

CANADA / JUDGMENT

Todsen v. Morse

2022 BCSC 1341

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2022 BCSC 1341 Todsen v. Morse

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Todsen v. Morse,

2022 BCSC 1341

Date: 20220808

Docket: S93548

Registry: Nanaimo

Between:

Richard Todsen, Linda Todsen, and Todsen Design & Construction Ltd.

Plaintiffs

And

Ezra Morse and Qualicum Nature Preservation Society

Defendants

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

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Place and Date of Trial/Hearing:

Nanaimo, B.C.

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August, 8, 2022

Table of Contents

INTRODUCTION.. 3

BACKGROUND: THE TODSENS' DEFAMATION CLAIM.. 3

Bribery Statements (BS) 5

Community Opposition Statements (COS) 7

Land Statements (LS) 7

Assault Statements (AS) 8

THE LAW: APPLICATIONS TO DISMISS SLAPP SUITS UNDER THE ACT. 9

THE LAW: CONSIDERATION OF DEFAMATION CLAIMS UNDER THE ACT. 11

POSITIONS OF THE PARTIES. 15

Mr. Morse's Position. 15

QNPS' Position. 16

The Todsens' Position. 17

ANALYTICAL FRAMEWORK.. 18

ANALYSIS. 19

1. The Todsens' Defamation Claim founded upon the Bribery Statements. 19
2. The Todsens' Defamation Claim founded upon the Community Opposition Statements. 33

3. The Todsens' Defamation Claim founded upon the Land Statements. 38
 4. The Todsens' Defamation Claim founded upon the Assault Statements. 45
 5. Summary of Conclusions Reached on the Dismissal Application. 53
 6. The Morse Defendants' Claim for Damages. 54
- DISPOSITION.. 56

INTRODUCTION

- [1] The plaintiffs Richard Todsens, Linda Todsens, and Todsens Design & Construction Ltd. (collectively referenced as "the Todsens") are builders who wish to develop a property in Qualicum Beach. The defendants Ezra Morse and Qualicum Nature Preservation Society ("QNPS") are engaged in a campaign to oppose this development. The Todsens claim that Mr. Morse and QNPS have published defamatory statements about the Todsens in the context of this campaign.
- [2] Mr. Morse and QNPS have responded by bringing applications to dismiss the Todsens' claim against them under the Protection of Public Participation Act, SBC 2019, c 3 (the "Act"). This legislation provides for a specific pre-trial procedure designed to summarily dispose of certain kinds of civil claims that could silence political debate on issues of public interest. Such claims are colloquially known as "Strategic lawsuits against public participation", or "SLAPPs". The Act also allows for damages to be awarded if such claims are found to have been brought in bad faith or for an improper purpose.
- [3] Therefore, the fundamental issues to be decided in accordance with the Act are: (1) whether the Todsens' defamation claim warrants summary dismissal, and (2) whether damages should be awarded to Mr. Morse and QNPS.
- [4] Having reviewed the application record and considered the parties' submissions, I find that the Todsens' claim is in the nature of a type of SLAPP proceeding that the Act prohibits. On the other hand, I do not find that the Todsens brought their claim in bad faith or for an otherwise improper purpose.
- [5] Accordingly, while their claim will be dismissed, the Todsens are not liable for any damages under the Act. The reasons for my conclusion are set out below.

BACKGROUND: THE TODSENS' DEFAMATION CLAIM

- [6] The Todsens' notice of civil claim was filed on May 14, 2021. Both Mr. Morse and QNPS' applications to dismiss the claim under the Act were filed on July 6, 2021. As contemplated by the Act, the parties then filed a significant number of affidavits in support of their respective positions, many of which were subject to cross-examination. The factual background for these applications is therefore drawn from the notice of civil claim, the affidavits, and transcripts of the affiants' testimony.

- [7] Richard Todsen and Linda Todsen are married spouses. Together, they own Todsen Design & Construction Ltd., a private British Columbia corporation that is in the business of home construction and development. It is a small, family run company with three employees and one part-time office assistant.
- [8] The Todsens acquired a 16.4 acre parcel of land in Qualicum Beach along with a business partner. The land was divided into two 8.2 acre strata lots. A house was built on each lot. The Todsens reside in one of them, and their business partner resides in the other. Together, the two homes are on 10 acres of the land parcel (5 acres each). The remaining 6.4 acres were set aside.
- [9] In June 2019, the Todsens applied to the Town of Qualicum Beach (the "Town") to rezone this unused 6.4 acre portion of their land. The purpose of the rezoning application is to allow for the development and building of 16 sub-divided properties, on which there would be 14 single family homes, 10 secondary and garden suites, and 2 sets of duplexes. The application involves both a zoning amendment and an amendment to the Qualicum Beach Official Community Plan (the "OCP").
- [10] Ezra Morse is also a resident of Qualicum Beach. In April 2020, he founded QNPS, a registered society under the Societies Act, SBC 2015, c. 18, along with two other individuals. Mr. Morse is the president of QNPS, and its address is the same as that of Mr. Morse's home. The fundamental purpose of QNPS is to advocate on conservation and environmental issues that impact Qualicum Beach and its residents.
- [11] Mr. Morse became aware of the Todsens' proposed development and rezoning application in or around March 2020. They concerned Mr. Morse because he felt that building houses on the land in question would adversely affect Qualicum Beach's environment. Mr. Morse was also worried about the precedential impact that Town approval of the application may have on future development.
- [12] Mr. Morse then instigated a campaign to raise awareness of and encourage political opposition to the Todsens' proposed development and rezoning application. Mr. Morse effected this campaign both personally and through QNPS by various means, including the posting of commentary on social media. The Todsens learned of these posts, and formed the view that they contained inaccuracies and were harmful to the Todsens' reputation.
- [13] On August 19, 2020, the Todsens hosted a public information meeting on their property in relation to the proposed development. Mr. Morse decided to come to the meeting and brought a protest sign with him. Shortly after his arrival, there was an altercation between Mr. Morse and Mr. Todsen over whether Mr. Morse could attend the meeting with his sign. While the specifics of their interaction are disputed, Mr. Morse later posted comments on social media to the effect that he was assaulted by Mr. Todsen. The Todsens feel that these posts are also defamatory.

[14] As previously noted, the Todsens filed their notice of civil claim on May 14, 2021. It alleges that Mr. Morse and QNPS published or caused to be published a total of 24 defamatory statements about the Todsens over the period from July 2020 to May 2021. The Todsens' pleading categorizes the 24 statements under four headings: (1) "Bribery Statements"; (2) "Community Opposition Statements"; (3) "Land Statements"; and (4) "Assault Statements". The statements themselves and their meaning as alleged by the Todsens in their notice of civil claim are set out here. For ease of reference, I have assigned a code to each statement that corresponds to how they have been categorized by the Todsens and the medium of their publication.

Bribery Statements (BS)

[15] The Todsens allege that 9 Bribery Statements were published by Mr. Morse and QNPS between July 2020 and February 2021. The first four (coded as BS-A1 through BS-A4) were posted on the "PQB & Area Residents Chat Group" Facebook page. The next two (coded as BS-B1 through BS-B2) were posted on the "Concerned Citizens of Qualicum Beach" Facebook page. The next two that follow (coded as BS-C1 through BS-C2) were alleged to have been posted on the QNPS Facebook page (in fact, only BS-C1 was posted on the QNPS Facebook page; BS-C2 was posted on the PQB & Area Residents Chat Group Facebook page). The last one (coded as BS-D1) was posted on the QNPS website. The Bribery Statements, as specifically pleaded at paragraph 12 of the Todsens' notice of civil claim, are:

Date

Statement

BS-A1

Jan. 13, 2021

"The speculator donated time and money to the Mayor's campaign"

BS-A2

Jan. 12, 2021

"I've never seen such a disingenuous defence of this land speculation scheme [] and speculation scheme [] being lied to for 16 lots and a shady \$270k CAC [] influencing land use decision"

BS-A3

Jan. 31, 2021

"betrayal of public trust to benefit the current Mayors significant contributors"

BS-A4

Feb. 6, 2021

"campaign contributors get to favors reward contractors with skill & diligence, not those who speculate with political connections"

BS-B1

Jan. 20, 2021

"[The Mayor] has already received significant campaign contributions from the proponent"

BS-B2

Feb. 4, 2021

"Estate Residential Developer (another significant contributor to the Mayor) verbally and physically assault a citizen at their public information meeting"

BS-C1

Jul. 20, 2020

"this is a sham"

BS-C2

Feb. 3, 2021

"Must be nice to be campaign contributors"

BS-D1

Jan. 2021

"a council of just 3 people (including the mayor who received significant campaign support from the proponent) may be poised to move forward these drastic changes to our OCP, our Urban Containment Boundary and our Rural Lands policies, which may subsequently trigger a deluge of developments sprawling into our pristine greenbelt both here and elsewhere"

[16] According to the Todsens, the 9 Bribery Statements were meant and understood to mean that the Todsens: (a) made significant campaign contributions to the Mayor of Qualicum Beach to encourage the passing of the rezoning application; (b) are disingenuous in their defence of the rezoning application; (c) are liars; and (d) are perpetrating a sham rezoning application.

[17] In the alternative, the Todsens allege that the natural and ordinary inferential meanings of the 9 Bribery Statements are that the Todsens: (a) bribed the Mayor of Qualicum Beach to support the rezoning application; (b) are scheming; (c) made significant campaign contributions to the Mayor of Qualicum Beach to encourage the passing of the rezoning application; (d) are liars; and (e) are perpetrating a sham rezoning application.

Community Opposition Statements (COS)

[18] The Todsens allege that 5 Community Opposition Statements were published by Mr. Morse and QNPS between January 2021 and February 2021. The first one (coded as COS-A1) was posted on the PQB & Area Residents Chat Group Facebook page. The other four (coded as COS-B1 through COS-B4) were posted on the QNPS Facebook page. The Community Opposition Statements, as specifically pleaded at paragraph 18 of the Todsens' notice of civil claim, are:

Date

Statement

COS-A1

Jan. 12, 2021

"every indication the majority of our community opposes this and stands to gain little from it"

COS-B1

Jan. 10, 2021

"90% of the residents in Qualicum beach support keeping the protections in place"

COS-B2

Feb. 10, 2021

"It is beyond clear, by every reasonable measure, the community does not want this."

COS-B3

Feb. 10, 2021

" simultaneously ignoring 80-90% of the community (measured by randomized survey)"

COS-B4

Feb. 10, 2021

"the community is against this"

[19] According to the Todsens, the 5 Community Opposition Statements were meant and understood to mean that the Todsens' rezoning application is opposed by a majority of the Qualicum Beach community.

Land Statements (LS)

[20] The Todsens allege that 4 Land Statements were published by Mr. Morse and QNPS between January 2021 and February 2021. The first two (coded as LS-A1 through LS-A2) were posted on the PQB & Area Residents Chat Group Facebook page. The next one (coded as LS-B1) was posted on the "Qualicum Beach Chat" Facebook page. The last one (coded as LS-C1) was posted on the QNPS Facebook page. The Land Statements, as specifically pleaded at paragraph 22 of the Todsens' notice of civil claim, are:

Date

Statement

LS-A1

Feb. 4, 2021

"bought a protected lot and cleared it for development"

LS-A2

Feb. 16, 2021

"the current zoning provides for conservation of one of the last intact coastal douglas fir forests on Vancouver Island"

LS-B1

Jan. 10, 2021

"setting precedent to remove 200+ football fields of protected forests"

LS-C1

Jan. 8, 2021

"paired with continual environmental devastation [] greenlight sprawl into our rural and protected spaces."

[21] According to the Todsens, the 4 Land Statements were meant and understood to mean that the rezoning application: (a) seeks to rezone protected land; (b) will affect protected land; (c) will allow the rezoning of 200+ acres of protected forest; and (d) will remove conservation of one of the last intact coastal Douglas fir forests on Vancouver Island.

[22] In the alternative, the Todsens allege that the natural and ordinary inferential meanings of the 4 Land Statements are that the Todsens seek to: (a) rezone protected land; and (b) remove conservation of one of the last intact coastal Douglas fir forests on Vancouver Island.

Assault Statements (AS)

[23] The Todsens allege that 6 Assault Statements were published by Mr. Morse and QNPS between October 2020 and May 2021. The first three (coded as AS-A1 through AS-A3) were posted on the PQB & Area Residents Chat Group Facebook page. The next two (coded as AS-B1 through AS-B2) were posted on the Concerned Citizens of Qualicum Beach Facebook page. The last one (coded as AS-C1) was posted on the Qualicum Beach Correspondence Log at the Qualicum Beach Town Hall, which is a physical book. The Assault Statements, as specifically pleaded at paragraph 28 of the Todsens' notice of civil claim, are:

Date

Statement

AS-A1

Oct. 13, 2020

"I've met your father the same amount on the day he yelled expletives at me and assaulted me for bringing a sign to the estate residential public information meeting"

AS-A2

Oct. 31, 2020

"Developers assaulting citizens"

AS-A3

May 5, 2021

"saddened you published information about that assault. I've gone to great lengths to protect the identity of the perpetrator out of respect for the family"

AS-B1

Jan. 26, 2021

"I, along with the Town, have a video of a resident being verbally and physically assaulted by the developer and told to get the F out of there"

AS-B2

Feb. 4, 2021

"Estate Residential Developer (another significant contributor to the Mayor) verbally and physically assault a citizen at their public information meeting"

AS-C1

Jan. 15, 2021

"I've had a lengthy discussion about being assaulted by Rick Todsens"

- [24] According to the Todsens, the 6 Assault Statements were meant and understood to mean that the Todsens verbally and physically assaulted someone, illegally and unprovoked.
- [25] In the alternative, the Todsens allege that the natural and ordinary inferential meanings of the 6 Assault Statements are that the Todsens verbally and physically assaulted someone who opposes the rezoning application, illegally and unprovoked, because of their opposition to it.
- [26] With respect to all 24 statements, the Todsens say that they are defamatory, false, malicious, and have caused the Todsens loss, damage and expense. Accordingly, the Todsens seek an unspecified amount of general, aggravated, and punitive damages, as well as injunctive relief to prevent Mr. Morse and QNPS from further publishing the alleged or any similar libel concerning the Todsens.

THE LAW: APPLICATIONS TO DISMISS SLAPP SUITS UNDER THE ACT

- [27] A defendant to any lawsuit involving expression related to matters of public interest may apply under the Act to have it dismissed summarily. Section 4 of the Act provides that the Court must dismiss the lawsuit if it finds that certain statutory criteria are present, as follows:

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.

4(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.

- [28] Sections 4(1) and 4(2) of the Act are worded almost identically to s. 137.1(3) and 137.1(4) of the Ontario Courts of Justice Act, RSO 1990, c. C.43. Those provisions were considered by the Supreme Court of Canada in two judgments issued on September 10, 2020: 1704604 Ontario

Ltd. v. Pointes Protection Association, 2020 SCC 22 ["Pointes"] and Platnick v. Bent, 2020 SCC 23 ["Bent"]. As was effectively noted by our Court of Appeal in Neufeld v. Hansman, 2021 BCCA 222 ["Neufeld"] at para. 7, these two judgments provide binding guidance on how SLAPP dismissal applications under s. 4 of the Act are to be adjudicated.

- [29] In particular, the Supreme Court of Canada explained that such applications are intended to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. However, in addition to protecting expression on matters of public interest, this mechanism is also designed to ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it: Bent at para. 74, referencing Pointes at paras. 16 and 46.
- [30] The mechanism involves a four-step analysis with shifting burdens of proof. At step one, the defendant who brings the application must establish that the underlying proceeding arises from an expression that relates to a matter of public interest. The burden then shifts to the plaintiff who is responding to the application for the next three steps. Plaintiffs that fail to meet their burden in respect of any of these three steps will have their proceedings dismissed.
- [31] The specifics of the remaining steps are as follows. At step two, the plaintiff must show that the proceeding has substantial merit. At step three, the plaintiff must show that the defendant has no valid defence to the proceeding. Finally, at step four, the plaintiff must show that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression.
- [32] At para. 81 of Pointes, Justice Côté wrote that the open-ended nature of the final step of the assessment provides courts with "the ability to scrutinize what is really going on in the particular case before them how allowing individual organizations to vindicate their rights through a lawsuit affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy" (my emphasis).
- [33] It should also be noted that while an application to dismiss brought under s. 4 of the Act is a procedural tool available to summarily dismiss proceedings prior to trial akin to Rule 9-5 applications to strike pleadings and Rule 9-6 summary judgment applications, there is an important difference between them. Specifically, an application under s. 4 of the Act "can prevent a plaintiff with an otherwise valid cause of action from proceeding with their suit so long as the public interest in protecting the defendant's expression outweighs the public interest in allowing the plaintiff to proceed": Neufeld at para. 5 (emphasis in original).
- [34] Finally, s. 8 of the Act empowers the Court on a s. 4 application for dismissal to award damages to the applicant against a respondent if it finds that the latter brought the underlying proceeding in bad faith or for an improper purpose.

THE LAW: CONSIDERATION OF DEFAMATION CLAIMS UNDER THE ACT

[35] In *Bent*, the Supreme Court of Canada adjudicated a SLAPP dismissal application brought in respect of a defamation claim. In so doing, it provided specific guidance on how defamation law principles are to be applied within the above-referenced analytical framework. The principles that apply to the case at bar are summarized in this section, as drawn from *Bent*, *Pointes*, and other relevant Supreme Court of Canada jurisprudence.

[36] I begin with paras. 90 to 100 of *Bent*, where the Court effected its second step analysis in relation to whether there are grounds to believe that the claim has "substantial merit". At this step, the decision-maker is to consider whether the claim has 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". For a defamation claim, this means ascertaining whether there is a real prospect that the plaintiff will establish the following three criteria:

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

For the third criterion, the Court also noted that evidence of actual harm to reputation is not required; instead there must be a realistic threat that the statement, in its full context, would reduce a reasonable person's opinion of the plaintiff. Further, the plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless as the tort is one of strict liability: *Bent* at paras. 92 and 96, citing *Grant v. Torstar Corp.*, 2009 SCC 61 ["*Torstar*"] at para. 28 and *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 78.

[37] At paras. 101 to 138 of *Bent*, the Court effected its third step analysis in relation to whether there are grounds to believe that there is "no valid defence" to the defamation claim. In that case, the defendant put in play the defences of justification and qualified privilege. The Court considered whether there is "a basis in the record and the law - taking into account the stage of the proceeding - to support a finding that the defences do not tend to weigh more in favour of [the defendant]": *Bent* at paras. 101 to 105.

[38] Because justification has also been invoked in the case at bar, it is worth noting that its general principles were canvassed and applied at paras. 107 to 120 of *Bent*. To succeed on a defence of justification, a defendant must adduce evidence showing that the statement and its defamatory "sting", or main thrust, are substantially true. In other words, the defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true: *Bent* at para. 107.

- [39] The other defence invoked in the case at bar is fair comment. While it was not considered in *Bent*, its general principles were set out in *Torstar* at para. 31. A defendant claiming fair comment must show that the comment is: (a) on a matter of public interest; (b) based on fact; (c) recognizable as comment - although it can include inferences of fact; and (d) one that, objectively, anyone could honestly have expressed. On the other hand, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. As to what constitutes malice, it was discussed in *Bent* at paras. 121 and 136 (by Côté J. for the majority) and at paras. 245 to 247 (by Abella J. for the dissent). It includes having an actual, express motive to speak dishonestly, as well as acting with knowing or reckless disregard for the truth. The party who alleges malice has the burden of proving it, and it is one that is not easily satisfied.
- [40] At paras. 139 to 174 of *Bent*, the Court effected its fourth step analysis involving the weighing of the competing "public interests" in having the defamation claim proceed and protecting the impugned expression. It did so after first being satisfied that the plaintiff had shown: (a) the existence of harm; and (b) the fact that the harm was suffered as a result of the defendant's expression. As for the weighing exercise itself, the Court in *Pointes* at paras. 77 to 82 identified a large number of factors that could potentially bear upon it, namely:
1. the importance of the expression and its proximity to the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing;
 2. the history of litigation between the parties, including the plaintiff's use of litigation or the threat of litigation to silence critics;
 3. a financial or power imbalance that strongly favours the plaintiff;
 4. a punitive or retributory purpose animating the plaintiff's bringing of the claim;
 5. minimal or nominal damages suffered by the plaintiff;
 6. broader or collateral effects on other expressions on matters of public interest;
 7. the potential chilling effect on future expression either by a party or by others;
 8. the defendant's history of activism or advocacy in the public interest;
 9. any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award; and
 10. 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.

- [41] That said, it is unnecessary for the Court to expressly consider each and all of these factors, as evidenced by the fact that this was not done in either Bent or Pointes. Ultimately, the Court must scrutinize whether "what is really going on" in a plaintiff's claim is an attempt to strategically silence a defendant's expression on a matter of public interest, or to actually remedy harm suffered as a result of the defendant's communication.
- [42] Lastly, the Court in Pointes at para. 52 cautioned judges who adjudicate SLAPP dismissal applications to only engage in a limited weighing of the evidence, deferring ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage. This does not, however, mean that the applications judge should take the evidence presented at face value or that bald allegations are sufficient. The judge is permitted to make a preliminary assessment of credibility and thereby may resolve conflicts in the evidence so long as the assessment does not transform the proceeding into a de facto summary judgment application.

POSITIONS OF THE PARTIES

Mr. Morse's Position

- [43] Mr. Morse is represented by counsel. His basic position is that the statutory preconditions set out at s. 4 of the Act for the Court to dismiss the Todsens' claim are present in this case.
- [44] First, Mr. Morse says that all of his impugned expressions relate to matters of public interest, namely: (1) governance concerns with respect to how the Town was managing the approval process for the Todsens' rezoning application; (2) the state of community opinion on the Todsens' proposed development and the need to protect the impacted land; and (3) what took place at the August 19, 2020 public information meeting regarding the Todsens' rezoning application for their proposed development, and its impact on political discourse in relation thereto.
- [45] Second, Mr. Morse argues that the Todsens have not met their burden to establish both that their defamation claim has substantial merit, and that Mr. Morse has no valid defence to it. Mr. Morse invokes the defences of justification and fair comment with respect to his impugned statements, and says that they are valid.
- [46] Third, Mr. Morse submits that even if the Todsens were to establish the substantial merit of and the lack of a valid defence to their claim, the Todsens have not shown that the harm caused by Mr. Morse's expression outweighs the public interest in protecting that expression. Mr. Morse points to multiple factors in support of this assertion, including the importance of political expression relating to environmental matters and the alleged disproportion between the resources being used in this lawsuit and the nominal harm suffered by the Todsens as a result of the comments in issue.

- [47] Finally, Mr. Morse argues that this is a case where it would be appropriate to award him damages because the Todsens brought their claim for the improper purpose of intimidating him and other opponents of the Todsens' development project into silence, thereby undermining their ability and inclination to exercise their democratic rights. In addition to the alleged weakness of the Todsens' claim, Mr. Morse highlights the timing of when the Todsens' retained legal counsel and filed their lawsuit as apparent evidence of its improper purpose.

QNPS' Position

- [48] QNPS is represented by its own counsel. It agrees with and adopts Mr. Morse's position in its entirety in support of its application to dismiss under the Act.
- [49] QNPS also highlights its separate legal identity from that of its co-defendant, Mr. Morse, as well as the separate identities of the three plaintiffs - Richard Todsen, Linda Todsen, and their company. QNPS argues that the Todsens have been indiscriminate in their allegations regarding which of the defendants made and published the impugned statements, as well as which of the plaintiffs were harmed thereby. QNPS also takes issue with how the statements are set out in the notice of civil claim, which QNPS says have been misleadingly excerpted and edited without providing the necessary context. QNPS cautions the Court that it must carefully examine all 24 statements individually and not simply assess them as four groups of collective statements, as presented by the Todsens.
- [50] While I recognize and accept that Mr. Morse and QNPS are separate legal entities, given the similarity of their positions, for convenience I will reference these two co-defendants in the balance of these reasons collectively as "the Morse Defendants", when appropriate.

The Todsens' Position

- [51] Richard Todsen, Linda Todsen, and Todsen Design & Construction Ltd. are all represented by the same counsel. The Todsens' position is that their claim is a good faith response to false and defamatory statements repeatedly published by the Morse Defendants as part of a deliberate campaign to destroy the Todsens' reputations. While they do not dispute that the 24 impugned statements relate to matters of public interest, the Todsens argue that all of the remaining elements of the statutory test for rejecting the Morse Defendants' applications to dismiss under s. 4 of the Act are present.
- [52] First, the Todsens say that they easily meet the evidentiary threshold to obtain judgment in a defamation action, namely, that the Morse Defendants' statements: (1) would tend to lower the Todsens' reputation in the eyes of a reasonable person; (2) referred to the Todsens; and (3) were published. The Todsens stress that defamation is a tort of strict liability, and that it is therefore unnecessary for them to prove that the publications were made carelessly or with intention to cause harm. They also do not have to show that anyone in particular actually thought less of them as a consequence of the defamation.

- [53] Second, the Todsens argue that neither justification nor fair comment can be validly invoked by the Morse Defendants as defences to the claim. In order to succeed on a defence of justification, a defendant must prove that both the statement and its defamatory "sting" are factually accurate and true. As for a defence of fair comment, it will only be accepted if the court finds that a person could honestly express the impugned opinion based on proven facts, and that the defendant was not actuated by express malice. The Todsens say that the Morse Defendants have made outlandish statements which are factually untrue and cannot be proven. Alternatively, if the statements are comment, they are based on such poor evidence that no person could honestly have expressed them.
- [54] Third, the Todsens submit that the harm they have suffered as a result of the Morse Defendants' expressive statements outweighs the public interest in protecting this expression. The Todsens say that these statements have been very damaging to their reputation, particularly the allegations of bribery and assault as they connote criminal behaviour. On the other hand, the Morse Defendants have not been silenced by the Todsens' lawsuit since they are still engaging in public communication, including media interviews and fundraising efforts for their legal fees.
- [55] Finally, the Todsens deny that they brought their claim in bad faith or for an improper purpose. Accordingly, the Morse Defendants should not be awarded any damages under s. 8 of the Act. In the alternative, if the Court is inclined to make such an award, it should be nominal given the paucity of evidence tendered on this issue.

ANALYTICAL FRAMEWORK

- [56] There is no dispute between the parties that the impugned statements were made by one or both of the Morse Defendants, and that the statements all relate to matters of public interest. I agree. Therefore, I find that the Morse Defendants have met their burden under s. 4(1) of the Act, and there is no need to further consider the first step of the SLAPP dismissal application analysis explained earlier.
- [57] Instead, I will move immediately to consideration of the three other analytical steps in relation to the 24 impugned statements with a view to determining whether the Todsens have met their burden to establish the statutory conditions set out at s. 4(2) of the Act for dismissal of the Morse Defendants' applications.
- [58] For that analysis, I accept that I must generally assess each statement individually, absent referability or other inextricable linkage: Neufeld, at para. 26. For readability purposes, however, I will sequentially conduct the analysis by statement category as identified by the Todsens.

- [59] Specifically, I will first examine the 9 Bribery Statements and determine which statement, if any, gives rise to a defamation claim: (1) that has substantial merit; and (2) to which there is no valid defence. If both (1) and (2) are present for a particular statement, I will consider whether: (3) the public interest in having the defamation claim proceed in relation to that statement outweighs the public interest in protecting expression of the statement.
- [60] I will then conduct the same sequential analysis for the 5 Community Opposition Statements. After that, I will analyze the 4 Land Statements sequentially as well.
- [61] For the 6 Assault Statements, however, I am of the view that there is an inextricable linkage between them which allows for a collective analysis, albeit one that follows the same steps as for all of the other statements.
- [62] Lastly, I will conclude these reasons with an assessment of whether damages ought to be awarded to the Morse Defendants further to their applications for such relief.

ANALYSIS

1. The Todsens' Defamation Claim founded upon the Bribery Statements

- [63] Prior to examining the 9 Bribery Statements individually, I make the following general observations with respect to the Todsens' defamation claim in relation to these statements.
- [64] The Todsens essentially posit that these statements collectively form a false and defamatory narrative that the Todsens effected a bribe by making a significant financial contribution to the Mayor of Qualicum Beach with the objective of ensuring that the Town approves the Todsens' rezoning application.
- [65] The Morse Defendants, on the other hand, deny that any of these statements accuse the Todsens of bribery. Rather, they are a reference to the fact that Mr. Todsen provided \$180 to the Mayor's political campaign, and to the Morse Defendants' concern that this contribution may influence the Town's decision on the Todsens' application. The Morse Defendants note in particular that under the applicable provisions of the Local Elections Campaign Financing Act, SBC 2014, c. 18, a person who provides over \$100 to a political candidate is defined as a "significant contributor".
- [66] I will turn now to the nine individual Bribery Statements.
- a) Statement BS-A1
- [67] On January 13, 2021, Mr. Morse posted a comment on the PQB & Area Residents Chat Group Facebook page. It was posted in response to the following comment made by Ray Woroniak (the vice president of QNPS):

The builder is is telling the Mayor and Council, "Comprehensive planning is for the whole community. Who cares about comprehensive community planning? I'm a property speculator, I want my profits now!"

What's the message from the Mayor? Where do individual councillors stand? Are they for the property speculator?

[68] Mr. Morse then posted the following comment in response (the allegedly defamatory words are underlined):

The speculator donated time and money to the Mayor's campaign. The Greenbelt Sprawl will be a multi-million dollar ROI windfall.

We need to know where the councillors stand now.

[69] In my view, while Mr. Morse's statement about the "speculator" was published and is a reference the Todsens, the statement is not defamatory in the sense that it would lower the Todsens' reputation in the eyes of a reasonable person. That is because it is not defamatory to simply say that someone has donated their time or money to a political campaign. Even if it was defamatory, however, I find that the defence of justification has a real prospect of success given that Mr. Morse did donate \$180 to Qualicum Beach Mayor Brian Wiese's political campaign with respect to the municipal election held on October 20, 2018. Furthermore, Mr. Morse had been told by Anne Skipsey, now a Qualicum Beach municipal councillor, that Mr. Todsens had helped Mayor Wiese put up his campaign signs.

[70] I am therefore not satisfied that there are grounds to believe that the Todsens' defamation claim in respect of Statement BS-A1 has substantial merit. I am also not satisfied that the Morse Defendants have no valid defence to this claim. There is therefore no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-A1.

b) Statement BS-A2

[71] On January 12, 2021, Mr. Morse posted on the PQB & Area Residents Chat Group Facebook page an infographic setting out the results of an "engagement postcard survey" in relation to the Todsens' proposed "Estate Residential Development". This prompted further posts by others, including Peter Simkin and Steve Knutson (Richard Todsens and Linda Todsens's son-in-law), who suggested that the land in question has already been logged and is not protected. In response to one of Mr. Simkin's comments, Mr. Morse posted (the allegedly defamatory words are underlined):

Peter, its verifiably zoned Estate Residential--which is protected and considered a part of our identity in the OCP--and you are carrying the developer's water because they already logged it? Of course there is no forest left! So we now reward bad behaviour by removing the first piece ever from the Estate Residential? I've never seen such a disingenuous defense of this land speculation scheme, which also nullifies rural subdivision policies that impact likely thousands of acres. And you all people claim this is over-reacting?

[72] Mr. Morse then posted another comment to Mr. Simkin (the allegedly defamatory words are underlined):

Frankly, I accept this entire issue might be out of your wheelhouse. You should try to actually pick up the Qualicum Beach OCP (Bylaw 800) and read the entire section.

"We wanted to protect the Estate Properties. I'm concerned that if we move ahead with this one that that will be the "Thin Edge of the Wedge" and eventually you are going to see a change in that area It's important for the Town to have these large greenspaces."

-Mayor Westbroek, 2018 OCP Review

"As stated in the Town's Official Community Plan, 'The Town will manage growth through an Urban Containment Boundary that is independent of the Growth Containment Boundary in the Regional Growth Strategy.'"

Mayor Brian Wiese, January 3rd, 2019

We are being lied to for 16 lots and a shady \$270K CAC. We could fit as much housing on a half acre close to our downtown core. Do you know why we aren't? Because there isn't as much money to be made as in the case of this speculation. That's the bottom line. This argument is not about housing. Its not about if the property has been logged or not. Its about maximizing the amount of money a land speculator can make off our environment and our community's vision by influencing land use decision.

If you have any honest questions, I'd be happy to address them, as someone who does not have a financial conflict of interest in these land speculation scheme. Otherwise, have a great night Peter!

BTW Peter, please don't mistake these 2 posts as a rant. I'm providing the excerpts, explanation, and quotes because I respect you as a person enough to believe you have the ability to think your way through this.

[73] The phrase "shady \$270K CAC" refers to a \$270,000 Community Amenities Contribution ("CAC") that the Todsens had proposed to make to the Town in connection with their rezoning application, in accordance with Qualicum Beach Policy 3008-11. That policy provides that the Town will seek an amenity contribution equivalent to 50% of the additional land value created by a rezoning, based on a land lift analysis. The Todsens arranged for a land lift appraisal which assessed the increase in land value due to rezoning at \$540,000. Accordingly, the Todsens proposed a CAC of 50% of this amount, or \$270,000. In a report by Town staff that was attached as supporting material to the agenda for the Town's January 13, 2021 Council meeting, the staff called into question the land lift appraisal. Ultimately, Council rejected the Todsens' land lift assessment at its April 7, 2021 meeting and directed Town staff to commission a new assessment instead.

[74] I do not accept the Todsens' characterization of Statement BS-A2 as constituting a single statement, as they suggest in their notice of civil claim. It is in fact three separate statements.

- [75] The first statement regarding the "disingenuous defense" is made in respect of Mr. Simkin's argument, and does not reference, let alone defame, the Todsens.
- [76] As for the second statement regarding "being lied to for 16 lots and a shady \$270K CAC", I find given the context that it is an expression of opinion about Qualicum Bay politicians generally and the Mayor in particular when the latter said he "will manage growth through an Urban Containment Boundary" by supporting the Todsens' proposed development which is outside the Urban Containment Boundary. As such, the phrase "we are being lied to" is an allegation that the Mayor lied, not the Todsens.
- [77] On the other hand, I accept that the second statement's reference to the "shady \$270K" does relate to the Todsens, as does the third statement regarding "influencing land use decision". Furthermore, the use of the pejorative adjective "shady" to describe the Todsens' proposed CAC in the context of a post suggesting that it might be "influencing" a land use decision is likely defamatory.
- [78] However, Mr. Morse invokes the defences of justification and fair comment in respect of these statements. While I do not agree that justification could apply to Mr. Morse's comments, I find that there is a valid fair comment defence in regard to Mr. Morse's opinion that the valuation of the CAC was "shady". In addition to the evidence of the Town staff's concerns with the Todsens' land lift assessment, Mr. Morse had also received an email on January 11, 2021 from Steven G. Coull, a Certified Review Appraiser, that questioned the valuation set out in the land lift assessment commissioned by the Todsens. Accordingly, Mr. Morse's critical view of the CAD is one that has a basis in fact and that anyone could honestly have expressed. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.
- [79] I am therefore not satisfied that there are grounds to believe that the Todsens' defamation claim in respect of Statement BS-A2 has substantial merit, with the exception of the words that relate to the CAC. However, I am not satisfied that there is no valid defence to a defamation claim based on Mr. Morse's comments about the CAC. As such, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-A2.
- c) Statement BS-A3
- [80] On January 31, 2021, Mr. Morse shared on the PQB & Area Residents Chat Group Facebook page a Parksville Qualicum Beach News article titled "Concerns raised over Qualicum Beach growth containment boundary at hearing". As its title suggests, the article discusses concerns raised by members of the public during a public hearing about changes to the growth containment boundary within the Regional Growth Strategy for the Regional District of Nanaimo. Mr. Morse then posted the following comment (the allegedly defamatory words are underlined):

A little more context in case anyone is missing it

Where I am from, when people don't tell the public the truth or break promises, we just call them liars. Or politicians.

What we have before us is a betrayal of public trust to benefit the current mayors significant contributors. Our Town deserves more than this.

[81] Within that comment, Mr. Morse also posted a screenshot containing an extract from a January 2019 letter written by Qualicum Beach Mayor Brian Wiese. It reads as follows:

Some of the delegations and letters to the RDN [Regional District of Nanaimo] board on December 4th, 2018 implied that this amendment will invite more changes to land use designations in Qualicum Beach, which is not the case. As stated in the Town's 2018 Official Community Plan, "The Town will manage growth through an Urban Containment Boundary that is independent of the Growth Containment Boundary in the Regional Growth Strategy."

This same approach of aligning the Growth Containment Boundary with the municipal boundary was taken in the 2011 Regional Growth Strategy by the City of Nanaimo. It should be noted there have not been lands removed from the Agricultural Land Reserve in Nanaimo since that time, nor did the 2011 change result in major land use changes.

In the future I invite you to approach Council directly with your concerns. Over the next four years of this term, Council will maintain the Town's high standard of public engagement, and I trust that you will stay engaged as we work with residents and stakeholders in pursuit of the Town's long-term vision.

Warm regards,

Brian Wiese Mayor Town of Qualicum Beach

[82] In my view, when properly contextualized, this comment is an expression of Mr. Morse's opinion about the Mayor of Qualicum Beach, and not the Todsens. I find that Mr. Morse is expressing his view that the Mayor has betrayed the public trust by stating an apparent intention to contain growth, while at the same time being prepared to permit growth. Neither the Todsens nor their proposed development are expressly referenced in the post, and I do not accept that the plural term "significant contributors" is a sufficiently clear indirect reference to the Todsens to found a defamation claim that has a real prospect of success in the context of this particular post by Mr. Morse.

[83] If I am wrong in this assessment, however, I would find that the Morse Defendants have a valid defence of fair comment. Mr. Morse's personal opinion that the Mayor's apparent willingness to consider supporting certain rezoning applications constitutes a "betrayal of public trust" since it would arguably contradict the Mayor's previously expressed position is an opinion based on fact that anyone could honestly hold. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

[84] I am therefore not satisfied that there are grounds to believe that the Todsens' defamation claim against the Morse Defendants in respect of Statement BS-A3 has substantial merit, or is not the subject of a valid defence. As such, I need not conduct the weighing exercise contemplated by ss. 4(2)(b) of the Act in relation to Statement BS-A3.

d) Statement BS-A4

[85] On February 6, 2021, Deborah McKinley posted on the PQB & Area Residents Chat Group page a comment about an upcoming Town public hearing at which the Todsens' rezoning application was to be discussed. In response, Kathy Fraser posted a comment expressing her view that she could not understand the logic of people who are now against development when they reside in houses that were the fruit of past development. Mr. Morse responded to Kathy Fraser's comment with the following post (the allegedly defamatory words are underlined):

My father was in a similar profession but he was a contractor. In all those decades, we never built a home for someone in a wetland or a protected forest.

What I can't wrap my head around is why people twist themselves into pretzels to justify exploiting protected land to maximize private profits.

This is not about housing or developing. We agreed as a community to densify, and are doing so by putting just as many units on an urban half-acre lot. As a community, we also agreed this land was off limits. We've said "no" over and over. The audacity to continually push this is astounding.

BTW, as someone whose family built homes and have done so myself, I find it disgusting that different people get different rules. The playing field should be level. There are people out there trying to put food on the table, but they face an unlevel playing field because campaign contributors get to favors? Look, we need to make a plan and stick to it. Reward contractors with skills and diligence, not those who speculate with political connections.

[86] Unlike the previous statement, I find that in the context in which this comment was posted by Mr. Morse, the impugned words likely can be viewed as including a defamatory indirect reference to the Todsens. However, in my view, what is fundamentally being expressed by Mr. Morse is his opinion that political decisions regarding development projects ought not to favour those who make campaign contributions or who may have political connections, and his concern about the fact that Mr. Todsen's contribution to the Mayor's campaign may influence the Town's decision on the rezoning application. Mr. Morse's comment and opinion have a factual foundation, and could honestly be held by anyone. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement. Therefore, a viable defence of fair comment can be advanced in respect of the statement.

[87] Accordingly, I am not satisfied that there are grounds to believe that the Todsens' defamation claim against the Morse Defendants in respect of Statement BS-A4 is not the subject of a valid defence. As such, I need not conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-A4.

e) Statement BS-B1

[88] On January 20, 2021, Art Smith posted on the Concerned Citizens of Qualicum Beach Facebook page a comment and a link to the BC property assessment about the land that the Todsens propose to develop. Mr. Morse responded with a comment expressing his opinion that "we as a community have nothing to gain from this [development] and so much to lose." Mr. Smith then posted a comment stating: "I'm guessing there are some individuals on the QB council that may have something to gain from this transaction " Mr. Morse then posted the following comment (the allegedly defamatory words are underlined):

Potentially. We know that Mayor Wiese is a former real estate manager, and has already received significant campaign contributions from the proponent. We also have been told there have been many potential violations of policy 3008-6 with the proponents, and members of council may have been entertained at the residence with wine and cheese socials. Beyond that, we do not know if this is a favor for friends or something more. Regardless, it is not a favor for our community.

[89] Mr. Morse's statement about the Mayor of Qualicum Beach having received significant campaign contributions from "the proponent" was published and is clearly a reference the Todsens. However, it was written in response to the suggestion by Art Smith that "some individuals on the [Qualicum Beach] council may have something to gain from the transaction", to which Mr. Morse responded with the word "potentially". As such, Mr. Morse did not fully accept Mr. Smith's insinuation of impropriety, which was directed at the municipal council and not at the Todsens. Accordingly, I do not accept that this impugned statement is necessarily defamatory in respect of the Todsens.

[90] Even if I am wrong and it could be considered defamatory, however, I find that the defences of justification and fair comment have a real prospect of success. This is because Mr. Todsens was a "significant contributor" to the Mayor's election campaign as that term is defined in the Local Elections Campaign Financing Act. Furthermore, Mr. Morse can be said to have expressed an opinion on potential impropriety by the Qualicum Beach Town council based on the fact that he knew the Todsens had made a contribution to the Mayor's campaign which potentially was a benefit to the Mayor stemming from the latter's perceived pro-development political views. This is an honest opinion, based on fact, that anyone could hold. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

[91] I am therefore not satisfied that there are grounds to believe that the Todsens' defamation claim in respect of Statement BS-B1 has substantial merit. I am also not satisfied that the Morse Defendants have no valid defence to this claim. As such, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-B1.

f) Statement BS-B2

[92] On February 4, 2021, Mr. Morse posted on the Concerned Citizens of Qualicum Beach Facebook page a comment, a partial extract of which was entered into evidence by the Todsens. That extract included the following phrase (the allegedly defamatory words are underlined):

Estate Residential Developer (another significant contributor to the mayor) verbally and physically assault a citizen at their public information meeting

[93] In my view, Mr. Morse's impugned statement about the "Estate Residential Developer" being "another significant contributor to the mayor" was published and is a reference the Todsens. However, I do not find that these specific impugned words are defamatory. That is because simply identifying someone as a "significant contributor" to a municipal politician does not lower that individual's reputation in the eyes of a reasonable person. Even if it was a defamatory statement, however, in this case the defence of justification would apply given that Mr. Todsens did donate over \$100 to Mayor Brian Weise's October 2018 campaign, qualifying Mr. Todsens as a "significant contributor" under the Local Elections Campaign Financing Act.

[94] I am therefore not satisfied that there are grounds to believe that the Todsens' defamation claim in respect of Statement BS-B2 has substantial merit. I am also not satisfied that the Morse Defendants have no valid defence to this claim. As such, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-B2.

[95] As for the balance of the quoted extract that references an "assault", the Todsens have alleged that it is defamatory as an "Assault Statement" (AS-B2). That separate allegation will be considered later in these reasons.

g) Statement BS-C1

[96] On July 20, 2020, Mr. Morse posted on the QNPS Facebook page the following comment (the allegedly defamatory words are underlined):

One-trick pony Scott Harrison, Qualicum Beach Councillor makes a plea again for "affordable housing", but yet even Town Staff knows that's a joke:

"staff cannot support this application, as it conflicts with most of the Town's policies regarding residential development and does not meet any of the housing needs that are specifically identified in the OCP" (COW, Nov. 14, 2019)

We all want affordable housing, but urban sprawl into our rural lands or the greenbelt for the Mayor's campaign contributors has absolutely no correlation to making housing more affordable (but it does help the speculators' bank accounts). This is a sham being bandied about by sham politicians who are enabling connected land speculators to profit off of our ecosystems, vision and sustainable future.

Qualicum Beach deserves better. Our children deserve better. Keep your signs warm. It is an insult to assume we are so easily fooled.

[97] The post also contained a link to a Radio-Canada article titled "Des habitants de Qualicum Beach s'opposent à un complexe d'habitation dans une forêt" (some Qualicum Beach residents oppose a housing complex in a forest) which referenced the Todsens' proposed development.

[98] In my view, the statement "this is a sham" is an expression of Mr. Morse's opinion that Councillor Harrison and the Qualicum Beach municipal council's apparent willingness to support the Todsens' development proposal on the basis that it will provide affordable housing is disingenuous. While I accept that the statement is likely defamatory, I find that the Morse Defendants would have a valid defence of fair comment. It is an expression of opinion based in part upon the fact that Town staff apparently stated that the proposed development would not actually meet the housing needs identified in the Town's OCP. As such, while others may disagree, it is a comment that anyone could honestly express. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

[99] As I am not satisfied that the Morse Defendants have no valid defence to this aspect of the Todsens' claim, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-C1.

h) Statement BS-C2

[100] On February 3, 2021, Deborah McKinley posted a lengthy comment on the PQB & Area Residents Chat Group Facebook that was critical of the Todsens' proposed development. Mr. Morse posted a number of comments in response, the first two of which stated (the allegedly defamatory words are underlined):

So let me get this straight. After 2 years of public consultation, the OCP committee and council deemed this land as not "suitable for urban development". Then the Town "upsized" the infrastructure to support a development on protected lands behind our backs?

Something doesn't smell right here.

Dang. Must be nice to be a campaign contributor.

If we are going to start urban sprawl in our rural lands, just where does it stop, if ever?

[101] In my view, Mr. Morse's sarcastic comment that it "must be nice to be a campaign contributor" after using the expression "something doesn't smell right here" to describe the municipal council's apparent support for the Todsens' development is likely defamatory. However, I find that the defence of fair comment has a real prospect of success given the fact that Mr. Todsens did contribute money to the political campaign of a mayor of a municipal council apparently inclined to support the Todsens' proposed development. In my view, expressing concern that Town politicians may give preferential treatment to developers who make campaign contributions is an opinion based on underlying facts that anyone could honestly have expressed. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

[102] I am therefore not satisfied that the Morse Defendants have no valid defence to this aspect of the Todsens' claim. As such, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-C2.

i) Statement BS-D1

[103] In or around January 2021, QNPS posted this comment on its public website (the allegedly defamatory words are underlined):

But on Wednesday, January 13th, a council of just 3 people (including the mayor who received significant campaign support from the proponent) may be poised to move forward these drastic changes to our Official Community Plan, our Urban Containment Boundary and our Rural Lands policies, which may subsequently trigger a deluged of developments sprawling into our pristine greenbelt both here and elsewhere.

It is our responsibility to send a message. Each and every one of us needs to speak up, inform our neighbors, roll up our sleeves and save our home.

If you care about the future of our village, please take a moment to use our form to contact Town Hall

[104] Mr. Morse's statement about the "proponent" was published, is a reference to the Todsens, and has a defamatory "sting" in the sense that it is implied that Mr. Todsens's campaign contribution may influence the Mayor's view of whether the rezoning application warrants support. However, I find that both the defence of justification and fair comment have a real prospect of success in respect of Mr. Morse's statement. As has already been noted, Mr. Todsens did donate \$180 to Mayor Wiese's political campaign, which qualifies Mr. Todsens as a "significant contributor" under the Local Elections Campaign Financing Act. Given this fact, I find that an expression of concern that the Mayor might be inclined to support the Todsens' application partly because of this support is one that anyone could honestly express. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

- [105] I am therefore not satisfied that there are grounds to believe that the Morse Defendants have no valid defence to this aspect of the Todsens' claim. As such, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement BS-C2.
- j) Conclusion: Viability of the Todsens' Defamation Claim Founded Upon Bribery Statements
- [106] I have found that all of the Bribery Statements are either likely not to be defamatory, or are likely subject to a valid defence, or both. This has made it unnecessary for me to determine whether the public interest in allowing the Todsens' defamation claim in relation to the Bribery Statements to proceed outweighs the public interest in allowing the Morse Defendants to express the Bribery Statements.
- [107] However, if I had been required to conduct a weighing exercise under s. 4(2)(b) of the Act, I would have found that the Todsens have not met the public interest hurdle in relation to the Bribery Statements. This finding would have been based primarily on the importance of protecting expression relating to political decision-making, and encouraging public participation in the democratic process: Pointes, at para. 77.
- [108] Fundamentally, I consider the statements in issue to be expressions of concern that a municipal politician who is considering a rezoning application may be swayed by the fact that the applicant is also one of his campaign contributors. While this concern may turn out to be unfounded, it is deserving of public debate. Furthermore, while I have adopted in these reasons the Todsens' moniker of "Bribery Statements" as a shorthand, none of the statements actually indicate or imply that an actual "bribe" was paid by the Todsens or that they expected and understood that Mr. Todsens's \$180 campaign contribution would ensure approval of the rezoning application. In my view, the legislative intention underpinning the Act includes protecting individuals from defamation suits should they engage in public discourse that warns of the potential impact of campaign contributions on political decision-making so long as they stop short from making unjustified accusations of actual criminal influence peddling.
- [109] In other words, I find that "what is really going on" with the Todsens' claim in relation to the Bribery Statements is effectively a request for judicial consideration of whether the Morse Defendants and others should be permitted to engage in this kind of public discourse, rather than whether the Todsens are deserving of a legal remedy in relation to the 9 specific expressions identified in their notice of civil claim. The Morse Defendants are therefore justified in invoking the Act to spare them from having to respond further to this aspect of the Todsens' claim.
- [110] In sum, by operation of s. 4 of the Act, I find that the portion of the Todsens' defamation claim founded upon the Bribery Statements cannot be allowed to proceed, and will have to be dismissed.
2. The Todsens' Defamation Claim founded upon the Community Opposition Statements

- [111] Prior to considering them individually, I make the following general observations regarding the 5 Community Opposition Statements.
- [112] According to the Todsens, these statements purport to convey that a majority of the Qualicum Beach community opposes the Todsens' rezoning application. While the Todsens acknowledge that some community members are against their proposed development and the application they have submitted to the Town, the Todsens say that the statements grossly exaggerate the extent of the opposition. The Todsens also say that the statements are based on unreliable information.
- [113] The Morse Defendants concede that the meaning of the Community Opposition Statements is essentially as posited by the Todsens: that is to say, the majority, or at least a significant portion, of Qualicum Beach residents opposes the Todsens' proposed development. However, they deny that such statements defame the Todsens as they relate to the residents' views about the project, and not about the Todsens themselves. The Morse Defendants also argue that the veracity of the statements is supported by publicly available information, including a survey and a petition.

a) Statement COS-A1

- [114] On January 12, 2021, Mr. Morse posted an infographic on the PQB & Area Residents Chat Group Facebook page setting out the results of an "engagement postcard survey" in relation to the Todsens' proposed development (this posting also prompted Statement BS-A2, discussed earlier). Kari Knutson (Richard Todsens and Linda Todsens's daughter) posted in response a number of comments questioning the reliability of the survey results. Mr. Morse then posted in further response the following comment (the allegedly defamatory words are underlined):

One quick thought Kari. I wish we had more to go on besides the 2018 OCP, the petition and the survey with a limited sample, but the current council doesn't want to engage the community in a large scale manner. They were invited to be a part of this survey. Perhaps it could have gone out to 5000 people.

But at some point, I think we have to recognize that we have every indication the majority of our community opposes this and stands to gain little from it. We've been provided with no evidence the community supports it, or we have much to gain.

I'm not even sure the council should be discussing this at all. We have bigger priorities that "business as usual". People are hurting. Our council isn't even complete. It should be on the backburner.

- [115] I am not persuaded that this statement is defamatory in the sense that it would lower the reputation of the Todsens in the eyes of a reasonable person. In particular, expressing the view that a majority of community members are likely opposed to a specific enterprise or project proposed by a business does not necessarily lower the reputation of the business itself or its owners.
- [116] However, even if the statement is defamatory, I find that there is a basis for finding that there is a valid defence of fair comment that tends to weigh more in favour of the Morse Defendants. In particular, Mr. Morse deposes that his belief that a majority of the Qualicum Beach community opposes the development is founded on an online petition that had gathered over 6,000 signatures and a survey showing that 80% of the 95 persons surveyed were against amending the OCP to allow the development to proceed. Even if the reliability of the data gathered through the petition and the survey could be disputed, I am satisfied that they are facts upon which anyone could honestly express the opinion that most Qualicum Beach residents do not support the project. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.
- [117] Given these findings, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement COS-A1.
- b) Statement COS-B1
- [118] On January 10, 2021, Mr. Morse posted on the QNPS Facebook page the following post (the allegedly defamatory words are underlined):
- Did you know 90% of the residents in Qualicum Beach support keeping the protections in place for our Estate Residential forest properties? After all, our OCP recognizes this treasure as part of our identity.
- [119] Once again, it is not self-evident to me that a simple statement that a large proportion of a community is politically opposed to a development is defamatory to the proponents, particularly when expressed as support for maintaining an existing environmental protection regime. Even if this statement could be viewed as defaming the Todsens, however, I find that the Morse Defendants have a valid justification defence in respect of this statement.
- [120] This is because Mr. Morse based his statement on a survey commissioned by a former Qualicum Beach municipal councillor that found that 88.5% of the survey respondents replied "strongly agree" or "somewhat agree" to a question regarding whether the land that is the subject of the rezoning application should continue to be protected. While Mr. Morse rounded up the percentage to 90%, I nevertheless accept that it provides a basis for concluding that Mr. Morse's statement is substantially true.
- [121] Given these findings, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement COS-B1.

c) Statement COS-B2

[122] On February 10, 2021, Mr. Morse quoted these words from a news article published by the Parksville Qualicum Beach News titled "Marathon public hearing held regarding OCP amendment for proposed 16-parcel subdivision in Qualicum Beach":

The majority of citizens who participated in the public hearing via Zoom expressed their opposition to the project. Approximately 75 per cent defended the OCP and the preservation of the region's unique green space and environment".

[123] Mr. Morse added a link to the article, but then noted in a follow-up post that its content had apparently been subsequently changed:

As strange as it sounds, the PQBNews just edited their story to remove "Approximately 75 per cent defended the OCP and the preservation of the region's unique green space and environment."

10 were in favor, and over 30 against. Peculiar.

[124] Mr. Morse's next post was made in response to Roo Whetstone who asked "what is next step?". Mr. Morse posted the following (the allegedly defamatory words are underlined):

The next step is to begin gathering information in preparation. It is beyond clear, by every reasonable measure, the community is against this.

[125] I reiterate my previous finding to the effect that an expression regarding the extent to which a community is opposed to a project does not necessarily defame a proponent. Even if I had found this particular statement to be defamatory, though, I would also have found that there is a valid defence of fair comment. In particular, I accept Mr. Morse's evidence that he based his expression of opinion on the Parksville Qualicum Beach News article, whose amended text states: "A majority of citizens who participated in the public hearing via Zoom expressed opposition". Based on this, Mr. Morse's opinion is one that anyone could honestly have expressed. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

[126] Given these findings, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement COS-B2.

d) Statement COS-B3

[127] On January 8, 2021, Mr. Morse posted on the QNPS Facebook page a graphic titled "We wish you a late merry Christmas in the Qualicum Banana Republic!" with some accompanying text. This prompted certain posts from others, and certain responses written by Mr. Morse under the name "Qualicum Nature Preservation Society". The Todsens allege that one of those responses was written by Mr. Morse on February 10, 2021, and states the following (the allegedly defamatory words are underlined):

If you understand the facts of how 3 people are moving forward changes that will have a widespread impact on the future of our community, while simultaneously ignoring 80-90% of the community (measured by a randomized survey), we welcome you to express them and take the lead. And if you don't then perhaps we cannot value your criticism that highly.

[128] Mr. Morse admits that he is the author of this post, although he does not confirm the date on which he wrote it.

[129] For the purpose of this application, I find that this statement (COS-B3) is for all intents and purposes the same as Statement COS-B1 that I considered earlier. For the reasons set out under the heading "Statement COS-B1", I find that Statement COS-B3 is not defamatory to the Todsens, that there is a valid defence of justification, and that it is unnecessary to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to this statement.

e) Statement COS-B4

[130] The statement impugned at paragraph 18(b)(iv) of the Todsens' notice of civil claim (Statement COS-B4) is in fact the same statement that the Todsens impugned at paragraph 18(b)(ii) of the notice of civil claim (Statement COS-B2). The only difference is that the Todsens misquoted a portion of the statement in paragraph 18(b)(ii) by incorrectly alleging in the pleading that Mr. Morse wrote "the community does not want this" when the actual statement was "the community is against this". In other words, the Todsens' allegations in relation to Statement COS-B4 are essentially duplicative of those made in relation to Statement COS-B2.

[131] Accordingly, my assessment of Statement COS-B4 is the same as the one I have set out above under the heading "Statement COS-B2".

f) Conclusion: Viability of the Todsens' Defamation Claim Founded Upon Community Opposition Statements

[132] I have found that all of the Community Opposition Statements are either likely not to be defamatory, or are likely subject to a valid defence, or both. This has made it unnecessary for me to weigh whether the public interest in allowing the Todsens' defamation claim in relation to the Community Opposition Statements to proceed outweighs the public interest in allowing the Morse Defendants to express the Community Opposition Statements.

[133] However, if I had been required to conduct this weighing exercise under s. 4(2)(b) of the Act, I would have found that the Todsens have not met this public interest hurdle in relation to the Community Opposition Statements, for essentially the same rationale that I articulated earlier in relation to the Bribery Statements.

[134] In particular, I find that the Morse Defendants' comments about the state of public opinion in Qualicum Beach regarding whether the Todsens' rezoning application should be approved are the kind of expression on a matter of public interest that the Act is designed

to protect from defamation claims so long as it has an adequate foundation in fact. While the Todsens are free to take issue with Mr. Morse's comments regarding the extent of public opposition to the rezoning application, the Act precludes them from doing so through the vehicle of a defamation claim pleaded as the Todsens have in the case at bar.

[135] I also reiterate my earlier comments in respect to what I find is "really going on" in respect of this aspect of the Todsens' claim. It appears to be more about what sort of public discussion of the extent of opposition to the rezoning application is permissible rather than whether legal remedies should be provided to the Todsens in relation to the 5 statements identified in their notice of civil claim. The Act therefore warrants being applied.

[136] In sum, by operation of s. 4 of the Act, I find that the portion of the Todsens' defamation claim founded upon the Community Opposition Statements cannot be allowed to proceed, and will have to be dismissed.

3. The Todsens' Defamation Claim founded upon the Land Statements

[137] I make the following general observations regarding the Land Statements before considering them individually.

[138] From the Todsens' perspective, the Land Statements falsely convey the impression that the rezoning application is made in respect of environmentally sensitive forest land that is legally protected from development. The Todsens say to the contrary that they are acting within their legal rights by applying for permission to change the designated use of their private land on which most of the trees were already removed relatively recently.

[139] The Morse Defendants, on the other hand, say that the Land Statements are not defamatory in respect of the Todsens in that they refer to the project and development property only. The Morse Defendants also submit that these statements are subject to defences of justification and fair comment. In particular, they say that they have properly characterized the legal status of the land in question as being subject to protection as noted in the Town's OCP, and in the sense that it cannot be lawfully developed unless the Town changes the zoning.

a) Statement LS-A1

[140] On February 4, 2021, Mr. Morse posted on the PQB & Area Residents Chat Group Facebook page a link to a news article published by Second Opinion QB titled "Todsens proposal creeping closer to D-Day". This prompted Todd Burnham to post the question: "Land is cleared isn't it?". Mr. Morse responded by posting (the allegedly defamatory words are underlined):

Yup, it appears they bought a protected lot and cleared it for development to me, against the explicit wishes of the community. A councillor at the time called it "shameful".

Then the OCP Steering committee still said it was not "suitable for urban development" just two years ago.

What changed since then?

[141] I find that this statement is likely defamatory in that it would tend to lower the Todsens' reputation in the eyes of a reasonable person. However, I also find that Mr. Morse has a valid defence of fair comment in respect of the statement.

[142] In particular, I accept that Mr. Morse's opinion that the Todsens bought a "protected lot" and cleared it for development is one that is based on fact and that anyone could honestly express. The view that the land is "protected" is supported by the section of the Qualicum Beach OCP titled "Estate Residential", which is a reference to the area which encompasses the specific parcel owned by the Todsens. That section says the OCP proposes to protect the Estate Residential lands as a large-lot forested area, and that a Tree Protection Bylaw has been adopted to facilitate this protection. The OCP also says that the Estate Residential properties form part of the "protected Greenbelt area". Furthermore, as reported in the Parksville Qualicum Beach News, former Qualicum Beach councillor Neil Horner called the process of buying property on the outskirts of town and then trying to flip them for residential "shameful". Mr. Morse also deposes that over the course of 2015 and 2016, he personally witnessed significant tree removal activities on the subject property. Finally, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

[143] Given these findings, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement LS-A1.

b) Statement LS-A2

[144] On February 16, 2021, Mr. Morse posted on the PQB & Area Residents Chat Group Facebook page a link to a news article published on the Parksville Qualicum Beach News titled "Qualicum Beach developers say some concerns with proposed project not based on facts". Qualicum Beach councillor Scott Harrison then posted a lengthy comment in relation to the rezoning application in issue. Mr. Morse responded with the following post (the allegedly defamatory words are underlined):

While the hearing is closed, I can talk about these issues in general:

"but the creation of secondary suites and duplexes will help families looking to age in place" How often is this occurring in WestRidge? Or how often are these being used as guest homes? I really don't know. I mean, we can all fabricate best scenario use cases, but we cannot control how market forces play out.

"Also, I think people need to think about what the current zoning provides for." The current zoning provides for conservation of one of the last intact coastal douglas fir forests on Vancouver Island. It is entirely appropriate for a municipality to downzone or lower zoning to achieve community conservation goals.

If you have not, I would suggest reading:

<https://milnergardens.viu.ca/.../milnergardensandwoodland...>

[145] Unlike the previous statement, Statement LS-A2 does not directly reference the Todsens. I am nevertheless prepared to accept that it is potentially defamatory given the context in which it was made, namely, a Facebook page discussion of the Todsens' rezoning application and the implicit assertion that a change to the zoning would imperil conservation of a Douglas fir forest.

[146] However, as with the previous statement, I accept that Mr. Morse's opinion that the current zoning provides for conservation of one of the last intact Coastal Douglas fir forests on Vancouver Island is subject to a valid defence of fair comment. This opinion is founded upon a report titled "Milner Gardens and Woodland Forest Management Plan: Qualicum Beach, British Columbia" (the "Milner Report"), to which Mr. Morse provided a link in his post. It is also supported by the Qualicum Beach OCP, which includes a statement that: "The Town shall consider the importance of Coastal Douglas-fir ecosystems and associated wildlife and vegetation when considering proposed changes in land use or designation". I find that Mr. Morse's opinion is therefore based on fact and is one that anyone could honestly express. Also, the evidence presented does not show that Mr. Morse was actuated by malice when he made the statement.

[147] Given these findings, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement LS-A2.

c) Statement LS-B1

[148] On January 9, 2021, Moira Rosser posted the QNPS' "change.org" petition opposing the Todsens' proposed development on the Qualicum Beach Chat Facebook page. This prompted a number of posts, including the following one written by Mr. Morse (the allegedly defamatory words are underlined):

"Knock your house down and build two"

Actually, that's exactly what it means. Again, refer to the OCP; our community has decided to densify vs. sprawl. As such, you are seeing taller buildings closer to the downtown core. I guess we want to have it both ways now?

I do not fully agree with rampant, large-scale densification. I think it needs to be gradual and come in waves. I also think it needs to be paired with improving the community, streetscape and adding social capital & culture.

Anyway, these are the conversations that are happening. Welcome to the table. I encourage you to read up a bit.

PS, there are 16 condos (I think) coming into Memorial in a 3+ story building (to replace a house). Generally the project looks good. They did bend the rules for them. Its denser than OCP (which was my primary contention). Sometimes you have to make some changes. The lot was not designated as protected in the OCP. The variances were not done egregiously to maximize profits to no end for donors. Things like this are going to happen. But allowing everything under the sun and setting precedent to remove 200+ football fields of protected forests that we consider a part of our identity, well thats a whole other thing. Its radical. Its your thing. Good luck with that.

[149] Once again, it is not immediately apparent that the impugned statement is a reference to the Todsens and their rezoning application, although it does appear following a series of posts by various individuals about urban sprawl and densification that follows the posting of the QNPS' change.org petition opposing the Todsens' application. However, the Morse Defendants concede that that the statement is an expression of Mr. Morse's opinion that approval of the Todsens' rezoning application could set a precedent for removing more properties within the 200 acres of Estate Residential lands from its current OCP land use designation to allow for more urban development. Based on this concession, I accept that the statement is likely defamatory to the Todsens, who view Mr. Morse's opinion as an unjustified exaggeration of the impact that an approval of their rezoning application would have.

[150] However, I also find that Mr. Morse's opinion is subject to a defence of fair comment. In particular, Mr. Morse deposes to statements made by Richard Todsens, Adam Walker (a former Qualicum Beach councillor), and Teunis Westbroek (the former mayor of Qualicum Beach), all of which suggest that once development is permitted on a portion of the Estate Residential lands, there will be calls for additional development that will be difficult to justifiably refuse after a precedent is established. This evidence provides a sufficient factual basis to hold that Mr. Morse's view is one that anyone could honestly express. Also, the evidence does not show that Mr. Morse was actuated by malice when he made the statement.

[151] Given these findings, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement LS-B1.

d) Statement LS-C1

[152] On January 8, 2021, Mr. Morse posted on the QNPS Facebook page a graphic titled "We wish you a late merry Christmas in the Qualicum Banana Republic!" with some accompanying text (this is the same posting referenced earlier in relation to Statement COS-B3). This first paragraph of the text stated the following (the allegedly defamatory words are underlined):

What do you get when you cross a mustache with a gold chain and a boatload of contributions by real-estate speculators? Well, it looks like you get some special handouts on taxpayers' backs--damn the will of the community--paired with continual environmental devastation.

We have just days before our *3 person* council makes numerous, drastic OCP changes to greenlight sprawl into our rural and protected spaces that we treasure here in Qualicum Beach.

While they rush towards reshaping the fabric of our community and shredding ecosystems in the name of profit, we will raise awareness of these disgusting sweetheart deals. We will promote writing letters and action. We will represent the voice of this amazing community.

Meanwhile, the 3 most embarrassing councillors in the history of this Town will likely ignore our voice and do nothing to fill the council, promote democracy and actually fulfill their duties to represent the will of the people.

Welcome to our Banana Republic.

[153] In one of his affidavits, Mr. Morse describes this post as "political satire targeted at [Qualicum Beach] municipal politicians". While that may be an accurate characterization, Mr. Morse's choice to include a reference to "real-estate speculators" renders the post defamatory towards the Todsens as well. However, as the Todsens have only taken issue with the portions suggesting that approval of rezoning application will cause "environmental devastation" and "sprawl into our rural and protected spaces", my analysis is limited to whether a defamation proceeding against the Morse Defendants based upon these specific words is precluded by the Act.

[154] In my view, it is so precluded since Mr. Morse has a valid fair comment defence to his opinion regarding the environmental impact of the Todsens' development, and his concern that approving the rezoning application will create a precedent that may encourage further urban sprawl into protected spaces. In support of this conclusion, I reiterate my findings set out above in relation to Statement LS-A2 (notably, those based upon the Milner Report) and Statement LS-B1 (notably, those based upon the comments made by Mr. Todsens, former councillor Walker, and former mayor Westbroek). Also, the evidence does not show that Mr. Morse was actuated by malice when he made the statement.

[155] Given these findings, there is no need to conduct the weighing exercise contemplated by s. 4(2)(b) of the Act in relation to Statement LS-C1.

e) Conclusion: Viability of the Todsens' Defamation Claim Founded Upon Land Statements

[156] I have found that while all of the Land Statements are likely defamatory, they are all subject to a likely valid defence of fair comment. It is therefore unnecessary for me to weigh whether the public interest in allowing the Todsens' claim in relation to the Land Statements to proceed outweighs the public interest in allowing the Morse Defendants to express the Land Statements.

- [157] However, if I had been required to conduct this weighing exercise, I would have found that the Todsens have not met this public interest hurdle in relation to the Land Statements. This is because, as with the Bribery Statements and the Community Opposition Statements, I find that the Land Statements are expressions on matters of public interest of a kind that the Act was intended to protect from defamation claims such as that of the Todsens.
- [158] In particular, public discussion about how approving a rezoning application could entail the weakening of existing environmental protection would seem to be the type of expression that the Act was designed to foster and protect. Provided such discussion is conducted on the basis of substantially accurate facts, engaged individuals should be able to participate in it knowing that they may invoke the Act should their statements prompt a defamation lawsuit. Also, at the risk of repeating myself, I once again find that what is "really going on" in this aspect of the Todsens' claim is litigation regarding the permissible scope of public discussion over environmental protection in connection with municipal land development, as opposed to whether the four Land Statements are specifically actionable in defamation.
- [159] In sum, by operation of s. 4 of the Act, I find that the portion of the Todsens' defamation claim founded upon the Land Statements cannot be allowed to proceed, and will have to be dismissed.

4. The Todsens' Defamation Claim founded upon the Assault Statements

- [160] As noted earlier in my reasons, I am of the view that the Assault Statements differ from the other impugned statements in that they are inextricably linked and can be analyzed collectively. Accordingly, I will first set out all six of the Assault Statements, and then consider the three questions of whether: (1) they found a meritorious defamation claim, (2) do not give rise to any valid defence; and (3) the public interest in proceeding with the claim outweighs the public interest in protecting the impugned expression.
- [161] Before doing so, however, I make the following general observations regarding the Todsens' defamation claim in relation to the Assault Statements.
- [162] From the Todsens' perspective, no assault took place at the August 19, 2020 public information meeting on the Todsens' property, and therefore the Morse Defendants' statements to the contrary are defamatory and actionable. The Todsens say that Mr. Morse chose to attend the meeting with a protest sign. When Mr. Morse arrived, he was told that while his presence was welcome on the property, his sign was not. After Mr. Morse refused to leave the sign at the entrance, Mr. Todsen confronted Mr. Morse. According to Mr. Todsen, he wanted to prevent Mr. Morse from taking his sign into a tent where the meeting was to take place. Mr. Todsen did so by walking towards Mr. Morse with arms outstretched, thereby physically stopping Mr. Morse. However, Mr. Todsen denies assaulting, hurting, or harming Mr. Morse, who eventually put his sign away and came into the tent to attend the information session. Mr. Todsen later apologized to Mr. Morse for what Mr. Todsen called the "heated nature of their initial interaction".

- [163] In further support of their position, the Todsens say that while two videos of the incident were tendered into evidence, neither one clearly shows Mr. Todsen touching Mr. Morse. In addition, the Todsens note that no criminal charges were laid even though Mr. Morse did inform the police that there was an altercation at the meeting. The Todsens note further that the police told Mr. Morse words to the effect that even if Mr. Todsen had used physical force on Mr. Morse, Mr. Todsen would have been within his rights as Mr. Todsen was protecting his property. Accordingly, the Todsens argue that Mr. Morse ought to have known that he could not fairly characterize his interaction with Mr. Todsen as an "assault".
- [164] From the Morse Defendants' perspective, however, Mr. Morse was assaulted by Mr. Todsen at the public information meeting, both physically and verbally. Mr. Morse acknowledges that he was told not to bring the sign on to the Todsens' property, and that he initially refused to comply. Mr. Todsen then told Mr. Morse to get "off the fucking property", and physically shoved Mr. Morse backwards. Mr. Morse also says that while Mr. Todsen's son-in-law, Steve Knutson, was holding Mr. Todsen back, Mr. Todsen shouted at Mr. Morse to "get the fuck out of here" before Mr. Todsen turned around and walked away.
- [165] Mr. Morse further confirms both that Mr. Todsen later apologized to him for the incident, and that Mr. Morse told the police about it but without the intention of encouraging the laying of charges. Mr. Morse also acknowledges that the police officer he spoke to opined that as Mr. Todsen was defending his property, Mr. Todsen could not have committed a criminal offence during his interaction with Mr. Morse. However, Mr. Morse says that when describing Mr. Todsen's conduct at the meeting as "assault", he is using the ordinary definition of that word and not its criminal law meaning.

a) Statement AS-A1

- [166] On October 13, 2020, Mr. Morse posted a comment on the PQB & Area Residents Chat Group Facebook page in response to an earlier post by Kari Knutson (the allegedly defamatory words are underlined):

A friend is someone you meet more than once, just as I have met Westbroek and the Mayor. In fact, I have met you more if we include the time you screamed at my family from the top of Quality Foods during the March for our Future. Are we friends? I've met your father the same amount on the day he yelled expletives at me and assaulted me for bringing a sign to the estate residential public information meeting to speak democratically on behalf of our environment. I respected that he apologized and perhaps we should be friends. I truly believe the more friends are the better.

b) Statement AS-A2

- [167] On October 30, 2020, Mr. Morse posted this comment on the PQB & Area Residents Chat Group Facebook page (the allegedly defamatory words are underlined):

Hey John, one thing that you are missing is that if building this is fully compliant, council would not be involved. This is only compliant after a rezoning and creating that precedent. Personally, I want a carriage home as well, but wish the Town would figure out how to allow them without spot zonings of this type.

If you are late to this party, consider yourself lucky. I did my best to stay out of it until I couldn't look in any direction without seeing problems. And while it may seem alarmist, we are in an odd time. Developers assaulting citizens, councillors suing each other and the town, public officials lying on public record. I honestly just want things to go back to normal. We deserve more in Qualicum Beach.

c) Statement AS-A3

[168] On May 5, 2021, Mr. Morse posted a link to a Victoria Times Colonist article titled "Qualicum Beach swamped by surge in freedom of information requests" on the PQB & Area Residents Chat Group Facebook page. In response, Qualicum Beach councillor Scott Harrison posted images showing several pages from the Town's public correspondence log. One of the images contained a part of an email chain in which Mr. Morse stated: "I've had a lengthy discussion about being assaulted by Rick Todsens " (this email is discussed further below under "Statement AS-C1).

[169] In response to Scott Harrison's post, Mr. Morse posted the following (the allegedly defamatory words are underlined):

I am most certainly confused at how volunteer citizens strategizing against a perceived contravention of the Local Government Act has much to do with the topic at hand. I do know that the subject eventually became a topic of an FOI in February unbeknownst to most of those involved in this discussion. But that single FOI doesn't explain the current "swamping". So?

BTW, I am really saddened you published information about that assault. I've gone to great lengths to protect the identity of the perpetrator out of respect to their family.

d) Statement AS-B1

[170] On January 26, 2021 Mr. Morse posted the following comment on the Concerned Citizens of Qualicum Beach Facebook page in response to questions posted by John Phillips about the August 19, 2020 public information meeting at the Todsens' property (the allegedly defamatory words are underlined):

Yes, I signed up and went to the public information meeting, which was hosted on private property. I--along with the Town--have a video of a resident being verbally and physically assaulted by the developer and told to get the f*ck out of there.

e) Statement AS-B2

[171] On February 4, 2021, Mr. Morse posted on the Concerned Citizens of Qualicum Beach Facebook page a comment, a partial extract of which was entered into evidence by the Todsens. That extract included the following phrase (the allegedly defamatory words are underlined):

Estate Residential Developer (another significant contributor to the mayor) verbally and physically assault a citizen at their public information meeting

[172] This is the same phrase that the Todsens allege to be defamatory as a "Bribery Statement", discussed above under the Heading "Statement BS-B2".

f) Statement AS-C1

[173] On January 15, 2021, Mr. Morse wrote a private email to a group of individuals discussing their legal and other options for opposing the Todsens' rezoning application. The email included the following paragraph (the allegedly defamatory words are underlined):

For what it's worth, WCEL has already reached out to offer aid this summer on the Estate Residential development. I've had a lengthy discussion about being assaulted by Rick Todsen and other matters with their lead guy.

[174] The email was then accidentally forwarded by Lois Eaton, another participant in the group discussion, to an official email account belonging to the Town. This resulted in the email appearing in the Town's public correspondence log. As noted above under the discussion of "Statement AS-A3", Mr. Morse's email was also posted by councillor Scott Harrison to the PQB & Area Residents Chat Group Facebook page.

g) Assessment and Conclusion: Viability of the Todsens' Defamation Claim Founded Upon Assault Statements

[175] I have no hesitation in finding that the Assault Statements are defamatory. Given the context in which they were published, they reference and identify Mr. Todsen directly or indirectly as a person who assaulted Mr. Morse on the Todsens' property at a meeting whose purpose was to discuss the Todsens' proposed development and rezoning application. These statements would tend to lower the Todsens' reputation in the eyes of a reasonable person. The Todsens have therefore met their burden under s. 4(2)(a)(i) of the Act.

[176] The fundamental question in respect of this aspect of the Todsens' defamation claim, however, is whether the Morse Defendants have a valid defence of justification to advance. Answering it requires a limited weighing of the evidence and a determination of whether or not it tends to demonstrate that Mr. Todsen can be said to have assaulted Mr. Morse at the August 19, 2020 public information meeting. As has been noted, such weighing is permissible, so long as it does not require the Court to ultimately assess credibility or consider other questions that may need a "deep dive" in order to be resolved: *Pointes*, at para. 52.

[177] In my view, the evidence before me shows that Mr. Todsen likely did "assault" Mr. Morse, as that word is used in ordinary parlance, by subjecting Mr. Morse to a "violent physical or verbal attack". This definition is drawn from the Merriam-Webster dictionary, which defines "assault" and "violent" as follows:

assault (noun)

1(a) a violent physical or verbal attack

assault (verb)

1 to make an assault on : to attack violently

violent (adjective)

4 notably forceful, furious, or vehement

[178] In reaching this conclusion, I rely primarily on my assessment of the two videos of the incident that were tendered into evidence. They were both relatively brief and of good quality, and did not require a "deep dive" to review.

[179] The first video was filmed by Mr. Morse. He was holding his smartphone camera in front of himself and facing forward as he was filming. As such, the video provides Mr. Morse's perspective from his personal viewpoint in the sense that it shows effectively what he was seeing and hearing at the time.

[180] The images and sound on the video convey that Mr. Morse's decision to enter the meeting with a protest sign and his refusal to put it away when asked provoked concern and anger among several of the attendees at the meeting. When Mr. Todsen is first seen approaching Mr. Morse, the environment is tense and hostile.

[181] Once Mr. Todsen and Mr. Morse are in close proximity to each other, the video records the following exchange of words between them:

Mr. Todsen: The sign goes, you can stay.

Mr. Morse: It feels like it's my democratic right at a public information meeting

Mr. Todsen: Off my property right now let's go...

[182] At that point, Mr. Todsen is shown on the video to be directly in front of Mr. Morse, with his arms outstretched towards the upper part of Mr. Morse's body. The camera view then changes in a manner consistent with Mr. Morse stepping backwards while Mr. Todsen is still advancing. The camera view also shifts as if someone's hands have been placed near or on Mr. Morse's shoulders or torso, although no actual touching can be seen on the video. The following words are then spoken:

Mr. Morse: This is assault. This is assault. You can't assault me.

Mr. Todsen: Get out of here. (shouting) Get the fuck out of here!

Mr. Morse: This is a public information meeting.

Steve Knutson: This is private property.

Mr. Todsen: Get out.

Mr. Morse: Then why are we having a public information meeting on private property?

[183] Mr. Knutson then steps in between Mr. Todsen and Mr. Morse, following which Mr. Todsen turns around and walks away. After that, a spirited discussion continues to take place between Mr. Morse, Steve Knutson, Kari Knutson, and others regarding whether Mr. Morse can attend the meeting with his protest sign. Ultimately, Mr. Morse turns around, walks back to the entrance of the Todsens' property, and leaves his sign on the ground.

[184] The second video was filmed by Craig Dutton, an individual who had been invited by Linda Todsen to the meeting to provide the Todsens with "support". Mr. Dutton's video captures only a portion of the interaction between Mr. Todsen and Mr. Morse. However, it does briefly show Mr. Todsen advancing with his arms outstretched and Mr. Morse retreating. It also seems to show Mr. Knutson attempting to restrain Mr. Todsen from behind by pulling him away from Mr. Morse. The video does not, however, clearly show Mr. Todsen actually pushing or touching Mr. Morse. That said, an unidentified speaker can be heard on this video twice saying "get your hands off him".

[185] In my view, this video evidence provides a basis to show that the defence of justification tends to weigh more in favour of the Morse Defendants in the sense that a statement to the effect that Mr. Todsen assaulted Mr. Morse at the public information meeting is substantially true. Specifically, it shows that both a physical and verbal assault took place when Mr. Todsen physically interacted with Mr. Morse while verbally directing angry and aggressive words at Mr. Morse. Furthermore, this finding is corroborated by Mr. Morse's spontaneous statement to the effect that "this is assault", the bystander's contemporaneous plea to "get your hands off him", and the fact that Mr. Knutson felt the need to restrain Mr. Todsen in order to prevent any further interaction with Mr. Morse.

[186] While not as compelling, I have also considered the evidence about the incident contained in the affidavits of Mr. Morse and Mr. Todsen, as well as their cross-examination testimony. Mr. Morse deposes that: "Mr. Todsen, without provocation and without consent from me, physically shoved me backwards. As Mr. Knutson held Mr. Todsen back, Mr. Todsen shouted at me 'get the fuck out of here!'. As for Mr. Todsen, he deposes that: "I walked towards Mr. Morse with my arms outstretched, pointing and indicating to him that he should leave his sign. While I physically stopped Mr. Morse from entering the tent with his sign and without properly signing-in, I did not by any means assault, hurt or harm him."

- [187] This evidence is largely consistent with what can be seen on the video. Mr. Morse's assertion that Mr. Todsen "shoved me backwards" provides a cogent explanation for why Mr. Morse is seen to briefly retreat after Mr. Todsen approaches Mr. Morse with outstretched hands. Mr. Todsen's description of his actions as having "physically stopped Mr. Morse" also conforms with the video evidence. The video also seems to confirm that Mr. Morse was not hurt or harmed by Mr. Todsen. As for Mr. Todsen's assertion that he did not assault Mr. Morse, it is an unhelpful statement of opinion on the ultimate issue which cannot be accepted as persuasive factual evidence, any more than if Mr. Morse had baldly deposed that he was assaulted. It is also inconsistent with the video evidence.
- [188] In sum, I find that the Todsens have not shown grounds to believe that the Morse Defendants have no valid defence to the defamation claim based on the Assault Statements. To the contrary, consideration of the evidence tendered shows that the justification defence tends to weigh more in favour of the Morse Defendants. The Todsens have therefore not met their burden under s. 4(2)(a)(ii) of the Act.
- [189] Given this finding, it is unnecessary for me to consider whether the public interest in allowing the Todsens' defamation claim in relation to the Assault Statements to proceed outweighs the public interest in allowing the Morse Defendants to express the Assault Statements. If it had been necessary, however, I would have found that the Todsens had met their burden under s. 4(2)(b) of the Act.
- [190] I would have reached this conclusion largely because, unlike the three other types of statements pleaded in the Todsens' claim, the Assault Statements are less closely linked to participation in political decision-making, or any other core values underlying freedom of expression. While I accept that the Assault Statements have a public interest component in that the incident took place at a public information meeting in relation to a proposed development subject to a municipal rezoning application, it was held on private property and involved a brief and regrettable interaction between the developer and an opponent of the project. In my view, what is "really going on" in this aspect of the claim is a request for the Court to determine whether the assault allegations are justified, as opposed to what are the appropriate boundaries for public discussion of the incident. Therefore, had I found that there were grounds to believe that the Morse Defendants have no valid defence to the Todsens' defamation claim based on the Assault Statements, I would have been inclined to conclude that the harm caused to the Todsens by these statements outweighs the public's interest in protecting this particular expression.
5. Summary of Conclusions Reached on the Dismissal Application
- [191] My conclusions with respect to the Morse Defendants' application brought pursuant to s. 4 of the Act can be summarized as follows.

- [192] First, the Morse Defendants have met their burden under s. 4(1) of the Act to demonstrate that the Todsens' defamation claim arises from expressions made by the Morse Defendants that relate to matters of public interest.
- [193] Second, the Todsens have not met their burden under s. 4(2)(a) of the Act to demonstrate that there are grounds to believe both that: (i) the Todsens' defamation claim against the Morse Defendants has substantial merit; and (ii) the Morse Defendants have no valid defence to the Todsens' defamation claim, in respect of any of the 24 impugned statements.
- [194] Third, in light of this second conclusion, it is not necessary for me to determine pursuant to s. 4(2)(b) of the Act whether the public interest in allowing the Todsens' defamation claim to continue outweighs the public interest in protecting the impugned expression. However, if this had been necessary, I would have found that the public interest in protecting the impugned expression set out in the Bribery Statements, the Community Opposition Statements, and the Land Statements outweighs the public interest in allowing the Todsens' defamation claim in respect of these statements to proceed. On the other hand, I would have found that the public interest in allowing the Todsens' defamation claim regarding the Assault Statements to proceed outweighs the public interest in protecting the expression set out in those statements.
- [195] Accordingly, I am required by s. 4(2) of the Act to make a dismissal order in respect of the Todsens' claim.

6. The Morse Defendants' Claim for Damages

[196] Section 8 of the Act provides:

On an application for a dismissal order under section 4, the court may, on its own motion or on application by the applicant, award the damages it considers appropriate against a respondent if it finds that the respondent brought the proceeding in bad faith or for an improper purpose.

- [197] As I was informed by the parties, this provision has received limited jurisprudential consideration by this Court, and none by our Court of Appeal. Furthermore, there does not appear to be any reported decision in which such damages have in fact been awarded in British Columbia.
- [198] The most extensive discussion of s. 8 of the Act can be found in this Court's decision in *Hobbs v. Warner*, 2019 BCSC; rev'd on other grounds 2021 BCCA 290. In that case, Justice Donegan noted that the Ontario Court of Appeal in *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128 ("United Soils") had considered Ontario's equivalent provision to s. 8 of the Act, and she decided to draw upon *United Soils* for interpretive guidance. I will do the same. That guidance, which is set out at paras. 34 to 38 of *United Soils*, can be summarized as follows:

- a) s. 8 of the Act represents an effort to separate out a subset of SLAPP cases which go beyond simply reflecting an effort to limit expression and include active efforts to intimidate or to inflict harm on the defendant;
- b) if the court is satisfied on the record before it that an action has been brought in bad faith or for an improper motive, such as punishing, silencing or intimidating the defendant rather than any legitimate pursuit of a legal remedy, an additional remedy should be available for this improper conduct;
- c) medical evidence is not necessary to support a claim for s. 8 damages and, in certain cases, it may be presumed that damages will arise from the use of a SLAPP lawsuit;
- d) that said, damages will not naturally flow in every case where the action is dismissed;
- e) whether an award of damages is warranted should also take into account the presumption set out at s. 7 of the Act that costs will be awarded on a full indemnity basis; and
- f) s. 8 of the Act does not empower the Court to award punitive damages.

[199] The Morse Defendants submit that s. 8 damages are merited in this case because of both circumstantial and direct evidence of improper purpose. The circumstantial evidence relates to both the alleged weakness of the Todsens' claim as well as its timing. In particular, the Morse Defendants note that the Todsens decided to retain counsel and pursue their lawsuit prior to when 23 of the 24 allegedly defamatory statements were made. The Todsens also filed the lawsuit on the eve of a Town council by-election in which the Todsens' rezoning application was an issue, and without prior notice or seeking an apology from the Morse Defendants. As for direct evidence, Mr. Todsen testified about deciding to bring this lawsuit against Mr. Morse and a separate lawsuit against Deborah McKinley since they were the "two people" whom the Todsens believed were the most vocal opponents of the proposed development.

[200] On my assessment of the totality of the evidence presented, however, I am not persuaded that the Todsens' claim is in fact more than an effort to limit expression which they felt was harmful to their reputations, or that it was an active effort to intimidate and inflict harm on the Morse Defendants.

[201] To the contrary, while I have found that the Todsens' claim must be dismissed by operation of s. 4 of the Act, I accept that the Todsens were deeply troubled by some of the words chosen by the Morse Defendants to describe the Todsens and their business on social media. I also accept that the Todsens subjectively felt that by bringing this lawsuit, they were engaged in a good faith attempt to vindicate their reputations and prevent them from being impacted further. I do not agree that the timing of the Todsens' lawsuit or any of the other evidence presented shows that the Todsens actually intended to intimidate or inflict harm on the Morse Defendants.

[202] In other words, just as I did not find that Mr. Morse was actuated by malice when he expressed his opinions, I can see no basis for a finding that the Todsens were actuated by malice when they responded with their claim. Rather, the situation here is fundamentally one where two parties have strong opposing views about the merits of a proposed land development and its potential impact on the environment. One party has taken issue with the manner in which the other has expressed these views, and has brought a defamation suit accordingly. While the Act does not permit this particular claim to proceed, this is not a case where bringing the claim warrants sanction in the form of a damages award. This is especially the case since full indemnity costs are presumptively available for compensation in respect of legal expenses pursuant to s. 7 of the Act.

[203] Accordingly, the Morse Defendants' applications under s. 8 of the Act are dismissed.

DISPOSITION

[204] For the reasons set out above, the Morse Defendants' applications to dismiss the Todsens' notice of civil claim are allowed, and the Todsens' defamation action is dismissed pursuant to s. 4 of the Act. No damages are awarded to the Morse Defendants pursuant to s. 8 of the Act.

[205] At the hearing, counsel for the parties requested an opportunity to make submissions in writing with respect to costs following judgment. After reviewing these reasons, if the parties are unable to agree to the terms of a costs order, they are at liberty to make submissions in writing through Supreme Court Scheduling. If necessary, the schedule for the exchange of such submissions shall be as follows: The Morse Defendants' submissions are to be filed within three weeks of the date of the reasons for judgment; the Todsens' response thereto is to be filed no later than two weeks after receipt of the Morse Defendants' submissions; and the Morse Defendants' replies, if any, shall be filed no later than one week after receipt of the Todsens' submissions.

"Brongers J."

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