA is commonly referred to as "anti-SLAPP legislation". A strategic lawsuit against public participation, or a "SLAPP lawsuit", is one which seeks to suppress expression on a matter of public interest. The PPPA creates a mechanism by which defendants may apply to court to have a defamation claim made against them dismissed in its early stages. That is what the defendants in this case seek to do.
- [3] The plaintiffs deny that their defamation lawsuit against the defendants is a SLAPP lawsuit. They say that they have a valid defamation action against the defendants, which they should be permitted to pursue.

Facts

The Parties

- [4] Valley's Edge is the developer of Valley's Edge Resort (the "Resort"). The Resort is made up of cottages and recreational vehicle lots. It is located in Edgewater, British Columbia. Mr. Ortt is the principal of Valley's Edge.
- [5] The Strata Corporation is a strata corporation within the meaning of s. 2 of the Strata Property Act, S.B.C. 1998, c. 43. The Strata Corporation consists of the 201 strata lots that make up the Resort.
- [6] Valley's Edge, Mr. Ortt, Mr. Holden and Mr. Peterson are all members of the Strata Corporation, through their ownership of strata lots in the Resort.
- [7] Mr. Holden was first elected to the Strata Corporation's Strata Council (the "Council") in 2011 as Vice-President, Operations, but resigned in or about 2013. He was then re-elected to the Council at the November 23, 2022 Annual General Meeting ("AGM"). At the times relevant to this action, Mr. Holden was the President of the Council. He ceased to be the President at a Special General Meeting ("SGM") of the Strata Corporation held on March 7, 2023.
- [8] Mr. Peterson was also elected to the Council at the November 23, 2022 AGM. He became the Vice-President, Communication of the Council. He ceased to hold that position on March 7, 2023 when he was removed at the same SGM as was Mr. Holden.

The Building Scheme

[9] Valley's Edge is the administrator (the "Administrator") of the statutory building scheme registered on title to the lots within the Strata Corporation (the "Building Scheme"). The Building Scheme is registered pursuant to s. 220 of the Land Title Act, R.S.B.C. 1996, c. 250. It has been registered on the titles since on or about June 30, 2006, and runs with the titles in the nature of a restrictive covenant.

[10] The Building Scheme is geographically coterminous with the Strata Corporation. The Building Scheme generally governs what can and cannot be done to lots within the Strata Corporation. For example, Article 2.2 provides that no improvements can be made on any strata lot until plans and specifications have been submitted to and approved by the Administrator. Pursuant to Article 2.3, the Administrator has the sole right to approve and reject plans and specifications. Its decision is final and binding.

[11] Article 2.4 provides that:

It is the intention of this Building Scheme and Design Guidelines that all improvements are to be controlled as to their design for the benefit of the Strata Lots and the development known as Valley's Edge Park as a whole.

[12] Schedule 1 to the Building Scheme contains the Design and Development Guidelines (the "Guidelines") for Valley's Edge. Article 1 of the Guidelines provides that:

The Valley's Edge Park is a comprehensively planned recreational development located near Edgewater, British Columbia. The character of the Valley's Edge Park, and the character of the Cottages and Recreational Vehicles placed within the Valley's Edge Park, are to be planned and constructed to create a first class cottage and recreational vehicle park.

[13] Article 2 states that the purpose of the Guidelines is to "establish and protect the owners investment and peaceful enjoyment of its recreational potential by ensuring the integrity of the development" of each strata lot.

[14] The Building Scheme does not create any mechanism to remove or change Administrators or to challenge the decisions of the Administrator.

The Allegedly Defamatory Expressions

[15] In 2022, Mr. Holden and Mr. Peterson expressed concerns about Mr. Ortt's administration of the Building Scheme. Mr. Peterson made a verbal statement, and Mr. Holden wrote a letter, both of which the plaintiffs submit are defamatory.

[16] There is no dispute that Mr. Peterson said and Mr. Holden wrote the allegedly defamatory words.

[17] Mr. Peterson states that his best recollection of his words is as follows:

I had a series of emails with Ortt where I asked for his permission to build a deck extension. He is refusing to give me approval unless I pay the strata \$1000 for a removed tree. The removed tree has nothing to do with the deck extension. This is totally unfair. He is trying to extort me.

[18] Mr. Holden's letter was attached as Appendix A to the minutes of the Council for a meeting held December 15, 2022 (the "Letter"). It reads as follows:

I have been an owner at VER since 2008. I have made many friends and watched our park grow.

I have also watched the developer's administrator massage "OUR" building scheme and bylaws to benefit his corporation and his personal whims.

The VER Building Scheme states

2.4. It is the intention of this building scheme and design guidelines that all improvements are to be controlled as to their design for the benefit of the strata lots and the development known as Valley's Edge Park as a Whole.

I will cite 4 sections of the building scheme where Mr. [Ortt] has abused, ignored or manipulated to benefit his corporation.

Section 2.5. The Administrator shall receive and consider plans and specifications in a TIMELY manner, and either approve or reject plans or specifications, or make further recommendations for alterations of the plans or specifications, the key word in this section is TIMELY.

Lot 25 has waited 5 years for any recommendations, approval or rejection from Mr. Ortt as to his deck and shed approval.

Section 3.1 clearly states that cottages will have a maximum size of 65 Square metres (approx 700 square feet).

Mr. Ortt has built a cottage on lot 29 that totally ignores this design feature. Mr. Ortt applied to RDEK for a development variance in 2018. I am in possession of a copy of this application which shows only 1 objection to this application. I personally submitted a written objection to this application and it was never recorded. My letter did appear in 2019 at Mr. Ortt's office when a person connected to me asked if he could rent a lot from Mr. Ortt for 1 week. How did Mr. Ortt get my letter? How many other objections were struck from the official record?

Section 4.4 states a recreation vehicle must be a minimum of 23 feet in length.

He contravened this section by allowing placement of a 17 foot trailer on lot 89. This infraction was brought to Mr. Ortt's attention in June 2022 and he has failed to rectify.

Section 5.6 has been contravened by Mr. Ortt since I have been an owner at VER. He has clear cut all trees so that he may sell lots. Mr. Ortt has vehemently denied permission to other owners who have asked to remove a single tree when the tree is interfering with placement of their trailers or in some cases pose a serious risk of harming others.

In an email from Mr. Ortt sent in 2022, I quote his exact words: "I am also of the opinion that the loss of the mature trees in the resort is a loss to all owners, not just the individual lot the tree is located on. I think the trees are one of the features that make the resort what it is. That is why I have tried to save as many trees as possible."

Most recent disregard was at Lot 89 which was owned by Mr. Ortt's corporation. Mr. Ortt had all "HEALTHY" trees removed including mature trees contravening section 5.6 of the Building Scheme. The trees removed would not have interfered with placement of a trailer.

Lot 181 believes Mr. Ortt has attempted to extort monies from him. Mr. Ortt stated he would approve gazebo and deck extension if the owner would contribute \$1,000.00 to the strata for the removal of a tree that interfered with the placement of his new trailer.

Denis Holden

[19] Some background is necessary to put the allegedly defamatory communications in context. It is to that which I now turn.

Background to Peterson Statements

[20] On March 15, 2022, Mr. Peterson sent an email to Mr. Ortt requesting approval to build a deck extension on his lot. Mr. Ortt replied on April 2, 2022. He wrote that there was no approval on file for Mr. Peterson's existing deck and that no approval would be given for an extension to a deck that was not itself approved. He suggested Mr. Peterson might wish to re-apply for approval for the existing deck with the proposed extension. Mr. Ortt further noted that a tree shown on the approved plan had been removed without approval, in breach of the Building Scheme. He asked Mr. Peterson how he intended to remedy this breach.

[21] Mr. Peterson responded on April 8, 2022. He asked for approval of his deck and its extension. With respect to the tree, Mr. Peterson said that he planned on planting a replacement, but was open to considering alternate remedies.

[22] Mr. Ortt replied on April 20, 2022. He indicated that he thought the compensation for the loss of the tree should be to the Strata Corporation, not the developer. He suggested that Mr. Peterson compensate the Strata Corporation \$1,000 for the loss of the tree, to be recorded as a donation. Mr. Peterson replied that same day, stating he would take the tree suggestion into consideration and asked about the status of his deck approval request.

[23] On April 21, 2022, Mr. Ortt stated that he would prefer to deal with everything at once, and that if his suggested resolution to the tree issue was acceptable, he would approve the deck, subject to the Strata Corporation receiving the donation.

[24] Mr. Peterson says that this felt entirely unfair and "like extortion".

[25] Mr. Peterson says that in the fall of 2022 he told the story of this email exchange to several people at the Resort. He says that he probably used the word extortion.

[26] In the fall of 2022, Mr. Peterson decided to stand for election to the Council. He was concerned about what he saw as Mr. Ortt's unfair treatment of strata owners.

Background to Mr. Holden's Letter

[27] Mr. Holden says that he started to have concerns about Mr. Ortt's conduct as the Administrator in or about 2013, when he resigned from Council. Those concerns appear to have grown over the years.

[28] Prior to the November 2022 AGM, Mr. Holden prepared a motion asking the Strata Corporation to fund a legal opinion about a developer being in a conflict of interest situation. In support of his motion, he prepared the Letter.

[29] According to Mr. Holden and Mr. Peterson, Mr. Ortt stood up at the beginning of the AGM to say that the motion was not properly on the agenda, and needed to be removed. The motion was removed from the agenda.

[30] Mr. Holden was re-elected to Council at the November 2022 AGM. He continued in that position until he was voted off at the March 2023 SGM.

[31] Mr. Holden continued to be concerned about the issues discussed in the Letter. He felt it was necessary to get the Letter out to the other owners so they would be less intimidated by Mr. Ortt and understand that others had also had negative experiences. Mr. Holden says that he shared the Letter with others on the Council, and they agreed to append it to the December 2022 minutes that were sent to the owners.

Correspondence Relating to the Allegedly Defamatory Expressions

[32] On January 9, 2023, counsel for the plaintiffs wrote the Strata Corporation and the members of Council complaining that the Letter was defamatory. Counsel demanded that the defendants distribute letters of apology to all owners with the next strata minutes, in a form to be approved by the plaintiffs. Counsel further demanded that they remove the Letter from any website or other place it could be seen by members of the public or of the Strata. Counsel further put them on notice that the plaintiffs intended to file a notice of civil claim regarding the matter.

[33] On January 14, 2023, Mr. Holden replied to counsel for the plaintiffs in his capacity as President of the Council. He submitted a form of apology for approval, and said it would be attached to the next minutes. If it was not acceptable, he asked counsel to suggest wording. The proposed apology read as follows:

The council representing the owners of Strata Plan NES3039 wish to apologize to Glen Ortt and Valley's Edge Park Ltd. for allowing a potentially libelous statement to be attached to the Dec 15, 2022 council minutes. The council does not condone the content of the appendix A and will remove statements made by Denis Holden attached to the 15 Dec 2022 council minutes. The Dec 15, 2022 minutes will be deleted from our records and refiled without an appendix.

[34] Counsel for the plaintiffs replied on January 20, 2023. He stated that the apology was inadequate. He further stated that given Mr. Holden's conflict of interest, he was not prepared to accept his authority to issue such a letter on behalf of the Strata Corporation. Counsel went on to list what the apology letter must contain. That same day, the present action was filed.

Analysis

Framework

[35] In *Hansman v. Neufeld*, 2023 SCC 14 [Hansman], the Supreme Court of Canada discussed the purpose and application of anti-SLAPP legislation. At para. 2, the Court stated that:

Defamation suits are a way to vindicate an individual's personal or professional reputation in the face of attack, but can have the undesirable effect of suppressing the open debate that is the cornerstone of a free and democratic society.

[36] It is for this reason that anti-SLAPP legislation, such as the PPPA, has been enacted to target strategic defamation lawsuits that disproportionately suppress free expression on matters of public interest.

[37] At para. 46 of *Hansman*, the Court gave a further explanation of what a SLAPP is. It is a tactical action that seeks to suppress expression on a matter of public interest. Its goal is not necessarily a legal victory, but rather a political one: "to intimidate and suppress criticism with the threat of costly litigation". Thus, a key feature of a SLAPP is "the strategic use of the legal system to silence contrary viewpoints". As further explained at para. 48, "the consistent defining feature of a SLAPP is that the proceeding acts to silence the defendant, and more broadly to suppress debate on matters of public interest, rather than to remedy serious harm suffered by the plaintiff".

[38] These applications are made pursuant to s. 4 of the PPPA. It reads:

Application to court

4 (1) 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.

- (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.
- [39] Section 4 of the PPPA creates a multi-step process with shifting burdens between the applicant and the respondent. The Supreme Court of Canada described that process as follows in *Hansman*:
- [53] A s. 4 application first requires the applicant (the defendant) to prove, on a balance of probabilities, that the proceeding arises from expression that relates to a matter of public interest (s. 4(1); see *Pointes*, at paras. 18 and 31). If the defendant does so, the onus shifts to the respondent (the plaintiff) under s. 4(2) to satisfy the court there are grounds to believe that: (1) the proceeding has substantial merit (s. 4(2)(a)(i)), and (2) the defences raised by the defendant are not valid, in that they can be said to have no real prospect of success (s. 4(2)(a)(ii)). If the court is not satisfied the plaintiff has met their onus as to one or both criteria, it must dismiss the proceeding. Even if, however, the plaintiff meets their burden, the court must conduct a public interest weighing exercise under s. 4(2)(b), in which the plaintiff must satisfy the court that the harm they are likely to have suffered or are likely to suffer due to the defendant's expression outweighs the public interest in protecting that expression. In other words, once the court is satisfied that the proceeding arises from expression that relates to a matter of public interest, it must dismiss the proceeding if the plaintiff does not meet its onus as to either s. 4(2)(a) or (b). The order in which a judge chooses to address each of the elements under s. 4(2) is, of course, at the discretion of the court.

Do the expressions relate to a matter of public interest?

- [40] The first question that must be decided is whether the expressions relate to a matter of public interest. The burden is on the applicants to prove, on a balance of probabilities, that the expressions relate to a matter of public interest. There is no dispute that the defendants made the expressions. The parties join issue on whether the expressions relate to a matter of public interest. This is a "threshold hurdle" that the applicants must pass.

- [41] The words "relates to a matter of public interest" are to be given a broad and liberal interpretation: *Hobbs v. Warner*, 2021 BCCA 290 at para. 11, leave to appeal to SCC ref'd, 39922 (28 April 2022) [Hobbs]. In *1704604 Ontario Limited v. Pointes Protection Association*, 2020 SCC 22 [Pointes], the Supreme Court of Canada described the inquiry under the analogous provision in the Ontario legislation as follows:
- [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.
- [42] I would note that in *Hansman*, at para. 52, the Supreme Court of Canada held that given the substantial similarity between the Ontario and British Columbia legislation, its interpretation of s. 137.1 of the Ontario statute in *Pointes* and *Bent v. Platnick*, 2020 SCC 23 [Bent], applies with equal force to s. 4 of the PPPA.
- [43] In *Pointes*, at para. 27, the Court referred to *Grant v. Torstar Corp.*, 2009 SCC 61 [Grant], for the principles that apply in determining what constitutes a "matter of public interest". The Court stated that:

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" While there is "no single test", "[t]he public has a genuine stake in knowing about matters" ranging across a variety of topics

[Citations omitted.]

- [44] At para. 28 of *Pointes*, the Court stated that it is not legally relevant whether the expression is valuable or helps or hinders the public interest. The burden is not an onerous one.
- [45] It is helpful to consider cases in which the threshold hurdle has been analyzed. In *Peterson v. Deck*, 2021 BCSC 1670 [Peterson], the Court considered an application to dismiss a defamation lawsuit related to posts made on a website by a woman who was unhappy with the quality of the breast augmentation procedure performed by her plastic surgeon. At para. 32, the Court held that the posts were expressions on a matter of public interest. The Court reasoned that there is a segment of women considering breast augmentation and contemplating having the plaintiff surgeon in that case perform the procedure. That segment of women would have a genuine interest in receiving information about the defendant's experience with the plaintiff. The threshold hurdle was, therefore, met in *Peterson*.

- [46] In *McDonald v. Goranko*, 2023 BCSC 231 [McDonald], the Court considered an application to dismiss a defamation action relating to social media posts made by the defendant which stated that they had been sexually assaulted by the plaintiff. Both parties were members of Vancouver's drag community. At paras. 46-51, the Court considered whether the posts related to a matter of public interest and held that they did. The Court concluded that the expressions related to the public interest in encouraging open discourse about sexual assault, both generally and within the drag community in particular.
- [47] Somewhat similarly, in *Lyncaster v. Metro Vancouver Kink Society*, 2019 BCSC 2207 [Lyncaster], the Court considered an application to dismiss a defamation action that had been filed with respect to statements made in an open letter and at a local society's town hall meeting related to why the society had terminated its professional relationship with the plaintiff. The allegedly defamatory expressions referred to the plaintiff having engaged in a pattern of misconduct in the kink community. At para. 27, the Court held that the expressions were made in relation to a matter of public interest concerning consent boundaries and safe interactions among members of Vancouver's kink community. At para. 28, the Court rejected the contention that the expressions arose solely within the context of a private dispute between individuals or groups of individuals.
- [48] The foregoing cases demonstrate the breadth with which the phrase "matter related to the public interest" has been interpreted, especially by this Court. It is not necessary that the public at large have an interest in the matter. It is enough if a segment of the public, such as women considering breast augmentation or members of the drag or kink community, have a legitimate interest in the subject matter of the expression in issue.
- [49] That said, there are limits to what constitutes a "matter related to the public interest". The respondents to the present application relied in this respect on the decision of the Ontario Superior Court of Justice in *Walsh v. Badin*, 2019 ONSC 689 [Walsh]. The parties in Walsh all lived in a condominium complex. The plaintiffs sued the defendants for allegedly defamatory comments made in three letters that were distributed to condominium residents. The plaintiffs had all been members of the condominium's board of directors, and the defendants were condominium residents who had been active in condominium affairs.
- [50] The allegedly defamatory expressions in Walsh included allegations that the plaintiffs had taken funds from the condominium corporation, received kickbacks from contractors, interfered in board elections, and denied owners' access to condominium corporation records. As summarized at para. 18 of Walsh, the allegations were of corruption and dishonesty on the part of the plaintiffs.
- [51] The Court in Walsh held at para. 27 that the applicants failed to meet the initial burden of showing the proceeding arises from an expression made by the defendant. That is because the defendants/applicants denied making the expressions in issue. That was sufficient to dispose of the application to dismiss.

- [52] The Court went on to consider whether the applicants had demonstrated that the expressions related to a matter of public interest. The Court referred to *Grant and Pointes*, as well as *Taft Management Inc. v. Gentile*, 2018 CanLII 82880, [2018] O.J. No. 4464 (S.C.J.), an earlier case dismissing a SLAPP application with respect to allegedly defamatory communications within a condominium. The Court in *Walsh* held that the expressions did not relate to a matter of public interest. It reasoned as follows:
- [37] Based on the case law and the Statements at issue in this case, I find that the Statements do not relate to a matter of public interest. The operations and governance of the Board bear none of the characteristics identified in *Grant v. Torstar*; they do not attract public attention, affect the welfare of citizens, or attract considerable controversy. The public has no interest in the functioning of the Board, who gets elected to it, or how it uses the Condominium's funds. The fact that the concerns raised are legitimate or important to the Condominium residents does not mean that they relate to a matter of public interest. Those matters are more accurately characterized as a private interest, albeit one that might be held by a number of individuals. The internal governance and proper functioning of a condominium board may be of significant interest to the residents of the Condominium, but it is not a matter of public interest. While the Defendants point to the possibility that a condominium corporation could be put into court-appointed receivership under the Condominiums Act, this does not in itself render condominium governance a matter of public interest.
- [53] The plaintiffs/respondents submit that the reasoning in *Walsh*, albeit obiter, applies directly to the application currently before the Court. They submit that infighting within a strata corporation, including about the administration of a building scheme, as in the case at bar, is not a matter related to the public interest.
- [54] Our Court of Appeal considered *Walsh* in a decision decided after this application was heard: *Christman v. Lee-Sheriff*, 2023 BCCA 363. The question in issue there was the first ground upon which *Walsh* was decided, namely whether an applicant must admit to having made an impugned expression in order to benefit from the PPPA. At para. 66, the Court of Appeal upheld the trial judge's reasoning, based upon *Walsh*, that it is not possible for an applicant to prove that a proceeding arises from an expression he made while at the same time denying making that expression. This is not an issue in the present case, as the defendants do not deny making the allegedly defamatory expressions. I have been unable to locate any decisions that have considered the Court's alternative analysis in *Walsh*.
- [55] In *Cheema v. Young*, 2021 BCSC 461 [*Cheema*], the Court considered an application to dismiss a defamation suit arising from a series of tweets made by the defendant. The tweets were made by the defendant in the context of a Surrey municipal election. They related to the ongoing controversy in Surrey about whether to establish a municipal police force. The plaintiff alleged that the tweets accused him of surreptitiously influencing elected officials, acting dishonestly, and improperly benefitting from his association with the Mayor of Surrey, among other things.

[56] At paras. 84-91 in *Cheema*, the Court considered whether the tweets in issue related to a matter of public interest. At paras. 87-88, the Court accepted that the transition to a local police service was a matter of public interest, and that some of the tweets did relate to that issue. At para. 89, however, the Court held that the tweets about the plaintiff did 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.

[57] The case at bar is a marginal case with respect to whether the expressions in issue relate to a matter of public interest. There is much to recommend the point of view expressed by Justice Nishikawa in her alternative analysis in *Walsh* that the internal governance and functioning of a strata corporation are not a matter of public interest.

[58] Nonetheless, I have come to the conclusion that the particular expressions in issue in the case at bar do relate to a matter of public interest. Cases such as *McDonald* and *Lyncaster* establish that the segment of the public with a legitimate interest in the expressions in issue does not have to be large in order for an expression to relate to a matter of public interest.

[59] A significant factor which leads me to the conclusion that these expressions relate to a matter of public interest is that Mr. Peterson's statements and Mr. Holden's Letter related to the conduct of Mr. Ortt and Valley's Edge in their role as Administrator of the Building Scheme.

[60] The unique nature of statutory building schemes was discussed by the Court in *Hemani v. British Pacific Properties Limited*, 1992 CanLII 575 (BC SC), upheld 1993 CanLII 2300 (BC CA). At p. 51, the Court referred to the restrictive covenants that were part of the building scheme in issue there, stating that they were for the benefit of all owners, as well as the developer. All parties were described as having "a common interest in maintaining them; and the cases show that this community of interest necessarily requires and imports reciprocity of obligation." The Court held at pp. 56-57 that the power to control construction on a lot was vital to the scheme, and of the utmost importance to the owner submitting a plan, as well as the developer and their neighbours. The right and power to approve and reject plans was described as "probably the most important restrictive covenant contained" in the scheme in issue. That right and power was to be exercised "in the furtherance of the community of interest and for the benefit of those participating in that interest and their lots". At p. 62 the Court held that the developer was under an equitable obligation to properly perform its duties in the approval process. The Court held at pp. 68-69 that the developer's right and duty to approve or reject plans was a restricted one, and that the developer could not lawfully exercise that power unreasonably. At pp. 73-74 the Court held that the developer's exercise of that power was subject to judicial review, but that the test for judicial

interference should be a high one.

- [61] The manner in which the administrator of a building scheme administers such a scheme will be of legitimate interest to the owners of units governed by said scheme. Given the largely unchecked power that an administrator of a building scheme has, dissemination of information and opinions about how they are going about their role is of legitimate interest to those subject to that power. I am satisfied that this element distinguishes the application before me from a truly private dispute such as might arise between two neighbours in a strata complex.
- [62] Keeping in mind that this threshold hurdle is not onerous, and that the Court at this stage does not concern itself with the value of the expression in issue, I am satisfied that the applicants have met their burden of establishing that the expressions in issue relate to a matter of public interest.

Are there grounds to believe that the proceeding has substantial merit and that the defences pleaded by the defendants are not valid?

- [63] The burden now shifts to the plaintiffs/respondents to show that there are grounds to believe that the proceeding has substantial merit and that the defences pleaded by the defendants are not valid.
- [64] As explained by Justice MacNaughton in *Cheema* at para. 14(a), the first branch of this stage of the analysis involves determining whether Mr. Ortt and Valley's Edge's claim is "legally tenable and supported by evidence that is reasonably capable of belief. The stronger the claim, the weaker the justification to dismiss the proceeding."
- [65] As further explained by MacNaughton J. at para. 14(b), the second branch of this stage involves determining whether there is a basis on the record and in law to support a finding that the defences do not weigh more in Mr. Peterson's and Mr. Holden's favour.
- [66] Justice MacNaughton expanded on what the "grounds to believe" standard requires in assessing these two branches in *Cheema*:
- [15] The "substantial merit" and "no valid defence" standards at stages two and three are not assessed on a balance of probabilities, but on a "grounds to believe" standard requiring a basis in the record and the law, taking into account the stage of the litigation, the limited record, and the potentiality of future evidence arising: *Pointes Protection* at para. 39 and *Bent* at para. 87. The rationale for applying the lower "grounds to believe" standard is that a court must be careful not to suggest that the outcome has been adjudicated at this stage: *Pointes Protection* at para. 37. The standard of "grounds to believe" requires more than mere suspicion, but less than proof on the balance of probabilities: *Pointes Protection* at para. 40, citing *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40. The standard is subjective, reflecting the discretion and authority conferred on the motion judge: *Pointes Protection* at para. 41. It is part of an overall assessment of Mr. Cheema's prospects of success.

Are there grounds to believe the proceeding has substantial merit?

- [67] Justice MacNaughton provided further guidance with respect to the "substantial merit" standard in *Cheema*:
- [16] For the underlying proceeding to have "substantial merit", it must have a real prospect of success. It is not just some merit, any merit, or some chance of success. The purpose of applying this standard is to ensure that a plaintiff with a legitimate claim is not unduly deprived of an opportunity to pursue it. The "substantial merit" standard is higher than the one applicable on a motion to strike or applicable in showing a "reasonable prospect of success". Even a claim that is "not merely frivolous or vexatious" may not withstand the substantial merit test. However, the plaintiff is not required to show their claim is likely to succeed. The underlying claim must have a real prospect of success, meaning one that tends to weigh more in favour of the plaintiff, but it need not have a demonstrated likelihood of success. The standard is lower than the "strong prima facie case" threshold applicable in deciding an injunction or the test for summary judgment: *Pointes Protection* at paras. 44--54.
- [68] This proceeding encompasses both libel and slander, as Mr. Peterson's comments are alleged to be a slanderous oral communication, and Mr. Holden's Letter is alleged to be libellous.
- [69] To prove libel, the plaintiffs must establish that the words refer to the plaintiffs; that the words have been published to a third party; and that the words complained of are defamatory: *Grant* at para. 28. Defamation is a strict liability tort. If those three elements are proven, the law presumes falsity and damage: *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309 at para. 61. The onus then shifts to the defendants to advance a defence: *Grant* at paras. 28-29.
- [70] To prove slander, the plaintiffs must establish the same three elements. In most cases, they must also prove damages. The exception is if the imputation of the allegedly defamatory words is that the plaintiffs committed a criminal offence, in which case the slander is actionable per se, and damages need not be proven: *Caldwell v. McBride* (1988), 45 C.C.L.T. 50 at 155, [1998] B.C.J. No. 967 (S.C.). Again, if the plaintiffs establish the requisite elements, the burden shifts to the defendants to advance a defence.
- [71] The classic test for whether words are defamatory is "whether the words have a tendency to injure the person's reputation in the estimation of reasonable right-thinking persons": *Weaver v. Ball*, 2020 BCCA 119 at para. 119.
- [72] The defendants submit that the words complained of do not refer to Valley's Edge, only Mr. Ortt, and are not capable at law of giving rise to the defamatory meanings alleged by the plaintiffs in their claim. They also submit that Mr. Peterson's reference to "extortion" did not impute that Mr. Ortt had committed a criminal offence, so damages need to be proven and none are pleaded.

- [73] Keeping in mind that all Mr. Ortt and Valley's Edge must do at this stage is establish that there are grounds to believe the proceeding has substantial merit, I find that they have met their onus in relation to both Mr. Peterson's statements and Mr. Holden's Letter. Mr. Peterson said that Mr. Ortt had attempted to extort him, a clearly defamatory statement, and one which may well be held to impute that Mr. Ortt committed a criminal act. Mr. Holden wrote that "the developer's administrator" engaged in a variety of wrongdoing, including massaging the Building Scheme to benefit his corporation and his personal whims. He wrote that Mr. Ortt had abused, ignored or manipulated the Building Scheme to benefit his corporation. He wrote that Mr. Ortt had attempted to extort money from "Lot 181" (a reference to Mr. Peterson's lot). Again, these are clearly defamatory statements, which were published to third parties, namely all owners in the Strata Corporation, and refer to the plaintiffs.
- [74] Dealing with the question of whether the allegedly defamatory expressions referred to both plaintiffs, it is true that the expressions referred explicitly to Mr. Ortt, not Valley's Edge. However, as stated by the Court of Appeal in its very recent decision in *Rooney v. Galloway*, 2024 BCCA 8 [Rooney] at para. 97, the "meaning of the words must generally be understood by taking into consideration all of the circumstances and the publication as a whole". The meaning conveyed by the impugned statements here is that there was some wrongdoing by Mr. Ortt both individually, and acting as principal for Valley's Edge, to benefit the corporation. This clearly implicates the reputation of both plaintiffs.
- [75] Given the standard applicable on this branch of the analysis, I need to be careful not to suggest that the outcome has been adjudicated at this stage: *Cheema* at para. 15. I think it is sufficient for me to say that I am satisfied that Mr. Ortt and Valley's Edge's claim has a real prospect of success. The statements made by Mr. Peterson and by Mr. Holden would tend to lower them in the estimation of right-thinking members of the public.
- [76] I conclude that Mr. Ortt and Valley's Edge have established that there are grounds to believe the proceeding has substantial merit.

Are there grounds to believe the defences pleaded are not valid?

- [77] The burden remains on Mr. Ortt and Valley's Edge to show there are grounds to believe that the defences pleaded by the defendants are not valid.
- [78] As stated by the Supreme Court of Canada at para. 144 of *Hansman*, the standard is not a very demanding one. It requires showing that there is basis in law and on the record for finding there is no valid defence.
- [79] I have found the following summary of the analysis at this stage in the Court of Appeal's decision in *Rooney* of assistance in considering this question:
- [82] At the second step of the plaintiff's burden, to demonstrate a defendant has no valid defence, there must be a basis in the record and the law to support a finding that the defence does not tend to weigh more in favour of the plaintiff (*Bent*, at para. 103). The logic

essentially flows as follows: i) the plaintiff must show there are grounds to believe the defence(s) has no real prospect of success; ii) this requires showing there are grounds to believe the defence(s) does not tend to weigh more in favour of the defendant; and iii) due to the definition of "grounds to believe", 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 defence(s) does not tend to weigh more in favour of the defendant (Bent, at para.103).

[80] Mr. Peterson submits that his statements are protected by the defence of fair comment. Mr. Holden submits that the Letter is protected by the defence of qualified privilege. The Strata Corporation essentially adopts Mr. Holden's position in relation to the Letter.

[81] The test for the defence of fair comment was set out by the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40:

[28] For ease of reference, I repeat and endorse the formulation of the test for the fair comment defence set out by Dickson J., dissenting, in *Cherneskey* as follows:

- (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?
- (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice. [Emphasis added; emphasis in original deleted; pp. 1099-1100.]

(citing *Duncan and Neill on Defamation* (1978), at p. 62)

[82] Mr. Ortt and Valley's Edge submit that there are grounds to believe Mr. Peterson does not have a valid defence of fair comment. Among other things, they submit that Mr. Peterson's statement was not on a matter of public interest; that it omits critical factual information, in particular that Mr. Peterson suggested that Mr. Ortt suggest alternative remedies for the removal of the tree; that the statement was not comment; and that no one could honestly have expressed the comment that Mr. Ortt was extorting Mr. Peterson based on the facts. They also submit that Mr. Peterson was actuated by express malice, which would defeat the defence of fair comment.

[83] For reasons similar to my conclusion that the statement relates to a matter of public interest, I conclude that there is a real prospect that Mr. Peterson will be able to show that his comment about Mr. Ortt trying to extort him was a matter of public interest to the other owners in the Strata Corporation.

- [84] The line between fact and comment can be difficult to draw, as stated by the Supreme Court of Canada in *Hansman* at para. 109. An assertion that might be taken as factual in one context may be properly construed as comment in another. At para. 110 of *Hansman*, the Court discussed a number of cases in which statements were held not to be comments but statements of fact. These included statements that a person supported terrorists, that corruption and collusion occurred in a bidding process, and that someone was a "seasoned liar". The Court commented that, in the context of the cases in which those words were used, "the statements suggested concrete knowledge of past wrongdoings, which is distinguishable from the generalized critiques at issue in this case." Those "generalized critiques" included that Mr. Neufeld was a transphobe, violated his obligations as a school board trustee, and "tip toed into hate speech".
- [85] Mr. Peterson has sworn that he "probably used the word extortion because that is what it felt like." It is possible that Mr. Peterson would be able to establish at trial that his comment about Mr. Ortt was, in context, recognizable as comment rather than a statement of fact. This would be particularly true if Mr. Peterson is ultimately held to have commented that Mr. Ortt's conduct "felt like extortion" as opposed to "was extortion". In my view, however, it is more probable that Mr. Peterson's statement would be held to be a statement of fact, as a concrete allegation of a particular act of attempted extortion.
- [86] The record on this issue, consisting essentially of the email thread between Mr. Ortt and Mr. Peterson, discloses facts upon which the statement could be shown to be based. However, Mr. Ortt and Valley's Edge submit that Mr. Peterson's statement omitted crucial factual information, rendering it indefensible as fair comment. In this regard, they rely on his failure to include in his statement the fact he had told Mr. Ortt he was open to alternative remedies, and suggested that Mr. Ortt propose same. In *Level One Construction Ltd. v. Burnham*, 2019 BCCA 407 at paras. 65-66, the Court of Appeal held that the omission of proven facts rendered an impugned comment indefensible as fair comment. In my view, this aspect of the case shows that there are grounds to believe that the defence of fair comment does not weigh more in favour of Mr. Peterson.
- [87] I turn to the defence of qualified privilege relied upon by Mr. Holden. The Supreme Court of Canada summarized the defence of qualified privilege in *Bent*:
- [121] An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" and the recipient has "a corresponding interest or duty to receive it": *Downard*, at §9.6 (footnote omitted). Importantly, "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself": *Hill*, at para. 143; *Botiuk*, at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": *Hill*, at para. 144; *Botiuk*, at para. 79. However, the privilege is qualified in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was

reckless as to the truth of the words spoken; or where the scope of the occasion of privilege was exceeded (Downard, at §1.9; see also Hill, at paras. 145-47; Botiuk, at paras. 79-80).

- [122] For this reason, a precise characterization of the "occasion" is essential, as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused.
- [88] Mr. Ortt and Valley's Edge submit that Mr. Holden does not have a reasonable prospect of establishing the defence of qualified privilege for a number of reasons. These include that Mr. Holden was not under any legal duty to publish the Letter, that he published the Letter with the minutes when it was not on Council's agenda, that he used inappropriate and unnecessary language, and, as in the case of Mr. Peterson, that the dominant motive behind the words was malice.
- [89] Mr. Holden wrote the Letter, and it was published to all the owners in the Strata Corporation with the minutes of the December 15, 2022 Council meeting. It had not been on the agenda of that meeting. At the time, Mr. Holden was the newly elected Council President. The Letter was described in the minutes as a "dissertation from Denis Holden with issues pertaining to the administrator's (Glen Ortt) role at Valley's Edge Resort".
- [90] In the circumstances, there is a triable issue as to whether the Letter was written on an occasion of qualified privilege. There is also a triable issue, if the Letter was written on an occasion of qualified privilege, as to whether that privilege was lost due to inappropriate content that went beyond the exigencies of the situation: *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121 at para. 29. In this regard I refer to Cheema at para. 121, where one of the factors MacNaughton J. considered in deciding that there were grounds to believe the defence of qualified privilege would not succeed was that the communications in issue there made thinly veiled accusations of criminal conduct. She further noted that if the defendant in that case was truly concerned about criminal wrongdoing, a report to the appropriate authorities might have given rise to a privileged occasion. The same considerations apply here.
- [91] I conclude that there are grounds to believe there is no defence of qualified privilege.
- [92] In the case of both Mr. Peterson's statements and Mr. Holden's Letter, Mr. Ortt and Valley's Edge submitted that any defence was overcome by express malice. I decline to make any finding as to malice at this stage of the proceeding. As in *McDonald* at para. 104 and *Cheema* at para. 141, it is unnecessary for me to do so as I have found that there are other grounds to believe that there is no defence of fair comment or qualified privilege. In my view, the question of whether either communication was motivated by malice is an issue better left to trial.

Balancing of Competing Interests

- [93] At this final stage, the burden remains on Mr. Ortt and Valley's Edge to show that the claim should not be dismissed. As explained in *Cheema* at para. 14(c), they must show, on a balance of probabilities, that they have likely suffered or will suffer harm as a result of each of the two communications in issue, and that the corresponding public interest in allowing the action to continue outweighs the deleterious effects on expression and public participation. A definitive determination of harm or causation is not required at this stage. Instead, the plaintiffs must provide evidence upon which the court can draw an inference of the likelihood of harm and a causal link.
- [94] This analysis at this stage was summarized in *Rooney* as follows:
- [83] The "fundamental crux" or core of the s. 4 analysis is in the final weighing of the various public interests in s. 4(2)(b) (*Hansman*, at para. 58; *Pointes*, at paras. 18, 62). This last step allows the court to scrutinize "what is really going on" in the case before them and serves as a "robust backstop to protect freedom of expression" (*Pointes*, at paras. 53, 81).
- [95] In *Pointes*, the Supreme Court of Canada provided the following guidance about the final balancing exercise:
- [80] Accordingly, additional factors may also prove useful. For example, the following factors, in no particular order of importance, may be relevant for the motion judge to consider: the importance of the expression, the history of litigation between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the Charter or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise.
- [81] Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit -- a fundamental value in its own right in a democracy -- affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy.
- [82] In conclusion, under s. 137.1(4)(b), the burden is on the plaintiff -- i.e. the responding party -- to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation. This weighing exercise is the

crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a s. 137.1 motion.

[Emphasis in original.]

- [96] I consider first the question of harm to the defendants. Mr. Ortt has provided affidavit evidence about injury to his reputation and that of Valley's Edge, which he attributes to the impugned statements. He also says that sales and sales inquiries are down at Valley's Edge in 2023.
- [97] Mr. Peterson and Mr. Holden submit that Mr. Ortt and Valley's Edge have not suffered and are not likely to suffer any harm as a result of the communications.
- [98] As stated by the Court of Appeal in Hobbs:
- [81] General damages are presumed in a defamation case; the plaintiff bears no obligation to prove actual loss or injury: *Weaver v. Corcoran*, 2017 BCCA 160 at para. 70. The legal test does not require monetized damages or a fully developed damages brief.
- [99] I am satisfied that the plaintiffs/respondents have shown that they are likely to have suffered serious harm as a result of the communications in issue. They were accused of extortion in the impugned communications, an inherently serious allegation of criminal wrongdoing. As explained by the Court of Appeal in Hobbs, at para. 84, where the statements at issue concern allegations of criminal misconduct, the harm arises from the nature of the allegation and there is no obligation on the plaintiffs to prove actual loss. Accusations of extortion could be devastating to the plaintiffs' reputations and leave the public doubting whether they can be trusted: Hobbs at para. 85.
- [100] Mr. Ortt and Valley's Edge are aware of all sales within the Resort because Valley's Edge holds a right of first refusal on all lots. Given the stage of the proceeding, the evidence provided by Mr. Ortt and Valley's Edge is sufficient to demonstrate that notwithstanding that there may be other causes for some of the harm alleged by them, they likely suffered serious financial and reputational harm as a result of the impugned communications: *Lyncaster* at para. 61.
- [101] That harm must be weighed against the public interest in protecting the expression in issue. Is the harm serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting the expression in issue?
- [102] I have already held that the impugned expressions relate to a matter of public interest. The sector of the public with a legitimate interest in the subject matter of the expressions is small: owners in the Strata Corporation. The expressions were published only to members of the Strata Corporation. There is unlikely to be any broader chilling effects on other expressions on matters of public interest outside the Resort if this action is allowed to proceed.

- [103] The Court in *Pointes* at paras. 74-76 makes clear that the quality of the expression in issue is relevant at this stage. Some of the expressions in issue can be characterized as intemperate, in particular the use in both cases of the word "extortion". In the case of Mr. Holden's Letter, such intemperate language goes further, including accusing Mr. Ortt of "massag[ing]" the Building Scheme to benefit his corporation and "his personal whims", and of having "abused, ignored or manipulated" the Building Scheme to benefit his corporation. Accepting that Mr. Ortt and Valley's Edge's administration of the Building Scheme is a matter of legitimate interest to owners in the Strata Corporation, the use of such language would tend to inflame rather than further the informed discussion and resolution of controversies.
- [104] There is evidence of other litigation involving some of the parties, in particular, Valley's Edge's petition to the court seeking the removal of a deck on the lot owned by Mr. Holden and his wife, filed on February 28, 2023. Valley's Edge also wrote a letter to the Council on January 12, 2023, alleging that they were breaching Valley's Edge's copyright in its logo. This suggests that Valley's Edge was prepared, in the months following these statements, to threaten or take legal action to pursue alleged breaches of its rights. There is no evidence, however, of any other legal action being threatened or instituted by Mr. Ortt or Valley's Edge to silence their critics.
- [105] As Administrator of the Building Scheme, Mr. Ortt and Valley's Edge clearly have the ability to exercise significant power within the Resort. Within this litigation, however, it is far from clear that they have disproportionate power, as the two individual defendants have the support of their co-defendant, the Strata Corporation.
- [106] The court is told that, at this stage of the analysis, it must ask: what is really going on? In *Hobbs*, Justice Goepel wrote the following in relation to this question in that case:
- [95] This is not a proceeding that was brought to stifle expression. This proceeding is not a SLAPP. It was not brought to frustrate Mr. Warner's participation in public affairs; it was brought to vindicate the appellants' reputations. While the PPPA is not limited to SLAPPs and extends to any case based on an expression on a matter of public interest, the legislation does not dictate that all such litigation must come to an end. In *Bent*, Justice Côté emphasized the need for assiduous and judicial balancing of freedom of expression and the protection of reputation. Her words are worth repeating:
- [1] Freedom of expression and its relationship to the protection of reputation has been subject to an assiduous and judicious balancing over the course of this Court's jurisprudential history. While in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, this Court recognizes the importance of freedom of expression as the cornerstone of a pluralistic democracy, this Court has also recognized that freedom of expression is not absolute -- "[o]ne limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault" ... Indeed, "the right to free expression does not confer a licence to ruin reputations" That is because this Court has likened reputation to a "plant of

tender growth [whose] blossom, once lost, is not easily restored" Values, therefore, are not without countervailing considerations.

[107] I have concluded in the case at bar that Mr. Ortt and Valley's Edge have established a legitimate purpose for bringing their action. The evidence before the Court is sufficient to draw the inference that they are likely to suffer reputational and financial harm as a result of the impugned communications. The harm they are likely to have suffered is sufficiently serious that the public interest in permitting this action to continue outweighs the public interest in protecting Mr. Peterson and Mr. Holden's expression.

Conclusion

[108] For the foregoing reasons, I dismiss the applications to dismiss Mr. Ortt and Valley's Edge's action.

[109] I would hasten to add that this is not a final determination of the merits of Mr. Ortt and Valley's Edge's action. It is simply a determination that this is a real dispute, and their claim deserves a trial on the merits.

[110] I would also add that the PPPA is intended to provide for the speedy determination of an application to dismiss a defamation action. I wish to express my regret to the parties that this decision was not rendered in a more timely fashion.

[111] Section 7 of the PPPA governs costs. Section 7(1) provides that if the court makes a dismissal order under s. 4, the applicant is entitled to its costs on a full indemnity basis unless the court considers it inappropriate in the circumstances. Section 7(2) applies in the case at bar, and it provides that if a dismissal order is not made, the respondent is not entitled to costs on that application unless the court considers it appropriate in the circumstances. I have not heard from the parties on costs. If the parties are unable to agree and wish to speak to costs, they may seek to appear before me to do so by contacting Supreme Court Scheduling within 30 days of this decision.

"L.M. Lyster J."

LYSTER J.

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