

CANADA / JUDGMENT

Rooney v. Galloway

2024 BCCA 8

COURT

British Columbia Court of Appeal

DECIDED

10 January 2024

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2024 BCCA 8 Rooney v. Galloway

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Rooney v. Galloway,

2024 BCCA 8

Date: 20240110

Dockets: CA47985; CA47986; CA47988;

CA47989; CA47991; CA47992;

CA47998; CA48003; CA48007

Docket: CA47985

Between:

Chelsea Rooney

Appellant/

Respondent on Cross Appeal

(Defendant)

And

Steven Galloway

Respondent/

Appellant on Cross Appeal

(Plaintiff)

And

A.B., Keith Maillard, Mandi Gray, Theresa Smalec,

Kiera Anderson, Marcelle Kosman, and

Ari Rombough

Respondents

(Defendants)

- and -

Docket: CA47986

Between:

Marcelle Kosman

Appellant

(Defendant)

And

Steven Galloway

Respondent

(Plaintiff)

And

A.B., Chelsea Rooney, Mandi Gray, Theresa Smalec,

Kiera Anderson, Keith Maillard, and

Ari Rombough

Respondents

(Defendants)

- and -

Docket: CA47988

Between:

Ari Rombough

Appellant

(Defendant)

And

Steven Galloway

Respondent

(Plaintiff)

And

A.B., Chelsea Rooney, Mandi Gray, Theresa Smalec,

Kiera Anderson, Keith Maillard, and

Marcelle Kosman

Respondents

(Defendants)

- and -

Docket: CA47989

Between:

Keith Maillard

Appellant/

Respondent on Cross Appeal

(Defendant)

And

Steven Galloway

Respondent/

Appellant on Cross Appeal

(Plaintiff)

And

A.B., Chelsea Rooney, Mandi Gray, Theresa Smalec,

Kiera Anderson, Ari Rombough, and

Marcelle Kosman

Respondents

(Defendants)

- and -

Docket: CA47991

Between:

A.B.

Appellant/

Respondent on Cross Appeal

(Defendant)

And

Steven Galloway

Respondent/

Appellant on Cross Appeal

(Plaintiff)

And

Keith Maillard, Chelsea Rooney, Mandi Gray,

Theresa Smalec, Kiera Anderson,

Ari Rombough, and Marcelle Kosman

Respondents

(Defendants)

- and -

Docket: CA47992

Between:

Mandi Gray

Appellant/

Respondent on Cross Appeal

(Defendant)

And

Steven Galloway

Respondent/

Appellant on Cross Appeal

(Plaintiff)

And

A.B., Keith Maillard, Chelsea Rooney, Theresa Smalec, Marcelle Kosman,

Kiera Anderson, and Ari Rombough

Respondents

(Defendants)

- and -

Docket: CA47998

Between:

Kiera Anderson

Appellant

(Defendant)

And

Steven Galloway

Respondent

(Plaintiff)

And

A.B., Keith Maillard, Chelsea Rooney, Mandi Gray,

Theresa Smalec, Ari Rombough, and

Marcelle Kosman

Respondents

(Defendants)

- and -

Docket: CA48003

Between:

Theresa Smalec

Appellant

(Defendant)

And

Steven Galloway

Respondent

(Plaintiff)

And

A.B., Chelsea Rooney, Mandi Gray, Keith Maillard,

Kiera Anderson, Ari Rombough, and

Marcelle Kosman

Respondents

(Defendants)

- and -

Docket: CA48007

Between:

Steven Galloway

Appellant

(Plaintiff)

And

Annabel Lyon and Alicia Elliott

Respondents

(Defendants)

Corrected Judgment: The text of the judgment was corrected at paragraph 704 on April 29, 2024.

SEALED (IN PART)

Sealing order: Pursuant to the sealing order of this Court, dated May 18, 2022, to the extent that any materials filed by the parties contain information that could identify A.B., the unredacted materials are sealed and are not to be released to any person other than a party and their counsel. The redacted

materials are not sealed. This sealing order applies, unless otherwise ordered.

Restriction on publication: A publication ban has been imposed pursuant to the order of this Court, dated May 18, 2022, prohibiting the publication, broadcast, or transmission of any information that could identify A.B. as a party to these appeal proceedings, including any descriptions or links to print or Internet publications containing any information that may identify A.B. as a party to these appeals. Any reference to A.B. being a former student of the Creative Writing Program shall not be considered impermissible identifying information for the purposes of that order. This publication ban applies, unless otherwise ordered.

Before:

The Honourable Madam Justice Bennett

The Honourable Justice MacKenzie

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated December 2, 2021 (Galloway v. A.B., 2021 BCSC 2344, Vancouver Docket S1811588).

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Place and Date of Hearing:

Vancouver, British Columbia

May 1-5, 2023

Written Submissions filed:

June 7, 21, 27, July 5, 2023

Place and Date of Judgment:

Vancouver, British Columbia

January 10, 2024

Written Reasons of the Court

Summary:

These appeals and cross appeals arise from a number of pre-trial applications under British Columbia's Protection of Public Participation Act ("PPPA").

The underlying defamation action was brought by Steven Galloway, a writer, novelist, and former tenured professor, against multiple defendants. He alleges those individuals defamed him by repeating the allegations that he had sexually assaulted, raped, and physically assaulted A.B. who was a former graduate student. These allegedly defamatory statements occurred in different forums, including on the Internet and on Twitter. Twelve of the defendants sought to have his action dismissed under s. 4 of the PPPA on various bases, including that their expression(s) were protected because they were addressing a matter of public interest. The chambers judge allowed Mr. Galloway's action to proceed with respect to most of the alleged defamatory statements, but dismissed the action with respect to other statements. She dismissed the claim in its entirety against two defendants (Professor Lyon and Ms. Elliott).

On appeal, the parties (which include a number of the applicants below and Mr. Galloway) assert that the chambers judge erred in applying the test under s. 4 of the PPPA. Mr. Galloway also raises other issues, including whether the Limitation Act barred some of his claims and whether the judge erred in "pruning" certain statements from those that were allowed to proceed against the same applicant.

Held: Defendants' appeals dismissed. Mr. Galloway's appeal and cross appeals allowed, in part.

Dealing with the limitations issues, as a preliminary matter, there is a fundamental concern with the suitability of raising limitations defences in the context of these PPPA applications. The chambers judge erred in deciding the many limitations issues that were raised and instead should have deferred these issues for trial on a full record. Given the preliminary stage at which PPPA applications are brought, they are inappropriate for fact intensive inquiries that require a judge to make significant findings of credibility or to draw inferences from competing primary facts. Judges must avoid taking a 'deep dive' into the ultimate merits of the claim under the guise of the more limited merits assessment in s. 4 of the PPPA.

The judge dismissed aspects of Mr. Galloway's claims against A.B., Professor Maillard, Professor Lyon, and Ms. Rooney, on the basis that some of their statements, or the republications of those statements, were statute barred. The judge erred in various ways with respect to several of these statements. Mr. Galloway's cross appeals with respect to various of these statements is allowed.

The judge did not err in concluding that s. 4 of the PPPA allowed her to dismiss limited aspects of Mr. Galloway's claim against certain appellants while allowing other aspects of those claims to proceed to trial. Section 4 does not create a prohibition against allowing a judge to "prune" a claim in this way.

The different appellants raise numerous issues and challenge the judge's application of various elements of the s. 4 framework. Many of these grounds of appeal invite this Court to engage in a re-weighting exercise, which is not the role of an appellate court.

Even post-Hansman v. Neufeld, 2023 SCC 14, the applicable framework from 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 and Bent v. Platnick, 2022 SCC 23 continues to apply.

In light of the legal framework and evidence, the judge's reasoning was sound and reflected a thorough consideration of the issues before her. Further, at the threshold stage of a PPPA application, the judge is not to take a deep dive into the evidence. Here, the judge identified the appropriate and relevant legal framework and it was within her discretion to assess whether the criteria under s. 4 of the PPPA were met. Overall, this Court agrees with her conclusions and finds no reviewable errors. Deference is owed to the judge's findings of fact and her exercises of discretion, absent reviewable error.

Most of the appellants also allege that the judge failed to consider certain aspects of the evidence or that she did not properly address the context for some publications. The judge had extensive material before her and she properly addressed every defence in play.

PPPA applications, such as those on appeal, should not serve to delay an eventual trial. It is in the interests of the parties to have the matter fully heard and adjudicated at trial once the claims pass the PPPA threshold. The judge made clear that the outcome of the PPPA applications was not a final adjudication on the merits of the claims or defences. Her conclusions that allowed Mr. Galloway's claims to go to trial were reasonable. The ultimate outcome will be determined at trial.

The appeals brought by Professor Maillard, A.B., Ms. Rooney, Dr. Gray, Dr. Smalec, Dr. Anderson, Mx. Rombough, and Dr. Kosman are dismissed. An aspect of Mr. Galloway's appeal against Professor Lyon is allowed as well as aspects of his cross appeals against each of Professor Maillard, A.B., and Ms. Rooney. Mr. Galloway's appeal against Ms. Elliott is dismissed.

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Reasons for Judgment of the Court:

Introduction

[1] Freedom of expression is central to a pluralistic and healthy democracy (1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, at para. 1 [Pointes]). However, this freedom is not absolute; "[o]ne limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault" (Grant v. Torstar Corp., 2009 SCC 61, at para. 2). Indeed, "the right to free expression does not confer a licence to ruin reputations" (Grant, at para. 58; see also Bent v. Platnick, 2020 SCC 23, at para. 1).

- [2] The two competing values at the core of defamation law are freedom of expression and the protection of reputation (*Hansman v. Neufeld*, 2023 SCC 14, at para. 1). Defamation lawsuits can serve to vindicate an individual's personal or professional reputation, but they can also "have the undesirable effect of suppressing the open debate that is the cornerstone of a free and democratic society" (para. 2).
- [3] These appeals involve the application of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA], which is a statute aimed in part at dissuading strategic lawsuits against public participation, also known as "SLAPPs". The PPPA, like other similar provincial statutes, is considered to be "anti-SLAPP" legislation.
- [4] This judgment addresses a number of appeals and cross appeals, heard together, and arising from various pre-trial applications made pursuant to the PPPA.
- [5] The underlying defamation action was brought by writer and novelist Steven Galloway who, at one time, was also a tenured professor and Chair of the Creative Writing Program at the University of British Columbia ("UBC"). After "serious allegations" were made against him by his former student A.B., he was removed from his position as Chair in November 2015.
- [6] A.B. is a writer and was a graduate student in the UBC Creative Writing Program. Between 2011 and 2013, A.B. and Mr. Galloway had a sexual relationship, but the nature of that relationship is contested; Mr. Galloway says it was consensual and A.B. asserts that it was not.
- [7] In his defamation action, Mr. Galloway pleaded that A.B. had defamed him by falsely asserting that he had sexually assaulted, raped, and physically assaulted her. He alleged that a number of individuals also defamed him by repeating those claims of sexual assault in different forums, including on the internet and on Twitter (the platform now known as "X").
- [8] He claimed that the statements made by the defendants (which include the appellants) about his having raped and physically and sexually assaulted A.B. were false. He said these statements were defamatory because a reasonable person would understand those statements to mean that he was guilty of criminal misconduct.
- [9] Prior to a determination of the merits of the defamation claims, 12 of the named defendants applied to have Mr. Galloway's claims dismissed based on the application of the PPPA. The applications were heard together over the course of 12 days and with further written submissions received thereafter. Despite the preliminary nature of PPPA applications precluding a "deep dive" into the evidence, there was still a massive evidentiary record before the chambers judge, running to almost 7,000 pages. Over 60 affidavits were filed, containing material that normally would be inadmissible. Mr. Galloway was cross-examined on eight occasions. There were hundreds of pages of written submissions and over 7,600 pages of authorities provided. The resulting judgment was 242 pages, totaling nearly 800 paragraphs.

- [10] In reasons indexed as 2021 BCSC 2344 ("RFJ"), the judge allowed Mr. Galloway's action to proceed with respect to some of the alleged defamatory statements, but she dismissed the action with respect to other such statements and fully dismissed the proceeding against two defendants (Professor Lyon and Ms. Elliott).
- [11] The appeals are brought on the basis that the judge erred in her assessment under s. 4 of the PPPA. Mr. Galloway's own appeal and cross appeals assert the judge erred in her findings regarding certain principles of the law of defamation and in the application of the Limitation Act, S.B.C. 2012, c. 13.
- [12] For the reasons that follow, we dismiss most of the appeals, except to allow Mr. Galloway's appeal partially, with respect to the publication of Lyon No. 2 on November 15, 2015 and the publication Lyon No. 3 to Professor Taylor. We dismiss his appeal against Ms. Elliott.
- [13] We allow aspects of Mr. Galloway's cross appeals with respect to the Limitation Act, namely on Maillard No. 1 (other than its initial publication at the November 15 meeting); Rooney No. 1 (except the publication to Ms. Flegg); and A.B. No. 1 (except for the initial publication to Professor Maillard, Professor Lyon, and Ms. Rooney, and the republication to Professors Maillard and Lyon at the November 15 meeting). His cross appeal on Gray Nos. 4 and 5 is dismissed.
- [14] We acknowledge the judge's careful and detailed analysis of the many issues raised in the applications before her. Given the voluminous record in this case, these reasons should be read with the chambers judge's comprehensive and well-organized judgment. It is not this Court's intention to be duplicative or repetitive of the judge's careful work below nor is it the role of this Court on appeal to re-hear and re-assess the applications that were before her.

Framework of s. 4 of the PPPA

- [15] We first situate this matter within the framework of the PPPA.
- [16] The applications below were brought pursuant to s. 4 of the PPPA, which authorizes individuals who have been sued over an "expression" to apply for the dismissal of the action if the expression relates to a matter of public interest and certain other conditions are met. Section 4 of the PPPA 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.
- [17] As mentioned, the PPPA was a legislative response to what are commonly referred to as strategic lawsuits against public participation ("SLAPPs"). SLAPPs are "lawsuits initiated against individuals or organizations who speak out or take a position on issues of public interest" in an effort to silence or deter that party from participating in public affairs (*Hobbs v. Warner*, 2021 BCCA 290, at para. 6, leave to appeal to SCC ref'd, 39922 (28 April 2022)). SLAPPs are tactical actions that seek to suppress expression on matters of public interest and the goal "is not necessarily a legal victory, but a political one: to intimidate and suppress criticism with the threat of costly litigation" (*Hansman*, at para. 46).
- [18] A key feature of a SLAPP is "the strategic use of the legal system to silence contrary viewpoints" (*Hansman*, at para. 46; see also *Pointes*, at para. 2). This can serve to chill debate on matters of legitimate public interest, resulting in inappropriate censorship and self-censorship (*Hansman*, at para. 46, citing *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, at para. 15 [*WIC*]). The "archetypal SLAPP" is described as generally involving a "powerful or wealthy plaintiff, who has suffered only nominal damage, using litigation against a comparatively under-resourced defendant to silence criticism" (*Hansman*, at para. 47). However, SLAPPs do not always have those features as they are not always initiated by the rich and powerful, and the plaintiff may not have a history of using litigation or the threat of litigation to silence critics (para. 48). Ultimately, the consistent defining feature of a SLAPP is that it acts to silence the defendant and to suppress debate on matters of public interest, rather than to remedy serious harm that the plaintiff suffered (*Hansman*, at para. 48; *Pointes*, at para. 2).
- [19] The PPPA "creates a procedure for screening proceedings arising from expression on matters of public interest at an early stage" (*Hansman*, at para. 49). More specifically, s. 4 "function[s] as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions" (*Pointes*, at paras. 16, 62, in relation to the equivalent provision in Ontario's Courts of Justice Act, R.S.O. 1990, c. C. 43, s. 137.1 [*CJA*]).
- [20] Section 4 evaluates the merits of the proceeding and whether there are any valid defences in order to ensure the proceeding is meritorious; however, it also engages with the concern the PPPA seeks to address by assessing "public interest and public participation

implications" (Pointes, at para. 62). Thus, the public interest aspect of s. 4 serves as a backstop that allows judges to dismiss a claim if the public interest in protecting the expression at issue outweighs the public interest in allowing the proceeding to move forward, even if, on its face, the claim appears meritorious. This recognition, that even claims with substantial merit can be dismissed if outweighed by the public interest in preserving free debate, is a core feature of s. 4 (Hansman, at para. 51, citing Pointes, at para. 62).

Issues on Appeal

- [21] At its core, these appeals allege errors with how the chambers judge applied the test under s. 4 of the PPPA to the defamation claims brought by Mr. Galloway.
- [22] Except for Mr. Galloway, the appellants (with respect to their own expressions), contend the judge erred in:
- a) concluding there were grounds to believe Mr. Galloway's defamation proceeding had substantial merit;
 - b) concluding there were grounds to believe the defence of fair comment was not valid in the circumstances;
 - c) finding malice undermined the defences of fair comment and qualified privilege; and
 - d) concluding that the public interest in allowing the proceeding to continue outweighed the public interest in protecting the expressions.
- [23] In Mr. Galloway's appeal and cross appeals, he alleges the judge erred by dismissing certain claims on the basis of limitations defences and "pruning" certain claims from those that were allowed to proceed against the same appellant; finding certain expressions were not defamatory; and finding the defence of fair comment should succeed in relation to certain claims.
- [24] Although there is significant overlap in the nature of the issues raised, we address the issues specific to each individual appeal in the analysis below.

Standard of Review

- [25] We underscore at the outset that strict standards of appellate review are dispositive of most of these appeals. Deference is owed both to the judge's findings of fact and to her exercises of discretion, absent reviewable error.
- [26] A judge's interpretation of the s. 4 PPPA framework itself raises questions of law reviewable on a standard of correctness (Pointes, at para. 97). However, a judge's ultimate determination on a s. 4 application is entitled to deference on appeal absent a reviewable error (Hansman, at para. 56, citing Bent, at para. 77, which in turn cites Housen v. Nikolaisen, 2002 SCC 33, at paras. 8, 36).

- [27] Once the chambers judge has correctly interpreted s. 4 of the PPPA, Pointes is clear that the assessment under s. 4(2)(a)--the merits-based hurdle--must be made from the perspective of the judge hearing the application. The Court's statement in Pointes makes clear that the standard of review on the application of s. 4 to the facts is therefore highly deferential:
- [41] Importantly, the assessment under s. 137.1(4)(a) must be made from the motion judge's perspective. With respect, I am of the view that the Court of Appeal for Ontario incorrectly removed the motion judge's assessment of the evidence from the equation in favour of a theoretical assessment by a "reasonable trier" (para. 82). The clear wording of s. 137.1(4) requires "the judge" hearing the motion to determine if there exist "grounds to believe". Making the application of the standard depend on a "reasonable trier" improperly excludes the express discretion and authority conferred on the motion judge by the text of the provision. The test is thus a subjective one, as it depends on the motion judge's determination.
- [28] The standard of review for a judge's finding on defamation differs depending on the nature of the alleged error (*Level One Construction Ltd. v. Burnham*, 2019 BCCA 407, at para. 34 [Level One]; *Kazakoff v. Taft*, 2018 BCCA 241, at para. 29). The first question of whether the words are reasonably capable of bearing a defamatory meaning is a question of law and subject to a standard of review of correctness (*Weaver v. Ball*, 2020 BCCA 119, at para. 28 [Ball], citing Level One, at paras. 33-34). The second question of whether the words are in fact defamatory is a question of fact and the palpable and overriding error standard of review applies (Ball, at para. 28, citing Level One, at paras. 33-34; *Kazakoff*, at para. 29). A judge is not required to explicitly state their conclusion on the first question since if the words are found to be in fact defamatory, they must also be capable of that meaning. Thus, the first question is subsumed into the second (*Kazakoff*, at para. 27). However, even where a judge has merged the two lines of inquiry and concluded the words are in fact defamatory, this Court will still review on a correctness standard whether the words were capable of being defamatory if that is the alleged error (*Kazakoff*, at para. 29).
- [29] The appellants here, except Mx. Rombough, all appeal on the basis that the judge erred in her analysis of the fair comment defence. The standard of review on the question of whether the judge should have found grounds to believe there is no valid defence in the proceeding is particularly deferential, given the highly discretionary nature of the s. 4 scheme. A discretionary decision is only reversible on appeal "where [the lower] court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice" (*Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, at para. 27).
- [30] Whether words are recognizable as comment or statements of fact is a question of fact (*Vander Zalm v. Times Publishers, Bierman, McLintok and Underhill*, (1980) 18 B.C.L.R. 210 at 213, 1980 CanLII 389 (C.A.)); the applicable standard of review is palpable and overriding error. In the context of qualified privilege and fair comment, whether the defendant acted out of malice is a question of mixed fact and law to which the palpable and overriding error standard also applies, absent an error in principle (*Martin v. Lavigne*, 2011 BCCA 104, at

para. 32; *Cimolai v. Hall*, 2007 BCCA 225, at para. 30).

- [31] We also note that s. 9(5)(b) of the PPPA allows for cross-examination on affidavits, which occurred below regarding many of the appellants' and Mr. Galloway's affidavits. Therefore, it was for the judge to determine the parties' credibility. These findings deserve particular deference (*R. v. G.F.*, 2021 SCC 20, at para. 81). Though the judge made limited credibility findings, a judge should defer any ultimate assessments of credibility to trial given those made at this stage are only preliminary. Credibility findings at this preliminary stage are still entitled to deference.
- [32] Apart from the issues raised with respect to s. 4 of the PPPA, the cross appeals raise different issues concerning limitation periods. Whether a limitation period has begun to run or has expired is a question of mixed fact and law; therefore, a standard of palpable and overriding error applies (*Lewis v. Fraser-Fort George (Regional District)*, 2018 BCCA 285, at para. 43; *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, at para. 38). The question of discoverability is also one of mixed fact and law (*Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135, at para. 72, leave to appeal to SCC ref'd, 39282 (23 December 2020)).
- [33] The interpretation or construction of the Limitation Act (including, for example, the interpretation of legislated discoverability criteria) is a question of law (*The Graham-Aecon Joint Venture v. Malcolm Drilling Company Inc.*, 2022 BCCA 319, at para. 18).

Background Chronology

- [34] Bearing in mind the nature of the issues and the standards of review that bind us, we now turn to the background facts, which are largely undisputed.
- [35] The Appendices to these reasons provide details of Mr. Galloway's claims of defamation, the defences at issue on appeal, and whether the chambers judge granted or dismissed an individual appellant's PPPA application.
- [36] Mr. Galloway brought his action against multiple different defendants. These defendants were alleged to have collectively made approximately three dozen different defamatory statements, some of which were then alleged to have been repeated or republished a number of times. Mr. Galloway argued, and the judge accepted, that the unifying theme that underlay these various written and oral defamatory statements was that they asserted Mr. Galloway had engaged in criminal behaviour, which could reasonably be understood to assert that he had raped, sexually assaulted or physically assaulted the appellant A.B.
- [37] Mr. Galloway's Amended Notice of Civil Claim ("ANOC") identified each of these defendants and the statement, or statements, they were alleged to have made or repeated. Each statement was identified by number. A.B. was alleged to have made two such statements, A.B. No. 1 and A.B. No. 2, though these statements were also alleged to have been repeated or republished by others. Some defendants were alleged to have made a single defamatory

statement while others were alleged to have made several or more distinct defamatory statements.

- [38] Early in her judgment, the judge identified each of the defendants and their backgrounds in considerable detail (paras. 20-45). Two defendants, Ms. Glynnis Kirchmeier and Ms. Brit Bachmann, abandoned their appeals of the judge's decision to dismiss their PPPA applications. The judge granted the applications of Professor Annabel Lyon and Ms. Alicia Elliott, thereby dismissing Mr. Galloway's action against them. Mr. Galloway appeals those dismissals. A.B., Professor Keith Maillard, Ms. Chelsea Rooney, Dr. Mandi Gray, Dr. Theresa Smalec, Dr. Kiera Anderson, Mx. Ari Rombough and Dr. Marcelle Kosman each now appeal the dismissal of the PPPA applications against them.
- [39] The judge identified that only A.B., Professor Maillard, Professor Lyon, and Ms. Rooney had any earlier connection to Mr. Galloway, and only Professor Maillard, Professor Lyon, Ms. Rooney, and Dr. Gray had any personal connection to A.B (para. 18). The remaining defendants were educators, artists and writers who did not have any connection with A.B., but they made the allegedly defamatory statements against Mr. Galloway in different forums, including in articles, oral presentations and online.
- [40] After identifying the parties to the action, the judge provided a basic background to the claims, which included a chronology of events beginning in 2011-2013 and ending in fall 2018 when Mr. Galloway filed his action. She developed this background in considerable detail over more than 75 pages (paras. 75-316). It was in this background that she identified, by number and with reference to the ANOCC, each of the alleged defamatory statements made. Because context is important to many of these statements, and to many of the defences the appellants raised, the judge's detailed chronology anchored her judgment.
- [41] On appeal, we provide a high-level summary of certain key events. However, this summary omits many details that were important to the judge's findings and that are relevant to our conclusions. We have also identified a few further alleged specific defamatory statements for illustrative purposes. We otherwise rely on the detailed chronology in the judge's reasons.
- [42] Mr. Galloway began teaching in the Creative Writing Program at UBC in 2000. In 2013, he became the Chair of the Program. At the time, Mr. Galloway was also a well-known Canadian author who, as of November 2015, had published four award-winning and best-selling novels.
- [43] Between 2011 and 2012, A.B. was a mature graduate student in the Creative Writing Program. A.B. claims that in March 2011, she and Mr. Galloway were alone on his boat when he assaulted her by choking her. She also claims that between March and May 2011, Mr. Galloway sexually assaulted her on three separate occasions. He denies all these allegations. From 2011 to 2013, Mr. Galloway and A.B. were sexually involved in what Mr. Galloway publicly described as a consensual affair. A.B. did not accept that description. The question of whether their relationship was consensual, or whether A.B. was a victim of sexual

assault, was not before the chambers judge.

- [44] In 2014, A.B. left UBC, having not completed the thesis she required to graduate, and returned to Ontario. She says that during this time, she came across essays about gendered sexual violence in the Canadian literary and academic writing community and the silencing of victims. One of these articles was written by Professor Paul Krause with respect to problems of sexual violence on university campuses and sexual harassment of students by professors, including at UBC. She says these essays caused her to reflect on her own responsibility to report Mr. Galloway's conduct to UBC.
- [45] Professor Maillard and Professor Lyon were, respectively, a professor and an associate professor in UBC's Creative Writing Program. Both knew A.B.--Professor Maillard had been A.B.'s thesis supervisor and Professor Lyon had been a "second reader" for that thesis. Prior to these events they were also both close friends of Mr. Galloway.
- [46] In August 2015, A.B. reached out to Professor Krause for support and they began communicating by email. Professor Krause recommended A.B. reach out to the appellant Dr. Gray and to Ms. Ronna Syed. Dr. Gray was a doctoral candidate whose research focussed on how sexual violence affects survivors as well as the various institutional and other barriers that survivors face in holding their assailants and the involved institutions accountable. Ms. Syed was a CBC producer involved with the CBC's Fifth Estate program. At some point in September and October 2015, A.B. told each of Professor Krause and Dr. Gray that Mr. Galloway had raped or sexually and physically assaulted her.
- [47] On November 11, 2015, A.B. forwarded an open letter about a Fifth Estate episode on sexual violence to both Professor Maillard and the Chair of the Creative Writing Program (who at the time was Mr. Galloway); however, the body of the email was only specifically addressed to Professor Maillard. A day later, Professor Maillard and A.B. exchanged emails within which A.B. said she was ready to talk to him about her own "terrible experience" within the UBC Creative Writing Program. Professor Maillard told Mr. Galloway that A.B. was prepared to discuss her concerns. In response, Mr. Galloway phoned A.B. and left her two voicemails. A.B. said she was panicked by these calls that seemingly came "out of the blue" because she had not talked to Mr. Galloway since May 2014. However, Mr. Galloway asserted that because A.B. had emailed him, she was the one who initiated contact.
- [48] On November 12, Professor Maillard and A.B. had a phone call where she told him that Mr. Galloway had sexually assaulted, sexually harassed and physically assaulted her. She told him other women in the program, including the appellant Ms. Rooney, had experienced "inappropriate behaviour" from Mr. Galloway. Ms. Rooney was a former student of Mr. Galloway and had known him since 2005. He had been her initial thesis advisor; however, Professor Maillard assumed this role after Ms. Rooney felt her relationship with Mr. Galloway had become strained and uncomfortable (para. 24).

- [49] At about the same time, A.B. told Ms. Rooney that Mr. Galloway had raped her. Ms. Rooney accepted what A.B. said as true because of Ms. Rooney's own negative experiences with Mr. Galloway. Within two or three days, A.B. told Professor Lyon and Ms. Syed similar things. Professor Maillard repeated these assertions to Professor Lyon. A.B.'s statement to Professor Maillard, Professor Lyon, Ms. Rooney and "others" known to her that Mr. Galloway had "raped", "sexually assaulted", and "physically assaulted" her are the alleged defamatory statements that form the basis of A.B. No. 1.
- [50] On November 12 or 13, Professor Maillard phoned Ms. Rooney following his call with A.B. Ms. Rooney apparently raised her own concerns about Mr. Galloway, sharing that there were a number of other women who had told her that Mr. Galloway had engaged in "inappropriate behaviour" towards them (para. 123). They discussed that Ms. Rooney would speak to these women about whether they intended to come forward with complaints about Mr. Galloway. Ms. Rooney asserted that she and Professor Maillard agreed she would contact others who Ms. Rooney knew or believed had either witnessed something relevant to A.B.'s claims against Mr. Galloway or who might have a reason to advance their own complaint against him (paras. 123-124).
- [51] On November 13, A.B. sent an email to the Office of UBC's President and to two others, one of whom was the Associate Director, Student Conduct and Safety for UBC and was also with the Equity Office. The third individual was also with UBC. The email submitted a "formal complaint about a sexual assault perpetrated on [A.B.] by a current UBC professor" (para. 113). In the day or two that followed, A.B. exchanged further emails with these individuals.
- [52] On November 14, Professors Maillard and Lyon, and others in the department, organized a meeting, for the next day, of the entire Creative Writing Department's tenured and tenure-track faculty. Mr. Galloway was not aware of the meeting and was excluded from participating. Professor Maillard sent A.B. an email asking if she could provide any evidence that would "help to convince" the persons attending the faculty meeting of her allegations (para. 127). Commencing on about November 14, Ms. Rooney spoke to a number of individuals, some of whom had been identified to her by A.B., concerning complaints about Mr. Galloway. In the ANOCC Mr. Galloway alleged that Ms. Rooney told these individuals he had "raped A.B.". This was the basis of Rooney No. 1.
- [53] On November 15, A.B. provided a lengthy email response to Professor Maillard that the judge quoted in its entirety (para. 128), given its importance in the chronology and to the issues on the PPPA applications. There were also various other email and phone communications exchanged among A.B., Professor Maillard, Professor Lyon and Ms. Rooney that are described at length by the judge (paras. 125-141).
- [54] One of those documents was an email from A.B. to Professors Maillard and Lyon referred to as the "CBC Document" (para. 140) in which A.B. asserted that CBC wanted "[her] rape by [Mr. Galloway] to be one of the two lead stories" in a Fifth Estate documentary that was to air on November 20. She said, among other things, that a "CBC legal team" had said it "want[ed]"

to give [A.B.] a national platform to tell [her] story". In A.B.'s subsequent cross-examination, she admitted that critical statements in the CBC Document were complete and deliberate fabrications (para. 142); in the judge's words, the CBC Document was a "tissue of lies" (para. 539).

- [55] At the November 15, 2015 meeting of the Creative Writing Department (the "November Meeting"), each attendee was provided a package of materials (detailed at para. 145). The meeting was held at Professor Linda Svendsen's home; she also acted as chair of the meeting. As secretary, Professor Nancy Lee took reasonably detailed notes for the meeting. Her notes indicate, among other things, that Professor Maillard recounted to the faculty his conversations with A.B. regarding her allegations against Mr. Galloway. Professor Lyon then presented various other materials and the CBC Document.
- [56] Professor Lee's notes indicate Professor Maillard said he was convinced A.B. was telling the truth (para. 153). His alleged assertion at this faculty meeting that Mr. Galloway had "raped A.B.", "sexually assaulted A.B.", and "physically assaulted A.B." comprise part of Maillard No. 1. Various statements alleged to have been made by Professor Lyon at the meeting formed part of the basis of Lyon Nos. 1 and 2 (described in ANOCC, at para. 28).
- [57] Following the faculty meeting, Professor Lyon contacted the Dean of Arts' office and arranged for a meeting the following day between representatives of the Dean's office and faculty members.
- [58] On November 16, Mr. Galloway received an email from the Dean, advising him that he had been suspended and requiring that he step aside as Chair. Mr. Galloway then spoke to the Dean who repeated much of what had been said in the email. Mr. Galloway attempted to reach colleagues who either did not respond or deflected his inquiries. On November 16, the Dean issued a memo to the faculty, staff and students of the Creative Writing Program, advising that "serious allegations" had come to the attention of the Program and the Dean's Office. The memo further advised that Mr. Galloway had been suspended and temporarily removed as Chair, pending an investigation. Over the next several days, numerous media outlets reported on UBC's suspension of Mr. Galloway.
- [59] By the end of November 2015, UBC engaged retired British Columbia Supreme Court Justice Mary Ellen Boyd to investigate the allegations against Mr. Galloway (the "Boyd Investigation"). Mr. Galloway subsequently signed a confidentiality agreement that stated he would be provided with information about the allegations made against him, including the identity of the complainant, but he would not be able to disclose this information to the public.
- [60] Ms. Boyd ultimately concluded it could not be established on a balance of probabilities that Mr. Galloway had sexually assaulted A.B., but the evidence established that he had, at some point, sexually harassed A.B. (the "Boyd Report").

- [61] At the same time, the UBC Faculty Association brought a grievance against UBC on Mr. Galloway's behalf alleging a breach of his privacy rights in connection with the circulation of the Dean's memo.
- [62] On January 6, 2016 and thereafter, in the context of the Boyd Investigation, Mr. Galloway received various documents. This included, for example, Professor Lee's November Meeting notes. These documents were identified by the judge and were relevant to the limitation issues raised by some of the defendants.
- [63] On April 25, 2016 the Boyd Report was submitted to the Dean as a confidential document. On June 18, 2016, UBC terminated Mr. Galloway's employment. Around the same time, the UBC Faculty Association brought a second grievance against UBC on behalf of Mr. Galloway arising from the Boyd Report and UBC's public statements regarding Mr. Galloway's termination.
- [64] In November 2016, more than 80 notable members of Canada's literary community signed an open letter criticizing UBC's investigation into Mr. Galloway's actions and demanding due process for him. This is referred to as the "UBC Accountable letter" and was associated with the Twitter hashtag "#ubcaccountable". This open letter created a "firestorm" of discussion on social media. In response to the UBC Accountable letter, a counter letter was published that expressed anger over, for example, the fact that the original UBC Accountable letter expressed no support for the complainant and focussed on Mr. Galloway's interests. This counter letter was signed by several of the appellants. On Twitter, the counter letter was associated with the hashtag "#ubcunaccountable".
- [65] A number, though not all, of the alleged defamatory statements made by various appellants were made in the context of the Boyd Report, the UBC Accountable letter or out of the ensuing and ongoing discussion about Mr. Galloway and his termination. The details of the specific expressions at issue on this appeal are identified and addressed in our substantive analysis on the individual appeals.
- [66] On June 8, 2018, Mr. Galloway was awarded \$167,000 in damages pursuant to the initial grievance arbitration the UBC Faculty Association had brought on his behalf. The arbitrator found that certain communications by UBC contravened Mr. Galloway's privacy rights. On September 25, 2018, Mr. Galloway was awarded supplemental damages arising from a second arbitration, in the amount of \$60,000 for the continued breach of his privacy rights and ongoing harm to his reputation.
- [67] On October 26, 2018, Mr. Galloway filed his notice of civil claim. Most of the defendants then brought applications to have the claims against them dismissed pursuant to s. 4 of the PPPA.

General Conclusions

- [68] We discuss the judge's reasons in further detail when addressing each appeal and cross appeal. This will be followed by a summary of her disposition of each statement and conclusion on the limitations defence. At this point, we discuss her general conclusions in order to frame the analysis that follows.
- [69] There was no dispute the appellants had satisfied the conditions in s. 4(1) of the PPPA that the defamation proceeding arose from the expression(s) made by the respective applicant (appellant) and the expression(s) related to a matter of public interest (para. 49). Therefore, the judge focussed on the requirements under s. 4(2)(a) that required Mr. Galloway to demonstrate there were grounds to believe his underlying claims were legally tenable and supported by evidence that was reasonably capable of belief such that the claims had a real prospect of success (paras. 50, 393, citing *Pointes*, at para. 54).
- [70] Furthermore, Mr. Galloway was required to show grounds to believe that there was no valid defence in the proceeding as per s. 4(2)(a)(ii) of the PPPA (para. 505, citing *Bent*, at para. 103). This did not require the judge to find conclusively that there was no valid defence, but rather the judge said Mr. Galloway would meet this burden if she was satisfied based on the record and law, and taking into account the stage of the proceeding, that the defence the applicant had put in play did not tend to weigh more in the applicant's favour (para. 505, citing *Bent*, at para. 103).
- [71] The judge first observed that if she concluded some of the claims against one applicant had substantial merit and no valid defence, but others against the same applicant either had no substantial merit or had a valid defence then she was not bound to allow all the claims against that applicant to go forward. The judge concluded that s. 4 of the PPPA is not an "all or nothing" situation. It does not require allowing a claim that lacks substantial merit or where the plaintiff has failed to show there is no valid defence to go forward on the "coattails of other claims [that do] have substantial merit and no valid defence" (para. 413).
- [72] Several of the appellants relied on the Limitation Act, to argue that Mr. Galloway's claims were statute barred. For example, with respect to A.B. No. 1, Maillard No. 1, Lyon Nos. 1-2 and Rooney No. 1, the appellants argued that Mr. Galloway's claim was statute barred under the Limitation Act because the limitation period for this claim expired by the time Mr. Galloway filed his notice of civil claim on October 26, 2018 (para. 508). The judge concluded Mr. Galloway failed to meet his burden to show grounds to believe the limitation defence raised in respect of those claims was not a valid defence and had no real prospect of success (para. 530).

Legal Framework and Principles

- [73] The judge below comprehensively and accurately set out the applicable legal principles (paras. 319-392). We simply summarize them and provide any further detail in our analysis.

Section 4 of the PPPA

[74] Hansman, and the earlier companion cases of *Pointes* and *Bent*, discussed four steps involved in an analysis of an application under s. 4 of the PPPA (Hansman, at para. 53; *Bent*, at para. 76, citing *Pointes*, at para. 18). *Pointes* and *Bent* apply with equal force to s. 4 of the PPPA because of the substantial similarity between the Ontario and British Columbia anti-SLAPP legislation (Hansman, at para. 52).

[75] After the chambers judge delivered her decision and since we reserved judgment on these appeals, the Supreme Court of Canada issued its decision in *Hansman*. The appellants filed further written submissions after the hearing in order to address the effect of *Hansman* on these appeals. These submissions were made jointly and consolidated the largely similar positions of the parties on common grounds of appeal.

[76] *Hansman* was driven by its own specific facts, but it has not changed the legal framework established in *Pointes* and *Bent* with respect to the interpretation and application of the PPPA.

[77] In the following paragraphs, the "defendant" is the individual against whom a defamation proceeding has been commenced and is also the individual who has brought an application pursuant to s. 4 of the PPPA for a dismissal of that proceeding (i.e., the "applicant" under s. 4). The "plaintiff" is the individual alleging they were defamed by the defendant and whose proceeding is the subject of the PPPA application.

[78] To bring a s. 4 application, the defendant must first establish that the proceeding against them arises from an expression relating to a matter of public interest. Once the defendant has established this, the plaintiff bears the burden on the next three steps and must satisfy the judge that:

- 1) there are grounds to believe the proceeding has substantial merit;
- 2) there are grounds to believe the defendant has no valid defence to the action; and
- 3) the harm likely to have been or to be suffered by the plaintiff as a result of the defendant's expression is serious enough that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression.

See *Hansman*, at para. 53; *Bent*, at para. 76, citing *Pointes*, at para. 18.

[79] Courts should favour a "broad and liberal interpretation" in deciding what is a matter of public interest (*Bent*, at para. 81; *Pointes*, at para. 26; *Zeppa v. Rea*, 2023 ONCA 668 at paras. 18-19).

[80] *Pointes* made clear that s. 4 explicitly provides for a "grounds to believe" standard rather than a balance of probabilities standard (*Pointes*, at para. 39; see also *Hansman*, at para. 53). The "grounds to believe" standard means "something more than mere suspicion, but less than proof on the balance of probabilities" (*Hansman*, at para. 94, citing *Pointes*, at para. 40).

Thus, a "grounds to believe" standard only requires a basis in both the record and the law for "finding that the underlying proceeding has substantial merit and that there is no valid defence" (Bent, at para. 87, citing Pointes, at para. 39). It follows that any basis in the record and the law is sufficient to meet this standard as long as the basis is "legally tenable and reasonably capable of belief" (Bent, at para. 88).

- [81] At the first step of the plaintiff's burden, the judge must determine, in context with "grounds to believe", whether the claims of defamation have substantial merit. Pointes and Bent interpreted "substantial merit" to mean 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" (Bent, at para. 90, citing Pointes, at para. 49). Requiring a real prospect of success is a more demanding standard than "some" chance of success or a "reasonable" prospect of success (Pointes, at para. 50).
- [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).
- [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).
- [84] Consideration of the harm contemplated in s. 4(2)(b) requires that the harm was suffered by the plaintiff as a result of the applicant's expression. Either monetary or non-monetary harm can be considered (Pointes, at paras. 68-69). Given the language in s. 4(2)(b) refers to the term "likely" when describing the harm suffered by the plaintiff, harm or causation need not be proved, but there must be evidence sufficient for a judge to infer a causal link between the expression and the harm suffered (Pointes, at para. 71; Hansman, at para. 68). Where there are multiple defendants speaking out against the plaintiff, "inferring a causal link between [a single] defendant's expression and the harm suffered by the plaintiff becomes both more important and more difficult" (Hansman, at para. 68).
- [85] In a defamation action, general damages are presumed. This presumption is sufficient to show the existence of harm, but what is more important to consider is the magnitude or seriousness of the harm (Hansman, at para. 67; Bent, at para. 144, citing Pointes, at para. 70). This is because to "hold otherwise would be to presumptively tip the scales in favour of the plaintiff in defamation cases and effectively gut the weighing exercise" (Hansman, at

para. 67). Thus, presumed general damages alone or bare assertions of harm are an insufficient basis on which a judge can draw an inference of likelihood of harm of a magnitude that outweighs the public interest in protecting the defendant's expression (Hansman, at para. 67). There is a distinction between the establishment of harm and the magnitude of harm (*Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, at para. 47, leave to appeal to SCC ref'd, 40715 (2 November 2023) [Park Lawn]).

- [86] On a PPPA application, a plaintiff cannot be expected to present a fully developed damages brief; it is sufficient to provide evidence that allows a causal connection to be drawn between the expression and damages that are more than nominal (see e.g., *Hansman*, at para. 65; *Pointes*, at para. 115). It is true that where there are multiple potential causes of the harm suffered, a court should consider how each individual defendant contributed to the harm; however, "[w]hether a connection in fact exists is a matter for trial", as is any potential determination of the individual attribution to the harm suffered (*Hobbs*, at para. 88).
- [87] In a case such as the one at bar where the impugned statements concern allegations of criminal misconduct, the harm arises from the nature of the allegation and the plaintiff has no obligation to prove actual loss (*Hobbs*, at para. 84).
- [88] The closer an expression is to the core values underlying the right to freedom of expression in s. 2(b) of the Charter, the greater the public interest in its protection (*Pointes*, at para. 77). Certain other factors can be considered to guide the weighing of public interest (*Pointes*, at para. 80):

the importance of the expression, the history of litigation between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the Charter or human rights legislation.

See also *Hansman*, at para. 60.

- [89] Furthermore, when conducting the public interest weighing exercise, a court can consider some of the recognized indicia of a SLAPP suit: (1) a history of the plaintiff using litigation or the threat of litigation to silence critics; (2) a financial or power imbalance that strongly favours the plaintiff; (3) a punitive or retributory purpose animating the plaintiff's bringing of the claim; and (4) minimal or nominal damages suffered by the plaintiff (*Pointes*, at para. 78, citing *Platnick v. Bent*, 2018 ONCA 687, at para. 99). Notably, not all SLAPPs possess these recognized indicia (*Hansman*, at para. 48).
- [90] The above factors are only to be considered to the extent that they are tethered to the text of s. 4(2)(b) and the considerations that the legislature explicitly contemplated (*Hansman*, at para. 60, citing *Pointes*, at para. 80).

[91] If the plaintiff cannot meet their burden, the s. 4 application is granted and the underlying proceeding will be dismissed.

Defamation

[92] To succeed in a defamation action, the plaintiff must prove three criteria on a balance of probabilities (Grant, at para. 28; Bent, at para. 92):

- 1) that the impugned words were defamatory, meaning that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;
- 2) that the impugned words in fact referred to the plaintiff; and
- 3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

[93] If these three elements are proved, falsity and damages are both presumed (Grant, at para. 28). Defamation is a tort of strict liability because the plaintiff is not required to show the defendant intended to do harm, or even that the defendant was careless (para. 28). Once the plaintiff has met their burden of proving the required elements, the burden shifts to the defendant to advance a defence that would allow them to escape liability successfully (para. 29).

[94] To determine whether a statement is defamatory, two distinct questions must be answered: (1) are the words reasonably capable of having a defamatory meaning; and if so, (2) do the words, in fact, bear a defamatory meaning (Level One, at para. 33). However, as mentioned previously, a judge is not required to ask and answer the two questions separately since the first question is logically subsumed into an inquiry of the second question (Weaver v. Corcoran, 2017 BCCA 160, at para. 67 [Weaver]). Thus, the judge is ultimately tasked with determining whether the impugned words did, in fact, have a defamatory meaning (an inquiry that in the context of a s. 4 PPPA application need not be determinative but looks only to whether the claims have substantial merit).

[95] Any words that tend to lower an individual's reputation in the eyes of a reasonable person or expose an individual to hatred, contempt or ridicule are defamatory (Weaver, at para. 68, citing Grant, at para. 28; Botiuk v. Toronto Free Press Publications Ltd., [1995] 3 S.C.R. 3, at para. 62, 1995 CanLII 60, at para. 62).

[96] It is unquestionably defamatory to accuse an individual by implication or insinuation of committing a criminal act (Hansen v. Tilley, 2009 BCSC 360, at para. 27, aff'd 2010 BCCA 482). In determining whether words are in fact defamatory, a court may look at the surrounding circumstances (Botiuk, at para. 62). A court also looks to the "natural and ordinary" meaning of the words (Pan v. Gao, 2020 BCCA 58, at para. 61, citing Taseko Mines Ltd. v. Western Canada Wilderness Committee, 2017 BCCA 431, at para. 47 [Taseko]). Generally, what an ordinary person would infer without special knowledge has been considered to be the natural and ordinary meaning of the words (Lewis v. Daily Telegraph Ltd., [1963] 2 All E.R.

151 (H.L.), at 154-155 [Lewis]). In *Brown on Defamation* (Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (Toronto: Thomson Reuters) at § 5:3 [Brown on Defamation]), the process of determining the "natural and ordinary" meaning of words is discussed as follows:

A court must be guided by the test of reasonableness; that is the governing principle. It will not strain to give a particular meaning to published words, or stretch them beyond their fair meaning. It will avoid any unusual meaning, or a tortured, forced or unreasonable interpretation of the language, and the inferences drawn must not be far-fetched. Words will not be distorted to give them an unusual meaning. They should be judged by their general tenor and tone. The language will not be tortured to make certain that which is not certain. It is not the ingeniously possible interpretation, but the plainly normal construction that is preferred.

[Footnotes omitted.]

- [97] In assessing the meaning of the words at issue, the author and/or publisher's intentions are irrelevant, as is the understanding of the plaintiff (*Hodgson v. Canadian Newspapers Co. Ltd.*, (2000) 49 O.R. (3d) 161, at para. 41, 2000 CanLII 14715 (C.A.), leave to appeal to SCC ref'd, 28136 (3 May 2001); *Booth v. British Columbia Television Broadcasting System*, (1982) 139 D.L.R. (3d) 88, at 93-94, 1982 CanLII 251 (B.C.C.A)). The meaning of the words must generally be understood by taking into consideration all of the circumstances and the publication as a whole (*Taseko*, at para. 44; *Booth*, at 93-94).
- [98] The central question in a defamation claim is whether "the meaning conveyed by the impugned words genuinely threatened the plaintiff's actual reputation" (*Weaver*, at para. 68). It is not necessary that actual harm to an individual's reputation be proven, nor is it required that anyone actually thought less of a plaintiff because of the defamation (*Ball*, at para. 35; see also *Kerr v. Conlogue*, (1992) 65 B.C.L.R. (2d) 70, at 79-80, 1992 CanLII 924 (S.C.)).
- [99] Slander is oral defamation and proof of special damages is required unless the words were slanderous per se. One recognized category where damages are presumed to have been suffered from the very nature of the words, and thus an instance of slander per se, are accusations imputing the commission of a criminal offence (*Brown on Defamation*, at § 8:8, 8:6).
- [100] A court will determine if an expression does in fact refer to or is "of and concerning" the plaintiff from the perspective of an ordinary or reasonable reader (*Knuppfer v. London Express Newspaper Ltd.*, [1944] A.C. 116, at 121 (H.L.)). The question to be asked is whether the expression would lead reasonable people acquainted with the plaintiff to the conclusion that the statements refer to the plaintiff (*Knuppfer*, at 121; *Butler v. Southam Inc.*, 2001 NSCA 121, at para. 29).
- [101] It is still possible for statements or publications to be defamatory of a person even if that person is not identified by name (*Brown on Defamation*, at § 6:10-6:15).

- [102] To prove that the defamatory expression has been published, the plaintiff must demonstrate the defendant has, through any act, conveyed the defamatory meaning to any third party who has received it (*Crookes v. Newton*, 2011 SCC 47, at para. 16, citing *McNichol v. Grandy*, [1931] S.C.R. 696, at 699, 1931 CanLII 99). Generally, the form of the defendant's act and the manner through which the act assists in causing the defamatory expression to reach the third party are not relevant (*Crookes*, at para. 16). Thus, any act having the effect of transferring the defamatory content to a third person constitutes a publication (para. 16 citing *Stanley v. Shaw and Tracey*, 2006 BCCA 467, at para. 10).
- [103] Under the "repetition rule", anyone who repeats a defamatory statement is no less liable than the person who originated it (*Grant*, at para. 76). The logic of the repetition rule also means the fact that someone has already published a defamatory statement does not give another person license to repeat the statement without the potential for attracting liability themselves (para. 114).

Defences

- [104] Ordinarily, once a plaintiff has proved the required elements of a defamation claim, the onus shifts to the defendant to advance a successful defence in order to escape liability; however, in the context of a PPPA application, the onus is on the plaintiff to satisfy the court that the proceeding has substantial merit and that there are grounds to believe the defendant has no valid defence in the underlying proceeding (*Hansman*, at para. 53; see also *Pointes*, at para. 55).

Fair Comment

- [105] The justification for the defence of fair comment is premised on "the idea that citizens must be able to openly declare their real opinions on matters of public interest without fear of reprisal in the form of actions for defamation" (*Hansman*, at para. 95). The defence is intended to maintain the equilibrium between the competing values of protecting an individual's reputation from unwarranted attack, on one hand, and encouraging the sort of democratic discourse that is key to a free and open society, on the other. In analyzing this defence, courts must reconcile these two values rather than preferring one over the other (para. 95). The right of fair comment is "a basic safeguard against irresponsible political power" (para. 95, citing C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at 668).
- [106] A defendant can rely on the defence of fair comment if they can establish the following five elements (*Hansman*, at para. 96; *Grant*, at para. 31; *WIC*, at para. 28):
- a) the comment is on a matter of public interest;
 - b) the comment is based on fact;
 - c) the comment, though it can include inferences of fact, is recognizable as comment;

- d) the comment satisfies the following objective test: "could any person honestly express that opinion on the proved facts?"; and
- e) even if the comment meets those elements, the defence can still be defeated if the plaintiff proves that the defendant was actuated by express malice.

[107] It bears repeating that whether the judge could have found the defence of fair comment would not succeed is a discretionary decision, subject to significant deference.

[108] To rely on the defence of fair comment successfully, the expression must truly be a comment upon given facts and cannot simply be a statement of facts. The comment must be recognizable as comment and cannot be so intertwined with fact that a reader is unable to distinguish between what is comment and what is fact (*Ager v. Canjex Publishing d.b.a. Canada Stockwatch*, 2005 BCCA 467, at para. 43; *Brown on Defamation*, at § 15:5). Whether an expression is comment or fact is determined from the perspective of an ordinary, reasonable reader. Hansman said this regarding the difference between comment and fact:

[108] For expression to constitute fair comment, the statement must be one that would be understood by a reasonable reader as a comment rather than a statement of fact... A comment includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" This is a low threshold; "the notion of 'comment' is generously interpreted"

[References omitted.]

[109] To demonstrate the comment is based on fact, the comment must indicate, at least generally, the facts on which the comment is being made (*Hansman*, at para. 100; *WIC*, at para. 31). The factual basis for the impugned expression "must be explicitly or implicitly indicated, at least in general terms, within the publication itself or the facts must be 'so notorious as to be already understood by the audience'" (*Hansman*, at para. 99, citing *WIC*, at para. 34). Thus, the facts must be sufficiently stated or otherwise known to the expression's audience such that they can make up their own minds on the merits of the comment (*WIC*, at para. 31). The fair comment defence is not available if the factual foundation is unstated, unknown or discovered to be false (*WIC*, at para. 31).

[110] However, the facts need not actually support the comment, meaning that they need not confirm its truth because the purpose of the factual foundation requirement is "to ensure the reader is aware of the basis for the comment", so that they can come to their own conclusion as to its merit (*Hansman*, at para. 100). The purpose of the factual foundation requirement is not to measure the fairness of expression, thus the comment "need not be a reasonable or proportionate response" (*Hansman*, at para. 100).

Qualified Privilege

- [111] Statements of opinion and fact may be subject to "qualified" privilege, depending on the context or occasion in which the statements are made.
- [112] In Bent, the majority described qualified privilege as follows:
- [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.
- [113] As noted, qualified privilege can be defeated where "the limits of the duty or interest have been exceeded" (Bent, at para. 128, citing Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at para. 146, 1995 CanLII 59, Botiuk, at para. 80). This can occur, for example, when the information communicated in a statement is not relevant to discharging the duty or exercising the right that gives rise to the privilege, or when the information is not reasonably appropriate to the legitimate purposes of the occasion (Bent, at para. 128).

Malice

- [114] Even if the fair comment defence or qualified privilege is properly made out, it can be defeated by malice, which is a "state of mind" (Smith v. Cross, 2009 BCCA 529, at para. 42).
- [115] In the context of a PPPA application, malice is also a relevant factor in weighing competing interests at the last stage of the s. 4 analysis (Neufeld v. Hansman, 2021 BCCA 222, at para. 48, rev'd on other grounds, Hansman, citing Pointes, at para. 75). There are four potential categories under which a finding of express malice can be found (Hansman, at para. 115; Hobbs, at para. 29, citing R. D. McConchie and D. A. Potts, Canadian Libel and Slander Actions, (Toronto: Irwin Law, 2004) at 299):

A defendant is actuated by express malice if [they publish a] defamatory expression:

- i) knowing it was false; or

- ii) with reckless indifference whether it is true or false; or
- iii) for the dominant purpose of injuring the plaintiff because of spite or animosity; or
- iv) for some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

[116] The defence is also defeated by proof that subjective malice was the dominant motive behind a particular comment, even if a defendant relies on an objective honest belief (WIC, at para. 53). The more serious an allegedly defamatory comment is, the more weight courts will give to a defendant's failure to verify the comment prior to publication as evidence of malice (Bent, at para. 136, citing P.A. Downard, *The Law of Libel in Canada* (4th ed. 2018), at § 9:74).

[117] Malice is generally understood to mean spite or ill-will, but it can also be found where a defendant speaks dishonestly or with knowing or reckless disregard for the truth (Hansman, at para. 115; Hill, at para. 145).

Pruning or Trimming

Legislation

[118] An issue in this appeal is whether in the context of an anti-SLAPP application, a chambers judge can dismiss individual expressions from a defamation action while allowing other expressions to proceed to trial. This issue is often referred to as one of "pruning" or "trimming" the individual expressions.

[119] As indicated, an assessment of the merits of a defamation claim occurs pursuant to s. 4(2) (a) of the PPPA and s. 137.1(4)(a) of Ontario's CJA. At this point, as all the reported decisions in relation to the issue of pruning arise in Ontario, it is useful to set out both provisions:

Protection of Public Participation Act, S.B.C. 2019 c. 3

Courts of Justice Act, R.S.O. 1990, c. C. 43

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.

[Emphasis added.]

137.1(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

- (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
 - (a) there are grounds to believe that,
 - (i) the proceeding has substantial merit, and
 - (ii) the moving party has no valid defence in the proceeding; and
 - (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[120] The modern approach to statutory interpretation articulated by the Court in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para. 26, adopted the formulation from E.A. Driedger's *Construction of Statutes*, that "the words of an Act are to be read in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (see also *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, at paras. 9, 12). The provincial and federal Interpretation Acts provide that "every enactment must be construed as being remedial, and must be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects" (Interpretation Act, R.S.B.C. 1996, c. 238, s. 8 [Interpretation Act BC]; see also Interpretation Act, R.S.C. 1985, c. I-21, s. 12).

[121] The definition of "proceeding" in the PPPA has the same meaning as in the Supreme Court Act, R.S.B.C. 1996, c. 443, which states that a "proceeding" includes an "action, suit, cause, matter, appeal, petition proceeding or requisition proceeding" (s. 1). In a defamation action, each expression or publication of defamatory words to a new person is a distinct publication and gives rise to a separate cause of action. Nevertheless, a single "proceeding" can advance claims for multiple defamatory statements.

[122] Section 4 of the PPPA is throughout expressed in the singular and it speaks of "the proceeding", "the applicant", and "an expression". However, "in an enactment words in the singular include the plural" (Interpretation Act BC, s. 28(3)).

[123] Accordingly, the language of s. 4 extends, as a matter of principle and interpretation, to instances where a single proceeding can advance one or more causes of action based on one or more expressions or alleged defamatory statements.

[124] The question becomes whether a judge can or should, under s. 4 of the PPPA, determine only some of the claims, based on only some of the expressions, that are advanced in a proceeding.

Judicial consideration of "pruning"

[125] The following Ontario decisions have considered the issue of pruning, albeit in slightly different contexts.

[126] In *Laurie Thatcher-Craig v. The Corporation of the Township of Clearview*, 2021 ONSC 7352, the plaintiff brought a claim in negligence, defamation and breach of a fiduciary duty. The court found that an entire proceeding should not be subject to dismissal simply because it includes some claims that did not arise from expressions in the public interest:

[41] Before delving into the threshold analysis, I will address what appears to be the "all or nothing" structure of s. 137.1 of the CJA. On its face, s. 137.1 directs a court to dismiss "a proceeding" where the test set out in s. 137.1(3) and (4) is established. Section 137.1 of the CJA speaks only of "a proceeding." It does not use language like "a claim within a proceeding", "a proceeding or any part thereof" or similar language. At first blush, the choice of language would seem to suggest that whenever the test in s. 137.1 is met, the entire proceeding must be dismissed.

[42] Despite the language, I do not read this section to stand for the proposition that where a proceeding raises multiple claims, some of which arise from an expression in the public interest and some of which do not, the entire proceeding is subject to dismissal under s. 137.1 of the CJA. If that were the case, the defendants would stand to gain a windfall by having otherwise potentially meritorious claims dismissed against them merely due to the fact that the plaintiff included a claim arising from an expression in the public interest that was then dismissed under the provisions of s. 137.1.

[127] In that case, the judge concluded that the plaintiff's breach of fiduciary duty claim did not arise from an impugned expression in the public interest and that part of the claim was not dismissed under s. 137.1 of the CJA. The chambers judge dismissed the negligence claim as not having substantial merit. He did not dismiss the defamation claim on the basis that the plaintiff had shown that there were no valid defences.

[128] On appeal, in *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96, the court affirmed the decision to maintain the fiduciary duty claim. The court allowed the appeal from the defamation claim, concluding that there were valid defences to the claim. However, the Court of Appeal did not comment on the question of whether a proceeding included a "proceeding in part". *Thatcher-Craig* does not engage our issue because it refers to a dismissal of a separate tort claim that did not meet the "public interest" threshold, not to

the dismissal of an individual expression because it did not have merit under s. 4(2)(a) of the PPPA or s. 1371.1(4)(a) of the CJA.

- [129] In *Rizvee v. Newman*, 2017 ONSC 4024 (paras. 140-141), the court dismissed the plaintiff's defamation claim, but the malicious prosecution claim was able to proceed to trial. The court said it was open to the court to halt any part of a claim that engages and satisfies the test for dismissal in s. 137.1 of the CJA (para. 141). In the court's view, the "all or nothing" approach was contrary to the intention of the legislation and far too rigid an interpretation (para. 141). No appeal was taken from that decision.
- [130] In *Schwartz & Red Lake Outfitters v. Collette*, 2020 ONSC 6580, at para. 124, the judge allowed one individual expression from a defamation claim to proceed to trial, while dismissing the claims related to all other expressions. The issue of partial dismissal was squarely before the chambers judge and she concluded that where certain claims are separate and distinct from claims that engage s. 137.1, the court has the discretion to permit those other claims to proceed (para. 74). The Ontario Court of Appeal reversed this result in *Schwartz v. Collette*, 2023 ONCA 574. The court found that the entire action should have been dismissed because it was motivated by a desire to silence public interest expression, but it declined to respond to the question regarding partial dismissal:
- [7] In so concluding, we wish to make it clear that we are not deciding whether, on a successful s. 137.1 motion, the court has the authority to delineate between claims that are found to be subject to the section and ones that are not. We leave that question to be decided in another case where it is fully and completely presented.
- [131] In *Catalyst Capital Group Inc. and Callidus Capital Corporation v. West Face Capital Inc.*, 2021 ONSC 7957 [Catalyst Capital], the chambers judge was faced with a defence motion for a partial dismissal under s. 137.1. He concluded, ultimately, that he was not prepared to grant a partial dismissal and that the motion was improper (para. 478).
- [132] On appeal in *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381, leave to appeal to SCC sought, 40875 (28 August 2023), 40876 (28 August 2023), 40867 (24 August 2023) [Catalyst 2023], the court upheld the reasons of the motions judge who had concluded that it was not appropriate to prune some expressions in that case. On appeal, the court stated that it was unnecessary to decide, on the facts of the appeal, the broad question of whether s. 137.1 contemplated partial anti-SLAPP motions and deferred that question to another appeal where the issue would be dispositive (para. 145). The court's rationale in declining to address the issue was due to the summary nature of the anti-SLAPP motion, allowing partial anti-SLAPP motions "would have the effect of delaying the entire proceeding for little purpose and with great expense and delay" (para. 146). The court said it was not an error for the motion judge to dismiss the motion on the basis that s. 137.1 does not contemplate a motion that would not dispose of an entire cause of action (para. 146).

- [133] While it appears the court in *Catalyst 2023* concluded that a defendant cannot bring a partial motion for dismissal of a cause of action, it appears to have left open the "broad question" of whether a judge has the discretion to "prune" some expressions from a proceeding (para. 145).
- [134] While the Ontario Court of Appeal has considered the issue of partial dismissal under an anti-SLAPP claim, it has not determined the issue.

Pruning in the PPPA framework

- [135] As a PPPA application is intended to be "summary", or "expedited" or a "screening" application, it should not overwhelm the litigation process. Once the judge has decided that some of the publications should go to trial, the court has determined that it is not concerned about a strategic or abusive action on the part of the plaintiff. Nor is it concerned, broadly speaking, about the use of litigation to limit expression on matters of public interest. At this point, proportionality, cost, efficiency and other drivers of the litigation process will often take over.
- [136] Similarly, in circumstances where an applicant only applies to dismiss a subset of the "expressions" relied on by the plaintiff in a proceeding, that applicant will generally not be arguing that the proceeding has been brought for strategic or abusive purposes or to silence public discussion. The proceeding will not bear the hallmarks that the PPPA was intended to address.
- [137] Furthermore, the PPPA is not intended to replace or supersede other tools available to litigants. The PPPA creates a unique regime that is intended to address specific concerns in particular kinds of actions. Thus, the PPPA incorporates a distinct legal framework, a distinct set of onuses and a unique presumptive cost regime. In the context of certain actions, the legislature has determined that this discrete legal framework is appropriate.
- [138] However, the broad purpose of the PPPA is not to narrow or winnow the issues for trial. Defendants have other tools available to them to serve that winnowing function. This includes, for example, the summary trial process. Under R. 9-7(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] a defendant can seek judgment on a particular "issue". This would include judgment on one or more alleged defamatory statements.
- [139] In the discussion that follows we explain that the PPPA should not be relied upon if the true purpose of an application is to challenge a plaintiff's pleadings. Instead, such applications are properly governed by various specific rules, each of which is governed by its own jurisprudence. Similarly, the PPPA should not be relied on for the purpose of "pruning", narrowing, or winnowing aspects of a plaintiff's claim.
- [140] With this backdrop, and as the authorities we have referred to illustrate, the issue of "pruning", or of a partial dismissal, can arise in two primary ways. First, a defendant can apply under s. 4 of the PPPA to dismiss, for example, only one of five expressions or alleged

defamatory statements in a proceeding. That application is of little value. At best, it might determine a sliver of the proceeding. It does not enhance efficiency as the matter will still proceed to trial. It is likely to delay the action with attendant cost and expense. There exist other tools under the Rules that allow litigants to seek judgment on a finite issue. It is also not consonant with the underlying purpose of s. 4 of the PPPA.

- [141] In our view, the language and purpose of s. 4, as well as the jurisprudence that governs s. 4, do not support using the provision in this way.
- [142] The issue of pruning can arise in a second way. Here, a defendant brings an application under s. 4 to dismiss the plaintiff's claim. That claim relies on several expressions that are alleged to be defamatory. The judge determines the proper application of s. 4 should result in the dismissal of some but not all of the expressions in the proceeding. In such circumstances, the principled concerns we have identified are not engaged as directly. Issues of cost and efficiency are less obvious. There has been no misuse of s. 4. The question of whether some of the expressions should be "pruned" under s. 4 will be a matter of discretion for the chambers judge. In some cases, it will be more efficient or appropriate for all matters to proceed to trial; in others, less efficient or appropriate.
- [143] It will be important for judges to have an eye to whether an application brought under s. 4, ostensibly for the purpose of dismissing the plaintiff's claim, is actually intended to achieve that purpose.

Weber Defence

- [144] The "Weber defence" refers to the case of *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 1995 CanLII 108, which described the process for determining the appropriate forum for proceedings that may be governed by a collective agreement.
- [145] Weber emphasized that "[t]wo elements must be considered: the dispute and the ambit of the collective agreement. In considering the dispute the decision-maker must attempt to define its 'essential character'" (paras. 51-52). Thus, "[t]he question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement" (para. 52).
- [146] Recently, this Court in *Masjoody v. Trotignon*, 2022 BCCA 135, addressed an appeal from the dismissal of the appellant's action on the basis that the court lacked subject-matter jurisdiction because the dispute between the parties was governed by a collective agreement. One aspect of the claim related to alleged defamatory statements made by a co-worker and the university where the appellant was employed. The Court first referred to *Phillips v. Harrison*, 2000 MBCA 150 where the court created a framework for determining whether defamatory statements are work-related and therefore to be adjudicated under the mandatory dispute resolution procedures within a collective agreement (para. 35). *Phillips* was applied by this Court in *Haight-Smith v. Neden*, 2002 BCCA 132, at para. 43, leave to appeal ref'd, 29172 (21 November 2002) and *Stuart v. Hugh*, 2009 BCCA 127, at para. 40.

[147] The Phillips framework (at para. 71) asks whether:

1. the comments concern the employee's character, history, or capacity as an employee;
2. the comments were made by someone whose job it was to communicate a workplace problem; and
3. the comments were made to persons who would be expected to be informed of workplace problems.

[148] Masjoody said:

[36] In my view, the Phillips framework is a useful but not exclusive, means of examining whether defamatory statements are subject to mandatory dispute resolution procedures within collective agreements. The broader Weber framework continues to govern. If the Phillips framework indicates that defamatory statements are work-related, the essential character of the dispute concerns subject matter that is covered by the collective agreement. If it does not, it is necessary, in my view, for the court to dig deeper to determine if the defamatory statements nevertheless arise out of the interpretation, application, administration or violation of the collective agreement.

Overview of Analysis

[149] At the outset of our analysis, we emphasize, as did the chambers judge, that an application under s. 4 of the PPPA is "unequivocally not a determinative adjudication of the merits of a claim" (Bent, at para. 4; Hansman, at para. 37). This Court is not prejudging the ultimate merits of Mr. Galloway's claim or the defences that have been raised. The trial judge will determine the ultimate outcome (RFJ, at paras. 790-791). The comments and conclusions in this judgment are strictly limited to the PPPA applications in question and the issues raised on appeal.

[150] We will first address the limitation issues raised on Mr. Galloway's appeal against Professor Lyon and his cross appeals with respect to A.B., Professor Maillard and Ms. Rooney.

[151] Relying on the standard of review and legal framework discussed earlier, we then address the individual appeals and the specific issues arising on the respective appeals. We have set out the facts and reasons of the chambers judge to the extent necessary to resolve the issues raised on these appeals.

The Limitation Issues

[152] Mr. Galloway has cross appealed the determinations on A.B No. 1, Maillard No. 1 and Rooney No. 1 and appealed those made on Lyon Nos. 1 and 2 on two broad grounds:

- a) he contends the judge misapplied the test in *Novak v. Bond*, [1999] 1 S.C.R. 808, 1999 CanLII 685, as to discoverability; and,

- b) he submits the judge erred in treating the publications of A.B. No. 1, Maillard No. 1, Lyon Nos. 1 and 2, and Rooney No. 1 collectively, as single causes of action, rather than recognizing that each such publication, repetition and republication gave rise to a separate cause of action.

[153] A.B., Professor Maillard, Professor Lyon and Ms. Rooney (the "Limitation Applicants"), in response, defend the judge's conclusions.

[154] Prior to addressing these two main grounds, we first provide a general context for these issues and then address a preliminary issue related to the suitability of limitation defences in the context of PPPA applications.

General context for A.B. No.1, Maillard No. 1, Lyon Nos. 1 and 2, Rooney No. 1

[155] The judge made various findings and statements throughout her judgment that are relevant to the limitation issues raised. The following paragraphs of her reasons are particularly salient to the discussion and analysis that follows:

[156] Not infrequently, resolution of a limitation defence can require a "deep dive" into evidence. However, in my view, here, the facts relevant to the limitation defences are largely uncontested. There are grounds to believe that the claims in respect of A.B. No. 1, Maillard No. 1, Lyon Nos. 1 and 2 and Rooney No. 1 had been discovered by not later than July 2016. At that point, the limitation period for those claims began to run.

[157] As I noted in the Background and Outline of Events, by the end of February 2016, Mr. Galloway had received the following materials in connection with the Boyd Investigation: Professor Lee's notes of the November Meeting; A.B.'s 18-page Rape Narrative; the witness statement from Ms. Flegg; and a supplementary witness statement from Ms. Rooney. Mr. Galloway acknowledged this in his evidence. These documents disclose that: A.B. had stated A.B. No. 1 to Professor Maillard, Professor Lyon and Ms. Rooney (at least); A.B. No. 1 was repeated at the November Meeting; Maillard No. 1 and Lyon Nos. 1 and 2 had been communicated (or "published") to persons at the November Meeting, in circumstances where no one contacted Mr. Galloway to hear his side of events (therefore making a defence of qualified privilege at least questionable, if not quite doubtful); and Ms. Rooney had communicated Rooney No. 1 to Ms. Flegg at the very least, and almost certainly others. By June 2016, Mr. Galloway had received a complete copy of the Boyd Report. The complaints set out in the Second Grievance Letter include complaints about the November Meeting and about Ms. Rooney contacting other students in November 2015. These are things that Mr. Galloway knew or ought to have known about.

- [518] I reject Mr. Galloway's assertion that, by October 26, 2016 (two years before the NCC was filed), he did not know, or could not reasonably ought to have known, in relation to all of A.B. No. 1, Maillard No. 1, Lyon Nos. 1 and 2 and Rooney No. 1, that: he had sustained loss or damage; loss or damage was caused or contributed to by each of these statements being made; and the acts were those of A.B., Professor Maillard, Professor Lyon and Ms. Rooney. His evidence is very much to the contrary.
- [519] Mr. Galloway certainly knew by January 2016 that A.B. was accusing him of rape, sexual assault and assault. Although he did not know the full scope of A.B.'s reports, well before October 26, 2016 Mr. Galloway knew that she had reported her claims to Professor Maillard, Professor Lyon and Ms. Rooney. He knew (or, based on the notes of the November Meeting, ought to have known) that her claims were repeated by Professor Maillard and Professor Lyon at the November Meeting. I do not agree with Mr. Galloway that the notes of the November Meeting did not sufficiently disclose Lyon No. 1 and Lyon No. 2 for the limitation period to begin to run before October 2016. Rather, in the discussion above of the November Meeting and Professor Lee's notes, I have identified where Lyon No. 1 and Lyon No. 2 can be located. Mr. Galloway reported in his July 13, 2018 National Post article that the documents he received in January 2016 as part of the Boyd Investigation - the signed complainant statements - disclosed that individuals had been told that he had choked and raped A.B. Mr. Galloway himself drew the direct link between A.B.'s claims, the communication of those claims to others, and what he asserts was the almost immediate and devastating harm to his reputation.
- [520] On the record before me, I conclude that all of the elements of a defamation claim were known to Mr. Galloway, in respect of A.B. No. 1, Maillard No. 1, Lyon Nos. 1 and 2 and Rooney No. 1, well before October 26, 2016.
- [156] The following excerpt from Mr. Galloway's affidavit #3, dated October 28, 2020, is relevant to each of the Limitation Applicants:
29. The only defamatory publications pleaded in my claim which I knew of before Oct 26, 2016 (the date two years prior to my filing of this action) were those which had been specifically revealed in the Boyd investigation and report. That report was issued April 25, 2016. Statements of evidence in the investigation came in from December 2015 forward and I saw some of them in early 2016.
30. There was one statement I did see in early 2016, by Erin Flegg, which included an indication that Rooney told her I had raped AB, but the other statements I saw during that time did not confirm that. A statement by Rooney about the same time only said AB had told her I "choked" her and "it had gotten physical in other ways".
31. I did not see a third statement of Rooney's evidence (a narrative by Madam Justice Boyd from her second interview of Rooney) until 2017. The significance of this is that this statement was the first one confirming Rooney had told others that I had "raped" AB.

32. I did not learn until 2017 or later that Rooney had told others such as Cara Woodruff that I raped AB. Nor did I learn until 2017 or later what specifically AB or Rooney had said or to Lyon and Maillard or that Lyon and Maillard repeated those accusations to others. Nor did I learn until 2017 or later that AB had also made those defamatory statements to others including Paul Krause, Sierra Gemma or the CBC. The latter I only learned very recently through document disclosure.
33. Also, I did not know the full circumstances of the meetings or conversations necessary to assess a potential claim regarding what was said at and around that meeting. I am still learning details as to what documents and information were conveyed at and around that meeting.

Preliminary issue: The suitability of limitation defences in PPPA applications

- [157] We first address a fundamental concern with the judge's reasoning on these issues. The resolution of this issue would largely avoid the need to address most of the submissions made by Mr. Galloway and the Limitation Applicants.
- [158] Our concern is that the resolution of the many limitation issues raised by Mr. Galloway and the Limitation Applicants was fundamentally inconsistent with the nature and purpose of the PPPA applications before the chambers judge. She erred in undertaking the task and ought to have left the limitation issues for trial. Whether the PPPA applications were suitable for determining those claims in which limitation defences were raised should have been addressed as a preliminary matter. Had that been done, much of the unnecessary complexity of the hearing below and on appeal could have been avoided.
- [159] To be fair, this issue does not appear to have been raised before the judge nor was it argued before us on appeal. Accordingly, we have, to the extent possible, addressed the appeal on the basis it was argued. Though this may appear to be inconsistent with the comments that follow, we do so necessarily and because of how these issues were framed. In doing so, we should not be taken to endorse the approach followed in this case.
- [160] Although the judge recognized she was not to take a "deep dive" into the evidence before her, she was of the view that, having regard to the issues raised, no such deep dive was required. This, in part, was because she considered the facts relevant to the limitation defences were "largely uncontested" (RFJ, at para. 516). The Limitation Applicants accept the judge's assertion that the relevant evidence was "largely uncontested" is not accurate. But they contend it was still open to the judge to make the findings of fact, and to draw the inferences, she did. This may have been true for a limited number of the defamatory publications she was required to address, but it was not so in most instances.
- [161] PPPA applications are intended to be brought early in the litigation process. As such, they are inappropriate for fact intensive inquiries that require a judge to make significant findings of credibility or draw inferences from competing primary facts (1704604 Ontario Ltd. v. Pointes Protection Association, 2018 ONCA 685 at para. 78 [Pointes CA], aff'd 2020 SCC

22). When such issues arise, a judge "must avoid taking a 'deep dive' into the ultimate merits of the claim under the guise of the much more limited merits analysis required by" s. 4 of the PPPA (Pointes CA, at para. 78). In other words, the merits inquiry will reflect the inherent "limits imposed by the nature of the record" (para. 77).

- [162] The Court in Pointes confirmed this concern. In that case, the Court compared an application brought under the CJA, the Ontario equivalent of the PPPA, to a summary judgment application, and observed PPPA applications are brought "at an earlier stage in the litigation process, with much more limited evidence and corresponding procedural limitations" and with "ultimate assessments of credibility and other questions requiring a deep dive into the evidence" deferred to a later stage of the action "where judicial powers of inquiry are broader and pleadings more fully developed" (Pointes, at para. 52). Though a chambers judge is not required to take "the [application] evidence at face value" or accept "bald allegations" as sufficient, they are required to be "acutely conscious of the stage in the litigation process at which [the PPPA application] is brought and, in assessing the [application], should be wary of turning [their] assessment into a de facto summary judgment motion, which would be insurmountable at this stage of the proceedings" (para. 52).
- [163] PPPA applications have inherent limits, including the nature of the record before the judge and the test to be applied. Such applications are also intended to be expedited, efficient and economical and to serve as a "screening procedure"; they are not meant to duplicate a trial at the outset of a proceeding (Park Lawn, at paras. 33, 38; Subway Franchise Systems of Canada Inc. v. Canadian Broadcasting Corporation, 2021 ONCA 26, at paras. 80-81, leave to appeal to SCC ref'd 39607 (15 July 2021); Bent, at para. 51).
- [164] These constraints stand in stark contrast to what is often required to address a limitation defence. Assessing a limitation defence, including when a limitation period begins to run, is "inherently a factual exercise" that generally requires "a full evidentiary foundation" (Aubichon v. Grafton, 2022 BCCA 77, at para. 42 and the authorities referred to therein). Thus, "[f]actfinding is required to assess whether a claim is discovered under the Limitations Act" (Toussaint v. Canada (Attorney General), 2023 ONCA 117, at para. 11). And, determining discoverability "is not a relatively straightforward factual issue" given that "[d]iscoverability cases do tend to be contentious and complex" (Mega International Commercial Bank (Canada) v. Yung, 2018 ONCA 429, at para. 88).
- [165] Furthermore, whether a plaintiff has exercised reasonable diligence is also an issue that is best addressed on a full evidentiary record and will depend on all the circumstances of the case (Burtch v. Barnes Estate (2006), 80 O.R. (3d) 365, 2006 CanLII 12955 (C.A.), at paras. 27, 29; Longo, at para. 42). It is a question that may require some consideration of an individual plaintiff's personal circumstances (Fibabanka A. Ş. v. Arslan, 2023 SKCA 13, at paras. 67-68; Lawless v. Anderson, 2011 ONCA 102, at paras. 22, 26, 28; Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited), 2017 ONCA 16, at para. 42, leave to appeal to SCC ref'd, 37473 (1 June 2017) [Crombie]; Vu v. Canada (Attorney General), 2021

ONCA 574, at paras. 47-49). Accordingly, in most instances, and certainly in this case, these inquiries should be addressed at trial on a full record.

- [166] In light of these realities, limitations defences will rarely be decided on an application to strike brought under R. 9-5(1)(a) of the Rules (Aubichon, at para. 41 and the authorities referred to therein; Toussaint, at para. 11 (addressing a similar provision in Ontario)).
- [167] Nor are limitation issues readily determined under a summary judgment application brought under R. 9-6 of the Rules, where the question is whether there is a "genuine issue of material fact requiring trial" (Canada (Attorney General) v. Lameman, 2008 SCC 14, at para. 11, citing Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 432, 1999 CanLII 664, at para. 27). Thus, on an application under R. 9-6, "if the evidence needs to be weighed and assessed, then the application is to be dismissed" (Beach Estate v. Beach, 2019 BCCA 277 at para. 67).
- [168] When a judge fails to engage properly with the test they are required to apply, for example, on a R. 9-6 application, they commit an error in principle (Sakwi Creek Hydro Limited Partnership v. Dickin, 2023 BCCA 188, at paras. 25-26 [Sakwi Creek]; Beach Estate, at paras. 67-68). A failure to apply the correct legal test is an error of law, subject to a standard of correctness (Housen, at para. 36).
- [169] In this case, in regards to A.B.'s defence of justification (i.e., that her statements that Mr. Galloway raped, sexually assaulted and physically assaulted her are true), the judge recognized she could not resolve "assessments of credibility and other questions requiring a deep dive into the evidence" (Pointes, at para. 52), stating that the "conflicts in the evidence are too deep, and will have to await ultimate assessments of credibility at trial" (RFJ, at para. 74; see also para. 649 where the judge declined to undertake "a fine analysis of Mr. Galloway's reputation and how it was affected by various events" because it "would clearly require a 'deep dive' into the evidence").
- [170] We consider that the judge also failed to appreciate that the limitation issues raised by the Limitation Applicants required her to engage in multiple fact-finding exercises involving both assessments of credibility and the need to draw inferences from competing facts. Properly analyzed, there were literally dozens of alleged defamatory publications before the judge that had to be considered. Accordingly, the judge should have deferred these inquiries to trial on a full record.

Did the judge misapply the test in *Novak v. Bond* as to discoverability?

- [171] Mr. Galloway contends the judge erred in principle when she determined the analytical framework that governed the postponement provision in s. 6(4) of the former Limitation Act, R.S.B.C. 1996, c. 266 (the "former Limitation Act") was no longer relevant to the interpretation of the discoverability criteria under s. 8 of the current Limitation Act.
- [172] Section 6(4) of the former Limitation Act provided:

Running of time postponed

- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
- (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[Emphasis added.]

[173] Section 8 of the Limitation Act provides:

General discovery rules

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[174] Mr. Galloway relied in part on Novak, at para. 84, where McLachlin J. (as she then was) for the majority said:

Interpreting "ought . . . to be able to bring an action" in the second sense permits full weight to be given to all the words of s. 6(4)(b). The running of the limitation period is therefore postponed when the plaintiff shows that practical considerations arising from his or her "circumstances" and "own interests" render him or her unable, as a reasonable person, to bring an action at the earlier prescribed date. "[O]ught . . . to be able to bring an action", interpreted thus, is very different from the normative "should bring an action". "Should" connotes subjective choice; "could" connotes practical ability. On the interpretation I have proposed, the court's central task is to identify the point at which the reasonable person who animates s. 6(4) would consider that the plaintiff, in light of his or her own interests and circumstances, could reasonably have brought an action. Section 6(4)(b) therefore refers to a time at which, in light of the plaintiff's particular situation, the bringing of a suit is reasonably possible, not when it would be ideal from the plaintiff's perspective to do so.

[Underlined emphasis in original; italicized emphasis added.]

See also Novak at paras. 39-40, 67, 85-86.

- [175] On the PPPA application, Mr. Galloway argued Novak established that whether a plaintiff "ought to bring an action" (the language under the former Limitation Act) required an inquiry into the plaintiff's personal circumstances. He further asserted that the language in s. 8(d) of the Limitation Act--which delays discovery of a claim until the plaintiff knows or reasonably ought to know that a court proceeding is an "appropriate means" to remedy the damage--was to the same effect and continued to engage the same or similar questions.
- [176] Mr. Galloway argued his personal circumstances were informed by numerous considerations. He submitted that while his grievance and arbitration proceedings with UBC were ongoing, he was under formal confidentiality obligations and that he had been cautioned to keep information arising from the arbitration confidential. He deposed that he was "... in a devastated emotional and medical state and was in no condition to commence proceedings ", and that he was working day and night from being involved in the period of arbitration proceedings (from January to late September 2018) and could not emotionally or practically deal with anything else (RFJ, at paras. 512-515). He contended that as a result of these considerations, he was not in a position to know, or reasonably ought to have known, that a court proceeding would be the appropriate means to remedy the damage caused by various defamatory statements, and therefore had not discovered the claim (para. 528).
- [177] The judge disagreed and said:
- [527] [T]he postponement provisions in s. 6(4) of the former Limitation Act are no longer relevant when interpreting s. 8 of the current Limitation Act. Based on the words used in s. 8(d), whether "a court proceeding would be an appropriate means" to seek to remedy damage, is assessed "having regard to the nature of the injury, loss or damage," not a plaintiff's personal circumstances[.] The word "appropriate" should be understood to mean legally appropriate, not personally appropriate or appropriate depending on personal circumstances.
- [178] Though the judge determined that the question of the ongoing relevance of Novak under the Limitation Act did not require "a deep dive" (para. 526), the question before her was one of first instance. The judge was required to engage, at least to some limited extent, in the analysis required for questions of statutory interpretation (see for example Aubichon, at para. 49).
- [179] We do not say the judge's conclusions were wrong. There is support for those conclusions in the jurisprudence of other provinces whose limitations legislation is, in material respects, similar or identical (see for example *Sosnowski v. MacEwen Petroleum Inc.*, 2019 ONCA 1005, at paras. 18-19, 27; *Saskatchewan (Highways and Infrastructure) v. Venture Construction Inc.*, 2020 SKCA 39, at paras. 63-66, leave to appeal to SCC ref'd 39204 (29 October 2020)).

- [180] On the other hand, Justice David Crerar and Peter Waldkirch, in their recent text *The Annotated British Columbia Limitation Act* (Toronto: Thomson Reuters, 2022) [Crerar et al.], have commented that while the Limitation Act "imposes a more objective and focused test as to when a claim is discovered, there is still sufficient subjectivity in the statutory inquiry to (put positively) allow leniency in appropriate cases while still (put negatively) allow disputes as to what a plaintiff reasonably ought to have known, and when" (at 133; see also 157-159).
- [181] We are of the view, and several of the appellants in their submissions appeared to accept, that the issue before the judge warranted further analysis and a "deeper dive" before this issue could be properly determined. It will be for another court to undertake that further analysis.
- [182] There was no need for the judge to resolve the principled question of whether a plaintiff's personal circumstances remain relevant under s. 8 of the Limitation Act. This is because she did not, in any event, accept Mr. Galloway's factual assertions as to why he had not commenced his action at an earlier date.
- [183] Thus, the judge did not accept that the confidentiality agreement Mr. Galloway signed during the Boyd Investigation, properly interpreted, prevented him from taking timely legal action (para. 529). She did not accept for various reasons that Mr. Galloway did not appreciate a court proceeding would be the appropriate means to remedy the damage caused by the defamatory statements (para. 528). Nor did she consider "that [Mr. Galloway] was justified in delaying filing court proceedings because an alternative dispute resolution process (arbitration) offered an adequate remedy" (para. 528).
- [184] Finally, the judge commented, relying on Novak at paras. 81 and 86, that "purely tactical concerns have no place in the analysis" of when a plaintiff could have reasonably discovered their claim (para. 379). Mr. Galloway contends there was no basis in the record for any such motivation to be ascribed to him. However, Mr. Galloway accepted, in one of his cross-examinations, that he understood he was "better positioned in [his] arbitration [against UBC] if [he] didn't also bring a civil claim". It was open to the judge to rely on and draw an inference from this admission.
- [185] Each of these findings was a finding of fact or of mixed fact and law and each is entitled to deference. We do not give effect to this ground of appeal. These various findings are dispositive of the first issue raised by Mr. Galloway for each of A.B. No. 1, Maillard No. 1, Lyon Nos. 1 and 2 and Rooney No. 1.

Did the judge err in treating A.B. No. 1, Maillard No. 1, Lyon Nos. 1 and 2, and Rooney No. 1 as a single cause of action?

- [186] The second ground raised asks whether a number of the publications (A.B. No. 1, Maillard No. 1, Lyon Nos. 1 and 2 and Rooney No. 1) should be treated as a single cause of action or whether each publication, repetition, and republication gives rise to a separate cause of action.
- [187] For example, this ground of appeal is most easily explained in relation to Ms. Rooney who, the record indicates, told some 20 different individuals, at different times, either that Mr. Galloway raped A.B. or that she was told by A.B. that Mr. Galloway had raped her. Whether that distinction is legally relevant is a separate issue for a different day.
- [188] Mr. Galloway contends that the judge erred in treating these 20 separate publications as a single cause of action rather than recognizing that each individual publication gave rise to a separate action.
- [189] The specific question of how the discoverability provisions in s. 8 of the Limitation Act, or the discoverability criteria in our Act's functional equivalent in other provinces such as Ontario, Alberta, Saskatchewan and New Brunswick, apply in circumstances of multiple defamatory publications by a defendant does not appear to have been considered. Indeed, there does not appear to have been any substantive consideration by this Court or by the appellate courts of other provinces of how the discoverability provisions should be applied in defamation actions. The issue has received relatively limited attention by the trial courts of these other provinces (see e.g., *Almalki v. Canada (A.G.)*, 2017 ONSC 3750; *Clancy v. Farid*, 2022 ONSC 947). As such, the issue Mr. Galloway raises requires consideration of several different bodies of law.

a) Defamation actions and their relationship to limitation periods

- [190] Every publication of defamatory words to a new person is a distinct publication and gives rise to a separate cause of action (*Brown on Defamation*, at § 17:49; A. Mullis and R. Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London: Sweet & Maxwell, 2013), at 19:14; L.N. Klar et al., *Remedies in Tort* (Toronto: Thompson Reuters, 2022) at § 6:21; *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, at para. 20).
- [191] The relationship of this principle to limitation periods is explained by Peter A. Downard in his text, *The Law of Libel in Canada*, 5th ed., (Toronto: LexisNexis, 2022) at § 5.05:

Each publication, repetition or republication of a defamatory statement constitutes a new publication, and thus a separate and distinct libel. Each publication will be subject to its own limitation period or notice period where any such period runs from the accrual of the cause of action. When an action based upon the initial publication of defamatory matter would be statute barred as a result of the passage of time, a subsequent republication of defamatory matter within the limitation period may allow an action to proceed.

See also *Carter*, at para. 20; *Brown on Defamation*, at § 17:50.

- [192] As referenced in the foregoing passage from Mr. Downard's text, a party can, in certain instances, be responsible not only for their own defamatory publication but also for the "republication" of that statement by others (Gatley, at 6.47; Brown on Defamation, at §17:50). The judge recognized this general principle and the circumstances in which it can arise, including where "the republication was the natural and probable result of the original publication" (RFJ, at paras. 345-346; see also Brown on Defamation, at § 7:8). In such cases, a plaintiff may sue a defendant for both their original defamatory publication as well as for its republication as two separate actions (Gatley, at 6.52).
- b) Section 8 of the Limitation Act and discoverability
- [193] The judge properly recognized that s. 8 of the Limitation Act governed the limitations defences raised by the Limitation Applicants.
- [194] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 [Grant Thornton], the issue was "the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim under s. 5(2) [of the Limitation of Actions Act, S.N.B. 2009, c. L-8.5 [NB Act]]" (para. 3).
- [195] The discoverability factors under s. 5(2) of the NB Act correspond to the discoverability criteria in s. 8 of the Limitation Act, with the exception of the "appropriate means" provision in s. 8(d).
- [196] The Court in *Grant Thornton* said that s. 5 of the NB Act operates against the backdrop of the common law discoverability rule, and that "[u]nder that rule, 'a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to been discovered by the plaintiff by the exercise of reasonable diligence'" (para. 29 and the authorities referred to therein). This rule is an "interpretive tool for construing limitation statutes" (para. 30). The Court in *Grant Thornton* held that ss. 5(1)(a) and 5(2) of the NB Act codified, rather than displaced the common law rule (paras. 32, 34) and that s. 5 of the NB Act was modelled on similar limitation provisions in Ontario, Saskatchewan and Alberta, all of which have been found to codify the common law rule (para. 35).
- [197] We observe that s. 3(1)(a)(iii) of Alberta's Limitations Act, R.S.A. 2000, c. L-12, s. 5(1)(a)(iv) of Ontario's Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, and s. 6(1)(d) of Saskatchewan's The Limitations Act, S.S. 2004, c. L-16.1 respectively all represent a variation of the "appropriate means" provision. On this basis, s. 8(d) is not a distinguishing feature of BC's Limitation Act, and the principles regarding discoverability as explained in *Grant Thornton* apply.
- [198] On the requisite degree of knowledge required under s. 5 of the NB Act, the Court in *Grant Thornton* held:

- "[A] claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. It follows from this standard that a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim" (para. 3).
- The "material facts are generally set out in the limitation statute This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period" (para. 43).
- Both direct and circumstantial evidence can be used to assess the plaintiff's state of knowledge; a plaintiff "will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise" (para. 44).
- The plaintiff must "be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known"; this asks "whether a plaintiff 'had all of the material facts necessary to determine that [they] had prima facie grounds for inferring [liability on the part of the defendant]' (Brown v. Wahl, 2015 ONCA 778, 128 O.R. (3d) 583 at para. 7 []); "[a] plausible inference is one which gives rise to a "permissible fact inference" (para. 45).
- Plausible inference means knowledge that is "more than mere suspicion or speculation" but less than "certainty of liability", "perfect knowledge", or "perfect certainty" (para. 46). This standard is less than the "knowledge of facts that confer a legally enforceable right to a judicial remedy, including knowledge of the constituent elements of a claim" (para. 47).
- "The standard cannot be so high as to make it possible for a plaintiff to acquire the requisite knowledge only through discovery or experts By the same token, the standard is not as low as the standard needed to ward off an application to strike a claim. What is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently" (para. 48; emphasis added).

[199] An element of the discoverability inquiry is that of "due" or "reasonable diligence". The requirement of due diligence pre-dates the Limitation Act (Crerar et al. at 152, citing Ryan v. Moore, 2005 SCC 38, at para. 2). Where the discoverability rule is engaged, the claimant must have exercised reasonable diligence in discovering the material facts upon which to found that action (Sakwi Creek, at para. 37; G. Mew, D. Rolph and D. Zacks, *The Law of Limitations*, 4th ed. (Toronto: LexisNexis Canada Inc., 2023) at § 3.02[2]).

c) Pleadings

[200] Each of the Limitation Applicants argues that aspects of Mr. Galloway's submissions, on this portion of his appeal or cross appeals, are not open to him because of deficiencies in his pleadings. As such, understanding the requirements of a proper defamation pleading is important because Grant Thornton establishes that the requisite knowledge of a plaintiff for discoverability purposes (i.e., of the material facts from which a plausible inference of

liability can be established) is higher than the knowledge required of a plaintiff on an application to strike their pleadings (para. 48).

[201] The general purpose served by proper pleadings is well-established. Pleadings crystallize the issues between the parties and allow them to understand the case they have to meet. They define the ambit of document disclosure and examinations for discovery. They assist the court with the pre-trial management of a case as well as with the conduct of a trial (Weaver, at para. 63).

[202] Pleadings in defamation cases are "exceptionally important" and exacting. They face "enhanced judicial scrutiny" (Weaver, at para. 64; see also *Caron v. A.*, 2015 BCCA 47, at paras. 58-59). In *Brown on Defamation*, at § 19:2, the author states:

Pleadings in an action for defamation are of utmost importance. They play a disproportionate role in the conduct of the case, perhaps more so than in any other action. Traditionally, courts have required the utmost strictness and formality, more so than in any other cases. They are subject to a heightened pleading standard. This was especially true in the early development of the common law of libel and slander when the courts were particularly technical in examining the pleadings. It remains the case that defamation pleadings attract a more critical evaluation than pleadings in other actions, and require a more detailed outline of material facts. They are held to a higher standard with regard to the precision with which the material facts must be pleaded.

[203] The ongoing importance of pleadings in defamation cases, as well as the recognition that some greater flexibility may be appropriate in a plaintiff's initial pleadings, has been recognized and explained (see e.g., *Weaver* at paras. 64-65; *The Catalyst Capital Group Inc. v. Veritas Investment Research Corporation*, 2017 ONCA 85, at paras. 22-29 [Catalyst]; *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, at paras. 34, 38, 40, 42-44 [PMC York Properties], leave to appeal to SCC ref'd 40445 (20 April 2023)).

[204] A proper pleading in a defamation case ultimately requires the plaintiff to plead the defamatory words uttered or published by the defendant as those words are material facts (*Gatley*, at 26.11, 26.13). The plaintiff is also required to identify the occasion when the words were spoken or published and to whom the words were published (*Gatley*, at 26.5; *Brown on Defamation*, at § 19:4; Hon. Mr. Justice Blair et al., eds., *Bullen & Leake & Jacob's Precedents of Pleadings*, 17th ed., (London, UK: Thomson Reuter, 2012) [Bullen & Leake] at 37-17; *Catalyst*, at para. 23).

[205] However, in *Weaver*, this Court explained that "courts have applied greater flexibility when analysing defamation pleadings, at least in the early stages of a proceeding. While the need for enhanced scrutiny and precise pleadings remains, it is recognized that plaintiffs may be unable to provide full particulars of allegations prior to discovery" (para. 65, emphasis added).

[206] In *Catalyst* and *PMC York Properties*, the defendants brought applications to strike on the basis that the plaintiff's defamation pleadings were deficient and the plaintiff had engaged in a "fishing expedition". Both decisions relied on *Magnotta Winery Ltd. v. Ziraldo*, 25 O.R. (3d) 575, 1995 CanLII 7122 (Gen. Div.)--another case where the defendant brought an application to strike on the basis the plaintiff's defamation pleading was inadequate. These cases are useful because they address the threshold knowledge requirements of a plaintiff on an application to strike, referred to in *Grant Thornton*, in the specific context of a defamation action.

[207] The court in *Catalyst*, quoting from *Magnotta Winery*, said:

[28] On these authorities, it is open to the court in a limited set of circumstances to permit a plaintiff to proceed with a defamation action in spite of an inability to state with certainty at the pleading stage the precise words published by the defendant. The plaintiff must show:

- that he has pleaded all of the particulars available to him with the exercise of reasonable diligence;
- that he is proceeding in good faith with a *prima facie* case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
- that the coherent body of fact of which he does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff;
- that the exact words are not in his knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his disposal.

[Emphasis added.]

[208] The court developed these concepts further in *PMC York Properties* and said:

[43] At para. 50 [of *Catalyst*], this court reiterated and summarized what is generally meant by a "prima facie case" by contrasting it with what it is not, namely, "a fishing expedition". Putting it another way, the court instructed that claimants must proceed in good faith with "a prima facie case" that the court defined as "a 'coherent body of fact' of which they do have knowledge"

[44] Accordingly, when applicable, the modern flexible approach does not always and necessarily require exact particulars of the alleged defamation, namely, the exact words published, the exact dates and times of publication, or the exact names of the recipients of the defamatory words. Rather, pleading the gist of the defamatory words, specifying the timespan of publication, and identifying without naming the specific recipients of the defamatory words may be sufficient at the pleadings stage, so long as claimants proceed in

good faith, plead all particulars within their knowledge and a coherent body of facts, such that the defendants know the case they have to meet.

[Original emphasis omitted; emphasis in underline added.]

[209] A further pleadings point is relevant. It may be appropriate, as the foregoing statements from PMC York Properties recognize, for a plaintiff to plead the defendant made a defamatory statement to one or more named individuals as well as to "others" or to "persons unknown" (see also *Catalyst*, at paras. 20, 29; *Gatley*, at 26.7; *Bullen & Leake*, at 37-17).

[210] This form of pleading is, however, subject to further stringent requirements. The court in *Guergis v. Novak*, 2013 ONCA 449 said:

[52] The right to plead that a defamatory statement was made to certain unnamed persons is restricted to the case where a plaintiff has made out a *prima facie* case that the statement was made to a named person and has produced uncontradicted evidence of publication to other persons[.]

[Emphasis added.]

[211] This Court in *Wesson v. Campbell River (District)*, 63 B.C.L.R. 327, 1985 CanLII 479 (C.A.) said at 330:

The circumstances in which particulars may be required of a pleading such as the statement of claim in this case is referred to in *Gatley on Libel and Slander*, 8th ed. (1981), at para. 1067, appearing at p. 440 of the text. That paragraph reads:

1067. Publication to persons unknown. If the plaintiff knows or believes that the words have been published on more occasions and to more persons than he is at present aware of, he should state the names of the persons to whom he knows the words were published, and continue: "The plaintiff believes that the said words were also published to some other persons whom he cannot at present specify, but he will rely upon the publication thereof to every person to whom he may discover the same to have been published." But unless the plaintiff can show clearly that there have been other publications, the court will order particulars of the names and addresses of such other persons, or in default that the allegation be struck out; nor will the court postpone the giving of such particulars until after discovery and interrogatories. The plaintiff may not interrogate the defendant in order to discover instances of publication of which he is unable to give particulars, unless he can show by uncontradicted affidavit that there has been such publication.

[Emphasis added.]

See also *Gatley*, at 26.7.

[212] The strictness of the foregoing principles does not appear to have been ameliorated by the "modern flexible approach" discussed in the authorities to which we have referred. Indeed, the court in Catalyst endorsed the foregoing principles, except in the context of an application to strike where evidence is not admissible (paras. 29, 39-45).

d) Section 6 of the PPPA

[213] With respect to amending pleadings, s. 6 of the PPPA states:

Unless the court orders otherwise, a respondent may not amend the respondent's pleadings

- (a) in order to prevent or avoid a dismissal order under section 4, or
- (b) in order to continue the proceeding if the proceeding is dismissed.

[214] Relying on s. 6, A.B., Professor Maillard and Professor Lyon argue that on the PPPA application before the judge, Mr. Galloway was restricted to his Amended Notice of Civil Claim ("ANOC"). They say it was not open to him to rely on further examples of defamatory publications that became apparent as a result of court-ordered document disclosures (under s. 9(1) of the PPPA and R. 22-1(4)(c) of the Rules: see *Galloway v. A.B.*, 2020 BCCA 106, at paras. 39, 46-47, 51, leave to appeal to SCC ref'd, 39203 (13 August 2020) [Galloway CA]), and as a result of cross-examinations on affidavits (PPPA, s. 9(5)), as there were no specific references to such further publications in the ANOC. They argue that allowing Mr. Galloway to rely on such further defamatory publications on the PPPA application would circumvent the purpose of s. 6.

[215] It is apparent that there is tension between this submission, the recognition in Catalyst and PMC York Properties that some flexibility in scrutinizing a plaintiff's early defamation pleadings is necessary, as well as the purposes of a PPPA application. Catalyst and PMC York Properties recognize that a plaintiff who can at the outset plead a coherent body of facts will generally be permitted, after document disclosure and examinations for discovery, to amend their pleadings and include particulars or material facts not previously available to them. However, an application under s. 4 of the PPPA denies a plaintiff any pre-trial discovery and only potentially allows for some level of document disclosure on application (Galloway CA, at para. 51).

[216] We reiterate that a judge is required to be "acutely conscious" of the early stage at which many PPPA applications are brought and should defer some questions to a later stage in the litigation process where "pleadings [will be] more fully developed" (Pointes, at para. 52).

[217] We also reiterate that an underlying purpose of s. 4 of the PPPA is to screen out lawsuits that are often brought tactically or to silence opposing viewpoints (Hansman, at para. 46; Hobbs, at para. 6; Park Lawn, at para. 33). However, the submission made on behalf of A.B., Professor Maillard and Professor Lyon is divorced from this purpose. It would instead transform the PPPA into a strategic tool that insulates a defendant from any consequence for wrongdoing disclosed during the course of the PPPA application.

- [218] We emphasize the circumstances of this case because Mr. Galloway pleaded in the ANOCC that each of the Limitation Applicants had made various defamatory statements to named individuals and to "others", or to "several colleagues", or to "others known" to the defendants. The names of the individuals to whom various defamatory publications were made, and which were disclosed during the course of the application before the judge, were, in a sense, in the nature of particulars. There was no change in the theory of Mr. Galloway's case or in the basic nature of the claim that was advanced.
- [219] This is to be compared to, for example, *Platnick v. Bent* (No. 2), 2016 ONSC 7474, which Professors Maillard and Lyon rely on, where the plaintiff sought to amend his statement of claim materially after the close of argument.
- [220] We do not accept the suggestion by counsel for A.B. (made for the first time in reply submissions at the appeal) that for a plaintiff to be able to rely on wrongdoing that is disclosed during a s. 4 application, they must apply to amend their pleadings under s. 6. While there will be instances where such an application is appropriate, such applications have the prospect of further delaying or derailing the orderly progress of an action. There is little doubt that in this case, if Mr. Galloway had made an application to amend his pleadings, that application would likely have been opposed and that result, regardless of outcome, would have been appealed. In the case of the document disclosure orders that were made, and which A.B. then appealed, and then sought leave to further appeal, the progress of the PPPA application was delayed by some 12 months (see *Galloway v. A.B.*, 2019 BCSC 1417; *Galloway CA*, leave to appeal to SCC ref'd, 39203 (14 August 2020)).
- [221] Finally, in support of their argument that Mr. Galloway is restricted to his ANOCC, the Limitation Applicants describe s. 6 as "freezing" the pleadings by preventing any amendments. With respect, the text of s. 6 is more nuanced. First, subsection (a) provides that a respondent is not to amend their pleadings where the purpose of doing so is "to prevent or avoid a dismissal order under section 4". As explained above, had Mr. Galloway brought an amendment application to include further material facts regarding additional defamatory statements, his apparent purpose in doing so would have been to particularize the claim. Second, s. 6 provides that a respondent may not amend their pleadings to prevent a dismissal order "[u]nless the court orders otherwise". This clearly grants a measure of discretion to a judge to allow amendments to pleadings in appropriate circumstances (see *Platnick*, at para. 31; *Hosseini v. Gharagozloo*, 2023 ONSC 2469, at para. 118).

e) Summary

- [222] These various bodies of law establish the following framework. Relying on the "modern and flexible approach", described in *Magnotta Winery*, *Catalyst*, *Weaver* and *PMC York Properties*, a plaintiff who files a defamation claim, and who wishes to defend an application to strike, is required, at a minimum, to establish that they are proceeding in good faith with a *prima facie* case and that they are not engaging in a "fishing expedition".

This will normally require "at least" pleading "a coherent body of fact surrounding the incident such as time, place, speaker and audience" (Catalyst, at para. 28, relying on Magnotta Winery, at paras. 583-584), though the pleading will "not always and necessarily require exact particulars" of these matters (PMC York Properties, at para. 44). The coherent body of fact of which the plaintiff does have knowledge must also show "not only that there was an utterance or writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff" (Catalyst, at para. 28).

- [223] The standard of knowledge, actual or constructive, required of a plaintiff for discoverability purposes under s. 8 of the Limitation Act is still somewhat higher than this (Grant Thornton, at para. 48).
- [224] Each publication, repetition or republication of a defamatory statement, subject to certain conditions, gives rise to a separate cause of action (Carter, at para. 20). The date on which a defamatory statement is repeated or republished is the date on which the limitation period for that statement and cause of action begins to run (para. 20).
- [225] Section 6 of the PPPA does not interfere with the ability of a plaintiff to rely on additional publications or republications of a defamatory statement that are discovered during the PPPA application, when such additional publications are consistent with the plaintiff's initial claim.
- [226] When a pleading alleges a defendant made a defamatory statement to named individuals and "others", the plaintiff, other than on an application to strike, must be in a position to both make out a prima facie case and adduce uncontradicted evidence that the defamatory statement was made to third parties (Guergis, at para. 52; Catalyst, at paras. 39-45).

Did the judge err in treating A.B. No. 1 as a single cause of action?

- [227] We begin with the limitation issues raised in relation to A.B. No. 1.
- [228] Mr. Galloway contends, as noted earlier, the judge erred in treating A.B. No. 1 as a single cause of action. He asserts that the judge made an error in principle when she "started the limitation clock from the time Galloway knew of the first instances of A.B.'s utterance of her rape allegation".
- [229] Mr. Galloway's ANOCC contains the following pleadings relevant to A.B.:
9. The plaintiff was defamed by false accusations of rape, sexual assault and physical assault. The defamation began with false statements by A.B. to several other defendants, who recklessly repeated and asserted the truth of the accusations both within UBC and publicly on the internet, including on Twitter. The defendants have continued to publish the allegations

12. On or about November 12, 2015, A.B. verbally published defamatory statements to the defendants Keith Maillard, Annabel Lyon, Chelsea Rooney and others known to A.B., saying that the plaintiff had "raped", "sexually assaulted" and "physically assaulted" her (A.B. Defamation 1).
15. A.B. actively encouraged Keith Maillard, Annabel Lyon, and Chelsea Rooney to repeat A.B. Defamation 1 and find others who would support or repeat it, and as such, each of these defendants was part of a common design and jointly liable for Maillard Defamation 1, Lyon Defamations 1 and 2 and the Rooney Defamations set forth below.
37. The plaintiff did not become aware of A.B. Defamation 1, Maillard Defamation 1, Lyon Defamations 1 and 2 and Rooney Defamation 1 until the spring of 2016
103. In respect of all defamatory words herein, the defendants sought and obtained wide publication and re-publication of their defamatory publications as the intended or foreseeable consequence of the said publications, and they are all liable for all republications.

[230] The following paragraphs from A.B.'s Response to Amended Civil Claim are also relevant:

5. the claim for the words complained of at paragraph 12 of Part I of the Amended Notice of Civil Claim is statute-barred
6. The words complained of at paragraph 15 of Part I of the Amended Notice of Civil Claim ("Republications") are denied...
15. The Plaintiff sexually assaulted the Defendant on multiple occasions between the fall of 2010 and August 2013 (the "Assaults").
21. on or about November 12, 2015, the Defendant telephoned Professor Maillard and confidentially disclosed the Assaults to him.
23. On or about November 12 or 13, 2015, the Defendant confidentially disclosed to Chelsea Rooney that the Defendant had been sexually assaulted by the Plaintiff
25. On or about November 15, 2015, the Defendant contacted Annabel Lyon and disclosed the Assaults to Professor Lyon

[231] The judge, as noted earlier, developed a detailed chronology that ran from November 11, 2015 to November 15, 2015, where she described the activities of A.B., what A.B. told others about her rape and assault allegations, and what Professors Maillard and Lyon then told others (paras. 99-143).

[232] On November 11 or 12, A.B. told Professor Maillard that Mr. Galloway had "sexually assaulted and sexually harassed her, and physically assaulted her by choking her" (para. 109); and, she told Ms. Rooney that "she was a rape victim and that Mr. Galloway was the perpetrator" (para. 112). On or about November 13, A.B. told CBC producer Ms. Syed that Mr. Galloway had sexually and physically assaulted her (para. 117). On November 14, she

sent an email to Professor Maillard repeating the sexual assault allegation (paras. 125-126). That same day, Professor Maillard told Professor Lyon that A.B. alleged Mr. Galloway had sexually assaulted her (para. 126). On November 15, A.B. sent Professor Maillard a lengthy email that repeated the rape allegations (para. 128). She then forwarded that same statement to Ms. Rooney (para. 129). On November 15, A.B. told Professor Lyon that Mr. Galloway had sexually assaulted her (para. 130). Throughout that day, A.B. and Professor Lyon exchanged various emails, with Professor Maillard being copied on most of them (para. 136). One such email attached A.B.'s transcription of some text messages, which started with the statement "Steve sent me the text messages below to me several weeks before he choked me" (para. 138). On November 15, A.B. emailed the CBC Document, repeating the rape allegation, to Professors Maillard and Lyon (paras. 139-140).

- [233] At the November 15 faculty meeting, Professor Maillard repeated A.B.'s assertion that Mr. Galloway had raped her. The CBC Document, and A.B.'s rape allegation within it, was read, and thereby republished, by Professor Lyon to the faculty members who attended the November Meeting (para. 157).
- [234] Each of these instances is a separate publication of A.B. No. 1 and each gives rise, in concept, to a separate cause of action against A.B. She does not argue otherwise.
- [235] Mr. Galloway further contends, and the transcript of A.B.'s cross-examination indicates, that apart from Professors Maillard and Lyon and Ms. Rooney, A.B. repeated A.B. No. 1 to Dr. Gray, Ms. Kirchmeier, Dr. Smalec, Professor Krause, family members, and Ms. Syed. The judge recognized A.B. communicated A.B. No. 1 to Ms. Kirchmeier and Dr. Smalec (paras. 34, 309). Many of these individuals are alleged to have then repeated or republished A.B. No. 1. Ms. Rooney, as noted earlier, is alleged to have done so to some 20 further individuals. Nine of these persons were named in an email disclosed during this litigation and 11 others were named during Ms. Rooney's cross-examination. In that cross-examination, Ms. Rooney accepts she likely repeated what A.B. had told her to each person to whom she spoke. A.B. is, in concept, liable for all such republications.
- [236] The judge failed to address how s. 8 of the Limitation Act was engaged by most of these communications from A.B. to others, and the subsequent repetition or republication of A.B. No. 1, by individuals to whom she spoke or wrote, and then to other persons.
- [237] Professor Lee's notes (which Mr. Galloway accepts he received during the Boyd Investigation) provided a basis from which the judge could find or infer that Mr. Galloway knew or ought to have known that A.B. expressed A.B. No. 1, at some point, to Professors Maillard, Lyon, and Ms. Rooney, and that A.B. No. 1 was then republished at the November Meeting (para. 517). A.B.'s Response to Amended Civil Claim admitted these initial publications of A.B. No. 1 to Professors Maillard and Lyon and Ms. Rooney. Ms. Flegg's statement (which Mr. Galloway, in his third affidavit, admits he received in early 2016) provided the judge with evidence that Ms. Rooney communicated A.B. No. 1 to Ms. Flegg.

- [238] Though the judge had earlier identified some of these publications (para. 414), she did not address any of them when she considered the application of s. 8 of the Limitation Act to A.B. No. 1. Furthermore, as we have said, though the judge asserted she made her findings on largely uncontested facts (para. 516), the Limitation Applicants accept that this was not the case. Instead, Mr. Galloway deposed that he was unaware of these publications by A.B. and it does not appear from the record before us that he was cross-examined on this aspect of his affidavit.
- [239] Still further, many of the alleged statements, if they were republications of A.B. No. 1, were published within the two-year limitation period under s. 6 of the Limitation Act: Gray Nos. 1-3 were published on November 15, 2016 (para. 452); Kirchmeier No. 1 was published February 6, 2018 (paras. 34, 275); and Smalec No. 1 was published on August 3, 2018 (ANOC, at para. 66). If these statements were republications, then the limitation period for such republications of A.B. No. 1 would not have expired and A.B. would potentially remain liable for them.

Analysis

- [240] Respectfully, the judge's conclusions give rise to several difficulties. There is no apparent basis in the record from which she could find or infer that by October 26, 2016, Mr. Galloway was aware, or ought to have been aware, of either A.B.'s communication of A.B. No. 1 to a number of the individuals to whom she spoke or wrote on one or more occasions, or of the subsequent republication of A.B. No. 1 by individuals A.B. had spoken with, and then still on to others. We will return to aspects of this issue when we address Rooney No. 1.
- [241] We are of the view that the judge made several extricable errors of principle. She failed to recognize that each of the many publications, repetitions or republications of A.B. No. 1 that were revealed during the document disclosure and cross-examination process, but that were unknown to Mr. Galloway, actually or constructively, gave rise to a separate cause of action. As a result, she failed to consider and apply the conjunctive requirements of s. 8 of the Limitation Act in relation to the particular publication, repetition or republication.
- [242] A.B. argues that the judge identified that a defendant can, in certain circumstances, be held liable for the repetition or republication of a defamatory statement (paras. 345-347, 414). She argues this signals the judge understood these principles when she addressed s. 8 of the Limitation Act.
- [243] We recognize that a judge's reasons are to be read generously, functionally and contextually, and in light of the record (R. v. G.F., 2021 SCC 20 at paras. 69, 70; R. v. Mohsenipour, 2023 BCCA 6, at paras. 35-39). And we recognize that, for example, the judge noted that "A.B. No. 1 was repeated at the November Meeting" (para. 517) and that she said, "[f]or the purpose only of the PPPA Applications, I find that A.B. is responsible for the republication of her claims against Mr. Galloway at the November Meeting" (para. 538).

- [244] However, it is inescapable that the judge failed to address how s. 8 of the Limitation Act applied to the numerous separate causes of action against A.B. that potentially exist by virtue of her publication of A.B. No. 1 to others and how it applied to the repetition or republication of A.B. No. 1 by others. As discussed, the judge also erred in failing to consider that A.B. potentially remained liable for republications of A.B. No. 1 that occurred after October 26, 2016.
- [245] Finally, we return to the point we made at the outset. The judge acknowledged she was not to engage in a "deep dive" of the evidence (paras. 55 and 516). She was of the view that the exercise before her did not require a "deep dive" and that the relevant evidence before her was "largely uncontested": (para. 516). Respectfully, she failed to apprehend what would be required of a judge to resolve these issues. A judge would be required to address each publication, repetition or republication of A.B. No. 1 as a separate action. This would require a judge to assemble the evidence in relation to each such publication, make necessary findings of credibility based on the affidavits and cross-examinations, draw necessary inferences from the evidence, and apply s. 8 of the Limitation Act to these findings to consider whether Mr. Galloway knew or ought constructively to have known of each publication, repetition or replication. A judge would also be required to address whether Mr. Galloway, based on his suspicions, exercised reasonable diligence in looking into A.B.'s activities and statements. Though the evidence before the judge was straightforward and uncontested for some limited publications or republications of A.B. No. 1, that was not so in most other instances. The exercise a judge would have to undertake is ill-suited to the context of a PPPA application. The determination of these issues should have been deferred to trial.
- [246] A.B.'s primary contention is that Mr. Galloway's pleadings were deficient in multiple respects. Professors Maillard and Lyon and Ms. Rooney repeat many of the same issues. We will address most of these issues in relation to A.B. and do not intend to repeat those same points when advanced by Professors Maillard and Lyon or Ms. Rooney.
- [247] First, the application before the judge was not about the sufficiency of the ANOCC. A.B., Professors Maillard or Lyon, or Ms. Rooney did not bring an application to strike or otherwise challenge the ANOCC. Had they brought an application to strike under R. 9-5(1) (a), they would have had to overcome the "plain and obvious" or "no reasonable prospect of success" standard applicable to that Rule, as well as the reality that amendments are generously granted on such applications (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at 979, 1990 CanLII 90; 0848052 B.C. Ltd. v. 0782484 B.C. Ltd., 2023 BCCA 95, at para. 64). Applications to strike brought under R. 9-5(1)(b), (c) and (d) face other challenges.
- [248] The appropriate way to challenge the adequacy of a plaintiff's pleadings is through an application to strike. In *Kim v. Norton Rose Fulbright Canada LLP*, 2023 BCSC 1251, the judge declined to join an application to strike with a s. 4 PPPA application, correctly noting that each required the application of different legal tests and legal standards (paras. 161-64,

167-68). In *Boyer v. Callidus Capital Corporation*, 2023 ONCA 233, the court in obiter at paras. 58-62, concluded that a PPPA-equivalent application and an application to strike that were both filed by the respondent ought to have been heard together for the sake of economy and efficiency. Both cases demonstrate that a challenge regarding the adequacy of pleadings is best brought as a separate application rather than being subsumed by a PPPA application. As observed in *Pointes*, the PPPA was not intended to replace other procedural tools that are available to litigants under the Rules (para. 51).

- [249] Furthermore, some of the concerns that the Limitation Applicants now raise with Mr. Galloway's pleadings were expressly addressed by the judge (paras. 393-402). No issue is raised on the appeal with respect to those determinations.
- [250] We do not agree with A.B.'s contention that Mr. Galloway was required to plead expressly that each publication, repetition or republication of A.B. No. 1 gave rise to a separate cause of action. A plaintiff is required to plead the material facts that are necessary to make out a cause of action and a concise summary of the legal basis for the relief sought. A plaintiff is not required to plead "the legal result that follows from the facts" (F.M. Irvine, ed., *McLachlin & Taylor, British Columbia Practice*, 3rd ed., (Markham, Ont.: LexisNexis Canada, 2006) (loose-leaf release 85-9/2022) at 3-1(2) and 3-7(1); Rules, R. 3-7(9); *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, at para. 44). The legal proposition that each publication, repetition or republication of a defamatory statement constitutes a separate cause of action is well understood and well-established. As discussed, pleadings give opposing parties fair notice of the case to be met (*Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, at para. 43). There was no prospect that A.B. or, more importantly, her counsel would not appreciate the case they had to meet.
- [251] A.B. argues that Mr. Galloway failed to plead that she "made any publications after November 12, 2015". To be precise, the ANOCC at para. 12 pleaded that A.B. published A.B. No. 1 "[o]n or about November 12, 2015 ". In A.B.'s Response to Amended Civil Claim, she admitted disclosing what is, in essence, A.B. No. 1 to Professors Maillard and Lyon and Ms. Rooney between November 12 and 15. Thus, A.B. understood Mr. Galloway's pleading was not limited to publications that occurred on a single day. Additional publications of A.B. No. 1 to Professors Maillard and Lyon and Ms. Rooney, as well as to others, were only discovered through the subsequent disclosure of documents and the cross-examinations of A.B. and others. Some of those publications, for example to Ms. Syed, took place in this same November 12 time frame. The dates of other publications are not clear from the record. Other publications, for example to Dr. Smalec, occurred well after the November 12 time frame.
- [252] A.B. and Professors Maillard and Lyon similarly rely on the various technical requirements of a defamation pleading we described earlier, without recognizing the "modern, flexible approach" described in *Weaver, Catalyst and PMC York Properties* for a plaintiff's initial pleading that predates discovery. For example, A.B. argues that proper defamation

pleadings require material facts going to "the publication made by each defendant, the words published by that defendant, which plaintiff was defamed by the publication, the time and place of the publication, the manner of the publication, and to whom the publication was made" (citing *Christian Advocacy Society of Greater Vancouver v. Arthur*, 2013 BCSC 1542 at paras. 107-110 [Arthur]). However, Arthur at paras. 111-112 recognizes some flexibility in these principles.

- [253] The reality is that the parties, on the basis of the ANOCC, were ordered to produce relevant records in their possession and they undertook cross-examinations on the affidavits that were filed. The record before the judge contained evidence of the publications, repetitions and republications of A.B. No. 1. The judge saw fit, in her chronology and elsewhere, to address numerous particulars of the defamatory publication defined in the ANOCC and that were only discovered after the commencement of the action.
- [254] We also do not accept A.B.'s suggestion that the judge intentionally limited her analysis to the finite subset of publications or republications of A.B. No. 1 that were specifically identified in the ANOCC. There is nothing in her reasons that suggests that. Indeed, the judge's reasons went well beyond these specific publications.
- [255] What is both important and telling is that A.B. does not suggest Mr. Galloway knew or ought to have known of the many instances we have identified where A.B. No. 1 appears to have been published, repeated or republished. It is this central inquiry that underlies the discoverability criteria in s. 8 of the Limitation Act and which the judge was required to consider for each publication, repetition and republication of A.B. No. 1.
- [256] Mr. Galloway's cross appeal is allowed, except for A.B.'s initial publication of A.B. No. 1 to Professor Maillard, Professor Lyon and Ms. Rooney and the republication of A.B. No. 1 by Professors Maillard and Lyon at the November Meeting. Those specific publications remain statute barred.
- [257] Whether any other publications or republications of A.B. No. 1, that were disclosed during the PPPA application or that may emerge during discovery, are statute barred will be a matter for trial. The trial judge will likely be faced with a different evidentiary record.

Did the judge err in treating Maillard No. 1 as a single cause of action?

- [258] The same error arises with respect to the judge treating Maillard No. 1 as a single cause of action.

- [259] The ANOCC sets out the alleged statements that form the basis of Maillard No. 1:

19. On or about November 13, 2015 Keith Maillard (Maillard) spoke the following false and defamatory words, or substantially similar words to several colleagues of the plaintiff in the UBC Creative Writing Department:

- a) "Stephen Galloway raped A.B."

- b) "Stephen Galloway sexually assaulted A.B."
- c) "Stephen Galloway physically assaulted A.B."

(Maillard Defamation 1)

- 20. On or about November 15, 2015, Maillard repeated Maillard Defamation 1 to all tenured and tenure-track faculty in the UBC Creative Writing Department.
- 22. Between November 12 and 18, 2015, the defendant Maillard further defamed the plaintiff by verbally repeating Maillard Defamation 1 to Chelsea Rooney and others known to him.

[260] What follows is meant to illustrate the level of detail required to address each alleged defamatory expression properly and to again show how ill-suited the PPPA application was to this intensive fact-finding exercise. These are but a few of the relevant pieces of evidence in the record.

[261] The judge developed the detailed chronology of A.B.'s communication of A.B. No.1 to various individuals and the republication of A.B. No.1 by some of those individuals to others. This included Professor Maillard telling Professor Lyon, on November 14, that Mr. Galloway had sexually assaulted A.B. (RFJ, at para. 126). It also appears to include, based on the judge's reasons, a phone call between Professor Maillard and a colleague, Professor Svendsen, that is referenced in an email sent by Professor Maillard to A.B. on November 14 in which Professor Maillard said (para. 127):

Here I am on Gmail. [Professor Svendsen] called me, and we had a long talk. She pointed out that even though I [Maillard] believe you, that means that all she can believe absolutely is that [Maillard] believes you. She was speaking hypothetically (she's good at that). Her first reaction was to believe you -- although, as she says, she was getting the story second hand. Now she wants, as she says, any evidence at all. Anything that would help.

[262] Both these publications by Professor Maillard appear to be publications of Maillard No. 1.

[263] Mr. Galloway also asserts that the record indicates Professor Maillard repeated Maillard No. 1 to Ms. Rooney and to Professor Andreas Schroeder.

[264] The judge appreciated that Maillard No. 1 was alleged to have been published both before and at the November Meeting and earlier in her reasons she said:

[425] In my opinion, the record supports the conclusion that Professor Maillard spoke the words alleged (or word substantially similar) to Professor Lyon in advance of the November Meeting, and also to the persons who attended that Meeting. At the Meeting, Professor Maillard communicated his belief that what he had been told by A.B. concerning Mr. Galloway was true. By his words, Professor Maillard asserted that Mr. Galloway was guilty of criminal conduct. Accordingly, I conclude that all the elements of a defamation claim have been established with respect to Maillard No. 1, and there are grounds to believe that the claim has substantial merit.

- [265] There is, however, no direct recognition in the salient portions of the judge's reasons that each publication of Maillard No. 1 gave rise to a separate cause of action and that each had to be separately considered in the context of s. 8 of the Limitation Act. Indeed, the language used by the judge at para. 425 suggests she treated these various publications as a single cause of action. The judge was, however, required to consider whether Mr. Galloway was, or should have been, aware of the separate publications of Maillard No. 1 to each of Professors Lyon and Svendsen prior to the November Meeting.
- [266] The judge did not address either of these earlier publications in the context of the limitation defence advanced by Professor Maillard. Thus, when the judge turned to address that limitation defence, she focused exclusively on Mr. Galloway's knowledge of Professor Maillard's statements at the November Meeting:
- "Maillard No. 1...had been communicated (or "published") to persons at the November Meeting. These are things that Mr. Galloway knew or ought to have known about" (para. 517); and,
 - "well before October 26, 2016 Mr. Galloway knew that [A.B.] had reported her claims to Professor Maillard, Professor Lyon and Ms. Rooney. He knew (or, based on the notes of the November Meeting, ought to have known) that her claims were repeated by Professor Maillard at the November Meeting" (para. 519).
- [267] There is no finding that, prior to October 26, 2016, Mr. Galloway knew or ought to have known of the earlier publications to Professors Lyon and Svendsen. The publication of Maillard No. 1 to Professor Svendsen was apparently revealed in an email that was produced under court order during the litigation. The publication of Maillard No. 1 to Professor Lyon was revealed in the cross-examination of Professor Lyon.
- [268] Mr. Galloway's allegation of an earlier publication of Maillard No. 1 by Professor Maillard to Ms. Rooney (ANOC, at para. 22) stands on a different footing. The judge, early in her chronology, said:
- [123] As Professor Maillard recalled, without him disclosing to Ms. Rooney what A.B. had told him about Mr. Galloway, or Ms. Rooney telling him that she knew about A.B.'s claims against Mr. Galloway, Ms. Rooney raised her own concerns about Mr. Galloway.
- [269] The foregoing description of the conversation between Professor Maillard and Ms. Rooney is consistent with the evidence. Professor Maillard affirmed in his affidavit, and then confirmed during his cross-examination, that he did not discuss A.B.'s allegations during his conversation with Ms. Rooney. Ms. Rooney's evidence was to similar effect. Though Mr. Galloway argues that "[i]t is obvious [Professor Maillard and Ms. Rooney] must have discussed A.B.'s sexual assault allegations", there is no evidence or finding to support that contention.

- [270] Mr. Galloway's contention that Maillard No. 1 was published to Professor Schroeder also stands on a different footing. In discussing Professor Lee's notes from the November 15 meeting, the judge said: "The notes reflect that on November 13, Professor Maillard called Professor Svendsen and "Andreas" [likely Andreas Schroeder] to tell them what A.B. had told him about Mr. Galloway" (para. 155, underlining added).
- [271] This is the only relevant reference to Professor Schroeder in the reasons, other than a brief reference to an "Andreas" as a mentor and friend by A.B. in the CBC Document (RFJ, at para. 140). Respectfully, the judge did not accurately capture the contents of Professor Lee's notes. Those notes simply state that on November 13, "[Maillard] called Linda [Professor Svendsen] and Andreas". The judge made no finding about what Mr. Galloway knew or should have known from this reference in Professor Lee's notes.
- [272] It is not obvious (as Mr. Galloway suggests) that it is "surely the case that Maillard repeated the rape allegation to all those he spoke to in arranging the November 15, 2015 meeting". What Professor Maillard actually said is a matter that is best left for the trial.
- [273] Professor Maillard raises a number of the same arguments regarding pleadings and s. 6 of the PPPA that we addressed when discussing A.B. No. 1. We addressed each of these submissions earlier, and consider they have no merit in the circumstances of this case.
- [274] Professor Maillard also argues there is no basis in the record to argue the judge made a "palpable and overriding error in finding that [Mr. Galloway] had discovered prior to October 26, 2016 that Maillard No. 1 was published to Professor Lyon and at the faculty meeting".
- [275] This submission appears to misapprehend Mr. Galloway's position. He accepts he was aware of Professor Maillard's publication of Maillard No. 1 at the November Meeting. And he accepts the judge's finding that Professor Maillard separately communicated Maillard No. 1 to Professor Lyon prior to the faculty meeting. But he argues, correctly in our view, that the judge did not address this earlier publication when dealing with Professor Maillard's limitation defence and she does not appear to have turned her mind to whether Mr. Galloway had, or ought to have, discovered this separate publication. Indeed, Professor Maillard does not identify any basis on which Mr. Galloway ought to have known of this publication of Maillard No. 1.
- [276] Mr. Galloway's cross appeal against Professor Maillard is allowed. He can pursue all publications of Maillard No. 1 other than its publication at the November Meeting. It also remains open to the trial judge to determine if any other publications of Maillard No. 1 are statute barred.

Did the judge err in finding Lyon Nos. 1 and 2 were not statute barred?

- [277] The basis of Lyon Nos. 1 and 2 are set out in the ANOCC as follows:

28. On or about November [15], 2015, the Defendant Annabel Lyon (Lyon) spoke the following false and defamatory words, or words substantially similar, about the plaintiff to all tenured and tenure track faculty of the UBC Creative Writing Department, all stated in the context of the same group of people having heard Maillard Defamation 1:

"The complainant's allegation of sexual assault is true. Voice messages to her from Stephen Galloway prove it. Galloway has never had any relationship with A.B. and was being dishonest when he suggested otherwise." (Lyon Defamation 1)

"A person I assigned to find other complainants has confirmed there are many women ready to come forward with similar allegations" (Lyon Defamation 2)

29. Lyon Defamations 1 and 2 meant, in both their literal and natural meanings, that the plaintiff had committed rape, sexual assault and physical assault upon A.B. Lyon Defamation 2 carried the further literal and natural meaning that the plaintiff had committed rape, sexual assault and physical assault against many other women.
31. Between November 12 and 18, 2015 Lyon repeated Maillard Defamation No. 1 to Chelsea Rooney and others known to her and is liable for the republication of Maillard Defamation 1.

(Though not defined as such, the defamatory publication described in para. 31 was described by counsel for both Mr. Galloway and Professor Lyon as Lyon No. 3).

[278] The judge found Mr. Galloway had the knowledge required under s. 8 of the Limitation Act when she said "I do not agree with Mr. Galloway that the notes of the November Meeting did not sufficiently disclose Lyon No. 1 and Lyon No. 2" (para. 519). We have addressed Lyon No. 1 and No. 2 separately because distinct considerations pertain to each.

a) Lyon No. 1

[279] The judge's finding on Lyon No. 1 is one of mixed fact and law and is owed deference subject to a palpable and overriding error or an extricable error of law (Housen, at paras. 10, 26-37).

[280] Lyon No. 1 is based on Professor Lyon's remarks at the November Meeting. The judge relied primarily on Professor Lee's notes for her findings, and she described the relevant portion of those notes at paras. 157-159. The notes indicate that Professor Lyon read a statement from A.B. to those attending the meeting. Mr. Galloway does not dispute that he had these notes by early 2016, however, he argues they "say nothing more about the statement ... and vitally whether it had anything to do with sexual assault or rape".

[281] The notes do not specifically identify what Professor Lyon said. But there was no need for them to do so, given the discoverability criteria in s. 8 of the Limitation Act and the guidance in Grant Thornton. The judge correctly identified that "[l]ack of legal certainty is irrelevant to the discoverability of a claim" (para. 521).

- [282] Instead, the notes, when reviewed in context and given other available materials, provided a foundation from which the judge could find Mr. Galloway knew, or ought to have known, that Professor Lyon expressed Lyon No. 1 to the persons attending the November Meeting. For example, the judge was able to consider the circumstances and purpose of that meeting. The notes demonstrate that the central purpose was to disclose A.B.'s allegations of sexual assault against Mr. Galloway to faculty members of the Creative Writing Department and to decide on a course of conduct. Mr. Galloway does not argue he did not know this before October 2016.
- [283] The structure of the meeting is also relevant. The notes identify that the "Agenda" for the meeting had Professor Maillard "walk us [through] [A.B.] events" and then had Professor Lyon provide an "update on current info[r]mation". This is what occurred. Professor Maillard repeated A.B.'s allegations and expressed Maillard No. 1; on the heels of his doing so, Professor Lyon read out a statement (later confirmed to be the CBC Document) from A.B. Indeed, Mr. Galloway relies on and pleads the inter-relationship of Professor Maillard and Professor Lyon's respective communications at the November Meeting (ANOC, at para. 28).
- [284] Furthermore, among the other documents the judge identified as relevant to the various limitation issues before her (RFJ, at paras. 517-519) was the second grievance letter filed on behalf of Mr. Galloway in his proceedings with UBC, dated July 6, 2016. In that letter, the Faculty Association expressed serious concern about "the departmental meeting when the allegations against Prof. Galloway were read aloud to tenure and tenure track faculty". By October 2016, Mr. Galloway appreciated that those allegations related to his alleged sexual assault of A.B. It was open to the judge to infer that the "allegations read aloud" was the statement Professor Lyon read to her colleagues.
- [285] In our view, there was a proper foundation before the judge for the inferences she drew and the finding she made about the publication of Lyon No. 1 at the November Meeting. As such, we find no reviewable error with respect to Lyon No. 1.
- b) Lyon No. 2
- [286] There are two aspects to Lyon No. 2. First, Mr. Galloway's pleading of Lyon No. 2 alleges that at the November Meeting, Professor Lyon said "A person [she] assigned to find other complainants confirmed there are many women ready to come forward with similar allegations" and that this carried the "natural meaning that the plaintiff had committed rape, sexual assault and physical assault against many other women" (ANOC, at paras. 28, 29; Appendix "C").

- [287] Mr. Galloway argues that, contrary to the judge's conclusions, the reference in Professor Lee's notes to seven women having "incidents to report" did not provide a basis from which it can be said he knew or should have known that Professor Lyon reported women would be coming forward with allegations of rape, sexual assault or physical assault. He argues that the word "incidents" could mean and, as it turned out in the Boyd Report, did mean, "a wide range of lesser grievances by others".
- [288] In our view, the judge erred in concluding that Mr. Galloway ought to have known of the publication of Lyon No. 2 from Professor Lee's notes. In particular, she appears to have conflated what Professor Lyon said at the November 15 meeting (i.e., whether the defamatory statement was made out) with what Mr. Galloway should have gleaned from Professor Lee's notes of the November Meeting (i.e., the limitations issue). This is apparent in the following paragraph of the judge's reasons:
- [402] In my view, the notes of the November Meeting, together with the evidence of Timothy Taylor in particular, are sufficient to conclude that the requirements of a proper plea of slander have been satisfied.
- [435] In my view, the notes of the November Meeting, together with (in particular) Professor Taylor's evidence (which is consistent with the notes), provide grounds to believe that, at the Meeting, Professor Lyon spoke words with the same or reasonably similar sting to the words pleaded. Like Lyon No. 1, Lyon No. 2 was spoken in the context of those at the Meeting having heard Maillard No. 1. The notes record Professor Lyon saying: "Seven women CR [Ms. Rooney] has spoken to have incidents to report." A reasonable person, not averse to scandal, would understand this to mean incidents involving Mr. Galloway and other women similar to the incidents described by A.B.
- [289] Professor Galloway was unaware of what Mr. Taylor or others may have understood from what Professor Lyon actually said. But he did have Professor Lee's notes. Those notes do not state or suggest that the word "incidents" pertained to other incidents of rape, or sexual assault or physical assault. Instead, the reference to "incidents" is immediately preceded by Professor Lyon's summary of Ms. Rooney's own interactions with Mr. Galloway--which appear on the notes to be an alleged failure by Mr. Galloway to respond to Ms. Rooney sharing that a friend with whom he had set her up on a date had assaulted her and his denial of her request to change thesis supervisors. Those are not allegations of rape or sexual assault against Mr. Galloway; in this context, "incidents" appears to have referred broadly to different kinds of complaints against Mr. Galloway.
- [290] Other portions of Professor Lee's notes support that same reading; the summary in the notes of Professor Maillard's conversation with Ms. Rooney include him asking Ms. Rooney whether other students in her cohort would have "stories to tell" and Ms. Rooney replying by detailing "several inappropriate incidents" involving other students. There is no basis to conclude that Mr. Galloway ought to have understood "stories" and "inappropriate incidents" as meaning rape or sexual assault allegations. Indeed, those "stories" or

"inappropriate incidents" had nothing to do with rape or sexual or physical assault.

[291] Other documents in the possession of Mr. Galloway referred to by the judge elsewhere support this conclusion. The second grievance letter filed on behalf of Mr. Galloway (quoted at RFJ, at para. 220) referred to the fact Ms. Rooney had been sent out "to gather other complaints" against Mr. Galloway and that these complaints "were unrelated to the main allegations [made by A.B.]".

[292] The judge's error is further evident when considered together with the evidence of Ms. Rooney, Professor Maillard and Professor Lyon that Ms. Rooney, in making inquiries of other students, was neither directed to ask nor did she ask whether they were aware of allegations of rape or sexual assault against Mr. Galloway.

[293] There was a significant body of evidence before the judge relevant to the inquiries Ms. Rooney was asked to make and what she reported she learned. The affidavits that were filed by Professors Maillard and Lyon and Ms. Rooney confirm their respective discussions were limited to other women with whom Mr. Galloway may have engaged in "inappropriate behaviour" or who might have "relevant information" to provide in relation to A.B.'s allegations (Maillard Affidavit #1, at para. 19; Lyon Affidavit #1, at para. 12; Rooney Affidavit #1, at paras. 30 and 31; Rooney Affidavit #2, at paras. 8, 19 and 20; Lyon Affidavit #2, at paras. 19, 20, 22 and 23). Ms. Rooney deposed "[n]one of the people I spoke with referred to allegations that were of a 'similar nature' to A.B.'s allegations" (Rooney Affidavit #2, at para. 22).

[294] Furthermore, the judge's earlier findings indicated that the "incidents" Ms. Rooney reported on had little to do with Lyon No. 2. Thus, the judge concluded that:

- a) starting November 14, Ms. Rooney began contacting individuals "concerning complaints about Mr. Galloway" (para. 172; emphasis added);
- b) Ms. Rooney reported the "task given to her by Professor Maillard (that is, locate others with possible complaints against Mr. Galloway) " (para. 547);
- c) on the morning of November 15, Ms. Rooney told Professor Lyon "Mr. Galloway had 'behaved inappropriately' towards her and that she knew of other women who had similar allegations against him but were afraid to come forward" (para. 132; emphasis added);
- d) on the morning of November 15, Professor Lyon spoke to A.B., who also told her there were "others who had complaints and concerns about Mr. Galloway" (para. 132; emphasis added); and,
- e) as discussed, Professor Lee's notes reflected Ms. Rooney told Professor Maillard about "several inappropriate incidents" (para. 155; emphasis added). See also paras. 123-124.

[295] Thus, the November 15 notes, other relevant documents, the evidence of Professors Maillard and Lyon and Ms. Rooney, and the earlier findings of the judge were all reasonably consistent. The "incidents" Ms. Rooney was asked to and did report on had little to do with

Lyon No. 2 or allegations of rape and sexual or physical assault. The judge appears to have, as we have said, conflated what individuals who attended the November Meeting understood from Professor Lyon's comments with what Mr. Galloway ought reasonably to have known from the November 15 notes.

- [296] What Professor Lyon actually said at the November Meeting, or what others understood she said, is a different question. These issues, and the conflicting evidence between the professors and others who attended the meeting, are matters that should be properly determined at trial.
- [297] A second aspect of Lyon No. 2 of concern is a potential second publication that the judge did not address. In his first affidavit, Professor Taylor deposed that on November 16 there was a second meeting between faculty members of the Creative Writing Department and representatives of the Dean's Office. He further deposed that at this meeting "[Professor] Lyon advised that now 19 women were ready to come forward with allegations of a similar nature to the complaint made by A.B. This was an increase from the seven students Lyon had referred to the previous day."
- [298] If the evidence of Professor Taylor is ultimately accepted, and subject to other defences that may be available to Professor Lyon, this would appear to be a second publication of Lyon No. 2.
- [299] For the reasons discussed earlier, we do not accept Professor Lyon's arguments about the adequacy of the ANOCC. As earlier discussed, the modern, flexible approach to defamation pleadings and the principle that s. 6 of the PPPA should not serve to insulate potential wrongdoing from scrutiny, do not mandate the strict approach Professor Lyon advances.
- [300] Mr. Galloway argued that individual publications of defamatory statements gave rise to separate causes of action. In our view, the judge erred in not addressing this second publication of Lyon No. 2. Having said that, this error is of no consequence as the defence of qualified privilege weighs in favour of Professor Lyon (as discussed later).
- [301] The judge did not address Lyon No. 3, likely because it was not expressly defined as a separate defamatory publication in the ANOCC. Lyon No. 3, as pleaded in para. 31 of the ANOCC, bears a defamatory meaning. Professor Taylor deposed that when Professor Lyon invited him to the November Meeting, she told him the meeting was to discuss an allegation of sexual assault by a student against Mr. Galloway. This provides grounds to believe there is merit to Lyon No. 3. There is no basis in the record to find that Mr. Galloway knew or ought to have known of this publication.
- [302] Mr. Galloway's appeal of the publication of Lyon No. 2 on November 15 and the publication of Lyon No. 3 to Professor Taylor is allowed. Whether these publications, or any other publications disclosed during discovery, are statute barred will be for the trial judge.

Did the judge err in treating Rooney No. 1 as a single cause of action?

[303] The alleged statements that form Rooney No. 1 are described as follows in the ANOCC:

32. The defendant Chelsea Rooney (Rooney), on or about November 18, 2015, spoke the following false and defamatory words to Erin Flegg, Sierra Skye Gemma and others known to her:

"Steven Galloway raped A.B."

(Rooney Defamation 1)

33. Rooney spoke the same or substantially similar false and defamatory statements to numerous other individuals known to her.
34. Rooney Defamation 1 constituted slander per se as it was an allegation of crime and disparaged the plaintiff in his occupation.
37. The plaintiff did not become aware of A.B. Defamation 1, Maillard Defamation 1, Lyon Defamations 1 and 2 and Rooney Defamation 1 until the spring of 2016 and was unable to reveal the information publicly until the fall of 2018 by virtue of confidentiality requirements of an UBC investigative process and later a grievance process.

[304] For ease of reference, the judge addressed these issues as follows:

[172] In the meantime, and starting about November 14, 2015, Ms. Rooney began contacting individuals, some of whom had been identified for her by A.B., concerning complaints about Mr. Galloway

[173] Ms. Rooney told at least some of the people she contacted (including Erin Flegg and Sierra Skye Gemma) that A.B. had told her that she had been raped by Mr. Galloway (this is the foundation for Rooney No. 1). As Ms. Rooney recalled, she had explicit permission from A.B. to communicate this to others. Indeed, Cara Woodruff, one of the women who spoke with Ms. Rooney, recalled Ms. Rooney telling her that: Mr. Galloway had "violently raped" A.B.

[190] Mr. Galloway acknowledged that, by January 2016, he knew that A.B. had told Professor Lyon and Professor Maillard that he had choked and sexually assaulted her. He also acknowledged that by March 2016 at the latest, he knew that A.B. had reported to Ms. Rooney that he had choked and sexually assaulted her, and that Ms. Rooney was contacting other women associated with the Creative Writing Department to see whether any had claims against him similar to those being made by A.B.) (this knowledge is relevant to both A.B. No. 1 and Rooney No. 1). Based on the contents of Ms. Flegg's statement, Mr. Galloway knew (or ought to have known) that Ms. Rooney told Ms. Flegg that Mr. Galloway had raped A.B. and choked her (in other words, that Ms. Rooney had stated Rooney No. 1 to Ms. Flegg).

- [517] by the end of February 2016, Mr. Galloway had received the following materials in connection with the Boyd Investigation: Professor Lee's notes of the November Meeting; A.B.'s 18-page Rape Narrative; the witness statement from Ms. Flegg; and a supplementary witness statement from Ms. Rooney. Mr. Galloway acknowledged this in his evidence. These documents disclose that Ms. Rooney had communicated Rooney No. 1 to Ms. Flegg at the very least, and almost certainly others. By June 2016, Mr. Galloway had received a complete copy of the Boyd Report. The complaints set out in the Second Grievance Letter include complaints about the November Meeting and about Ms. Rooney contacting other students in November 2015. These are things that Mr. Galloway knew or ought to have known about.
- [519] Mr. Galloway reported in his July 13, 2018 National Post article that the documents he received in January 2016 as part of the Boyd Investigation - the signed complainant statements - disclosed that individuals had been told that he had choked and raped A.B. Mr. Galloway himself drew the direct link between A.B.'s claims, the communication of those claims to others, and what he asserts was the almost immediate and devastating harm to his reputation.
- [520] On the record before me, I conclude that all of the elements of a defamation claim were known to Mr. Galloway, in respect of Rooney No. 1, well before October 26, 2016.
- [305] Mr. Galloway does not take issue with the judge's finding that his claim against Ms. Rooney for her communication of Rooney No. 1 to Ms. Flegg was statute barred. However, he contends the judge erred by treating Rooney No. 1 as a single cause of action that he discovered when he first knew that Ms. Rooney had communicated Rooney No. 1 to Ms. Flegg. He says the judge also failed to analyze whether he had discovered the near 20 other distinct instances of its publication to numerous individuals, which he also alleges are republications of A.B. No. 1. Many of these additional publications were disclosed during the proceedings before the judge. Some of those publications were recognized by the judge (para. 546).
- [306] Mr. Galloway says that, applying the discoverability criteria, he did not know of Ms. Rooney's publication of Rooney No. 1 to recipients other than Ms. Flegg because, while he was aware Ms. Rooney was speaking to others about him, he did not know the contents of those conversations.
- [307] In response, Ms. Rooney submits that the judge's findings on discoverability were not limited to her expression of Rooney No. 1 to Ms. Flegg, but rather, the judge found Mr. Galloway ought to have known, more than two years before he brought his claim, that she had communicated Rooney No. 1 to others.
- [308] Mr. Galloway is correct that each publication of Rooney No. 1 gives rise to a separate cause of action and that it was necessary for the judge to apply the conjunctive discoverability requirements of s. 8 of the Limitation Act to such additional publications.

- [309] To determine when the limitation period had commenced in regards to each claim, it was necessary, at a minimum, for the judge to examine under s. 8(a) of the Limitation Act whether Mr. Galloway knew, or he ought to have known, that injury, loss, or damage had occurred. Harm in defamation arises when the defamatory words are published (*Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, at para. 3; *Grant*, at paras. 28-29; *Brown on Defamation*, at § 25:2). For the limitation period to begin, it was also necessary that Mr. Galloway knew, or that he ought to have known, of each instance of the publication of Rooney No. 1 by Ms. Rooney.
- [310] There was no apparent basis to conclude Mr. Galloway had actual knowledge of the additional publications of Rooney No. 1. He deposed that he did not know of any publication beyond Ms. Flegg and he was not cross-examined on that assertion.
- [311] Nor was there an apparent foundation from which the judge could find Mr. Galloway had constructive knowledge of the additional publications of Rooney No. 1.
- [312] The judge relied on the following documents to demonstrate that Mr. Galloway had discovered the claim on Rooney No. 1: Professor Lee's notes, A.B.'s Rape Narrative (A.B.'s statement of evidence submitted in the Boyd Investigation and that later formed the foundation for her Art Exhibit), Ms. Flegg's witness statement, a supplementary witness statement from Ms. Rooney, a copy of the Boyd Report, and the second grievance letter dated July 6, 2016 (RFJ, at para. 517). However, the most these documents demonstrate--except for the Rooney supplemental witness statement, which Mr. Galloway appears not to have had--is that Ms. Rooney was speaking to others about Mr. Galloway and that she communicated Rooney No. 1 to Ms. Flegg. None of these documents either establish or suggest that Ms. Rooney communicated Rooney No. 1 to the other people to whom she spoke.
- [313] The judge also referred to an article authored by Mr. Galloway and published in the *National Post* on July 13, 2018, in which he wrote that the "signed complainant statements disclose they had been told that I choked and raped [A.B.]" (para. 519). Respectfully, this article says nothing about when Mr. Galloway received those statements. Although Ms. Rooney states that Mr. Galloway confirmed at his cross-examination "that he had received these complainant statements in January 2016", neither the portions of the transcript that are referred to by Ms. Rooney nor any other part of Ms. Rooney's cross-examination of Mr. Galloway supports this assertion. Conversely, Mr. Galloway's third affidavit confirms Mr. Galloway saw only "some" statements of evidence in early 2016. None of these statements, Mr. Galloway deposed, other than Ms. Flegg's statement, contained Rooney No. 1.
- [314] Finally, the judge also relied on a supplemental statement provided by Ms. Rooney to Ms. Boyd as part of her investigation, which the judge stated Mr. Galloway had by the end of February 2016 (see paras. 189, 517). Mr. Galloway says it was an error to find that he had this statement then. He points to his third affidavit in which he deposed that he "did not see a third statement of Rooney's evidence until 2017. The significance of this is that this

statement was the first one confirming Rooney had told others that I had 'raped' A.B." In the record available to us, it does not appear that he was challenged during any of his cross-examinations on this portion of his affidavit. Nor did the judge make any adverse credibility finding against Mr. Galloway on this evidence.

- [315] The record also demonstrates that there were issues with this supplemental statement during the Boyd Investigation. The Boyd Report indicates that when Ms. Boyd conducted interviews, she would prepare summaries of evidence and then forward them to the witnesses for their review and approval. However, several sources in the record indicate that Ms. Boyd stated in her report (in a portion that is redacted in the version of the report we have) that Ms. Rooney refused to confirm or edit the summary of her supplemental statement and instead "disavowed" it. This too may support Mr. Galloway's evidence that he did not receive the statement until later. Given Mr. Galloway's apparently unchallenged testimony that he did not receive the statement, and absent any finding which rejected this evidence it was an error for the judge to rely on Ms. Rooney's supplemental statement, when she assessed Mr. Galloway's state of knowledge.
- [316] The evidence before the judge was therefore largely consistent; Mr. Galloway appears to have had no knowledge from any source, documentary or otherwise, that Ms. Rooney expressed Rooney No. 1 to any of the people to whom she spoke other than Ms. Flegg. Based on this evidence there was no basis on which Mr. Galloway could draw a plausible inference of liability, nor did he have the material facts necessary to determine he had *prima facie* grounds to infer liability on the part of Ms. Rooney, for further publications of Rooney No. 1.
- [317] Receipt of Professor Lee's notes and Ms. Flegg's statement should perhaps have caused Mr. Galloway to suspect Ms. Rooney had repeated Rooney No. 1 to others. Suspicion or speculation is, however, not enough to ground a plausible inference of liability for discoverability purposes; "suspicion" may, however, trigger the need for a plaintiff to discover material facts by exercising reasonable diligence (Grant Thornton, at paras. 44, 46; Crombie, at para. 42).
- [318] The judge said almost nothing about what further inquiries Mr. Galloway made or should have made about Ms. Rooney's communications of Rooney No. 1 to others or, indeed, about A.B.'s, or Professor Maillard's or Professor Lyon's communications of A.B. No. 1, Maillard No. 1 and Lyon Nos. 1, 2 and 3 to others. The judge noted that when Mr. Galloway endeavored to speak to Professors Maillard and Lyon, both before and after the November Meeting, they either ignored him or deflected his inquiries (paras. 143, 155, 169). The record before us indicates Mr. Galloway made further inquiries of Professors Taylor, Wade and Tregobov to ascertain what was said at the November 15 meeting but was unable to learn anything. There is some conflict in this latter body of evidence that we were asked to resolve, but this further issue will be for trial on a full record. We have also earlier noted that whether a plaintiff has acted reasonably diligently is often a fact-intensive enquiry that requires a proper record and should generally be left for trial.

- [319] Ms. Rooney raises numerous issues in response to Mr. Galloway's cross appeal. She contends that para. 37 of the ANOCC (i.e., that Mr. Galloway became aware of "Rooney Defamation 1 [in] the spring of 2016") is an admission Mr. Galloway knew of the publication of Rooney No. 1 before July 2016. The judge did not address nor rely on para. 37 of the ANOCC for Ms. Rooney or otherwise. While para. 37 may speak to an individual or specific publication of Rooney No. 1, for example to Ms. Flegg, it is unlikely to pertain to publications Mr. Galloway was unaware of. Furthermore, whether an admission can be withdrawn (R. 7-7(5)) depends on whether it is in the interests of justice to do so. That inquiry is "highly fact specific" and will depend on various considerations including whether the admission was made without knowledge of the facts and whether relevant evidence was solely in the control of the other party (*Nagra v. Cruz*, 2016 BCSC 2469 (Master), at paras. 5-6, affirmed 2017 BCSC 347; *Century Services Inc. v. LeRoy*, 2014 BCSC 702, at paras. 45, 47, rev'd in part 2015 BCCA 120, at paras. 14-15). These conclusions on para. 37 of the ANOCC also pertain to A.B., Professor Maillard and Professor Lyon.
- [320] Ms. Rooney further contends Mr. Galloway did not plead that each publication of Rooney No. 1 gave rise to separate causes of action. For the reasons we have described, we do not agree. Here, the words of Rooney No. 1 are sufficiently pleaded, and the issue is about further publication of those words to unknown third parties.
- [321] Ms. Rooney takes a position that is inconsistent with that of A.B. and Professors Maillard and Lyon and argues that under the "modern flexible approach" to pleadings there was no need to plead the identities of each person to whom A.B. No. 1 was published. We agree in part. Mr. Galloway was able, as we have said and as the judge observed (para. 400), to plead that Rooney No. 1 was published to "others". That, however, is a separate question from when each claim was discovered. As discussed, discoverability under s. 8 of the Limitation Act required Mr. Galloway to have some level of knowledge of each cause of action that exceeded the knowledge requirement on an application to strike (*Grant Thornton*, at para. 48). That level of knowledge required Mr. Galloway to be able to plead "at least a coherent body of fact" that showed "not only that there was an utterance or writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff" (*Catalyst*, at para. 28).
- [322] Ms. Rooney submits the principle a plaintiff need not know the exact extent or nature of damage nor the type of damage they have suffered (*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 18, 1997 CanLII 325) extends to a plaintiff not needing to know the exact number and identities of the persons to whom a defamatory publication is made. We disagree. This confuses the extent of harm a plaintiff suffers as the result of a defamatory publication with the harm that arises from several distinct publications. In the first instance, it does not matter, for limitation purposes, whether five or ten persons were present at a meeting where a defamatory statement is made. The publication gives rise to a single cause of action. In the second instance, however, it is relevant that a particular statement is made to five individuals on five successive days. This latter example gives rise

to five causes of action and s. 8 of the Limitation Act is engaged for each such cause of action.

- [323] A further difficulty arises with the suggestion Mr. Galloway ought, at an earlier stage, to have pleaded that Rooney No. 1 was made to "others". In order to advance this pleading, he was required, other than in the context of an application to strike, to produce "uncontradicted evidence of publication to other persons" (Guergis, at para. 52) In this vein, it is relevant that Ms. Rooney, in her first two affidavits, denied expressing Rooney No. 1 to others. Had Mr. Galloway commenced this action in October 2016, it does not appear, based on his sworn evidence, that he would have been in a position to file such uncontradicted evidence of the further publication of Rooney No. 1.
- [324] Therefore, Mr. Galloway's cross appeal from the judge's dismissal of Ms. Rooney's publication of Rooney No. 1, on the basis it was statute barred, other than its publication to Ms. Flegg, is allowed. It remains for the trial judge to decide whether any publication of Rooney No. 1 that was disclosed during the PPPA application, or that is disclosed during discovery, is statute barred.

Analysis of Individual Appeals

- [325] We now turn to the arguments of each of the appellants. Despite the common nature of the issues raised, we have assessed each appellant's arguments in order to account for the different context and facts relevant to the defamatory statements at issue.
- [326] Throughout our analyses of the individual appellants, we rely on the Legal Principles section set out earlier in the judgment to dispose of the issues raised.
- [327] At the outset, we also highlight that the standard of review on these preliminary applications precludes a deep dive into the evidence. Ironically, many of the arguments before us on these appeals depend on us doing just that--taking a deep dive into the evidence. With respect to a number of the grounds of appeal, the appellants are in effect inviting this Court to engage in a re-weighting exercise or to substitute our interpretation of the evidence for that of the chambers judge, which is not the role of an appellate court. To the extent that the appellants take issue with the application of the legal framework to their unique facts and circumstances, it is not the role of an appellate court to engage in a reconsideration of that evidence to arrive at or substitute a conclusion that the appellants prefer.
- [328] A judge is not obliged to refer to every item of evidence or detail how each item of evidence was assessed as the purpose of reasons is not to show how a judge arrived at their decision in a "watch me think" fashion, but rather to show why the judge made that decision (R. v. J.M.H., 2011 SCC 45, at para. 32; R. v. R.E.M., 2008 SCC 51, at para. 17; R. v. S.S., 2022 BCCA 392, at para. 86).

- [329] In our view, this is especially so at the threshold stage of a PPPA application, where the object of a judge is not to take a deep dive into the evidence (Pointes, at para. 52). A judge's reasons are to be read generously and as a whole, with the presumption that they know the law (Barendregt v. Grebliunas, 2022 SCC 22, at para. 104). Their reasons are not meant to be finely parsed through in an isolated line-by-line analysis in search for error (G.F., at para. 69).
- [330] The chambers judge identified the appropriate and relevant legal framework under the PPPA. To repeat, an assessment under s. 4 of the PPPA is a matter for the discretion conferred on the chambers judge by the text of the provision. The test is a subjective one, as it depends on that judge's determination (Pointes, at para. 41).

Professor Keith Maillard

- [331] We begin our analysis of the individual appeals with Professor Maillard.
- [332] We have earlier summarized the judge's central conclusions on Mr. Galloway's claim against Professor Maillard, specifically on Maillard No. 1. The details of Maillard Nos. 2 to 4 are set out in Appendix "B" to these reasons.
- [333] Professor Maillard appeals many of the judge's conclusions. Accordingly, we have focused on those particular issues that appear to have been advanced in a serious way or were further developed in argument.
- [334] These issues fall into three broad categories of alleged errors: (a) whether the statements are capable of defamatory meaning; (b) whether there was no valid defence for the statement made; and (c) whether the judge erred in the weighing of harm.
- [335] Professor Maillard does not contend that the judge misstated the legal principles that governed the issues before her. Rather he argues she misapplied those principles in various respects.

Did the judge make "conclusive" or "unequivocal" findings?

- [336] Professor Maillard contends that the judge made various "conclusive findings" or "unequivocal findings" as to, for example, whether the meaning Maillard Nos. 2 and 3 conveyed was reasonably capable of being defamatory. We do not agree the judge made any such error in relation to the defamatory meaning of Maillard Nos. 2 and 3 or otherwise. She properly understood her role in the application before her. Thus, early in her judgment she said:
- [77] I will also note (as I do a number of times in these Reasons) that my comments, conclusions and findings are expressly limited to the PPPA Applications, and are expressed in that context, based on the record before me. Nothing can or should be taken as prejudging the ultimate merits of the claims or defences.

[337] On the specific question of whether any particular statement, alleged by Mr. Galloway to be defamatory, was in fact defamatory, we have already noted that she identified the correct legal test (para. 337; see also paras. 505, 545, 552, 647, 790-791).

Are Maillard Nos. 2 and 3 capable of a defamatory meaning?

[338] As noted earlier, this is a question of law subject to a standard of correctness.

[339] Professor Maillard advances a series of legal propositions that address how a judge is to determine the meaning of a publication and whether that meaning is capable of being defamatory. Those principles largely replicate the judge's discussion of the governing authorities. Indeed, several of the authorities he refers to were relied on by the judge (paras. 320, 328-336).

[340] Ultimately, Professor Maillard argues the judge erred in finding substantial merit to Mr. Galloway's claim that the words in Maillard No. 2 and 3 are capable of defamatory meaning. We disagree and see no error in the conclusions expressed by the judge at paras. 429-430. We also note that Professor Maillard's submissions ascribe no significance to the "grounds to believe" standard established in s. 4(2)(a) of the PPPA and that the judge was to apply. That standard did not require Mr. Galloway to establish he was "likely to succeed" or that he had a strong prima facie case (Pointes, at paras. 48-50; RFJ, at paras. 51-53).

[341] Professor Maillard advances a further submission. He argues the judge erred in law when she referred to the evidence of the writer Brad Cran (RFJ, at para. 313) who deposed that when he read Maillard No. 3, he "immediately understood the statement above to be a reference to the accusation of rape and sexual assault against Mr. Galloway". Mr. Cran was a signatory to the UBC Accountable letter and an acquaintance of Mr. Galloway before the impugned events.

[342] The judge's reference to Mr. Cran, however, arose in a different part of her reasons and was separated from her consideration of the meaning of Maillard No. 3 by more than a hundred paragraphs. The judge's earlier reference to Mr. Cran (para. 313) appears to have been made in the context of considering whether Maillard No. 3 was "of and concerning" Mr. Galloway. In this context, the test is undertaken from the standpoint of a reasonable person who is acquainted with the plaintiff. The judge correctly referred to this standard and to the relevant authorities at para. 342.

Did the judge err in finding no valid defence?

[343] The judge determined that the defence of fair comment was not available for Maillard Nos. 2 and 3 on two distinct bases. First, the "stings" in Maillard Nos. 2 and 3 were fact and not comment (paras. 553-554). And second, there were grounds to believe that Professor Maillard was actuated by malice against Mr. Galloway, which would, in any event, defeat the defence of fair comment (paras. 541-45, 553, 560). Professor Maillard challenges both findings.

[344] We start with several observations that help frame these issues. First, Professor Maillard does not argue the judge misstated the law that was relevant to either issue (on fair comment, see paras. 356-359; on malice, see paras. 368-373). Second, absent extricable error, the standard of review for the judge's findings on (a) whether Maillard Nos. 2 and 3 were statements of fact or comment; and, (b) whether Professor Maillard was actuated by malice, is subject to a standard of palpable and overriding error. Third, here too the judge started her analysis by confirming her findings were made for the "purposes only of the PPPA Applications" (para. 552). None of her findings were "conclusive" or "unequivocal" as asserted by Professor Maillard.

a) Fact or comment

[345] Professor Maillard's primary submission is that the judge erred in finding that the meanings of both Maillard Nos. 2 and 3 were fact and not comment. That submission, in large part, simply reargues or revisits the issue before the judge and ignores the various difficulties with the position being advanced.

[346] Comment must be recognizable as comment with the onus being on the defendant who raises the defence. Any ambiguity about whether the statement is one of fact or comment is resolved against the defendant (Ager, at para. 43). Furthermore, as earlier noted, the factual foundation for a comment must be apparent and its foundation "must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is made" or "so notorious as to be already understood by the audience" (WIC, at paras. 31, 34). This core requirement is not apparent in either Maillard Nos. 2 or 3. Thus, for example, Professor Maillard's assertion in Maillard No. 3 that "I believe [A.B.]" does not convert the statement into comment as it provides no basis for the belief nor does it provide the reader with any basis to agree or disagree.

[347] We see no error in the judge's finding that, for the purposes of the application before her, Maillard Nos. 2 and 3 are statements of fact, rather than comment on facts, and as such the defence of fair comment did not weigh in favour of Professor Maillard.

b) Malice

[348] A finding of malice will defeat the defence of fair comment.

[349] There was ample support for the judge's finding on malice based on the record before her. None of the issues raised by Professor Maillard would, in any event, meet the palpable and overriding standard.

[350] The judge found that, in the context of the PPPA applications, there were "grounds to believe that Professor Maillard and Professor Lyon were reckless so as to meet the legal test for malice" (para. 545). That finding was developed at some length (paras. 111, 127, 143, 155, 195, 536, 541-545, 560, 707, 731-732). Professor Maillard argues that the judge's findings were palpable and overriding errors. We do not agree. Professor Maillard simply seeks to put a different complexion on different pieces of evidence and to reargue the issue.

[351] Professor Maillard also contends the judge erred in two specific respects in her findings on malice. First, he relies on the minority opinion in Bent, which said:

[247] To establish malice through recklessness, "the evidence must be sufficiently strong to transcend a finding of carelessness or negligence and demonstrate an indifference to truth or falsity" and thus "no honest belief in [the] truth"

[Citations omitted.]

[352] However, the majority in Bent made clear both that the issue is more nuanced and that on a PPPA application, the grounds to believe that malice will defeat a defence (in that case, qualified privilege) do not have to meet the standard that a trial judge would examine:

[136] I add that malice is an alternative way to defeat the defence of qualified privilege. Malice is not limited to an actual, express motive to speak dishonestly. Instead, it can be established by "reckless disregard for the truth": Hill, at para. 145; Botiuk, at para. 79. Notably, an ostensibly honestly held belief may still be spoken recklessly and the privilege defeated if the belief was "arrived at without reasonable grounds": Downard, at §§9.60 and 9.61. "The more serious the allegation in issue, the more weight a court will give to a failure by the defendant to verify it prior to publication as evidence of malice, in the sense of indifference to the truth": §9.74 (footnote omitted)

[138] my colleague chooses to accept Ms. Bent's evidence over Dr. Platnick's at this early stage. With respect, this is not what is called for on a [s. 4 PPPA application]. As this Court makes clear in Pointes Protection, Dr. Platnick needs to have established only a basis in the record and the law, taking into account the stage of the litigation, to support a finding that Ms. Bent's defences do not weigh more in her favour. For the purposes of this motion, and for the reasons explained above, I am satisfied that there is such a basis here.

[353] The judge approached the issue correctly and said:

[374] In the context of the PPPA Applications, Mr. Galloway does not have to prove malice. Rather, it is sufficient at this stage if there is evidence before me, reasonably capable of belief, that would support such a finding.

See also the judge's discussion at paras. 57-58, citing Pointes and Bent.

[354] Second, and in a similar vein, Professor Maillard contends, relying on Smith, at para. 40, that if there is "honest belief on the defendant's part then malice can only be established by showing a dominant improper purpose or desire to injure". This is not correct. The "dominant purpose" test only pertains to the third and fourth forms of malice that are described (Smith, at para. 40). As such, there is no merit to this ground of appeal.

Did the judge err in the weighing of harm?

[355] Professor Maillard also submits that the judge made various errors when she engaged in the weighing exercise required by s. 4(2)(b) of the PPPA. This aspect of the judge's analysis, absent an extricable error, is fact specific and contextual and entitled to significant deference.

[356] The thrust of Professor Maillard's submission mirror those of other appellants and, in particular Dr. Anderson, Mx. Rombough, Dr. Kosman, and Dr. Smalec. He contends the judge failed to consider or differentiate the particular harm that Maillard Nos. 2 and 3 caused Mr. Galloway from the harm caused by the defamatory publications of others. He also asserts that the judge failed to give sufficient weight to, for example, the legitimate public interest of encouraging the reporting of sexual assault.

[357] In the case of Professor Maillard it is important to return to the judge's finding, for the purposes of the application before her, that his conduct was actuated by malice. The judge recognized that malice is relevant to the weighing exercise under s. 4(2)(b) (paras. 375, 531). Relying on Hobbs at para. 90, she reiterated that there "is no public interest in protecting malicious speech" (para. 731). She concluded that "Maillard Nos. 2 and 3 [on account of malice] weigh at the lower-end of the protection-deserving spectrum", that the "harm likely to be or to have been suffered by Mr. Galloway as a result of Professor Maillard's expressions lies closer to the high end of the protection-deserving spectrum" and that the public interest in Mr. Galloway continuing the proceeding in respect of Maillard Nos. 2 and 3 "outweighs the public interest in protecting those expressions" (paras. 732-734).

[358] We see no basis on which to interfere with those conclusions. It was appropriate for the judge to view the finding of malice on the part of Professor Maillard as largely dispositive of the s. 4(2)(b) analysis.

[359] Accordingly, the grounds of appeal raised by Professor Maillard for Maillard Nos. 2 and 3 are dismissed.

Maillard No. 1

[360] Given our conclusion that the judge erred in finding that some publications of Maillard No. 1 were statute barred, it is necessary for us to revisit the analysis required under s. 4 of the PPPA with respect to this expression.

- [361] Maillard No. 1 is capable of being defamatory. The evidence in the record and the finding of the judge (paras. 126-127) indicate there is substantial merit to claims based on the publications of Maillard No. 1. The judge's conclusions on malice are dispositive of the defences of fair comment and qualified privilege.
- [362] Malice also prevents Professor Maillard from relying on s. 69(1) of the University Act which pertains to "acts or omissions" of faculty members "done or omitted in good faith in the course of the execution of the person's duties on behalf of the university" (emphasis added). The judge's finding that Professor Maillard was actuated by malice (paras. 536, 541-545) and her finding that Professor Maillard's activities on the days leading to, and on November 15, were not undertaken as part of his duties on behalf of UBC (paras. 537, 706-707) are inconsistent with the application of s. 69(1) of the University Act. Nor can Professor Maillard argue that the Weber defence weighs in his favour. We have addressed that defence more fully in relation to Professor Lyon who worked closely with Professor Maillard on the day or two before or on November 15. Our conclusions also apply to Professor Maillard.
- [363] Finally, the weighing exercise required by s. 4(2)(b) militates in favour of allowing Mr. Galloway to continue his action for the publications of Maillard No. 1. The judge explained the weighing exercise she undertook for Maillard Nos. 2 and 3. Those considerations govern Maillard No. 1 and give rise to the same conclusion.

Maillard No. 4

- [364] The judge dismissed Mr. Galloway's claim, based on Maillard No. 4, on the basis that he failed to show the claim had substantial merit (para. 427). Mr. Galloway has cross appealed that determination.
- [365] Maillard No. 4 is a tweet by Professor Maillard on December 12, 2016 in which he says "The allegations that were investigated included that Mr. Galloway sexually assaulted A.B.". The judge addressed the context of Maillard No. 4:
- [427] The context of Maillard No. 4 is important. It is referring to the Boyd Report, and follows media publications, including Mr. Galloway's "Public Apology," published on the UBC Accountable website on November 23, 2016, in which Mr. Galloway confirmed that he had been accused of sexual assault. In my opinion, taken in context, Maillard No. 4 cannot bear the pleaded meaning, or any defamatory meaning. I conclude, therefore, that Mr. Galloway has not made out the necessary elements of a defamation claim in relation to Maillard No. 4. It follows that Mr. Galloway has failed to show grounds to believe that this claim has substantial merit.

- [366] Mr. Galloway's primary submission challenges "the logic" of the judge's decision. He contends the judge wrongly concluded that Professor Maillard was merely publishing what had by then been made public by #UBCAccountable and by Mr. Galloway's own public apology. Both these statements, however, he argues, were in defence of Mr. Galloway, whereas Professor Maillard's tweet "repeated the allegation without any caveat".
- [367] We do not agree. The judge noted, and Mr. Galloway accepts, that the words of a statement must be understood in the context of all the circumstances (paras. 320 and 338; Taseko, at paras. 42-44). Each of the statements to which the judge referred (the Boyd Report, Mr. Galloway's "Public Apology" and the UBC Accountable website) recognized that Mr. Galloway had been accused of sexual assault. The judge was of the view that, in context, Maillard No. 4 simply recognized this same reality and did not bear a defamatory meaning. We see no error in that reasoning or conclusion.
- [368] Mr. Galloway also submits, as he does with Elliott Nos. 1 and 4 discussed below, that the judge's conclusion offends the repetition rule. He emphasizes that the repetition of what is couched as an "allegation" can nevertheless ground a libel. This is true but it remains a question of context. The judge here quoted (para. 329) from the judgment of Lord Devlin in *Lewis* where the court explained that expressing a statement as an "allegation" does not necessarily insulate the statement. Nor, however, is every statement that "alleges" someone has been involved in wrongdoing necessarily defamatory. The question in both cases is "whether, in context, the statement carries a defamatory meaning" (para. 330).
- [369] Finally, Mr. Galloway argues it was not open to the judge to 'prune' Maillard No. 4 from his claim. We disagree for the reasons we have earlier expressed. In the circumstances of this case, there was no principled impediment that prevented the judge from dismissing only one of the various expressions Professor Maillard was alleged to have made.
- [370] The judge properly understood the governing legal principles. We see no error in her application of the principles and dismiss Mr. Galloway's cross appeal on Maillard No. 4.

Professor Annabel Lyon

- [371] We now turn to the expressions made by Professor Lyon, which are the subject of Mr. Galloway's appeal against her. The judge dismissed Mr. Galloway's claim against Professor Lyon because she found that both Lyon Nos. 1 and 2 were statute barred. She did not address Lyon No. 3. We have earlier concluded that the judge erred in part on Lyon Nos. 2 and 3.
- [372] Professor Lyon contends that the judge erred in addressing her conduct and in finding Mr. Galloway had met his initial onus under s. 4(2)(a)(i). She also contends that had the judge gone on to consider other defences she had pleaded--fair comment, the Weber defence, s. 69 of the University Act, and qualified privilege--she would have found that Mr. Galloway also failed to meet his onus under s. 4(2)(a)(ii) with respect to them. Finally, she argues that had the judge undertaken the weighing exercise under s. 4(2)(b), Mr. Galloway would have

failed as well.

Did the judge err in finding Mr. Galloway met his initial onus under s. 4(2)(a)(i)?

[373] We earlier described Mr. Galloway's pleading for Lyon Nos. 2 and 3. We also identified that the judge correctly expressed the legal principles that govern both s. 4(2)(a)(i) of the PPPA (paras. 50-54) and how courts determine whether the meaning of a statement or publication is defamatory (paras. 328-336).

[374] Professor Lyon raises several issues. She argues, relying on Level One, at para. 36, that the judge erred in relying on the evidence of Professor Taylor to interpret the meaning of Lyon No. 2. This misapprehends what the judge did and said. The defamatory meaning of Lyon No. 2, as pleaded, is patent. Lyon No. 2 refers to Professor Lyon telling the persons who attended the November Meeting there were many women who Mr. Galloway "had committed rape, sexual assault and physical assault, against".

[375] The judge said:

[435] In my view, the notes of the November Meeting, together with (in particular) Professor Taylor's evidence (which is consistent with the notes), provides grounds to believe that, at the Meeting, Professor Lyon spoke words with the same or similar sting to the words pleaded

[376] The judge's reference to the evidence of Professor Taylor provided the "basis in the record" the judge relied on to "support a finding of substantial merit" (Bent, at para. 88). Professor Taylor's evidence was not used to interpret the meaning of Lyon No. 2--the concern addressed in Level One. Rather it provided the grounds to believe that Professor Lyon uttered Lyon No. 2 at the November Meeting.

[377] Professor Lyon contends the judge erred in failing to refer to the evidence of Professor Tregebov, who had a different memory or understanding of what Professor Lyon communicated at the November Meeting, and in failing to explain why she preferred the evidence of Professor Taylor to the evidence of Professor Tregebov. Neither aspect of this submission has merit. There is no requirement that a judge refer to all of the evidence on a given issue that is before them (J.M.H., at para. 32). The primary role of an application judge, at the s. 4(2)(a)(i) stage of a PPPA application, is not to resolve inconsistencies in the evidence; it is to ascertain whether there are grounds to believe, on some basis in the record, that the claim is legally tenable and reasonably capable of belief (Pointes, at para. 40; Bent, at paras. 87-88).

[378] Professor Lyon argues that the evidence of what she is alleged to have said at the November Meeting is not precisely the same as the pleading for Lyon No. 2 and that in a defamation case a "plaintiff is bound by their pleadings". First, Mr. Galloway pleads that Professor Lyon spoke the words captured by Lyon No. 2 or "words substantially similar" (ANOC, at para. 28). Second, as explained earlier, in the early stages of a defamation claim a plaintiff may be afforded some greater flexibility or leniency in their pleadings. This appears to be

consistent with earlier case law that allowed a plaintiff in a slander case to plead the words that were uttered with "reasonable precision" and, following further information from the defendant, to then amend their pleading if necessary (Gatley, at § 26.17). The preliminary nature of a PPPA application does not displace such flexibility.

[379] As to Lyon No. 3, we are satisfied the words identified in the ANOCC, which allege Professor Lyon repeated Maillard No. 1 to Ms. Rooney and others, are capable of being defamatory. In his first affidavit, Professor Taylor deposes that when Professor Lyon invited him to the November Meeting, she told him the meeting was about "serious allegations of sexual assault" by a student against Mr. Galloway. We consider that evidence, at this early stage of the litigation, is reasonably consistent with the pleading for Lyon No. 3 and provides grounds to believe that Mr. Galloway's claim for Lyon No. 3 has substantial merit.

Did the judge err in finding the onus under s. 4(2)(a)(ii) was met?

[380] Professor Lyon argues that Mr. Galloway was unable to meet his burden to demonstrate, based on the record and the law, that the defences Professor Lyon had put in play did not tend to weigh in her favour (Bent, at para. 103).

[381] Several of the defences on which Professor Lyon relies are fully answered by the judge's finding that Professor Lyon was actuated by malice. Professor Lyon challenges that finding on the same basis as Professor Maillard. Indeed, she relies on the submissions made by Professor Maillard in his factum. We have addressed and rejected those submissions. We again emphasize the judge's findings are entitled to deference. The judge did not make any palpable and overriding error or otherwise err in finding Professor Lyon was actuated by malice.

[382] That finding of malice is dispositive of the question of whether the defences of fair comment and qualified privilege weigh in favour with Professor Lyon. It also provides an answer to Professor Lyon's reliance on s. 69(1) of the University Act. Actions actuated by malice cannot be said to have been undertaken in "good faith". The judge also found that Professor Lyon's actions on the days leading to, and on November 15, were not undertaken as part of her duties on behalf of UBC (paras. 537, 706-707).

[383] As to the Weber defence, the collective agreement between Mr. Galloway and UBC contained no reference to defamation. It contained provisions dealing with breaches of privacy and it appears that the grievance proceedings brought by Mr. Galloway against UBC were based on these privacy provisions. Professor Lyon points to no provision in the collective agreement that would provide Mr. Galloway with a remedy for her November 15 expression of Lyon No. 2 and of Lyon No. 3 respectively. Her reliance on Policy 3, which addresses Discrimination and Harassment, is misplaced. Based on the ANOCC and record before us, we do not consider that the "essential character" of the dispute between Mr. Galloway and Professor Lyon arises from the "interpretation, application, administration, or violation" of the collective agreement between the Faculty Association and UBC respectively.

- [384] Accordingly, neither the Phillips framework nor the direction from Weber provide Professor Lyon with a defence that has any prospect of success with respect to either the publication of Lyon No. 2 on November 15 or of Lyon No. 3.
- [385] Our conclusions in relation to the publication of Lyon No. 2 on November 16 are different. There was apparently a conversation between Professor Lyon and Dean Averill on the afternoon of November 15 (paras. 164-165). On this call, Professor Lyon told Dean Averill about the allegation against Mr. Galloway and indicated other faculty members wished to meet with the Dean to discuss how to proceed. The judge indicated there was a "very strong (verging on irrefutable)" argument that a meeting between Professors Maillard and Lyon and Dean Averill on November 15 would have been covered by qualified privilege (paras. 706, 708). Mr. Galloway does not suggest otherwise or argue that the conversation between Professor Lyon and Dean Averill on November 15 is actionable.
- [386] The further meeting on November 16, referred to by Professor Taylor, between members of its Department of Creative Writing and representatives of the Dean's office, and where Lyon No. 2 is alleged to have been repeated, is similarly a publication where the defence of qualified privilege weighs more heavily in favour of Professor Lyon. That meeting was the product of the conversation between Professor Lyon and the Dean the previous day. It was an attempt to follow the proper procedure or channel to report a sexual assault. Based on this conclusion, there is no need for us to consider whether the November 16 publication of Lyon No. 2 engages the Weber or University Act defences raised by Professor Lyon.

The weighing analysis

- [387] The final stage of the analysis requires weighing the public interest in allowing meritorious lawsuits to proceed against the public interest in protecting expression on matters of public interest (Pointes, at para. 81). The judge correctly described the steps of this analysis at paras. 61-66.
- [388] The judge addressed at length the harm to Mr. Galloway and the public interest in allowing him to pursue his action (paras. 632-655). She accepted the submission that at this stage of the litigation, Mr. Galloway was not required to prove harm or causation, but he was simply required to "provide evidence for the court to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link" (at para. 647, citing Pointes, at para. 71 and Bent, at paras. 154, 160). She concluded that the harm likely to have been suffered by Mr. Galloway from the various defamatory statements that had been made about him "[lay] close to the high end of the spectrum, and so too does the public interest in allowing his claims to proceed" (para. 655).

[389] The judge did not consider the value of protecting either Lyon Nos. 2 or 3. The judge's finding of malice on the part of Professor Lyon, for the purposes of the application before her, significantly informs that analysis and the weighing exercise. As with Professor Maillard (paras. 731-733) there is no public interest in protecting Professor Lyon's malicious speech. Furthermore, such speech is at the low end of the protection-deserving spectrum.

[390] Accordingly, we see no merit with respect to the issues raised by Professor Lyon.

Alicia Elliott

[391] We turn to Mr. Galloway's appeal against Ms. Elliott whose PPPA application was granted and the proceeding against her dismissed.

[392] Ms. Elliott is alleged to have published the following four defamatory statements online:

- a) a tweet published on January 17, 2017 about Mr. Galloway, saying: "re Galloway those pesky sexual assault survivors wouldn't shut up" (Elliott No. 1);
- b) a tweet published on December 29, 2016 about the person who had co-authored the UBCAccountable defence of Mr. Galloway, which said: "This year you've managed to demonize rape survivors" (Elliott No. 2);
- c) a tweet published on December 12, 2016 about Mr. Galloway, which said: "They outline the ways that UBC's process of dealing with sexual assault can be improved very well, esp considering they only had 4 months to prepare the report. Especially worth noting in the Galloway case is their definition of "sexual assault." It says, "Consent that is obtained through misuse of a position of trust or authority is not valid consent" (Elliott No. 3); and,
- d) a post on an internet crowdfunding website in which she said: "powerful men using their access to lawyers to silence the women accusing them of sexual assault . . . Steven Galloway" (Elliott No. 4).

[393] Each of these were alleged to mean that Mr. Galloway had committed rape and sexual assault.

[394] The judge found Elliott No. 3 was capable of a defamatory meaning (paras. 459-461); as such, Mr. Galloway's claim had substantial merit but the defence of fair comment weighed in Ms. Elliott's favor (paras. 590-592). She then found that Elliott Nos. 1, 2 and 4 were not defamatory of Mr. Galloway and as such he had not met his burden with respect to these publications. Accordingly, the judge dismissed his claim against Ms. Elliott. Mr. Galloway appeals each of these determinations.

[395] The primary basis for Mr. Galloway's appeal of Elliott Nos. 1, 2 and 4 is that the judge, in finding these publications were not defamatory, failed to consider the individual statements in their proper context. We disagree.

- [396] The judge fully and correctly set out the law that governs how a judge determines whether a particular publication or utterance is defamatory (paras. 320-336). She recognized the "full context is often critical to meaning" (para. 317). Relying on Botiuk, she confirmed a court is to "take into account all of the circumstances of a case ... including the context in which the words are used" (para. 320). And she referred to the decision of this Court in Taseko at para. 44 for the same proposition (para. 338; see also para. 330).
- [397] Furthermore, the judge addressed the circumstances and context of Elliott Nos. 1, 2 and 4 in some detail. She did so in the "Background and outline of events" section of her reasons (paras. 251-254, 279-280). A review of these paragraphs, together with paras. 459-467, reveals that the judge recognized some of the "context" Mr. Galloway asserts the judge failed to address.
- [398] Apart from considering how aspects of Elliott Nos. 1, 2 and 4 were informed by other events, the judge also placed these publications in context by setting out the full text of an individual publication as opposed to the excerpted segment of the publication relied on in the ANOCC. Thus, for example, the full text of Elliott No. 1 is more than ten paragraphs long (para. 254) and not the single sentence found at para. 52 of the ANOCC.
- [399] Finally, there was no need for the judge to advert expressly to all of the relevant "context" that pertained to any individual publication nor, in this case, was it realistic for her to do so (J.M.H. at 32; R. v. Dinardo, 2008 SCC 24, at para. 30).
- [400] Mr. Galloway advances two other submissions. First, in relation to Elliott No. 2, he relies on the judge's finding that she was "not persuaded a reasonable person who knew Mr. Galloway would conclude that Elliott No. 2 was of and concerning Mr. Galloway" (para. 463). In particular, he emphasizes the judge failed to address the evidence of Mr. Cran, who deposed he understood Elliott No. 2 pertained to Mr. Galloway.
- [401] Several considerations are relevant. First, a judge's finding about whether a publication "is of and concerning" a plaintiff is entitled to deference. Second, the judge correctly recognized the test for this issue is from the standpoint of "reasonable people acquainted with the plaintiff" (para. 342; see also Weaver, at para. 84). Third, the judge was aware of the evidence of Mr. Cran and referred to it a number of times in different contexts, including whether Mr. Cran understood other publications to refer to Mr. Galloway (paras. 250, 289, 313, 417, 421, 476). Fourth, though Mr. Cran's evidence was relevant, there was no need for the judge to refer to it, nor was she bound by that evidence. It was evidence she could rely on or not, as she saw fit. Finally, the finding that Elliott No. 2 was not "of and concerning" Mr. Galloway, was an alternative finding. The judge also was not persuaded that Elliott No. 2 was "capable of bearing the pleaded meaning" or "a meaning defamatory of Mr. Galloway" (para. 463).
- [402] The second matter raised by Mr. Galloway pertains to the judge's finding, in relation to both Elliott Nos. 1 and 4, that a reasonably thoughtful and informed reader would understand Ms. Elliott was speaking about "allegations" that had been made against Mr. Galloway,

rather that asserting the allegations were true (paras. 464, 466). Mr. Galloway suggests that the judge misapprehended the correct legal test. He contends the judge's finding "clashes with the well-established repetition rule" and relies in part on Grant, at para. 114, in aid of his submission.

- [403] We do not agree. The judge expressly addressed Grant and the repetition rule (paras. 346-347). Furthermore, as we noted earlier, the judge relied on Lewis and said: " simply using the word "alleges" or saying that a person is "suspected" of criminal conduct will not necessarily transform a defamatory statement into one that is not defamatory. The court will still have to consider whether, in context, the statement carries a defamatory meaning" (para. 330).
- [404] It was for the judge to determine whether a reasonable reader would understand that Ms. Elliott, in Elliott Nos. 1 and 4, was speaking about allegations that had been made against Mr. Galloway rather than implying the allegations were true.
- [405] The last issue raised by Mr. Galloway relates to the judge's finding that he had not met his burden to show grounds to believe that fair comment was not a valid defence for Elliott No. 3 (paras. 590-592). Mr. Galloway makes three distinct submissions.
- [406] First, he argues that Ms. Elliott's response to civil claim is defective in that it does not plead any foundation for the defence of fair comment. He contends that a defendant should not be permitted to "bypass pleading requirements" on a PPPA application.
- [407] Mr. Galloway is correct that in order to plead the defence of fair comment properly it is necessary for a defendant to plead the facts on which the comment is based (Bullen & Leake, at s. 37-40; Brown on Defamation, at § 19:35). There are, however, several difficulties with this submission. It does not appear to be an issue that he raised before the judge. As such it is not open to him to raise it now (Gorenshtein v. British Columbia (Employment Standards Tribunal), 2016 BCCA 457, at para. 44).
- [408] Furthermore, it is not entirely accurate to say that Ms. Elliott's response to civil claim does not plead the facts or context on which her defence of fair comment is based. There are several such facts pleaded though this aspect of the pleading could clearly have been further developed . Finally, we noted earlier that the Limitation Applicants never sought to challenge Mr. Galloway's pleadings and that the PPPA is not intended to replace other procedural tools in the Rules. The same is true for Mr. Galloway. Had Mr. Galloway brought an application to strike Ms. Elliott's pleadings, he would have had to overcome the various stringent requirements of a R. 9-5(1)(a) application.
- [409] Mr. Galloway also contends that Elliott No. 3 was an expression of fact and not comment, arguing that Elliott No. 3 asserts Mr. Galloway was guilty of sexual assault. He argues, relying on WIC, at para. 26, that "an indicia of comment is one that is generally incapable of proof. Whether one committed rape, sexual assault or physical assault is not 'incapable of proof'".

[410] The broad context for Elliott No. 3, apparent in the statement itself (para. 251), was the proposed definition of "sexual assault" in a report of the UBC Sexual Assault Panel. That definition apparently included ostensibly consensual sexual relationships where there was a power imbalance or breach of trust. The judge, based on this context, said:

[591] ... I agree with Ms. Elliott that a reasonable reader would understand her to be expressing her opinion on how Mr. Galloway's conduct (already described publicly) would be characterized, based on the definition of "sexual assault" in the UBC Sexual Assault Panel's report (which is described in Elliott No. 3). Her statement, in context, is recognizable as comment, and there is a properly disclosed (or notorious) factual foundation for comment. Ms. Elliott's opinion is one that anyone could honestly express based on those facts...

See also para. 590.

[411] In our view, the judge's finding disclosed no error and was available on the record before her.

[412] Finally, Mr. Galloway submits the judge should not have dismissed the prospect that Ms. Elliott acted with malice (para. 591) because the evidence against Ms. Elliott was not yet "fully revealed" and because Mr. Galloway had not yet had access to discovery of documents or examinations for discovery.

[413] The matters Mr. Galloway complains of are inherent in the structure of a s. 4 application under the PPPA. Under s. 4(2)(a)(ii) of the PPPA the onus lies with a plaintiff to show the defences in play do not tend to weigh more in favor of the defendant (Bent, at paras. 101, 103, 138). Furthermore, PPPA applications will often be brought early in the life of an action, with other pre-trial procedures being stayed (PPPA, s. 5) and with the plaintiff being denied the discovery normally available to them. It was necessary for Mr. Galloway to put some evidence of malice on the part of Ms. Elliott before the judge. He failed to do so and does not argue otherwise.

[414] In our view, there is no merit to any of the issues raised by Mr. Galloway in his claim against Ms. Elliott. His appeal is dismissed. Accordingly, as the judge found, the proceeding against Ms. Elliott is dismissed.

A.B.

A.B. No. 2 - The Art Exhibit

[415] We next turn to A.B. who appeals the judge's dismissal of her PPPA application with respect to the Art Exhibit (referred to as A.B. No. 2). A.B. submits that the judge erred by concluding that the Art Exhibit was "of and concerning" Mr. Galloway, and that it was fact rather than comment. She also alleges that the judge misapplied the test for assessing harm pursuant to s. 4(2)(b) of the PPPA and erred in her finding of malice on the part of A.B.

[416] A.B. No. 2 was based on an "Art Exhibit" created by A.B., which was displayed in a small gallery in 2018. A.B. took the statement from her Rape Narrative, "radically redacted it", enlarged the remaining text and placed it on 51 black panels. The chambers judge described the contents:

[293] Text on one of the panels (titled "No One") stated [ellipsis shows space on the panel]:

He was a famous author . . . I was no one

[294] Text on another panel (titled "Office Floor") stated in part [ellipsis shows spaces on the panel] (this panel includes part of A.B. No. 2):

March . . . On my back on the floor of his office He straddled over me . . . pushing up my dress . . . "Please no please no" . . . begging him no . . . May . . . came to naked on the floor [text continues]

[295] Text on another panel (titled "Final Year") mentioned that the man had been "promoted to Chair."

[417] The publication, which was online, identified A.B. by name and was posted on both the gallery website and A.B.'s own website (where she was identified by name).

[418] A.B. did not mention either Mr. Galloway or UBC specifically by name in the publication about the Art Exhibit. She removed details of her attendance at UBC from her artist's biography, but she included her receipt of a scholarship and award in 2012 from the "UBC Department of Creative Writing". Details of her attendance at UBC appeared on her personal website.

[419] The chambers judge quoted from the artist statement and set out the details of panel 12:

[301] A.B.'s artist statement (in addition to the quote above) stated in part (part of A.B. No. 2 is included, underlined below):

You are no longer able to create anything new. When an idea finally comes to you, you wince and feel sick because you know it's the only thing you can do and you don't want to do it. If you can't create, then you have to subtract, take the already existing radioactive material in the Rape Narrative and transform it. Redaction is a violent act. It was wielded against you and others, against every woman who comes forward.

You wince again and bear down, look directly at what you don't want to look at. You read and redact the document over and over with your jaw clenched until it aches. In doing this some of the power it has over you is diminished and some of the power he has over you is diminished as well. But as you print these pages on a large scale and imagine putting them up in a public space for anyone to see, knowing anyone can walk into that gallery space, you get really scared.

It's terrifying to try to exist in the world again, because not only is the man who raped you determined to punish you, so are many powerful people who support that man. These people you once admired now frighten and disgust you. "The truth will come out," they say, and "women lie." They are determined to be right no matter the cost.

...

[302] Another panel (panel 12) stated (this is part of A.B. No. 2) [ellipsis shows spaces on the panel]

no . . . he forced me . . . on my knees . . . put his . . . in my mouth . . . took a cell-phone photo. He said . . . "I better make sure I trash this before I go home."

[Emphasis added.]

Did the judge err in finding the Art Exhibit was "of and concerning" Mr. Galloway?

[420] A.B. submits that the chambers judge applied too narrow an analysis to the question of whether the Art Exhibit was "of and concerning" Mr. Galloway. She says that the judge erred in applying the test (para. 342): "A plaintiff must prove that the statements would lead reasonable people acquainted with the plaintiff to the conclusion that the statements refer to the plaintiff".

[421] A.B. presents two arguments on this point. The first is that the judge failed to apply the factors enunciated in the case law that define the surrounding circumstances or context for "of and concerning" and that she failed to apply the "ordinary person test" properly given the evidence supporting her finding came from interested parties as opposed to objective observers.

[422] Mr. Galloway submits that A.B. No. 2 is not just about the Art Exhibit, but also A.B.'s online publication of and about the exhibit on her website and on the gallery's website, both of which remained online at the time of the PPPA application (para. 722). Mr. Galloway says that the "Rape Narrative" published on the internet says that A.B. was "sexually assaulted, assaulted and abused by a professor". The images displayed in the gallery and on the websites used A.B.'s real name and described the abuser as a professor and a "famous author" promoted to the Chair. Mr. Galloway says this occurred shortly after national news stories about him were published with the same identifiers. He contends the chambers judge made no error in concluding that the publication was "of and concerning" Mr. Galloway.

[423] The chambers judge correctly set out the legal test for "of and concerning" at paras. 339-342.

[424] The judge concluded that Mr. Galloway had shown grounds that the statements in A.B. No. 2 would lead reasonable people acquainted with him to the conclusion that the statements referred to him (paras. 421-422). The weight to be given to the factors was ultimately a matter for trial, but she was satisfied there was more than sufficient evidence to meet the

"grounds to believe" standard. Specifically, the Art Exhibit had described the perpetrator as a "professor", "chair of the department", and a "famous author"; Mr. Galloway was all of those things (para. 421). Furthermore, Dr. Smalec's tweets from July using #ubcaccountable show that she was aware that the Rape Narrative in the Art Exhibit was about Mr. Galloway. It was understood by people who knew Mr. Galloway personally that the references in the Art Exhibit were to him. In addition, even though A.B.'s identity at the time was not publicly known, her identity was an "open secret" among the UBC and creative community at least (para. 422). Mr. Galloway's name was also in the media at the time. As well, the gallery's website referred to A.B. by name and stated that the Art Exhibit "derives from what [using A.B.'s real name] refers to as her Rape Narrative, a narrative (and term) sanctioned by a university after she disclosed being sexually assaulted, assaulted and abused by a professor".

- [425] A.B. submitted that the chambers judge failed to consider factors set out in *Weaver*, at para. 85, *Bou Malhab v. Diffusion Métromédia*, 2011 SCC 9, at para. 49, and *Butler*. However, the factors noted in those decisions are engaged when there is a group defamed as a whole. For example, in *Bou Malhab*, there were a number of taxi drivers who were the target of a radio host criticizing their language skills. The chambers judge did not err in not engaging those factors.
- [426] A.B. also argues that there were a number of factors the judge did not consider when assessing "the surrounding circumstances" with respect to whether the Art Exhibit was "of and concerning" Mr. Galloway. With respect, this submission misses the mark. The issue was not whether there were other aspects that did not identify Mr. Galloway--for example, the fact that the exhibit was small, in a major American city, was about sexualized violence, and so on. A.B. stated that the Art Exhibit was about a sexual assault by a professor, not sexual violence generally, and, in light of the fact that he was not named, it required an examination of all of the circumstances. However, the "identifiers" pointed directly to Mr. Galloway and were not diminished by the circumstances that narrowed the scope of the publication.
- [427] A.B. also submits that the judge did not correctly apply what she refers to as the "ordinary sensible person" test. She argues that the judge relied on those who were "embroiled" in the events in issue.
- [428] Part of the test involved in trying to identify the plaintiff as the person defamed is a question of fact: "Does the article, in fact, lead reasonable people, who know the [plaintiff] to the conclusion that it does refer to him?" (*Butler*, at para. 21, citing *Knuppfer* at 121). The test is not the "reasonable person at large", but refers to reasonable people who know the plaintiff.
- [429] The judge referred to a number of people who had seen the display and who recognized the material referred to Mr. Galloway. The identifiers overwhelmingly pointed to Mr. Galloway.

[430] A.B. is challenging a finding of fact that, in our opinion, is amply supported by the evidence. We would not give effect to this ground of her appeal.

Did the judge err in concluding that the Art Exhibit was fact and not comment?

[431] As discussed earlier, whether a statement is comment or fact is ascertained from the perspective of a "reasonable viewer or reader" (WIC, at para. 27; Hansman, at para. 108). The facts on which a comment is made must be "sufficiently stated or otherwise be known" in order for the reader or listener to "make up their own minds on the merits" of the comment (WIC, at para. 31).

[432] A.B. submits that the judge did not examine the context in which the Art Exhibit appears. She says that when the five-factor test in WIC at para. 1 is properly applied to the circumstances, the Art Exhibit is A.B. speaking to a "universal experience" and is comment, not fact.

[433] Mr. Galloway acknowledges that, as with most expression, some of the Art Exhibit was comment. However, the lawsuit is aimed at the "sting" contained in the Art Exhibit, which was fact. He submits that the statements that he committed rape, sexual assault and physical assault were not comment, but statements of fact.

[434] The judge concluded:

[550] Although presented in an artistic form, the statements in A.B. No. 2 would be understood by a reasonable person, in the context in which they were presented, as statements of fact. The "sting" of the Art Exhibit is that the Professor - that is, Mr. Galloway - committed rape and sexual assault of A.B. That is what a reasonable person would understand from A.B. No. 2 in context. These are not matters that are incapable of proof. A.B. No. 2 is a statement of facts, not comment on facts.

[435] The assertions of rape and sexual assault here were not comment. They were not expressions upon which it was open to a reader to form their own opinion on a subject. Wrapping expressions up as part of an art exhibit does not grant blanket protection from a claim of defamation. It does not render something stated as fact into comment.

[436] These assertions of serious criminal misconduct would be understood by a reasonable reader as comments rather than statements of fact (Hansman, at para. 108, citing WIC, at para. 27).

[437] Similar to the other stings involved, the judge made a finding on the question as to whether the stings were recognizable as comment. She held the stings of rape, sexual assault and physical assault were not comment, but fact. She was entitled on the record to have done so.

[438] In our view, the judge did not err in her conclusion and we would not give effect to this argument.

Did the judge err in weighing the harm of A.B.'s expression to Mr. Galloway?

- [439] A.B. also claims that the chambers judge erred in weighing harm under s. 4(2)(b) of the PPPA. She submits that there is no evidence of a causal link between her expression and the harm to Mr. Galloway. She points to all of the other sources of harm that occurred prior to her publication in the form of the Art Exhibit, and in particular, the acts that some appellants refer to as the "UBC Investigation Statements" (alleged defamatory statements made by A.B., Professor Maillard, Professor Lyon and Ms. Rooney during the UBC investigation). She points out that the damage to Mr. Galloway's reputation was done long before her Art Exhibit. The failure of Mr. Galloway to adduce evidence of a causal link to her publication is, in her submission, fatal to his claim.
- [440] Mr. Galloway submits that at the PPPA stage, he is not obliged to adduce a "fully developed damages brief" (Pointes, at para. 71). Mr. Galloway points to significant evidence of reputational harm as well as monetary harm that he suffered. He submits that it is not the law that a reputation once lost can be defamed with impunity. The persisting publications identifying Mr. Galloway as a rapist damage and prevent any rehabilitation of his reputation. He submits that the recurring publications have kept the criminal accusations alive and that he continues to suffer both financially and reputationally as a result. He submits that there is a link between the publication and harm.
- [441] The chambers judge intentionally did not separate the individual acts by the defendants in an effort to find a causal link to the harm done to Mr. Galloway by each act. She borrowed the analogy from Mr. Galloway that trying to identify particular damage as being caused by a discrete expression would be like trying to separate the "salt from the soup" (para. 640). She said all of the expressions at issue are "salt in the soup". The judge was alive to the need to find a link between the act and the harm, and concluded that each act identifying Mr. Galloway as a sexual predator continued the harm caused by the earlier acts and prevented him from rehabilitating his reputation. Mr. Galloway's reputation suffered each time he was called a rapist. She concluded that such harm was continuing and that the causal link to the harm clearly existed.
- [442] The chambers judge recognized the importance of victims reporting sexual offences (para. 703). However, the publication of A.B. No. 2 had nothing to do with facilitating a safe process for reporting. The chambers judge acknowledged the importance of sexual assault victims being able to address the trauma of that experience through art (paras. 719 -720), but she identified the Art Exhibit as having a "great power to damage Mr. Galloway's reputation" (para. 722).

[443] It bears repeating that at this preliminary stage of the proceeding, the law, which has not changed substantively post-Hansman, does not require an in-depth analysis of the harm done. Mr. Galloway needed to show harm, of which there was ample evidence, and that in the face of continuing publications, the harm has not abated, of which there was also ample evidence. Indeed, Ms. Boyd's investigation was a step towards rehabilitating his reputation, and the Art Exhibit, was a direct attack on her conclusions.

[444] In our view, the chambers judge did not err in her conclusion that there was a link between the Art Exhibit (or A.B. No. 2) and the harm suffered by Mr. Galloway, and we would not give effect to this argument.

Did the judge err in her application of principles relating to malice?

[445] To reiterate, a finding of malice by a defendant can defeat the defence of fair comment, and is also relevant to the weighing process under s. 4(2)(b) of the PPPA.

[446] A.B. submits that the chambers judge, while finding there was evidence to support malice on the part of A.B., failed to apply the test for malice, including finding that anything done by A.B. was for the dominant purpose of harming Mr. Galloway or any other improper purpose.

[447] The judge set out the evidence she found established malice on the part of A.B.:

[538] For the purpose only of the PPPA Applications, I find that A.B. is responsible for the republication of her claims against Mr. Galloway at the November Meeting. In that context, and even assuming the occasion was privileged, I find that there is a basis in the evidence, reasonably capable of belief, to support a finding of malice against A.B.

[539] The CBC Document was a tissue of lies, which A.B. knew was going to be presented at the November Meeting. Indeed, its purpose was to provide "evidence" to "build the case" against Mr. Galloway. The CBC Document was a deliberate fabrication, designed to persuade those attending the November Meeting that Mr. Galloway was guilty of rape, that lawyers at the CBC who had heard A.B.'s story had accepted it as reliable and true, and that the story would be taken to a national audience unless the faculty acted. Thus, in the CBC Document, A.B. manufactured a story for the occasion. This, in my view, provides a basis in the record to conclude that, in relation to A.B. No. 1, a defence of qualified privilege (assuming a privileged occasion) would be defeated by malice. Therefore, and in the context of A.B.'s PPPA Application, there are grounds to believe that qualified privilege is not a valid defence in respect of A.B. No. 1.

[540] In addition, A.B.'s e-mail communications with Ms. Rooney, and her active encouragement of Ms. Rooney to contact others, to report A.B.'s claim of sexual assault with the object of finding more individuals with similar claims against Mr. Galloway (including providing Ms. Rooney with names), provide a basis in the evidence, reasonably capable of belief, to conclude that a qualified privilege defence would be defeated by malice.

[448] A.B. submits that there are a number of other reasons why she conducted herself as she did. For example, she argues that her lying about the CBC investigation was a show of desperation on her part to convince the others that she was telling the truth. These arguments were made to the chambers judge and rejected. It is not for us to revisit the findings of fact absent a palpable and overriding error.

[449] The chambers judge did not review the principles with respect to malice again, nor the evidence noted above, before she drew the inference that the Art Exhibit was a public demonstration of A.B.'s malice toward Mr. Galloway. She said at para. 722:

Implicit in A.B.'s position is that she would be unable to create, and unable to gain any therapeutic benefit from creating, without defaming Mr. Galloway through A.B. No. 2. I do not find this persuasive. All art involves making choices. A.B. chose the subject matter of the Art Exhibit, and she chose what to communicate in it and the artist's statement that accompanied it. In addition, the Art Exhibit was designed for public display: that was the point of it. Not only was the Art Exhibit (with A.B. No. 2) available for public viewing at the Gallery, but it was also available for viewing on both the Gallery's and A.B.'s website (where [it] remains so, with a website address that identified A.B. by name). The broad publication of the Art Exhibit's graphic content (only some of which Mr. Galloway is suing over) had great power to damage Mr. Galloway's reputation. It was a public demonstration of A.B.'s malice toward Mr. Galloway. On the record before me, A.B. understood that she was running a real risk of being sued.

[450] A judge is not required to repeat the principles they are applying when reaching a conclusion. This is particularly so in a case as complex as this one. It is important to recall that, at the PPPA stage, justification or truth has not been relied on. The publication in the Art Exhibit was a reproduction of statements that had been found in the Boyd Report to be unsubstantiated. Malice can arise by stating a reckless falsehood. A.B. knew the risk she was taking by publishing the contents of the Art Exhibit.

[451] In our view, the judge did not err in either identifying the correct legal principles or in her application of those principles. Nor is there any palpable or overriding error with respect to her findings of fact for the purpose of the PPPA application. Therefore, we would not give effect to this argument.

[452] Accordingly, we dismiss A.B.'s appeal.

A.B. No. 1

[453] We concluded that the chambers judge erred, in part, in finding that the Limitation Act barred Mr. Galloway from proceeding on A.B. No. 1. As a result, A.B. raises other defences in the event that she was unsuccessful on Mr. Galloway's cross appeal. She raises the issues of qualified privilege, the Weber defence, and the public interest weighing exercise.

Are there valid defences to A.B. No. 1 on the basis of qualified privilege, the Weber defence or the public interest weighing exercise?

- [454] First, A.B. submits that the PPPA application should succeed on the basis of qualified privilege. The chambers judge made a number of observations in her reasons for judgment indicating that if she had to decide the issue, it would not be in A.B.'s favour. The judge concluded that A.B.'s conduct went far beyond what might have been considered privileged. Regardless of whether qualified privilege was open to A.B., the chambers judge concluded that A.B. was motivated by malice. We have upheld that conclusion. Malice defeats a claim of qualified privilege. Given our conclusion in relation to malice, no more needs to be said.
- [455] Second, we have discussed the Weber framework earlier. A.B. submits that the chambers judge erred when she concluded that the "essential character" of the dispute was not a "workplace problem" but a "problem in the workplace".
- [456] Applying that framework to A.B. No. 1, the repetition by A.B. and others of A.B. No. 1 makes it very clear that the comments do not refer to Mr. Galloway's "character, history or capacity" as an employee. She repeated her allegations not only to her two professors, but also to Ms. Rooney, the CBC journalist Ms. Syed, and many others. The defence fails on that basis alone. There is no question that a person who is a victim of sexual assault should be able to report that conduct; however, A.B. went far beyond reporting her allegations to someone whose job it was to receive such complaints.
- [457] Furthermore, based on the framework described earlier, the Weber defence has no application to the statements made in A.B. No. 1.
- [458] Much has already been said in relation to public interest weighing in terms of permitting meritorious applications to proceed against the public interest in protecting expressions on matters of public interest.
- [459] A.B. argues that the public interest in reporting sexual offences weighs heavily in her favour. However, the expressions at issue did not involve her reporting sexual misconduct to proper authorities, but were instead statements that went far beyond those boundaries. It is those statements on which liability is sought.
- [460] In addition, the judge's finding of malice on the part of A.B. also plays a role in the weighing process.
- [461] The chambers judge extensively reviewed the law and factors affecting the weighing process. She concluded that A.B. No. 2 should proceed to trial. There is no question that the expression in A.B. No. 2 was closer to the higher end of protection than A.B. No. 1, yet the judge concluded that the public interest weighed in favour of Mr. Galloway. In our view, the remaining defamatory statements in A.B. No. 1 fall at the high end of the spectrum as does the public interest in allowing Mr. Galloway's claims to proceed.

Chelsea Rooney

[462] The background relating to Ms. Rooney's part in the UBC investigations is set out in the Background Chronology. As discussed, her participation resulted in Rooney No. 1. After the Boyd Investigation, Ms. Rooney continued to tweet messages, resulting in Rooney Nos. 2-7. The chambers judge dismissed the PPPA applications in relation to those six tweets. The details of the six tweets are set out in Appendix "D" to these reasons.

[463] Ms. Rooney raises four grounds of appeal in relation to Rooney Nos. 2-7. The first three grounds allege errors in the judge's application of the legal test for defamatory meaning, fair comment, and malice. She also submits that the judge erred in the public interest weighing process.

Did the judge err in applying the test for defamatory meaning?

[464] The judge reviewed the legal principles applicable to finding whether a publication has a defamatory meaning (paras. 319-338). Whether these publications were actually defamatory is, however, a matter for trial.

[465] She analyzed Rooney Nos. 2-3 and concluded that they were capable of the defamatory meaning that Mr. Galloway raped, sexually assaulted and physically assaulted A.B. For similar reasons, the judge also concluded that Rooney Nos. 4-7 were also capable of bearing a defamatory meaning (para. 450).

[466] Ms. Rooney submits that the chambers judge erred by failing to assess the words of each tweet individually and instead seized on their worst possible meaning, and thus failed to consider the context in which the tweets were posted.

[467] She also submits that the chambers judge failed to consider the tweets separately, and did not refer to several of the tweets in her analysis. She says, properly considered, Rooney Nos. 2 and 3 were only statements that Mr. Galloway was the subject of allegations, not that the allegations were true. She alleges that the judge then continued down the path of error by simply tagging Rooney Nos. 4-7 as one group of tweets rather than analyzing them individually. In particular, Ms. Rooney submits that the entire analysis is void of context, and the tweets were considered "in a vacuum".

[468] Ms. Rooney compares the analysis of her tweets with those of Ms. Elliott. The judge concluded those tweets were not defamatory (see e.g., Elliott Nos. 1, 2, and 4) and says that had the same level of analysis been applied to her tweets, the result would have been quite different.

- [469] Mr. Galloway says that the judge examined the context and words carefully. For example, in Rooney No. 2, she set out the entire context (paras. 223-227) along with the tweet. Rooney No. 3 was a response to a tweet by Margaret Atwood where the author said: "No one can be asked to believe or not believe a package of unknown things"; Ms. Rooney then responded "I strongly disagree. We can be asked to believe a person who reports sexual assault. And we can believe her. And we do." The judge set out the context to that tweet at para. 231.
- [470] Mr. Galloway points to the extensive context leading up to Rooney No. 4 in the judge's reasons at paras. 242-248.
- [471] On November 23, 2016, Mr. Galloway published a "Public Apology" on the UBC Accountable website, which was released to the media (para. 242). The National Post and Globe and Mail both published articles. On November 24, 2016, counsel for A.B. published an online response that was highly critical of Mr. Galloway and stated that A.B.'s report to UBC was not about a "consensual affair" (para. 246). The same day, CTV news published a story under the title "Woman who accused Steven Galloway of sexual assault breaks silence", which was carried in the Canadian Press. Rooney No. 4 was published the same day. In that tweet, Ms. Rooney said: "A woman broke her silence about sexual assault today, and the signatories of UBC Accountable are still uploading their stories, as if they matter."
- [472] Mr. Galloway submits that the Rooney Nos. 5-6 followed shortly after Rooney No. 4 and that No. 7 occurred a few months later. He submits that the judge did not quote Nos. 5-7 in her reasons, but they appear in the Appendix to the reasons. In addition, they bear significant similarities to Rooney Nos. 2-4, and thus it was not necessary for the judge to repeat them.
- [473] Mr. Galloway submits that the tweets, in context, some of them following quickly after the other, may be considered both repetition of the defamation and referable to each other. He says the chambers judge's conclusion is not tainted by error.
- [474] The test applicable to whether something has a defamatory meaning is objective. As noted in Ball at para. 119, 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".
- [475] The chambers judge thoroughly reviewed the law applicable to defining a "defamatory meaning", including expressions alleging criminal conduct. She also reviewed how the objective, common sense approach to defamatory meaning avoids seizing upon the worst possible meaning.
- [476] The chambers judge properly set out what she had to assess in the context of these preliminary applications:
- [337] In the context of the PPPA Applications, I am not making any final determination of whether any statement alleged by Mr. Galloway to be defamatory is, in fact, defamatory. However, I must assess whether, in respect of a particular statement, Mr. Galloway has met his burden to show that there are grounds to believe there is substantial merit to his claim.

Mr. Galloway's burden is to show that there are "grounds to believe" statements alleged to be defamatory can bear the meanings pleaded or something substantially similar. In my view, this requires me, at the very least, to make a determination of whether the words complained of are reasonably capable of bearing a defamatory meaning.

[477] The judge concluded that Rooney Nos. 2-7 were reasonably capable of a defamatory meaning. In our view, the chambers judge applied the correct test to the issue of defamatory meaning. She considered the statements in context. She was not required, in the circumstances of these statements, to analyze each individual tweet given the similarity among them, particularly when they were considered cumulatively.

[478] In our opinion, the judge did not err in concluding that Rooney Nos. 2-7 all had a defamatory meaning.

Did the judge err in applying the law on fair comment?

[479] Similar to other appellants here, Ms. Rooney submits that the chambers judge misapplied the test for fair comment. She submits that the chambers judge committed two errors: first, she failed to analyze the words and context for each of the tweets in Rooney Nos. 2-7, and second, she failed to analyze whether the inference of fact she found for each tweet would be recognized by the ordinary reasonable reader as comment or fact.

[480] Ms. Rooney submits that context is critical, especially as it relates to tweets. Tweets that appear as fact, may be properly construed as comment when read in the context within the thread of tweets in which it appears.

[481] As noted above, the judge set out the context and detail with respect to Rooney Nos. 2-4. She concluded that the same analysis applied to the remainder of the tweets.

[482] The chambers judge concluded that all of the tweets had essentially the same defamatory meaning. She found that a reasonable reader would find that the tweets referred to Mr. Galloway, the allegations of rape, sexual assault and physical assault against him, and that Ms. Rooney accepted those allegations and stated them as fact, not comment.

[483] Ms. Rooney, like the other appellants, is asking us to re-weigh the evidence in the record and come to a different conclusion. It bears emphasizing that this is not the role of an appellate court.

[484] In our opinion, there is no basis to interfere with the chambers judge's findings and we would not give effect to this argument.

Did the judge err in her findings regarding malice?

[485] Ms. Rooney submits that the chambers judge erred by relying on her findings with respect to Ms. Rooney's malicious state of mind when Rooney No. 1 occurred. She submits that malice must be analyzed for each defamation alleged.

- [486] As noted in Hansman and Hobbs, one of the categories in which one can find malice is with "reckless indifference whether it is true or false". Here, Ms. Rooney continued with her tweets even after the release of the Boyd Report (wherein A.B.'s complaints were not sustained, save for a finding of sexual harassment). Combined with the judge's finding that Ms. Rooney's hostility towards Mr. Galloway prompted her actions in Rooney No. 1, the chambers judge was fully justified in her conclusions based on the evidence--particularly keeping in mind both the standard of review and the task at hand, which was not to find malice, but to find whether the plaintiff had shown there were grounds to believe that there was no valid defence.
- [487] The judge observed that Ms. Rooney had previous experiences with Mr. Galloway that resulted in her being ill-disposed towards him. The judge concluded:
- [546] As for Ms. Rooney, on the record, there are grounds to believe that she was motivated by spite and ill-will toward Mr. Galloway. She was clearly pre-disposed to believe the worst of Mr. Galloway, and motivated (with encouragement from A.B., Professor Maillard and Professor Lyon) to recruit others to her point of view. Moreover, and like Professor Maillard and Professor Lyon, Ms. Rooney accepted A.B.'s reports at face value as true, and never asked any questions before communicating Rooney No. 1 to more than a dozen people. Her conduct was, therefore, also reckless.
- [488] She added the following as part of the weighing process under s. 4(2)(b):
- [735] In my view, and like Professor Maillard, Ms. Rooney continued in her expressions to be motivated and actuated by malice toward Mr. Galloway. Her malice respecting Mr. Galloway extended to her rejection of the conclusions reached in the Boyd Report. Her expressions were not about truth-seeking, or promoting truth-seeking. Rather, Ms. Rooney's motivations were about confirming and vindicating her own very bad opinions about Mr. Galloway, and her deep dissatisfaction with the Boyd Investigation and with the conclusions in the Boyd Report.
- [489] The chambers judge found that the malicious state of mind under which Ms. Rooney operated continued, and was motivated beyond the initial expression in Rooney No. 1. While the chambers judge did not make specific findings for each expression, she was not required to do so. Malice is a state of mind. The judge concluded that it was continuing as reflected in her comment regarding the "flawed Boyd Report" and her views of Mr. Galloway.
- [490] As the judge said, even if the tweets were comment they were defeated by a finding of malice. In our view, the judge did not err in concluding that the defence was defeated by a finding of malice.

Was the judge's weighing process flawed?

- [491] Ms. Rooney submits that the chambers judge's errors, alleged above, with respect to defamatory meaning and malice, also mean that the weighing process was flawed. Given our conclusion that the chambers judge did not err with respect to those findings, we would not give effect to this argument.
- [492] Ms. Rooney further submits that the judge erred by holding that the public interest in increasing sexual assault reporting would "only weigh heavily in favour of the public interest in protecting expressions reporting sexual assault". She says that this misses the important point with respect to supporting complainants and de-stigmatizing sexual assault disclosures, which would advance the public interest (para. 704). However, the chambers judge actually said the following:
- [703] It is beyond argument that there is a very significant public interest in encouraging reporting of sexual assault. The public interest is recognized expressly in s. 276(3)(b) of the Criminal Code, for example, and in decisions of the Supreme Court of Canada, as counsel for the Applicants have pointed out. Unreported criminal acts cannot be prosecuted nor can perpetrators be punished. Denunciation of unlawful conduct (which sexual assault surely is) and deterrence of such conduct are important goals in the context of the criminal law, and important societal goals. Predatory misconduct (whether in the workplace, an educational institution or anywhere else) cannot be addressed, and victims of such conduct cannot be protected, if victims feel they cannot come forward, or will be ignored, shamed or face retribution and reprisal if they do. These are compelling reasons to provide appropriate, compassionate and necessary support and encouragement for victims to report. The public interest in doing so is overwhelming.
- [704] The concerns raised by Ms. Birenbaum (and other counsel) in submissions, if valid, would weigh very heavily in favour of the public interest in protecting expressions reporting sexual assault. However, I do not accept what I view as essentially in terrorem arguments about how the Applicants' expressions in this case - and specifically the Remaining Expressions- must be weighed in the context of the PPPA Applications. The Remaining Expressions are not reports of sexual assault at all. Rather, they are statements that would be understood to mean that Mr. Galloway is a rapist and guilty of criminal acts.
- [705] The implication of the Applicants' submissions is essentially that any public statement, the natural and ordinary meaning of which would be understood to be that a sexual assault was perpetrated by one person against another (in this case, that Mr. Galloway raped A.B.), and regardless of the circumstances in which the statement was published, must be protected. There would be no legal consequences of any kind attached to publicly calling someone a rapist, completely outside of any formal reporting, and no obligation ever to prove the statement was true. This, in effect, would place all statements concerning that type of claim into the category of absolute privilege. No distinction would be made between making a confidential report to an institution (almost certainly a privileged occasion), and publishing on Twitter to the world. There would be no recourse - certainly not in civil proceedings - for the person publicly so accused. It is difficult to see how something so extreme and

potentially reckless would be in the public interest.

- [493] Ms. Rooney's argument was considered and rejected by the chambers judge for the compelling reasons noted above. The judge was well-aware of the public interest and the importance of encouraging reporting of sexual offences. She also recognized that there cannot be an absolute protection surrounding the makers of such statements, regardless of the circumstances or the truth. The PPPA requires a judge to weigh the expression against the harm and determine where on the scale the public interest protection lies. The chambers judge did this weighing, and we do not see any basis to interfere with her conclusions.
- [494] Last, Ms. Rooney raises the issue of a causal link to harm, as have other appellants. In Ms. Rooney's case, her continuing barrage of tweets alleging misconduct by Mr. Galloway provides a strong causal link in the sense of not only repetition of the defamation, but continually bringing the expressions before the public long after the Boyd Report, hindering Mr. Galloway's opportunity to rehabilitate his reputation.
- [495] We would not give effect to any of the arguments raised by Ms. Rooney. Accordingly, her appeal is dismissed.

Rooney No. 1

- [496] Similarly to A.B., we concluded that the judge erred in finding Mr. Galloway was barred from proceeding on Rooney No. 1 due to the application of the Limitation Act. Ms. Rooney also raises the same defences as A.B. in the event that she was unsuccessful on Mr. Galloway's cross appeal.

Are there valid defences to Rooney No. 1 based on qualified privilege, the Weber defence, and public interest weighing?

- [497] Rooney No. 1, except in relation to Ms. Flegg, is not statute barred. Ms. Rooney is alleged to have told many people that Mr. Galloway raped A.B (para. 440).
- [498] Similar to A.B., Ms. Rooney claims qualified privilege. Even if qualified privilege was otherwise available, the chambers judge concluded that Ms. Rooney was motivated by malice, which defeats any defence of qualified privilege. A finding that we have upheld.
- [499] Ms. Rooney also raises the Weber defence, as described earlier. She submits that Mr. Galloway's claims have already been addressed in the grievance process. However, that claim was predominantly in relation to violation of privacy by UBC. The collective agreement, to which Ms. Rooney was not a party, did not address the harm caused by the type of expressions in issue here. In our view, the decision in Weber does not provide Ms. Rooney with a defence to Rooney No. 1.

[500] Ms. Rooney is alleged to have spread rape allegations against Mr. Galloway far and wide in Rooney No. 1. The chambers judge concluded that she was motivated by malice. These factors weigh heavily in placing the expressions at the lower-end of the protection-deserving spectrum. The evidence of harm to Mr. Galloway is significant and lies closer to the high end of the protection-deserving spectrum. Accordingly, the claim should be allowed to proceed.

Mandi Gray

[501] The defamatory statements that Dr. Mandi Gray is alleged to have made are set out in detail at Appendix "E". The judge dismissed Dr. Gray's PPPA application with respect to Gray Nos. 1-3, 6 and 7, and she allowed the application with respect to Gray Nos. 4 and 5. Dr. Gray only appeals the judge's dismissal of Gray Nos. 6 and 7. Mr. Galloway cross appeals the dismissal of his cause of action with respect to Gray Nos. 4 and 5.

[502] Dr. Gray submits that the chambers judge erred in concluding that Gray Nos. 6 and 7 have a defamatory meaning. She also contends that the judge made palpable and overriding errors of fact with respect to her finding regarding the defence of fair comment. Finally, she submits that the judge made palpable and overriding errors of fact in the weighing process pursuant to s. 4(2)(b).

[503] Mr. Galloway brought proceedings with respect to seven of Dr. Gray's tweets. The first three were published on November 15, 2016, in response to the UBC Accountable letter and we set them out below for context. These are referred to as Gray Nos. 1-3 (see Appendix "E").

[504] Gray No. 4 was published the next day:

generosity.com/communityfund #UBCaccountable we are raising funds to support two women who have legal bills due to @UBC inaction re: sex assault

[505] On December 5, 2016, Dr. Gray tweeted (Gray No. 5, underlined below) an exchange she had with Mr. Galloway in November 2015 about holding individuals accountable for sexual misconduct. She wrote:

I asked #stevengalloway a year ago about rape culture and sexual assault on campus . . . what did he respond? #ubcaccountable

I agree - rapists should be held accountable #VAW #stevengalloway #UBC

[506] On March 18, 2018, Dr. Gray tweeted Gray No. 6 (underlined): "There is an interesting contradiction between supporting those who are sexually assaulted when they are faceless & nameless "survivors" and the absolute erasure of those who have come forward. See: complainants in Galloway & Ghomeshi cases".

[507] The last expression, Gray No. 7 (underlined), was on July 6, 2018, when Dr. Gray tweeted a photo of herself in front of A.B.'s Art Exhibit along with the following observation: "I am in [city redacted] for the opening of my friend [A.B.]'s solo exhibition at #[Art Gallery] titled [Art Exhibit]. This is a very important installation about campus sexual violence".

Were Gray Nos. 4 and 5 capable of having a defamatory meaning?

[508] On Mr. Galloway's cross appeal, he submits that the chambers judge erred in concluding that Gray Nos. 4 and 5 did not have a defamatory meaning.

[509] The judge found that given their context, neither of these tweets were capable of carrying a defamatory meaning. She found that Dr. Gray was repeating Mr. Galloway's words from November 2015, and as such, a reasonable reader would understand those as being Mr. Galloway's words (paras. 454-455).

[510] Mr. Galloway submits that the judge did not consider the tweets in context and gave the most innocent interpretation to the expressions.

[511] In our view, the chambers judge properly considered the expressions in context and applied the correct principles of law. Gray No. 4 was about fundraising and did not carry the "sting" that Mr. Galloway is a rapist. Gray No. 5, when read in context, was, as the judge concluded, a repetition of Mr. Galloway's statements in the context of the public debate and did not carry the sting as pleaded.

[512] We would not give effect to those arguments.

[513] Having found no error by the chambers judge, it is not necessary to consider the arguments raised with respect to the defences available on Gray Nos. 4 and 5.

Did the judge err in "pruning" Gray Nos. 4 and 5 from other statements?

[514] Mr. Galloway submits that the chambers judge was required by law to permit Gray Nos. 4 and 5 to proceed. This argument is based on the concept that s. 4 of the PPPA is an "all or nothing" situation. Mr. Galloway submits that the legislation permits the court to dismiss a "proceeding", not part of a proceeding. Furthermore, he says it is contrary to public policy and the intent of the PPPA, which he submits is meant to screen out and avoid trials on unwarranted claims. He says no efficiency is gained by "pruning" (i.e., dismissing certain expressions and allowing others), and that allowing the entire proceeding to advance will give greater context to the trial judge when considering the claims.

[515] The judge considered this submission, but she disagreed that s. 4 is an all or nothing situation (para. 413):

I have concluded that I must reject Mr. Burnett's position. In my opinion, despite the use of the word "proceeding," s. 4 of the PPPA is not an "all or nothing" situation. In my view, neither the objectives of the PPPA nor those of the Supreme Court Civil Rules (specifically Rule 1-3) are compatible with allowing a claim that I have concluded lacks substantial merit, or one where the

plaintiff has failed to meet its burden to show no valid defence, to go forward, essentially on the coattails of other claims which I have concluded have substantial merit and no valid defence. I am not persuaded, particularly in the context of Mr. Galloway's many claims in this action, that the word "proceeding" in s. 4 requires that result.

[516] Dr. Gray submits that the chambers judge did not err and relies on the Ontario Superior Court level decisions that the judge cited (Rizvee; Schwartz et al. v. Collette, 2021 ONSC 2138). She also relies on the Ontario Superior Court level decision in Thatcher-Craig, at paras. 42-43, all of which are summarized above.

[517] As noted earlier, a chambers judge who is hearing an application to dismiss a case in its entirety has the discretion to consider "pruning" individual expressions, as in this case. Had the chambers judge here concluded not to "prune" the expressions of Dr. Gray, that also would have been within her discretion. Once a judge concludes that one expression will proceed to trial, it remains in their discretion whether the remaining expressions should proceed. The judge is, in accordance with the summary nature of the process, not required to review every expression. However, they may choose to do so.

[518] In addition, Mr. Galloway's larger context argument with respect to the admissibility of "pruned" expressions cannot succeed because expressions excluded as a cause of action will not necessarily be excluded at trial. The expressions may well have relevance and be admissible, just not triable. See Catalyst 2023, at para. 145.

[519] In this case, the chambers judge exercised her discretion and "pruned" some expressions from the action, finding that they did not meet the various tests in the PPPA. In our view and in light of the purpose of the legislation discussed at the outset of these reasons, the judge did not err in the exercise of her discretion.

[520] In light of the above, Mr. Galloway's cross appeal is dismissed.

Did the judge err in concluding that Gray Nos. 6 and 7 had a defamatory meaning?

[521] The judge found that the words in Gray No. 6 were capable of bearing a defamatory meaning because Mr. Galloway was expressly referred to in the tweet and in connection with "those who are sexually assaulted" and the "complainant" against him (para. 456). The judge said a reasonable reader would understand these words to mean that Mr. Galloway had raped and sexually assaulted A.B.

[522] Dr. Gray submits that this interpretation is "plainly wrong" because Mr. Galloway is referred to in the part of the tweet that encompasses "those who have come forward", not "those who are sexually assaulted". With respect, that is a distinction without a difference. The phrase "those who come forward" obviously refers to "those who have been sexually assaulted and come forward". It was open to the chambers judge to find a defamatory meaning on the record before her.

[523] Dr. Gray submits that that the chambers judge also erred in finding defamatory meaning in Gray No. 7.

[524] The chambers judge described the context for the tweet that forms Gray No. 7 and concluded that there were grounds to believe that it had a defamatory meaning at para. 457:

Gray No. 7 shows Ms. Gray pictured at the opening of the Art Exhibit, which is identified by name and Ms. Gray identifies A.B. by her real name. In context, a reasonable person, acquainted with Mr. Galloway, would infer that Gray No. 7 was of and concerning Mr. Galloway, and infer that Mr. Galloway had committed sexual violence upon A.B. In my view, there are grounds to believe that the elements of a defamation claim have been sufficiently established in respect of Gray No. 7.

[525] Dr. Gray again submits that this conclusion was plainly wrong. She contends that no reasonable person would understand Gray No. 7 to be asserting that Mr. Galloway committed sexual violence on A.B.

[526] As mentioned earlier, the judge reviewed the law with respect to defamatory meaning at length (paras. 319-338). She properly set out that she was required "to make a determination of whether the words complained of are reasonably capable of bearing a defamatory meaning" (para. 337).

[527] Dr. Gray submits that all a reasonable person could take from the tweet was that she attended A.B.'s Art Exhibit and that it was an important installation about campus violence. She says that there is nothing in the post from which an inference or even an innuendo could be drawn that--as a matter of fact--Mr. Galloway committed sexual violence on A.B. She submits that she was commenting on an art exhibit--an artistic work. And nothing more.

[528] The difficulty with this argument is that Dr. Gray does more than comment on an art exhibit. She states that the Art Exhibit (using A.B.'s real name in the tweet), was "a very important installation about campus violence". As noted previously, A.B.'s name was an "open secret" at UBC and the creative writing community. Her Art Exhibit was "of and concerning" Mr. Galloway. That Dr. Gray was affirming that Mr. Galloway was involved in sexual violence with respect to A.B. was a reasonable inference to draw from her tweet, and thus, reasonably capable of bearing a defamatory meaning. Accordingly, it was open to the judge to draw this conclusion. We see no reviewable error on this ground.

Did the judge err in her application of the defence of fair comment?

- [529] Dr. Gray raised a number of defences before the chambers judge, but she only presses the defence of fair comment on appeal. The judge concluded that fair comment was not available as a defence. She found that Gray No. 6 would be understood by a reasonable reader as including comment, but that the sting would be understood as a statement of fact rather than a comment on facts (para. 575). She drew the same conclusion regarding Gray No. 7 (para. 576).
- [530] Dr. Gray submits that the judge erred in her conclusion that the sting of Gray Nos. 6 and 7 were statements of fact.
- [531] Dr. Gray submits that if the tweets have a defamatory meaning, it does "not contain a bare assertion of fact" that Mr. Galloway sexually assaulted A.B. Any implication to that effect relates directly to Dr. Gray's opinion regarding the treatment of sexual assault complainants, which is what she contends the tweets were about. She submits that her tweets were matters of public interest and based on fact.
- [532] With respect to Gray No. 6, she submits that she opined on the fact that complainants who come forward with sexual assault complaints are met with "absolute erasure" contradicting society's support for victims of sexual assault "in the abstract". She submits that the view that complainants are too often met with hostility and suspicion from authorities forms the core of the "#MeToo" movement and the "Believe Women" movement. Her tweets, she says, were comments aimed at that issue and not at Mr. Galloway.
- [533] She submits that Gray No. 7 was clearly a comment on an art exhibit, the existence of which was clearly a "fact".
- [534] She submits that the proper inference to draw with respect to both tweets is that her observations were honest expressions of opinion.
- [535] Even though the analysis on the specific issue was brief (paras. 575-576), it must be considered in the context of the reasons as a whole.
- [536] It is important to consider the judge's conclusions regarding fair comment in the context of her findings of fact with respect to defamatory meaning. Given her findings of fact, there was no room, as she found, for a defence of fair comment.
- [537] For example, the judge's findings of fact in relation to whether the claims against Dr. Gray have substantial merit are found at paras. 452-458, and specifically reference Gray Nos. 6 and 7 at paras. 456-457.
- [538] Those findings inform the context of whether the statements amount to fair comment. The judge concluded that Dr. Gray's tweets would be understood as fact, not comment on facts (para. 575).

[539] The difficulty with Dr. Gray's submission is that any comment in her tweets is so intertwined with fact that a reader could not distinguish between what is fact and what is comment. Fundamentally her tweets inferentially say, as fact, that Mr. Galloway sexually assaulted A.B. The test is whether the comment is recognizable from the facts reported (Ager, at para. 43). The chambers judge concluded that it was not. There is no basis to overturn that conclusion.

[540] We would not give effect to this argument.

Did the judge err in the public interest weighing analysis?

[541] Dr. Gray acknowledges that the judge's decision with respect to the weighing process under the PPPA is owed deference; however, she contends that the judge made two errors in principle, which she says attracts a standard of correctness. As discussed earlier, while a judge's interpretation of the s. 4 PPPA framework is subject to the standard of correctness, a judge's ultimate determination on a s. 4 application is still entitled to deference on appeal, absent a reviewable error.

[542] The first error alleged is that the judge did not consider the magnitude of harm from each of Gray Nos. 6 and 7 when she conducted the weighing exercise. She submits that the legislation requires an individualized assessment of each expression, as stated in the wording of s. 4, noting that the PPPA refers to "an expression", "an applicant's expression", and "that expression".

[543] Dr. Gray submits that the judge's finding at paras. 646-647 amounts to an error in principle because she failed to find harm with respect to each expression. The judge discussed how Mr. Galloway had not attempted to differentiate between the harm he said was caused to him as a result of different expressions because from his perspective, such an exercise would be like trying to "separate the salt from the soup". In the judge's view, the harm that Mr. Galloway suffered was serious and extensive and the reputational harm was inflicted with each statement and post that was capable of bearing the meaning that he was a rapist and had sexually assaulted A.B. As we noted earlier, the judge said Mr. Galloway was not required to prove harm or causation, but he simply had to provide evidence for the court to draw an "inference of likelihood in respect of the existence of the harm and the relevant causal link" (para. 647, citing Pointes, at para. 71 and Bent, at paras. 154 and 160). The judge found Mr. Galloway had done so.

[544] Dr. Gray contends that the judge erred in failing to identify the magnitude of harm for each expression, submitting that the harm in each of Gray Nos. 6 and 7 is non-existent or close to it. She says that the judge failed to assess whether it was likely that many people would glean a defamatory meaning from the expressions. She submits that the decision in Hansman solidifies her position.

[545] Much has already been written regarding harm, the proof of the magnitude of harm and a causal link between the expression and the harm in these reasons. It is not necessary, at this stage, to "separate the salt from the soup" for the reasons stated above.

[546] Dr. Gray contends that the judge also erred by not properly assessing the public interest in protecting Gray No. 6 and 7. Her reasons on the public interest analysis are found at paras. 742 to 744:

I would not describe Gray Nos. 6 and 7 as published with the same recklessness as were Gray Nos. 1-3. The content was more measured and less inflammatory. In my view, these expressions fall more in the medium end of the protection-deserving scale.

In addition, Ms. Gray has a significant history of advocacy, and a strong academic and personal interest in campus sexual violence. Her PhD dissertation is connected with many of the issues in this case and in the PPPA Applications.

However, despite Ms. Gray's activism, Mr. Galloway's claims against her are few and narrow. I am not persuaded that Ms. Gray is unable to carry on her academic and other work unless she is able, without consequence, to make statements such as Gray No. 1 about Mr. Galloway. This, in my view, is another false dilemma.

[547] Dr. Gray contends that the judge failed to specifically consider Gray Nos. 6 and 7 in terms of the public interest analysis. And in particular, the chilling effect that this litigation will have on that kind of speech.

[548] She points to the importance of reporting by sexual assault victims, and that if this expression could result in a defamation lawsuit, the deterrence of people encouraging reporting, which is what she contends she did, is very much in the public interest.

[549] With respect to Gray No. 7, Dr. Gray submits that it is shocking that a defamation suit could go forward in the context of a tweet remarking on an art exhibit. She submits that commenting on an art show is the "quintessential" aspect of freedom of expression, which was completely overlooked by the chambers judge, resulting in an error in the balancing of the public interest aspect.

[550] As noted above, the chambers judge was not required to repeat her analysis on each separate issue. She referred generally to the public interest in relation to all of Dr. Gray's tweets, highlighting Gray No. 1. When the reasons are read as a whole, the judge concluded that while Gray Nos. 6 and 7 were not as serious as earlier tweets, on balance, the defamation claim should properly proceed.

[551] It is sufficient to say that in our view, as noted above, the judge did not commit an error in principle when she performed the weighing process under s. 4(2)(b) with respect to Dr. Gray. As such, her decision is owed deference. We would not give effect to this ground of argument either.

[552] Accordingly, Dr. Gray's appeal is dismissed.

Theresa Smalec

[553] We turn now to the appeal of Dr. Smalec.

[554] In July 2018, Dr. Smalec posted multiple tweets using the hashtag "#ubcaccountable" and identified A.B. by name in one of them (para. 307). Following this, Dr. Smalec published an Art Review article on the internet about A.B.'s Art Exhibit, with the portion forming Smalec No. 1 reading:

A.B.'s installation, . . . opened on July 6, 2018 at the . . . [Art Gallery] in [redacted] and remains on view until August 26. Some might be tempted to interpret [A.B.'s] project as a personal narrative emerging out of the #MeToo movement, since its subject matter is a student's reported sexual harassment and sexual assaults at the hands of an unnamed professor

[Art Exhibit] derives from what [A.B.] calls her "Rape Narrative"

I prefer not to describe the panel's disorienting bottom half, except to say that the student claims her sexual assault became what she perceived as a "horrible secret" that left her "in hell with him."

[555] Although A.B.'s Art Exhibit did not identify the subject student, the judge found it clearly apparent from both the Art Gallery's statement and A.B.'s artist statement that the exhibit was about A.B.'s personal experiences, and the Rape Narrative was hers. Dr. Smalec specifically stated in her published Art Review that the exhibit "derives from what [A.B.] calls her 'Rape Narrative'". Dr. Smalec explicitly said the Rape Narrative was written by the artist as part of an investigation into a professor's alleged misconduct.

[556] Dr. Smalec alleges the judge made various errors in dismissing her PPPA application. Similarly to other appellants, Dr. Smalec submits the judge erred in finding there were grounds to believe that the defence of fair comment was not valid.

[557] Dr. Smalec alternatively says the judge erred in finding the harm likely to have been suffered by Mr. Galloway as a result of Smalec No. 1 outweighed the public interest in protecting Dr. Smalec's expression.

[558] In her PPPA application, Dr. Smalec argued that Mr. Galloway was unable to show that Smalec No. 1 was "of and concerning" him. The judge disagreed. The content of the Rape Narrative, which asserted that the "professor" and "famous author" had raped and sexually assaulted A.B., would lead a reasonable person acquainted with Mr. Galloway to conclude the Rape Narrative referred to him. Furthermore, the judge found Dr. Smalec was aware the Rape Narrative was about Mr. Galloway because she tweeted about it using the hashtag "#ubcaccountable", a hashtag that emerged from the widely-signed letter written in support of Mr. Galloway.

- [559] While the judge did accept that Dr. Smalec used words such as "claims" and "reported" in the Art Review and stated that she did not know what actually happened between A.B. and the "professor", the judge found this was an attempt on Dr. Smalec's part to distance herself from A.B. and the content of the Art Exhibit, but it was insufficient (paras. 482-483). In her Art Review, Dr. Smalec repeated portions of the Rape Narrative and, either explicitly or implicitly, expressed her personal belief that A.B.'s allegations of rape were true. The judge found, in the context of the PPPA application, this was sufficient to establish that Smalec No. 1 was capable of bearing the pleaded defamatory meaning that Mr. Galloway had raped and sexually assaulted A.B (para. 483). Thus, Mr. Galloway demonstrated at the PPPA application stage that there were grounds to believe his claim regarding Smalec No. 1 had substantial merit.
- [560] The only defence Dr. Smalec raised was fair comment. While the judge accepted that readers of an art review would expect to find the reviewer's opinions about the exhibit, that did not preclude the possibility that an art review could also contain statements of fact. The judge found Dr. Smalec's Art Review "clearly contain[ed] opinions" (para. 607); however, the words used were also capable of meaning that Mr. Galloway had raped and sexually assaulted A.B. Thus, the judge found there were grounds to believe the words in Dr. Smalec's article should be characterized as fact and not comment, which meant fair comment was not a valid defence for Dr. Smalec (paras. 607-608).
- [561] In weighing the various public interests under s. 4(2)(b) of the PPPA, the judge reiterated that this exercise did not concern Dr. Smalec's ability to publish a review of A.B.'s Art Exhibit, nor did it concern the broader content of Dr. Smalec's Art Review as a whole. Rather, the emphasis was on specific expressions from Dr. Smalec's Art Review. The judge found Dr. Smalec could have written the article without defaming Mr. Galloway and that the inclusion of Smalec No. 1 was deliberate because Dr. Smalec was ideologically aligned with A.B. and her supporters. The judge also noted that Dr. Smalec was hostile towards Mr. Galloway. As a result, the judge found the public interest in protecting Smalec No. 1 was at the lower-end of the protection-deserving spectrum (para. 763).
- [562] The judge acknowledged Dr. Smalec's claims that Mr. Galloway's lawsuit had a chilling effect on her writing because it caused her to become fearful of discussing the #MeToo movement. However, the judge was not persuaded Dr. Smalec had in fact experienced a chilling effect. By way of example, the judge noted that after Mr. Galloway's action was filed, Dr. Smalec had tweeted a link to her Art Review alongside a caption saying she "[stood] by every word of [the Art Review]". Additionally, the judge found it remained possible for Dr. Smalec to participate in public debate over important social issues without being allowed to defame Mr. Galloway.

[563] Ultimately, the judge found Mr. Galloway's intention in bringing a suit against Dr. Smalec was not to silence her but to obtain a remedy for the harm Smalec No. 1 caused him. The public interest in allowing Mr. Galloway's claim in relation to Smalec No. 1 to proceed outweighed the public interest in protecting that expression. Since Mr. Galloway also demonstrated his claim against Dr. Smalec had substantial merit and that she did not have a valid defence, Dr. Smalec's PPPA application was dismissed.

Did the judge err in finding the defence of fair comment was not available to Dr. Smalec?

[564] Dr. Smalec submits the judge erred in characterizing the third element of the defence: whether the comment was recognizable as comment. Dr. Smalec concedes the judge correctly set out the proper test from WIC, but that she applied it incorrectly by asking whether the words in Smalec No. 1 should be characterized as fact, not comment (Dr. Smalec's emphasis).

[565] Dr. Smalec says the judge should have applied the objective standard in her assessment of whether Mr. Galloway had demonstrated reasonable grounds to believe Smalec No. 1 was not reasonably recognizable as an opinion.

[566] We are not persuaded that the judge incorrectly characterized the legal standard. In our view, the judge adhered to WIC by stating Smalec No. 1 was not recognizable as comment and thus should be characterized as fact. This is especially evident because in the same sentence, the judge said there were grounds to believe Smalec No. 1 should not be characterized as comment (para. 607).

[567] Given that the defence of fair comment requires comment to be recognizable as such, as per WIC and Hansman, the judge's observation that Smalec No. 1 should be characterized as fact also reflects the converse, namely that she did not consider Smalec No. 1 to be "recognizable as comment".

[568] A judge's reasons are to be read generously and as a whole, with the presumption that they know the law (Barendregt, at para. 104). While it is true the judge did not specifically use the words "reasonable person" or "reasonable reader" in her analysis of Dr. Smalec's defence of fair comment, the judge was aware this was the test and applied it correctly. This is evinced by her reference in para. 357 to WIC and Neufeld in stating that what is comment and what is fact "must be determined from the perspective of a reasonable viewer or reader". The judge also referred to the "reasonable reader" where she evaluated the defence of fair comment for other appellants.

[569] We do not sustain Dr. Smalec's argument.

[570] Dr. Smalec also claims the judge erred by failing to consider the totality of the circumstances and the context in which Smalec No. 1 was made when determining whether the defence of fair comment was available.

- [571] Had Smalec No. 1 been considered in the context of the entire Art Review, Dr. Smalec says it would have been readily apparent that it was reasonably recognizable as comment.
- [572] Dr. Smalec says her article was "editorial in nature". She is an academic who regularly publishes articles about art and its social implications. Dr. Smalec claims the words used in the article, and not just those used in Smalec No. 1, clearly demonstrate she was reviewing an art exhibit about a "reported" or "alleged" sexual assault. Dr. Smalec concedes she expressed her own opinion in the article, but says she expressly stated in the article that she did not know what happened between A.B. and Mr. Galloway.
- [573] We do not accede to Dr. Smalec's argument that the judge neglected to consider the above context of Smalec No. 1 (Taseko, at para. 44). As the judge noted at para. 607, Mr. Galloway was not suing Dr. Smalec for the entirety of her article or for her opinions. Instead, his action concerned the words in her Art Review that constitute Smalec No. 1.
- [574] The Taseko principle that requires all the circumstances be considered when analyzing a particular expression should not be interpreted to mean that isolating certain words from a publication and deeming them to be defamatory is an error. It was entirely appropriate, and indeed required, for the judge to focus on the portions of Dr. Smalec's Art Review that comprise Smalec No. 1.
- [575] Ultimately, it would not be possible to determine whether an expression was comment or fact without focusing on the impugned expression itself. However, this does not mean the judge failed to consider the context in which the expression was made.
- [576] Moreover, the judge was alive to the fact Smalec No. 1 was part of a larger article about A.B.'s Art Exhibit; this is demonstrated by the judge's various references to the Art Review as a whole (paras. 307-309, 481-483, and 606-607). In analyzing Smalec No. 1, the judge specifically stated that "context is often important in determining whether a statement carries a defamatory meaning". She then set out a large excerpt from the Art Review (para. 308). Thus, it is readily apparent the judge considered the entire Art Review when evaluating Smalec No. 1.
- [577] Last, we agree with the judge that the repetition rule effectively disposes of the argument that Dr. Smalec's use of words such as "claims", "alleged" or "reported" when discussing A.B.'s Rape Narrative and in relation to sexual assault was sufficient to indicate that her expressions were comments and not facts. The judge addressed this rule at para. 483. We see no error in her analysis.
- [578] A person's attempt to distance themselves from a complainant and their allegations by using terms such as "alleged" or "reported", does not protect them from liability if they repeat a defamatory statement elsewhere. The repetition rule continues to apply, as it does to Dr. Smalec's repetition of A.B.'s claims, so that anyone who repeats a defamatory statement is no less liable than the person who originated it, regardless of any tangentially related attempts to distance themselves (Grant, at para. 76).

Did the judge err in finding the harm likely to have been suffered by Mr. Galloway outweighed the public interest in protecting Smalec No. 1?

- [579] Dr. Smalec also asserts the judge made two specific errors in finding the harm likely to have been suffered by Mr. Galloway as a result of Smalec No. 1 outweighed the public interest in protecting Dr. Smalec's expression.
- [580] Dr. Smalec alleges the judge erred by weighing the value of Dr. Smalec's expression against the collective harm Mr. Galloway says he suffered as a result of all the defendants' expressions, rather than undertaking this weighing on a case-by-case basis.
- [581] Dr. Smalec claims Mr. Galloway was required to demonstrate a specific causal connection between the alleged harm and Smalec No. 1, but nothing on the record discloses this specific harm. In furtherance of this point, Dr. Smalec claims Mr. Galloway's reputation was already harmed before the publication of her Art Review and that he had no personal knowledge of any reputational harm that it specifically caused.
- [582] We agree with Mr. Galloway that Pointes made clear no definitive determination of harm or causation is required at the PPPA application stage where no adjudication on the merits is being made (Pointes, at para. 71). It is enough for a plaintiff to provide some evidence that allows a motions judge to draw "an inference of likelihood in respect of the existence of the harm and the relevant causal link" (Pointes, at para. 71; Hansman, at para. 67). Thus, the plaintiff bears no obligation to prove actual loss or injury (Bent, at para. 144).
- [583] Here, there is ample evidence of both the reputational and specific economic harm to Mr. Galloway arising from the impugned expressions in this case. As to each expression that was the subject of a PPPA application, the chambers judge identified evidence for an inference of likelihood respecting both the existence of the harm, the relevant causal link and the seriousness and magnitude of the harm (see for example, paras. 635-655).
- [584] Finally, this Court is bound by the principles developed in Pointes, Bent and Hansman and by its own decision in Hobbs, set out earlier in these reasons. As a result, we do not give effect to this ground of Dr. Smalec's appeal.

Did the judge fail to consider the context in assessing the value of Dr. Smalec's expression?

- [585] Dr. Smalec alleges the judge's second error in relation to s. 4(2)(b) was her failure to consider the Art Exhibit as a whole in assessing the value of Smalec No.1. Dr. Smalec submits that focusing on Smalec No. 1 as an excerpt led the judge erroneously to conclude that the public interest in protecting Smalec No. 1 was at the lower-end of the protection-deserving spectrum.

- [586] Dr. Smalec's argument fails to appreciate the nature of the weighing exercise under s. 4(2) (b) of the PPPA where a judge must not conflate the subject matter of the public interest with the actual expression complained of (Neufeld, at para. 61, rev'd on other grounds 2023 SCC 14). This distinction is important because it is only the public interest in protecting the specific expression that is considered under s. 4(2)(b). It is not the public interest in protecting the subject matter of the expression.
- [587] Dr. Smalec is essentially inviting this Court to find that because Smalec No. 1 was made by an individual who regularly engaged in public discourse about sexual misconduct, it should place higher on the protection-deserving spectrum. In our view, this fails to appreciate the important distinction between the subject matter and the expression in question. This Court has made clear that focusing on the subject matter of the expression and other non-defamatory components of a publication is an error (Neufeld, at para. 62).
- [588] It was open to the judge to find Dr. Smalec was hostile to Mr. Galloway and that the inclusion of Smalec No. 1 in the Art Review was deliberate, resulting in the public interest in protecting the expression to be at the lower-end of the protection-deserving spectrum.
- [589] In summary, we see no error in the judge's analysis of the fair comment defence with respect to Smalec No. 1. Nor do we see any error in the judge's analysis of the public interest weighing portion of s. 4(2)(b) of the PPPA. Accordingly, we dismiss Dr. Smalec's appeal.

Kiera Anderson

- [590] Similar to other appellants, Dr. Anderson's appeal raises issues related to fair comment and the public interest weighing exercise.
- [591] In January 2018, Margaret Atwood published an article in the Globe and Mail where she addressed her signing of the UBCAccountable letter. Two days later, Dr. Anderson posted the tweet that forms the basis for Anderson No. 1 (the pleaded defamatory statement is underlined):

I can't imagine how triggering and traumatizing it would be to be a survivor at UBC - especially to be the survivor Galloway assaulted - and read Atwood's words. Or to be a younger writer Atwood mentored.

- [592] The next day, Dr. Anderson posted another tweet which forms the basis for Anderson No. 2 (underlined):

For everyone defending #MargaretAtwood here's some context you might have missed IRT why people took issue with her defending #galloway, and falsely claiming he was not receiving due process [hashtags omitted], in particular, it's worth reading the account of the woman #galloway assaulted #metoo #timesup #ubccountable

- [593] Both Anderson Nos. 1 and 2 included links to the UBCAccountable counter letter, colloquially known as the "UBCUnaccountable" letter, as well as a Globe and Mail article about the sexual assault allegations against Mr. Galloway (para. 272).
- [594] The judge found that because both Anderson Nos. 1-2 (the "Anderson Expressions") were published and identify Mr. Galloway by name, a reasonable person reading the expressions would know that Dr. Anderson was asserting Mr. Galloway assaulted or sexually assaulted A.B. Therefore, Mr. Galloway successfully showed there were grounds to believe his claims in respect of these expressions had substantial merit.
- [595] The only defence at issue on Dr. Anderson's appeal is fair comment. The judge's analysis on the validity of this defence in relation to the Anderson Expressions is not detailed. The judge found those expressions would be understood as statements of fact rather than as comments or expressions of opinions on facts. Thus, fair comment was not a valid defence for either of the Anderson Expressions (para. 610). However, the judge also found fair comment not to be a valid defence in relation to the Anderson Expressions for the same reasons as expressions of other defendants who are not parties to this appeal. That is, the expressions would be understood by the reasonable reader to be statements of fact; namely, that Mr. Galloway had assaulted A.B. in some manner.

Did the judge err in disposing of the defence of fair comment?

- [596] Dr. Anderson's first issue is the judge erred in not considering the Anderson Expressions as a whole and in context. Dr. Anderson says the judge only looked at "a few words" from their tweets, finding the defence of fair comment was not available because those "few words" were a statement of fact and not comment. They say the judge should have defined the Anderson Expressions as being the entirety of the tweets rather than simply excerpts from the tweets.
- [597] Dr. Anderson submits that had the judge considered the entire context, she would have reached the same conclusion on the Anderson Expressions as she did for Ms. Elliott: that a reasonable reader would understand the expressions to be comments on facts and not statements of fact.
- [598] Dr. Anderson says it was clear in the context of all the tweets to which they were responding that they were opining on how Margaret Atwood's reaction to the allegations about Mr. Galloway would impact sexual assault survivors. They were only "providing another side of the story" to those who were publicly defending Ms. Atwood. Dr. Anderson says it was clear they were not making statements of fact about Mr. Galloway.
- [599] Furthermore, Dr. Anderson submits that had the judge considered the Anderson Expressions in the context of a multi-party online debate about institutional responses to allegations of sexual violence and Margaret Atwood's role in that debate, it would have been apparent Dr. Anderson's statements were recognizable as comments. Dr. Anderson says the Anderson Expressions properly disclosed a factual foundation because there had already

been three waves of media coverage on the subject by the time the Anderson Expressions were published.

- [600] Dr. Anderson cites no authority for the proposition that it is an error for a judge on a PPPA application to focus solely on the alleged defamatory expressions, rather than the entire context or publication in which the expressions were made.
- [601] We do not accede to this argument. To be clear, this is not to say that a judge on a PPPA application should ignore the context or the entirety of the publication from which the expression is taken; however, it is not an error for a judge to focus on the allegedly defamatory expression itself as this is wholly required for a proper analysis.
- [602] Dr. Anderson's tweets, even when considered as a whole, clearly mean that Mr. Galloway committed either a sexual or physical assault on A.B. The Anderson Expressions do not read as simply an opinion on whether Mr. Galloway had committed some act of assault on A.B. Even looking at Dr. Anderson's tweets as a whole, we do not agree that the Anderson Expressions are readily identifiable as comments.
- [603] It matters not that other portions of the exchange containing the Anderson Expressions could be construed as comments rather than facts. Rather, the focus must be on the impugned expressions themselves and whether those expressions are comments or statements of fact. Nor is the result exculpatory when considering that the Anderson Expressions were made "as part of a conversation with other Twitter users".
- [604] It is entirely possible to publish a defamatory expression that is not protected by the defence of fair comment when participating in a group conversation. The fact an expression forms part of a larger dialogue rather than being a "single statement published in isolation" is of little assistance when determining whether an expression is a comment or a statement of fact.
- [605] In any event, it is apparent from the judge's reasons that she had the entire context of the Anderson Expressions in mind. The judge set out Dr. Anderson's tweets in their entirety at paras. 270-271 of her reasons, so she was aware the Anderson Expressions were excerpts from a larger publication. She was also alive to the academic context of the expressions.
- [606] In sum, we do not accede to the argument that the judge erred in dismissing the defence of fair comment in relation to the Anderson Expressions by not considering the larger context in which the expressions were made.

Did the judge err by failing to weigh the claims advanced against each appellant separately?

- [607] As a second issue, Dr. Anderson claims the judge erred at the weighing stage by failing to weigh the claims against each appellant separately. They say the judge compiled all the harm caused to Mr. Galloway instead of undertaking a causal analysis of the specific harm caused by the Anderson Expressions.

- [608] Dr. Anderson says the error is evinced by the fact the judge's weighing exercise did not include any consideration of the actual harm caused by the Anderson Expressions. Nor did her analysis include the evidence Dr. Anderson gave as to the motivation behind the Anderson Expressions. This omission led the judge to combine all the harm allegedly suffered by Mr. Galloway from all the expressions forming the basis for his defamation proceeding, leading her erroneously to conclude Mr. Galloway had satisfied his burden to show that the Anderson Expressions in particular contributed to the harm he allegedly suffered.
- [609] Dr. Anderson claims Mr. Galloway failed to establish a causal link between the Anderson Expressions and his alleged losses. Furthermore, they say Mr. Galloway failed to distinguish the alleged harm caused by the Anderson Expressions from the harm caused by heavy media coverage and Mr. Galloway's own conduct before his termination from UBC. While the judge acknowledged Mr. Galloway had not differentiated between the harm suffered, she erred by concluding nonetheless that he had met the burden of establishing that all the expressions without a valid defence actually contributed to the harm he suffered.
- [610] Dr. Anderson submits this error is particularly reflected by Mr. Galloway's allegation that he suffered harm from the expressions of 25 defendants. Also, the Anderson Expressions were published in 2018, but Mr. Galloway testified at the PPPA hearing that he has remained in the same damaged state since 2015. On this latter point, Dr. Anderson seems to contend the Anderson Expressions, published in 2018, could not have harmed Mr. Galloway if his circumstances had remained unchanged since 2015. Dr. Anderson says the judge's failure to conduct a causal analysis undermined the weighing exercise required under the PPPA, which also requires assessing the magnitude of the harm caused.
- [611] This causation issue is similar to that raised by Dr. Smalec and a number of others, as discussed earlier. We largely adopt that analysis, repeating that no definitive determination of harm or causation is required at the PPPA stage because no adjudication on the merits is being made (Pointes, at para. 71).
- [612] As discussed earlier, where defamation arises from multiple sources it can be very difficult to prove a specific causal link to damages from the expressions of just one of the defendants (Hansman, at para. 68). This was certainly the case here. As such, the determination of whether a causal connection existed in fact between the Anderson Expressions and the harm suffered or likely to be suffered by Mr. Galloway is best left for trial (Hobbs, at para. 88).
- [613] Furthermore, we do not accede to the submission that because Mr. Galloway's reputation was already "heavily impaired" by countless others when the Anderson Expressions were made, the Anderson Expressions could not have caused much harm. It does not follow that because an individual's reputation is already tarnished, any harm caused by additional defamatory statements must be minimal such that no recourse is available.

- [614] It was open to the judge to find that any reputational harm to Mr. Galloway caused by publicly-known information, such as his termination or apology for an inappropriate relationship, was "of considerably lower magnitude, as compared with the sting of claims of criminal misconduct, including sexual assault" (para. 650).
- [615] Each impugned expression in the case at bar contained essentially the same sting, namely that Mr. Galloway was guilty of criminal conduct and as a result, the judge found that each time these claims were repeated, "Mr. Galloway's reputation sustained another blow" (para. 650). We interpret the judge's reasoning to mean there was sufficient evidence to support a causal link between each impugned expression and the potential harm caused to Mr. Galloway, whether reputational or otherwise.
- [616] As stated earlier, reputational harm is measured by magnitude, rather than binarily. As a result, it is not simply a matter of saying a reputation is either in a damaged state or not. This reality is reflected by the "repetition rule" (Grant, at para. 76). There would be no need for the "repetition rule" if it were not recognized that a person's reputation could be damaged further even after the initial defamatory statement was made.
- [617] Furthermore, the fact Dr. Anderson had a "limited audience of just over 400 followers" does not presumptively lead to the conclusion that any harm caused by the Anderson Expressions must be minimal. While there were undoubtedly Twitter accounts with more than 400 followers, 400 is not an insignificant number. This is especially so given the "retweet" feature of Twitter, which allows an account's followers to potentially repost tweets from that account.
- [618] Additionally, Dr. Anderson's use of various hashtags such as "#MargaretAtwood", "#galloway" and "#ubccountable" meant their tweets could also be seen by anyone who searched those hashtags, even without following Dr. Anderson's Twitter account. Thus, it is entirely possible the Anderson Expressions were seen by more than Dr. Anderson's 400 followers. In short, it does not follow that any reputational harm caused by the Anderson Expressions was necessarily immaterial.
- [619] Nor do we agree with Dr. Anderson's submission that the judge should have noted "that it was Mr. Galloway and his allies that started the public discussion around UBC's institutional response to the allegations". Mr. Galloway is not pursuing a defamation claim against Dr. Anderson for simply participating in a "public discussion [about] UBC's institutional response to [A.B.'s] allegations". Rather, he is pursuing the claim against them because he submits their expressions meant, and would be understood to mean, that he had sexually or physically assaulted A.B. These are two very different issues.

- [620] The fact Mr. Galloway publicly addressed the allegations made against him does not support the argument that because he "started" a public discussion, Dr. Anderson could make their expressions free from potential liability. They could have engaged in a public discussion about UBC's institutional response to the allegations without defaming Mr. Galloway.
- [621] It does not follow that the judge erred by not considering that "Mr. Galloway and his supporters injected themselves into [the] public debate over institutional responses to allegations of sexual assault" when weighing the potential harm caused by the Anderson Expressions. Dr. Anderson submits that because Mr. Galloway and his supporters "injected" themselves, they should have "expect[ed] rebuttal by those who [took] an opposite view".
- [622] In our view, this submission conflates the Anderson Expressions as merely being an "opposite view" of UBC's institutional response to allegations of sexual assault with what the judge considered the Expressions to be at the PPPA threshold level: potentially defamatory statements that Mr. Galloway physically or sexually assaulted A.B. In any event, that Mr. Galloway may have "started" the public discussion does not mean any possible harm caused by the Anderson Expressions "would [not] be beyond de minimis", as Dr. Anderson posits.
- [623] In addition, we fail to see any effect on the PPPA weighing exercise from Mr. Galloway's lack of recollection about whether the Anderson Expressions were brought to his attention before he was deciding against whom to bring a lawsuit. In our view, it was possible for Mr. Galloway to "have a legitimate impetus for bringing [his] lawsuit" even if he did not recall seeing the Anderson Expressions until he decided to pursue legal action. The timing of his recollection would not necessarily affect the impetus for a lawsuit against Dr. Anderson if Mr. Galloway considered that their tweets contributed to the harm to his reputation.
- [624] Dr. Anderson says the judge erred at the s. 4(2)(b) weighing stage of the PPPA analysis by finding the Anderson Expressions were at the low end of the protection-deserving spectrum. They say the judge failed to consider their explanations for "why they said what they said". Dr. Anderson also submits the judge erred by limiting her analysis of the chilling effect solely to the potential effects that Mr. Galloway's defamation proceeding would have on Dr. Anderson, rather than considering the chilling effect it would have on future expressions by others.
- [625] Dr. Anderson points to para. 74 of Pointes, which says that "the quality of the expression, and the motivation behind it, are relevant" to the weighing exercise under s. 4(2)(b). However, we are of the view that the judge did consider these factors to the extent described in Pointes.

- [626] The paragraph immediately following para. 74 of Pointes says that "a statement that contains gratuitous personal attacks may still be an expression that relates to a matter of public interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies [or] vitriol" (at para. 75, citing *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, at paras. 82-84 and 96-103, aff'd 2018 ONCA 690 (emphasis added)).
- [627] The finding that the Anderson Expressions were a "careless personal attack on Mr. Galloway" and therefore at the lower-end of the protection-deserving spectrum demonstrates the judge did consider the quality and motivation of those expressions as Pointes intended. Pointes warned against judges "descending into a moralistic taste test" (para. 76). We consider it was open to the judge to find that Dr. Anderson was making a careless personal attack, and this was the motivation behind their expressions (Pointes, at para. 76). We see no error in this analysis.
- [628] To escape potential liability, it is not enough for Dr. Anderson to plead that having reviewed A.B.'s account and being informed by their prior academic research and expertise, they believed A.B. to be telling the truth. Ultimately, Dr. Anderson made expressions amounting to statements that Mr. Galloway was guilty of criminal conduct even though it was not proven. Dr. Anderson submits the motivation behind the Anderson Expressions was to show support for survivors of sexual abuse; however, it was possible for Dr. Anderson to show support without defaming Mr. Galloway. Accordingly, we see no merit to Dr. Anderson's contention that the judge erred by failing to consider the quality of the Anderson Expressions and the motivation behind them.
- [629] Last, as to their assertion that the judge erred by failing to analyze the chilling effect of her decision on future expressions by the public, Dr. Anderson has mischaracterized the judge's finding. The judge did not find that any and all expressions of support for potential sexual assault complainants would necessarily be at the lower-end of the protection-deserving spectrum. Instead, it remains open to those who wish to make public expressions of support to do so; however, doing so does not require making defamatory statements.
- [630] The only portions of Dr. Anderson's expressions with which Mr. Galloway took issue were those stating he had committed a sexual or physical assault on A.B. The judge's finding that the Anderson Expressions were on the lower-end of the protection-deserving spectrum does not devalue the reporting of sexual assault. The judge also noted it was not contrary to the public interest were Dr. Anderson to feel the need to be more cautious before making "reckless statements". We see no error in her reasoning.
- [631] In the result, we dismiss Dr. Anderson's appeal.

Ari Rombough

[632] Similar to the other appellants, Mx. Rombough takes issue with how the judge undertook the weighing exercise under s. 4(2)(b) of the PPPA in relation to their expressions.

[633] In January 2018, following publicity regarding Margaret Atwood's signing of the UBCAccountable letter and her appearance at the Golden Globes wearing a "#TIMESUP" pin, Mx. Rombough posted a tweet that forms the basis for Rombough No. 1 (underlined):

@MargaretAtwood please talk about the statements you made in defense of #Stevengalloway after he was fired for sexual assault. You used the "witch hunt" narrative (term coined by the catholic church to defend predators). I can't deny how that affected me. #TIMESUP #GoldenGlobes

[634] At the PPPA hearing, in a submission similar to Dr. Anderson's, Mx. Rombough said there was no realistic threat that Rombough No. 1 could lower Mr. Galloway's reputation in the eyes of a reasonable person because he already had a "bad reputation" when Rombough No. 1 was published. The judge did not agree and concluded that Mr. Galloway was not required to prove that he had a "good" reputation as of the date Rombough No. 1 was published. It was sufficient that the reasonable person would understand Rombough No. 1 to mean Mr. Galloway had committed sexual assault. As a result, the judge found Mr. Galloway had shown grounds to believe his claim in relation to Rombough No. 1 had substantial merit.

[635] At the weighing stage, the judge found it was not necessary for Mx. Rombough to defame Mr. Galloway in order to provide an "under-represented perspective [of a survivor] on the nature and impact of the public dialogue surrounding high-profile allegations of sexual assault" (para. 775). Nor were they required to do so in order to "amplify the voices of survivors" (para. 775). The judge considered that Mx. Rombough had made a very serious personal attack on Mr. Galloway by accusing him of criminal conduct even though they had no knowledge of the facts apart from media reports.

[636] The judge found Mx. Rombough had no basis to state Mr. Galloway had been fired for sexual assault. As a result, posting Rombough No. 1 was reckless. The judge found Rombough No. 1 fell at the lower-end of the protection-deserving spectrum and found the public interest in allowing Mr. Galloway's claim in relation to Rombough No. 1 to go forward outweighed the public interest in protecting Mx. Rombough's expression.

Did the judge fail to analyze whether a causal link existed between Rombough No. 1 and the harm alleged?

[637] Mx. Rombough submits Mr. Galloway failed to establish a causal connection between Rombough No. 1 and the harm he suffered.

- [638] Mx. Rombough says the evidence precluded any causal link between Rombough No. 1 and the harm claimed by Mr. Galloway. That harm included his termination from UBC and the halting of the publication of his anticipated books, events that occurred several years before Rombough No. 1 was published.
- [639] In our view, and adopting much of our analyses of similar arguments raised by Dr. Smalec, Dr. Anderson, and others, the judge properly addressed why Mr. Galloway was not required to differentiate between the harm caused by each individual expression. She found, in the context of the PPPA applications, it was sufficient for Mr. Galloway to provide some evidence for the court to draw an inference of likelihood of harm, and the relevant causal link (Pointes, at para. 71; Bent, at paras. 154 and 160). To reiterate, Mr. Galloway was not required to prove harm or causation at this stage.
- [640] While it is certainly true that Mx. Rombough would not be responsible for any of the harm suffered by Mr. Galloway before Rombough No. 1 was published, we cannot agree with Mx. Rombough's submission that they were insulated from liability for any harm caused to Mr. Galloway after Rombough No. 1 was published. Nor did the judge agree with this submission. Instead, she found that any expressions made after the events Mr. Galloway claims caused him harm served to maintain "the currency of the propositions that Mr. Galloway was a rapist and guilty of sexual assault". Therefore, they continued to cause him damage, despite the fact that the expressions may have been made years after other harm-causing events such as Mr. Galloway's termination (para. 650). The judge considered that every expression was presumed to cause harm, including Rombough No. 1. Mr. Galloway was not required at the PPPA stage to quantify the separate harm caused by each expression. We see no error in this reasoning.
- [641] It is also worth noting that while Mr. Galloway may have begun to experience a loss of speaking, teaching, and writing engagements before Rombough No. 1 was published, this does not preclude Rombough No. 1 from contributing to Mr. Galloway's ongoing loss of these types of engagements. As stated earlier, it would be very difficult for Mr. Galloway to prove an actual causal link to damages from each specific expression. In any event, that determination is best left for trial and not the PPPA threshold stage (Hobbs, at para. 88).
- Did the judge fail to ascertain the magnitude of any reputational harm flowing specifically from Rombough No. 1?
- [642] We disagree with Mx. Rombough's submission that the judge failed to ascertain the magnitude of the reputational harm that flowed from Rombough No. 1. The judge noted that "the reputational harm to Mr. Galloway from being called a rapist and someone who has perpetrated criminal acts is likely serious and sustained" (para. 654). This clearly reflects that the judge assessed the magnitude of the harm to Mr. Galloway and deemed it "likely serious".

- [643] We agree with Mr. Galloway's submission that what Mx. Rombough seeks on appeal is a specific quantification of the harm. This is much different from the magnitude of the harm, which the judge addressed. She stated that the reputational harm to Mr. Galloway caused by publicly-known information was of "considerably lower magnitude, as compared with the sting of claims of criminal misconduct, including sexual assault" (para. 650).
- [644] Mx. Rombough seems to suggest that damage to an already impaired reputation would necessarily be minimal. We do not interpret *Levant v. DeMelle*, 2022 ONCA 79, leave to appeal to SCC ref'd, 40109 (3 August 2023) to stand for the proposition that consideration of a plaintiff's reputation is necessary because if it is already damaged, any further defamatory statements would cause minimal harm.
- [645] Mx. Rombough submits the judge weighed the total harm from all the impugned expressions against the public interest and this was inconsistent with the PPPA. In our view, the judge referred to the impugned expressions collectively in relation to the magnitude of harm because in her view, every expression contained the same, or very similar, stings: namely, that Mr. Galloway was a rapist and/or that he physically or sexually assaulted A.B.
- [646] As a result, the magnitude of harm presented by each of the expressions claiming Mr. Galloway was guilty of criminal conduct was of the same nature. Thus, the judge found the reputational harm from being named as someone who committed a criminal act was "likely serious and sustained" (para. 654).
- [647] We do not take the judge as saying that all the expressions combined resulted in a lump sum of reputational harm which was then used in the weighing exercise, as Mx. Rombough appears to argue. Rather, we see the judge as referring to the expressions collectively in an effort to be efficient and succinct when dealing with multiple expressions that would inflict the same kind of reputational harm.
- [648] Mx. Rombough further submits that if Rombough No. 1 did cause any reputational harm to Mr. Galloway, that harm was incremental because by the time Rombough No. 1 was published, he had been suspended, then terminated from UBC, and had already received national media attention.
- [649] Mx. Rombough says the judge should therefore have considered making the starting position for her assessment of reputational harm that of a "markedly diminished reputation". As stated earlier with respect to Dr. Anderson, it does not follow that simply because an individual's reputation has been previously tarnished that any further reputational harm, as Rombough submits, "could only have been minor".

Did the judge err by disregarding evidence of the mode and extent of publication of Rombough No. 1?

- [650] Mx. Rombough also submits the judge erred by disregarding evidence of the mode and extent of publication of Rombough No. 1, and only focusing on its nature. Mx. Rombough says the fact a tweet might appear on the Twitter feeds of an account's followers does not necessarily mean any of them will read or engage with the tweet. Mx. Rombough submits that none of their followers "liked" or "retweeted" Rombough No. 1, and only one person commented on it. Further, Mx. Rombough deleted the tweet three months after having posted it. Mx. Rombough says these factors make it clear that any harm caused by Rombough No. 1 was "minimal and short-lived".
- [651] We disagree that this evidence definitively leads to the conclusion that the harm caused by Rombough No. 1 was minimal or short-lived. It is possible that not all Mx. Rombough's approximately 300 followers saw their tweet. But even if, for example, two thirds of their followers saw Rombough No. 1, it would mean about 200 individuals read the defamatory statement that Mr. Galloway had committed a sexual assault. This is not an insignificant number.
- [652] Nor do we agree that the fact Rombough No. 1 did not receive any "likes" or "retweets" necessarily means it was not seen by many people. While "likes" and "retweets" may be "helpful indicators of the visibility and the engagement of a Twitter audience with that tweet", they are not strictly determinative of the number of people who saw Rombough No. 1. To the contrary, the fact Mx. Rombough used hashtags such as "#stevengalloway", "#TIMESUP" and "#GoldenGlobes" meant it was possible the number of potential Twitter users capable of viewing Rombough No. 1 was much higher. The use of these hashtags meant viewership was not necessarily confined to Mx. Rombough's approximately 300 Twitter followers. Thus, the use of these hashtags is at odds with the submission that the intended audience of Rombough No. 1 was "deliberately circumscribed" by the decision to begin the tweet with Margaret Atwood's username.
- [653] As explained earlier, these hashtags served to amalgamate any tweets that used them, meaning that anyone who searched "#TIMESUP" on Twitter would potentially be able to see Rombough No. 1. It is therefore entirely possible that the viewership of Rombough No. 1 was much greater than Mx. Rombough's Twitter following. In the result, the judge did not err in finding the harm caused by Rombough No. 1 was not minimal or short-lived.
- [654] Mx. Rombough also submits that reputational harm from a defamatory social media post is not to be determined by reference to its potential reach. Rather, the analysis must look to the actual mode and extent of publication. However, Mx. Rombough simultaneously says the harm was minimal because Rombough No. 1 only had the potential of reaching all their followers, but it is possible that tweet did not actually make it to all their followers' Twitter feeds.

[655] This logic is inherently contradictory. It asks this Court to find error in the judge's reasons based on her recognition of the potential reach of Rombough No. 1 while simultaneously arguing that the potential reach of the tweet did not necessarily include all of Mx. Rombough's followers and consequently, its impact was minimal. Put another way, Mx. Rombough relies on the very reasoning they now characterize as an error on the part of the judge.

Did the judge err in concluding the public interest in protecting Rombough No. 1 was at the lower-end of the protection-deserving spectrum?

[656] Finally, Mx. Rombough submits the judge erred in concluding that Rombough No. 1 fell at the lower-end of the protection-deserving spectrum. They say both the quality and motivation behind the expression are relevant to the s. 4(2)(b) analysis of determining the public interest in protecting an impugned expression. Mx. Rombough says the judge erred by referring to Mx. Rombough's evidence regarding the motivation behind Rombough No. 1, but finding it unreasonable for them to have formed the understanding, based on media reports, that Mr. Galloway was fired from UBC for sexual assault.

[657] Mx. Rombough says it was not unreasonable or reckless to conclude, based on the information available to them, that Mr. Galloway was fired for sexual assault. This information included that the accusations against Mr. Galloway were comprised of sexual assault, sexual harassment and other inappropriate behaviour, that as a basis for his termination UBC referred to a record of misconduct resulting in an irreparable breach of trust placed in faculty members, and that UBC announced it was undergoing a comprehensive investigation into Mr. Galloway's actions.

[658] Mx. Rombough argues it was evident that many others who read the same media reports came to the same conclusion. They say this is demonstrated by the fact Mr. Galloway was awarded damages in his grievance against UBC because UBC's communications harmed his reputation. While it is possible that many others could have reached the same conclusion as did Mx. Rombough, the fact Mx. Rombough came to this conclusion is not the issue in Mr. Galloway's defamation claim. Instead, it was the fact Mx. Rombough made their conclusion publicly known by publishing a defamatory statement about Mr. Galloway that the judge found to be reckless.

[659] We note the majority in Bent concluded that a personal attack on another individual will detract from the broader value the expression may have, thus resulting in the expression moving downward on the protection-deserving spectrum. The judge clearly considered the motivation behind Rombough No. 1 where she set out at length Mx. Rombough's pleaded intention (para. 775). The judge recognized Mx. Rombough's motivation in posting Rombough No. 1 may have been laudable and their intention was to provide "the perspective of a survivor of sexual assault is deserving of protection" (para. 778).

- [660] However, the judge ultimately concluded the public interest in protecting the "actual expression found in Rombough No. 1" was at the lower-end of the protection-deserving spectrum, largely because Mx. Rombough's conduct was reckless. They had no basis for saying Mr. Galloway was "fired for sexual assault" (paras. 777-778).
- [661] Mx. Rombough submits the finding of recklessness "runs entirely counter to the stated objectives of the PPPA"; however, in Bent, the majority found that permitting certain defamation claims to proceed would "deter others from making defamatory remarks against an individual without first substantiating, or attempting to substantiate, the veracity of their allegations" (Bent, at para. 167, emphasis in original).
- [662] In this way, individuals would be incentivized to "act with reasonable due diligence and to tailor their expression so as to avoid needlessly defaming an individual" (Bent, at para. 167). The majority in Bent found this was "the appropriate balance between freedom of expression and reputational considerations" (para. 168). Consequently, the PPPA's inherent objective is not only as a mechanism to evaluate whether a defamation suit is brought for legitimate reasons. It is also to consider whether a claim should be allowed to proceed to deter others from recklessly making defamatory statements.
- [663] The PPPA is not intended to stifle meritorious claims. The media reports Mx. Rombough points to as the basis for Rombough No. 1 do not conclude that Mr. Galloway was guilty of sexual assault. Rather, they refer to an investigation into claims of sexual assault and that an irreparable breach of trust was the basis for Mr. Galloway's termination. In contrast, Rombough No. 1 asserts that Mr. Galloway was fired because he was guilty of sexual assault. The conclusions arrived at in the media reports and in Rombough No. 1 are quite different.
- [664] We discern no error in the judge's finding that based on the information known to Mx. Rombough at the time, it was reckless for them to state Mr. Galloway was fired for sexual assault. Nor do we accede to Mx. Rombough's submission that this finding would have a negative impact on public discourse because the public would be unable to rely on reports from established news outlets without risking a finding of recklessness. Mx. Rombough did not directly rely on such information as the basis for Rombough No. 1. Instead, Mx. Rombough used that information to come to their own conclusion that Mr. Galloway was fired for sexual assault.
- [665] The judge made no error in her discretionary weighing of the factors before her and in concluding that Rombough No. 1 fell at the lower-end of the protection-deserving spectrum.
- [666] There is no basis for intervention in Mx. Rombough's appeal. This appeal is dismissed.

Marcelle Kosman

- [667] Finally, we turn to the appeal of Dr. Kosman regarding Kosman Nos. 1-2 (the "Kosman Expressions"). On appeal, and much like other appellants, Dr. Kosman asserts the judge erred by failing to consider relevant context and finding a causal link between the Kosman Expressions and the harm to Mr. Galloway.
- [668] In November of 2016, Dr. Kosman signed the counter letter to the UBCAccountable letter (paras. 240-241).
- [669] In March of 2017, Dr. Kosman was on a panel discussing UBCAccountable and "the Steven Galloway controversy" (para. 258). Some teachers in attendance asked if they could still use one of Mr. Galloway's novels in their classrooms. Dr. Kosman responded, "You cannot teach a rapist if you do not want to promote rape culture. It is very simple." (para. 259). Dr. Kosman's statement was live tweeted and this tweet formed the basis for Kosman No. 2.
- [670] On another panel in May of 2017, Dr. Kosman was in charge of live-tweeting the discussion. She tweeted a statement, attributed to one of the panelists, that read "We will never fully know the scope of Galloway's violence and can never fully account for it." (para. 261). This tweet was the basis for Kosman No. 1.
- [671] The judge found Dr. Kosman's intentions were irrelevant with respect to whether the expressions had a defamatory meaning. The reasonable person would understand those hashtags, when used in the "context of a discussion of sexual assault or inappropriate relationships between professors and students", to be in reference to Mr. Galloway (para. 496).
- [672] The judge concluded an ordinary person would interpret Kosman No. 1 to mean that Mr. Galloway was a violent person who had committed violent assaults. As a result, the judge found Kosman No. 1 was defamatory. As to Kosman No. 2, the judge found that even in context, a reasonable person would understand that the expression referred to Mr. Galloway, and the natural and ordinary meaning of the words were that Mr. Galloway is a rapist. Therefore, since Kosman No. 2 implied that Mr. Galloway was guilty of criminal conduct, the judge found it to be defamatory.
- [673] Dr. Kosman advanced the defence of fair comment before the chambers judge. However, the judge found a reasonable reader would understand Kosman No. 1 to be the statement of fact that Mr. Galloway is a violent person. As a result, the defence of fair comment was not available. The judge drew the same conclusion with respect to Kosman No. 2, finding the reasonable reader would understand it to be the statement of fact that Mr. Galloway is a rapist.

Did the judge fail to consider context?

- [674] Dr. Kosman says the judge erred by "isolating [her] statements from the relevant academic and internet contexts" in assessing whether they were defamatory, protected by the defence of fair comment, and in considering their public interest value.
- [675] Dr. Kosman submits that academic freedom, meaning "the freedom to express and explore ideas to advance both knowledge and understanding", is important to democratic values and is intrinsically connected with freedom of expression (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 281, 286-287, 1990 CanLII 60). She contends the law should not interfere with the controversy that may arise in connection with academic discourse. Dr. Kosman submits the Kosman Expressions fall within the protected sphere of academic freedom.
- [676] We are not persuaded that the judge failed to consider context when analyzing whether Kosman No. 1 was defamatory, or that the factors Dr. Kosman points to would make it any less defamatory. The judge was acutely aware of Dr. Kosman's position as an academic, as someone who believed in public discussion about sexual violence towards women, and as someone who regularly used Twitter (see paras. 45 and 782-783).
- [677] Although the judge may not have explicitly set out all the factors that she considered formed the context for the defamation analysis, it is apparent from her reasons at para. 498 that she knew to consider Kosman No. 1 in context. Not recording every aspect of the context for Kosman No. 1 does not indicate that the judge failed to consider it.
- [678] Furthermore, the academic context in question does not make the expressions any less defamatory.
- [679] Dr. Kosman further submits that Kosman No. 1 was part of a thread of live-tweets which made it "apparent that the subject matter was theoretical, academic dialogue". However, the subject matter was not purely theoretical as Mr. Galloway was explicitly named in Kosman No. 1.
- [680] As observed in our previous discussion of the same issue, the judge had to extricate Kosman No. 1 from the series of tweets because Kosman No. 1 was the only expression at issue. This is not to say it prevented the judge from considering the broader context (and in our view, the judge did consider the broader context). The judge had to focus on Kosman No. 1 on its own to determine whether it was defamatory. The judge did not err in finding that Kosman No. 1 had a defamatory meaning, nor did she fail to consider the academic and Twitter context in which it was published.
- [681] Largely the same analysis can be applied to Kosman No. 2. The judge was aware of the context and at the very least, this context served to bolster her finding that Kosman No. 2 was defamatory. Dr. Kosman's evidence was that Kosman No. 2 was made in the context of teachers saying they had many copies of Mr. Galloway's book and asking the panelists, including Dr. Kosman, whether they "thought it [was] possible to separate an artist from [their] work" (para. 260).

- [682] In oral argument, Dr. Kosman's submissions evolved to enlarge the scope of what Kosman No. 2 referred to by arguing the expression was in response to a myriad of topics regarding educational responsibilities, which included author Joseph Boyden's claims to Indigeneity, the play "A Streetcar Named Desire" and its main character Stanley Kowalski, and Mr. Galloway's novel "The Cellist of Sarajevo". However, the judge was clear that she found Kosman No. 2 to be in direct response to a question specifically referring to Mr. Galloway's novel (para. 260). This conclusion was open to the judge, especially given that she found Dr. Kosman's affidavit evidence illustrated that Kosman No. 2 immediately followed a question from teachers asking whether they could still teach Mr. Galloway's novel.
- [683] It is clear from this context, (whether teachers should still teach Mr. Galloway's novel), and from Dr. Kosman's reply that "[you] cannot teach a rapist if you do not want to promote rape culture" that she was referring to Mr. Galloway.
- [684] We fail to see how this academic context would have rendered Kosman No. 2 any less defamatory. Regardless, the judge was aware of the academic context of Kosman No. 2, and it supported her finding that Kosman No. 2 was defamatory.
- [685] Dr. Kosman further submits that Kosman No. 2 is not "of and concerning" Mr. Galloway, noting that Kosman No. 2 "does not even refer to any person in particular". We reiterate that it is possible for statements to be defamatory even where the person is not identified by name (Brown on Defamation, at § 6:10 to 6:15).
- [686] Dr. Kosman specifically takes issue with Mr. Galloway's reliance on the evidence of Mr. Cran, who testified that he understood Kosman No. 2 to be about Mr. Galloway. Dr. Kosman says for these reasons, Mr. Cran cannot be "an objective observer or a reliable indicator of what a 'reasonable' person would understand [Kosman No. 2] to mean". She submits that because Mr. Cran is "closely associated" with Mr. Galloway, he cannot be a "stand-in" for the reasonable person.
- [687] In our view, Dr. Kosman misunderstands the test to determine whether a statement is "of and concerning" a plaintiff when the plaintiff is not explicitly named. The question then becomes "would the statements lead reasonable people who know the plaintiff to conclude that they refer to the plaintiff?" (Weaver, at para. 84, emphasis added). The court must ask whether this reader would, in light of the surrounding circumstances, reasonably believe that the person referred to in the defamatory statements is the plaintiff (Weaver, at para. 84).
- [688] As a result, Dr. Kosman's claim that Mr. Cran's perspective cannot be relied on to find that Kosman No. 2 was "of and concerning" Mr. Galloway is without merit. Mr. Cran's assertion that he knew Kosman No. 2 referred to Mr. Galloway further supports that a reasonable person who knew Mr. Galloway would conclude Kosman No. 2 referred to him.

- [689] Dr. Kosman also says the judge failed to consider all the surrounding circumstances as described. As mentioned, the surrounding circumstances of Kosman No. 2 included that Dr. Kosman was answering a query from teachers as to whether they could still teach Mr. Galloway's book. The judge properly considered this context. Thus, the judge's ultimate finding that Kosman No. 2 was "of and concerning" Mr. Galloway is without error. Her conclusion was founded on the evidence.
- [690] Dr. Kosman also submits the judge failed to consider the academic context in considering the defence of fair comment. In our view, that setting does not preclude the making of factual statements by participants in academic panels.
- [691] An academic panel is not akin to the editorial opinion piece at issue in WIC. Furthermore, while it is possible the physical audience hearing the Kosman Expressions might have had a different understanding of those expressions, the fact remains that the Kosman Expressions were published on Twitter as well (WIC, at para. 27). This publishing significantly broadened the potential audience. It was not limited to only fellow academics.
- [692] Finally, Dr. Kosman similarly argues the judge failed to consider context when weighing the public interests under s. 4(2)(b) of the PPPA. Dr. Kosman submits academic freedom is directly engaged by Mr. Galloway's claim. Since it is intimately connected with freedom of expression, academic debate is required for a free and democratic society. In oral submissions, Dr. Kosman's counsel argued the judge did not give enough weight to this academic context. However, we agree with Mr. Galloway that to engage in academic freedom, it is not necessary to make defamatory statements of criminal conduct. While we acknowledge that the "necessity" of making an expression in order to participate fully in a debate, academic or otherwise, is not the test under s. 4(2)(b) of the PPPA, we make these remarks only to emphasize that precluding an individual from making defamatory statements does not necessarily prevent that individual from being able to participate in discussion fully and meaningfully.
- [693] Dr. Kosman's oral submissions placed much more emphasis on the public interest in specifically supporting debates on educational responsibilities rather than academic freedom generally. Dr. Kosman argued the reasons contained no assessment of the public interest in that sort of debate and suggested that the judge needed to look at all of the tweets that were threaded together with Kosman No. 2 and specifically ask what the public importance was in a debate about educational responsibilities.
- [694] While the PPPA may at times permit a defamatory statement to be of greater public importance than a claim in defamation, the judge found this was not the case here. Although Dr. Kosman asserts that the "free exchange of ideas may be heated", this does not excuse or justify the use of defamatory statements. Indeed, the judge found this was not a case where an expression made in a heated debate was worthy of protection under the PPPA. Dr. Kosman is essentially asking this Court to reach a different conclusion than did the judge on the weighing exercise under s. 4(2)(b), but without identifying any error. The

judge was aware of the academic freedom and educational responsibilities context in which Kosman No. 2 was made but found that despite this context, the public interest in protecting Kosman No. 2 did not outweigh the public interest in allowing Mr. Galloway's proceeding to continue. This discretionary decision was available to the judge.

[695] The judge was not persuaded that Mr. Galloway was trying to silence Dr. Kosman. Rather, she found Mr. Galloway was attempting to encourage Dr. Kosman, as well as others, to "tailor their expressions so as to avoid needlessly defaming an individual in Mr. Galloway's position" (para. 784).

[696] Dr. Kosman submits this conclusion was akin to saying Mr. Galloway was attempting to quash public debate, the very cornerstone of a SLAPP suit. But requiring that expressions be tailored so as not to defame another does not quash public debate. We conclude the judge did not err by failing to consider the appropriate context of the Kosman Expressions when weighing the public interests under s. 4(2)(b).

Did the judge err in finding a causal link between the Kosman Expressions and harm to Mr. Galloway?

[697] Dr. Kosman submits there was no evidence upon which the judge could have found a causal link between the Kosman Expressions and the harm purportedly suffered by Mr. Galloway. For the reasons given in response to similar claims by Drs. Smalec and Anderson (and others), we discern no error at this preliminary PPPA stage in finding a causal link between the Kosman Expressions and the harm allegedly caused to Mr. Galloway.

[698] Dr. Kosman submits the damages caused by the Kosman Expressions are no more than minimal. However, her only submission on this point is that the Kosman Expressions were "obscure comments buried in academic live-tweet threads" and were published after Mr. Galloway had already published an apology of his own. We adopt our reasoning in response to Dr. Anderson's submission on this same issue. We see no error requiring our intervention.

[699] In the result, we dismiss Dr. Kosman's appeal.

Disposition

[700] We echo the statement of the Ontario Court of Appeal that "[u]nlike SLAPP suits which reek of the plaintiff's improper motives this litigation smells of a genuine controversy [and it] should be tried on its merits" (Bondfield Construction Company Limited v. The Globe and Mail Inc., 2019 ONCA 166, at para. 28). The parameters of anti-SLAPP litigation should be limited in scope in order to avoid costly, unmeritorious, and protracted litigation, which is ironically what the PPPA procedure is meant to protect against (Park Lawn, at para. 40).

[701] Pointes urged chambers judges to be "acutely conscious" of the stage in the litigation at which an anti-SLAPP application is brought (para. 52). Conducting a full-blown analysis of the underlying claim, as some of the appellants advocated here, is to engage in the "deep dive" that Pointes explicitly recognized is unnecessary and inappropriate at this stage.

[702] Many of the appellants' submissions risk perpetuating the problem identified by the Ontario Court of Appeal and losing sight of the early stage of the proceeding, as was explained by the Supreme Court of Canada.

[703] In sum, we make the following dispositions on the defendants' appeals:

- a) Professor Maillard's appeal is dismissed;
- b) A.B.'s appeal is dismissed;
- c) Ms. Rooney's appeal is dismissed;
- d) Dr. Gray's appeal is dismissed;
- e) Dr. Smalec's appeal is dismissed;
- f) Dr. Anderson's appeal is dismissed;
- g) Mx. Rombough's appeal is dismissed; and,
- h) Dr. Kosman's appeal is dismissed.

[704] Mr. Galloway's appeal and cross appeals are disposed of as follows:

- a) Mr. Galloway's appeal with respect to the publication of Lyon No. 2 on November 15 and the publication of Lyon No. 3 to Professor Taylor is allowed;
- b) his appeal against Ms. Elliott is dismissed;
- c) the cross appeal on Maillard No. 1 is allowed, other than its initial publication at the November Meeting;
- d) the cross appeal on Maillard No. 4 is dismissed;
- e) the cross appeal on Rooney No. 1 is allowed, except with respect to the publication to Ms. Flegg;
- f) the cross appeal against A.B. is allowed, except for the initial publication of A.B. No. 1 to Professor Maillard, Professor Lyon, and Ms. Rooney and the re-publication of A.B. No. 1 to Professors Maillard and Lyon at the November Meeting; and,
- g) his cross appeal on Gray Nos. 4 and 5 is dismissed.

Costs

[705] In *Hobbs*, the Court decided that the cost provisions of s. 7 of the PPPA do not apply to the costs of an appeal; they apply only to the costs of the application (paras. 100-101).

Therefore, pursuant to s. 44 of the Court of Appeal Act, S.B.C. 2021, c. 6, we make the following costs awards:

- a) Ms. Elliott was entirely successful and is awarded her costs against Mr. Galloway;
- b) as success was divided between Dr. Gray and Mr. Galloway, they will each bear their own costs; and
- c) Mr. Galloway will have his costs on the remaining appeals and cross appeals.

[706] The trial judge will determine the costs of the PPPA applications.

"The Honourable Madam Justice Bennett"

"The Honourable Justice MacKenzie"

"The Honourable Mr. Justice Voith"

Appendix "A" - Defamatory statements alleged to have been made by A.B.

A.B.

Pleaded

Sting alleged

Defence(s) in play

Disposition

in BCSC

A.B. No. 1

On or about November 12, 2015 A.B. verbally published defamatory statements to the defendants Keith Maillard, Annabel Lyon, Chelsea Rooney and others known to A.B. saying that the plaintiff had "raped", "sexually assaulted" and "physically assaulted" her.

A.B. No. 1 meant and was understood to mean, in both its literal and natural meanings, that the plaintiff raped, sexually assaulted and physically assaulted A.B.

Limitation Act

Weber

Qualified privilege

Granted

A.B. No. 2

In 2018 A.B. published in an art show and in multiple websites and in publications offered for sale on the internet the following false and defamatory statements regarding the plaintiff, beginning in or about May of 2018 and continuing:

- a) "It's not just what he did, but that he was able to do it for so long. The Rape spans six years, and the losses keep piling up. It makes you sick and sad and filled with rage that it went on for so long. But that's not on you. That's on him"
- b) "It's terrifying to try to exist in the world again, because not only is the man who raped you determined to punish you, so are many powerful people who support that man"
- c) "Exhibition by A.B. derives from what A.B. refers to as her Rape a narrative after she disclosed being sexually assaulted, assaulted and abused by a professor"
- d) "March On my back, on the floor of his office. He straddled over me pushing up my dress 'Please no please no' begging him no May came to naked on the floor "
- e) "no" he forced me on my knees put his in my mouth took a cell phone photo. He said 'I better trash this before I go home'

A.B. No. 2 meant and was understood to mean, in both its literal and natural meanings that the plaintiff raped, sexually assaulted and physically assaulted A.B.

Statements are not defamatory

Fair comment

Dismissed

Appendix "B" - Defamatory statements alleged to have been made by Professor Maillard

Maillard

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Maillard No. 1

On or about November 13, 2015 Maillard spoke the following false and defamatory words, or substantially similar words to several colleagues of the plaintiff in the UBC Creative Writing Department:

- a) "Steven Galloway raped A.B."

- b) "Steven Galloway sexually assaulted A.B."
- c) "Steven Galloway physically assaulted A.B."

On or about November 15, 2015 Maillard repeated Maillard Defamation 1 to all tenured and tenure-tracked faculty in the UBC Creative Writing Department.

Between November 12 and 18, 2015 the defendant Maillard further defamed the plaintiff by verbally repeating Maillard Defamation 1 to Chelsea Rooney and others known to him.

Maillard No. 1 meant and was understood to mean, in its literal and inferential meaning, that the plaintiff raped, sexually assaulted and physically assaulted A.B.

No defamatory statements were made

Limitation Act

Weber and University Act

Qualified privilege

Granted

Maillard No. 2

Maillard also published on Twitter the following false and defamatory words regarding the plaintiff on or about February 11, 2018. The context was that an article in the Walrus, after further editorial review, removed a portion of the article that repeated an unsubstantiated allegation of sexual assault. Maillard republished the same unsubstantiated defamation allegation:

"A very serious omission She has stated her assault allegations were not about an affair at all. The fact that should not have been removed. Shame on you Walrus"

Same as Maillard No. 1

Words were not defamatory.

Fair Comment

Qualified privilege (response to attack)

Dismissed

Maillard No. 3

Maillard also published in an essay titled "Burn" in or about September of 2018 the following false and defamatory words regarding the plaintiff, in the context of wide public knowledge by that point that A.B. had accused the plaintiff of rape and sexual assault:

"I have received express permission from the Main Complainant to disclose that she has told me her story. I believe her"

Same as Maillard No. 1

Same as Maillard No. 2

Dismissed

Maillard No. 4

Maillard also posted on Twitter on or about December 12, 2016 included that "The allegations that were investigated included that Mr. Galloway sexually assaulted A.B."

Same as Maillard No. 1

Words were not defamatory

Justification

Limitation Act

Qualified privilege (response to attack)

Granted

Appendix "C" - Defamatory statements alleged to have been made by Professor Lyon

Lyon

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Lyon No. 1

On or about November 16, 2015 Lyon spoke the following false and defamatory words, or words substantially similar, about the plaintiff to all tenured and tenure track faculty of the UBC Creative Writing Department, all stated in the context of the same group of people having heard Maillard Defamation 1:

"The complainant's allegation of sexual assault is true. Voice messages to her from Steven Galloway prove it. Galloway has never had any relationship with A.B. and was being dishonest when he suggests otherwise"

Lyon No. 1 meant, in both its literal and natural meanings, that the plaintiff had committed rape, sexual assault and physical assault upon A.B.

No defamatory statements were made

Limitation Act

Weber and the University Act

Qualified Privilege

Granted (and proceeding dismissed)

Lyon No. 2

On or about November 16, 2015 Lyon spoke the following false and defamatory words, or words substantially similar, about the plaintiff to all tenured and tenure track faculty of the UBC Creative Writing Department, all stated in the context of the same group of people having heard Maillard Defamation 1:

"A person I assigned to find other complainants has confirmed there are many women ready to come forward with similar allegations"

Lyon No. 2 meant, in its literal and natural meanings, that the plaintiff had committed rape, sexual assault and physical assault upon A.B, and that the plaintiff had committed rape, sexual assault and physical assault against many other women.

Same as Lyon No. 1

Granted (and proceeding dismissed)

Appendix "D" - Defamatory statements alleged to have been made by Chelsea Rooney

Rooney

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Rooney No. 1

Rooney, on or about November 18, 2015 spoke the following false and defamatory words to Erin Flegg, Sierra Skye Gemma and others known to her:

"Steven Galloway raped A.B."

Rooney No. 1 meant and was understood to mean, in both its literal and natural meanings, that the plaintiff raped, sexually assaulted and physically assaulted A.B.

Statement was not defamatory

Justification

Qualified privilege

Weber

Limitation Act

Granted

Rooney No. 2

Rooney published a false and defamatory statement regarding the plaintiff on Twitter on October 26, 2016, stating:

"A woman said she was sexually assaulted. UBC assessed ALL the evidence - including the flawed Boyd Report - and found the truth"

Same as Rooney No. 1

Statement was not defamatory

Justification

Fair comment

Dismissed

Rooney No. 3

Rooney published a false and defamatory statement regarding the plaintiff on Twitter on November 16, 2016 as follows:

"We can be asked to believe a person who reports sexual assault. And we can believe her. And we do"

Same as Rooney No. 1

Same as Rooney No. 2

Plus: implied consent

Dismissed

Rooney No. 4

Rooney published a false and defamatory statement regarding the plaintiff on Twitter on November 24, 2016, stating:

"A woman broke her silence about sexual assault today, and the signatories of UBCAccountable are still uploading their stories, as if they matter"

Same as Rooney No. 1

Same as Rooney No. 3

Dismissed

Rooney No. 5

Rooney published a false and defamatory statement regarding the plaintiff on Twitter on December 5, 2016, stating:

"I acted on allegations of violence. Because I believed the allegations."

Same as Rooney No. 1

Same as Rooney No. 3

Dismissed

Rooney No. 6

Rooney published a false and defamatory statement regarding the plaintiff on Twitter on or about Dec 5 2016 "#UBCAccountable and their surrogates have effectively effaced the person who reported sexual harassment and assault"

Same as Rooney No. 1

Same as Rooney No. 3

Dismissed

Rooney No. 7

Rooney published a false and defamatory statement regarding the plaintiff on Twitter on or about March 4, 2017 "#UBCAccountable start and end with the woman who reported rape"

Same as Rooney No. 1

Same as Rooney No. 3

Dismissed

Appendix "E" - Defamatory statements alleged to have been made by Mandi Gray

Gray

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Gray No. 1, No. 2 and No. 3

Mandi Gray, on or about November 15, 2016 published the following false and defamatory words about the plaintiff in a series a publications on Twitter:

"Prof sexually assaults a student"

"a dude who has sexually assaulted someone"

"A bunch of Canadian authors jumping to the aid of someone who has assaulted and harassed numerous students"

Gray Nos. 1-3 meant and were understood to mean, in their literal and natural inferential meanings, that the plaintiff raped, sexually assaulted and committed sexual violence upon A.B.

Statements were not defamatory

Fair comment

Responsible communication

Dismissed

Gray No. 4

Mandi Gray, on or about November 16, 2016 published the following false and defamatory words about the plaintiff on Twitter:

"UBC inaction re sex assault"

Same as Gray Nos. 1-3

Same as Gray Nos. 1-3

Granted

Gray No. 5

Mandi Gray, on or about December 5, 2016 published the following false and defamatory words about the plaintiff on Twitter:

"#galloway . . . rapists should be held accountable"

Same as Gray Nos. 1-3

Same as Gray Nos. 1-3

Granted

Gray No. 6

Mandi Gray, on or about March 14, 2018 published the following false and defamatory words about the plaintiff on Twitter:

"Contradiction between supporting those who are sexually assaulted when they are faceless and nameless and the absolute erasure of those who have come forward: see complainants in Galloway and Ghomeshi"

Same as Gray Nos. 1-3

Same as Gray Nos. 1-3

Dismissed

Gray No. 7

Mandi Gray, on or about July 6, 2018 published the following false and defamatory words about the plaintiff on Twitter, along with a photo of the art installation referenced in A.B. Defamation [No. 2]:

"very important installation about campus sexual violence"

Same as Gray Nos. 1-3

Same as Gray Nos. 1-3

Dismissed

Appendix "F" - Defamatory statements alleged to have been made by Alicia Elliott

Elliott

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Elliott No. 1

Alicia Elliott, on or about January 17, 2017 published the following false and defamatory words about the plaintiff on Twitter:

"re Galloway those pesky sexual assault survivors wouldn't shut up"

Elliott No. 1 meant and was understood, in its natural meaning, to mean that the plaintiff had committed rape and sexual assault

Statement was not defamatory

Justification

Fair comment

Granted (and proceeding dismissed)

Elliott No. 2

Alicia Elliott, on or about December 29, 2016 published the following false and defamatory words about the plaintiff on Twitter, by saying of a person who had co-authored the UBCAccountable defence of the plaintiff:

"This year you've managed to demonize rape survivors"

Same as Elliott No. 1

Same as Elliott No. 1

Granted (and proceeding dismissed)

Elliott No. 3

Alicia Elliott, on or about December 12, 2016 published the following false and defamatory words about the plaintiff on Twitter:

"They outline the ways that UBC's process of dealing with sexual assault can be improved very well, esp considering they only had 4 months to prepare the report. Especially worth noting in the Galloway case is their definition of "sexual assault." It says, "Consent that is obtained through misuse of a position of trust or authority is not valid consent".

Same as Elliott No. 1

Same as Elliott No. 1

Granted (and proceeding dismissed)

Elliott No. 4

Alicia Elliott, on or about February 22, 2018 published the following false and defamatory words about the plaintiff on an internet website for crowdfunding:

"powerful men using their access to lawyers to silence the women accusing them of sexual assault . . . Steven Galloway"

Same as Elliott No. 1

Same as Elliott No. 1

Granted (and proceeding dismissed)

Appendix "G" - Defamatory statements alleged to have been made by Theresa Smalec

Smalec

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Smalec No. 1

Theresa Smalec, on or about August 3, 2018, published the following words about the plaintiff on the website Political Letters Live:

[A.B.'s] installation, [hyperlink], opened on July 6, 2018 at the [hyperlink] Gallery in [redacted] and remains on view until August 26. Some might be tempted to interpret [A.B.'s] project as a personal narrative emerging out of the #MeToo movement, since its subject matter is a student's reported sexual harassment and sexual assaults at the hands of an unnamed professor.

[named art show] derives from what [A.B.] calls her "Rape . . ."

I prefer not to describe the panel's disorienting bottom half, except to say that the student claims her sexual assault became what she perceived as a "horrible secret" that left her "in hell with him".

Smalec No. 1 meant, both in its literal and natural meanings, that the plaintiff raped and sexually assaulted A.B.

Statements were not defamatory

Fair comment

Dismissed

Appendix "H" - Defamatory statements alleged to have been made by Kiera Anderson

Anderson

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Anderson No. 1

Kiera Anderson on January 15, 2018 published the following false and defamatory words about the plaintiff on Twitter:

"the survivor Galloway assaulted"

Anderson No. 1 meant and was understood, in both its literal and natural meanings, to mean that the plaintiff committed a sexual or physical assault on A.B.

Statement was not defamatory

Fair comment

Responsible communication

Dismissed

Anderson No. 2

Kiera Anderson on January 16, 2018 published the following false and defamatory words about the plaintiff on Twitter:

"the woman #galloway assaulted"

Same as Anderson No. 1

Same as Anderson No. 1

Dismissed

Appendix "I" - Defamatory statement alleged to have been made by Ari Rombough

Rombough

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Rombough No. 1

Ari Rombough, on January 8, 2018, published the following false and defamatory words about the plaintiff on Twitter:

"#stevengalloway after he was fired for sexual assault"

Rombough No. 1 meant and was understood, in both its literal and natural meanings, to mean that the plaintiff committed sexual assault.

Statement was not defamatory

Justification

Dismissed

Appendix "J" - Defamatory statements alleged to have been made by Marcelle Kosman

Kosman

Pleaded

Sting alleged

Defence(s) in play

Disposition in BCSC

Kosman No. 1

Marcelle Kosman, on May 29, 2017, republished the following false and defamatory words about the plaintiff on Twitter:

"We will never know the scope of Galloway's violence and can never fully account for it"

Kosman No. 1 meant and was understood, in both its literal and natural meanings, to mean that the plaintiff committed violent assaults.

Statements were not defamatory

Fair comment

Justification

Dismissed

Kosman No. 2

Marcelle Kosman, on March 29, 2017, published the following false and defamatory words about the plaintiff on Twitter in response to reference to whether the plaintiff's writings should be included and taught as part of the UBC curriculum:

"You cannot teach a rapist if you do not want to promote rape culture"

Same as Kosman No. 1

Statements were not defamatory

Fair comment

Dismissed

Appendix "K"--Kosman and Galloway Agreed Statement of Facts on Twitter

Twitter Generally

1. Twitter (twitter.com) is an American social media "microblogging" platform launched in July 2006.
2. As of 2019, Twitter has 330 million monthly active users.
3. Approximately 500 million tweets are sent every day.

Opening an Account

4. To use Twitter, users must sign up for a free account, which will create a profile page where the user can add a photo of themselves, a brief bio, and a header image.
5. The user also must choose a user name, which is referred to as their Twitter "handle". Twitter handles begin with the "@" symbol and may or may not include the user's "real" name. A user's Twitter "display name" is distinct from the user's "handle", and users can change their "display name", as well as their profile image, at any time.

Following

6. Twitter users can "follow" the accounts of people whose "tweets" they are interested in seeing in their Twitter feed.
7. One's Twitter feed is shown on their Home page and is updated continuously as the accounts that they follow send tweets (including any re-tweets of tweets from another user).
8. The practice of following means that the scope of one's tweets is not everyone on Twitter, but only those who follow that user or those who may find the tweet through a hashtag or word search.
9. Unlike other social media platforms such as Facebook, Twitter does not operate by a reciprocal following model. This means that a Twitter user may follow someone, without that person following them back.

Tweet Mechanics

10. Most conversations on Twitter are started by a "tweet": a short-form public message that a user can send out from their account.
11. Since November 7, 2017, a tweet can include up to 280 characters, and may also include visual content such as photos, a GIF, or a video. Prior to November 7, 2017, a tweet could include a maximum of 140 characters.

Viewing Tweets

12. User's tweets are posted in reverse-chronological order on their profile page. They are also available to the user's "followers," who are able to see recent tweets or retweets from people that they follow on their feed).
13. Just because a user follows someone does not guarantee they will see all of their tweets. This is because one's Twitter feed is constantly updating as the people that they follow tweet. Older tweets gets pushed to the bottom of the feed and eventually will disappear.
14. The only way to see these "disappeared" tweets would be to find them in a search or on the user's profile page.

Deleting Tweets

15. A user can delete any of their own tweets from Twitter at any time, and this will be reflected on twitter.com (your account, your followers' accounts, and search results), Twitter for iOS, and Twitter for Android. Retweets of the deleted tweet will also be removed on Twitter.com, Twitter for iOS, and Twitter for Android.

Engaging With Others

16. There are several tools which allow Twitter users to participate in conversations in different ways:
 - a. Reply: Twitter users are able to "reply" to another tweet, including one's own tweets, using the reply button. All replies are public, unless one has a protected account, in which case one's reply will only be available to one's followers. Replies allow a user to directly engage with a tweet and have their response be visually presented publicly alongside the original tweet.
 - b. Retweet: A retweet is a reposting of a tweet that a user shares publicly with their followers, and is often used as a way to amplify, or spread, a tweet. A user can retweet their own tweets (as of 2016) or tweets authored by others using the retweet button. Additionally, a user can add their own comments and/or media to a tweet before retweeting.
 - c. Mention (@): A mention is a tweet that contains another person's username anywhere in the body of the tweet, and is accomplished by using the "@" sign followed directly by the username of the person one is mentioning. If a user is mentioned in another user's tweet, they will see this in their notifications tab.
 - i. Prior to May 2016, any tweet that began with a mention would be hidden by default in one's followers' feeds unless the follower follows both the user and the person being mentioned. Users circumvented this by placing a period before a mention in order to make the tweet visible to their followers.
 - ii. In May 2016 Twitter changed this feature, making visible tweets that start with a mention, without users needing to precede the mention with a period. Such tweets are thus included in the feeds of followers in the same way as other tweets. Replies continue to be visible to those following the mentioned parties. If a user wants all of their followers to see a reply that begins with a mention, that user must retweet their reply to all of their followers.
 - d. Like: Users can show an appreciation for a tweet by "liking" a tweet, clicking on the heart icon below the tweet. Once clicked, the heart will turn red, confirming that a user has liked the tweet. Likes can be undone by clicking on the red heart.

- e. Thread: A thread is a sequence of connected tweets from one person that is used to make a series of connected points or to post a message that is longer than 280 characters. Users can create a thread using the "plus" icon and the "tweet all" button to post the thread in its entirety.

Hashtags

- 17. A hashtag, demarcated by the "#" symbol before a word or phrase, is used to index keywords and topics on Twitter (and other social media platforms). Hashtags can use both upper and lower case letters, although they function identically within a hashtag.
- 18. A popular hashtag may garner hundreds of thousands of tweets.
- 19. The ways in which hashtagged tweets are made visible to viewers by a search is determined by Twitter's algorithms.
- 20. Hashtags are self-selected, meaning that users can essentially choose to use a hashtag already circulating (if they wish to contribute to an ongoing discussion) or they can make their own hashtag by merely adding the # symbol in front of any word or phrase.
- 21. There is no gatekeeper for a hashtag, which means that it is possible for the meanings of hashtags to shift over time.

Live Tweeting

- 22. Live tweeting refers to the practice of tweeting about an event in real time.
- 23. Event organizers encourage live tweeting by creating event hashtags, which users can include in their tweets in order to link them with other tweets related to the designated event.

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