

CANADA / JUDGMENT

Ward v. Clark

2001 BCCA 724

COURT

British Columbia Court of Appeal

DECIDED

19 December 2001

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2001BCCA0724

Citation:

Ward v. Clark

Date: 20011219

2001 BCCA 724

Docket:

CA027465

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

ROBERT WARD

PLAINTIFF/RESPONDENT

(APPELLANT BY X-APPEAL)

AND:

GLEN CLARK

DEFENDANT/APPELLANT

(RESPONDENT BY X-APPEAL)

Before:

The Honourable Mr. Justice Esson

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

Donald A. Farquhar, Q.C.

Counsel for the Appellant

Douglas H. Christie

Counsel for the Respondent

Place and Date of Hearing:

Victoria, British Columbia

November 1, 2001

Place and Date of Judgment:

Vancouver, British Columbia

December 19, 2001

Written Reasons by:

The Honourable Mr. Justice Esson

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall Reasons for Judgment of the Honourable Mr. Justice Esson:

- [1] The defendant, having been held liable by the trial judge in this slander action for damages in the amount of \$150,000, now appeals seeking a dismissal of the action or, failing that, a reduction in the amount of damages. The plaintiff cross-appeals seeking an increase in the amount of damages.
- [2] The plaintiff has a wide background in many aspects of ships and shipping. After graduating from the Royal Military College at Kingston he spent four years at the Royal Naval Engineering College in Plymouth, obtaining diplomas in 1960 in marine and mechanical engineering. He was then employed both in the navy and merchant marine as an engineer officer and, for part of the time from 1960 to 1975, was an executive sales engineer with Fairbanks Morse Diesels, and a management consultant for a firm of engineers in England. Since 1975, he has been self-employed through companies owned by him carrying on business as marine consultants, marine engineers, ship managers and brokers. He has had dealings in many parts of the world and with respect to many different kinds of ships. In the period starting in 1990, during which the issues herein arose, he appears to have been primarily engaged in the ship brokering business but, as will appear, had other business interests.

- [3] The defendant at all material times was a minister in the New Democrat government which took office in 1991. His principal portfolios were as Minister of Finance and then, beginning on February 22, 1996 as Premier. He held other portfolios from time to time. On February 6, 1996, when the cause of action arose he was the Minister responsible for British Columbia Ferry Corporation ("B.C. Ferries"), a Crown corporation which operates a very large fleet of ferries which provide service between Vancouver Island and the mainland, and on various other routes.
- [4] The action is based on the defendant's response to public criticisms by the plaintiff of the project, to which the government and B.C. Ferries had become committed in 1994, to build and operate on the route between Horseshoe Bay and Nanaimo three high speed catamaran ferries. Those vessels were designed to carry up to 1,000 passengers and 250 motor vehicles at a speed which would enable them to achieve a "turn-around" time of three hours as compared to the four hours required by the conventional ferries which had long been in use on that route.
- [5] The basis of the action is the defendant's statement to a reporter that the plaintiff was a "disgruntled bidder on this project who is constantly feeding misinformation on this issue". The plaintiff by February, 1996 had achieved much media attention as a persistent and knowledgeable critic of the fast ferry project. He had assisted the legislative opposition in preparing attacks on its feasibility, attacks which it fell to the defendant to meet in the House and outside it. The essence of the defendant's position was that, although there had been delays, there were no serious problems.
- [6] When the defendant emerged from the Legislative chamber on February 6, 1996 he was engaged by a number of reporters in a media "scrum". In response to a question by Mr. Beatty, a reporter for the Vancouver Sun who put to the defendant the criticisms made by the plaintiff and others, the defendant made the statement which is the basis of the action.
- [7] On the following day, a lengthy article appeared in the Sun under Mr. Beatty's by-line. To the point of the defendant's statement, it read:

B.C.'s controversial fast-ferry project is heading into rough water, critics say, with design problems, long delays and at least \$90 million in cost over-runs. But Glen Clark, the minister in charge of B.C. Ferries, said Tuesday the charges are baseless and that the \$70 million price tag for each of the three ships is fixed. "The costs are not over our estimation. And the designs are working out well. Sure, we are a few months behind. But name a construction project, particularly one of this complexity, that doesn't take a few months longer." While Clark and B.C. Ferries dispute some of the criticisms, they admit the 3 aluminum-hulled catamarans which were supposed to be travelling between Vancouver Island and the Mainland this year won't be ready for at least another year. Design problems will mean the first ship won't be in the water until spring 1997 and the other two won't be ready until 1998, said Tom Ward, engineering vice-president of B.C. Ferries. Clark and Ward maintain the \$70 million price tag per vessel is fixed despite a recent article in Fairplay, a British shipping journal, which quotes unnamed sources

who say the cost of each ship will rise to \$100 million, especially if the price of aluminum alloy continues to rise. ... But Bob Ward, a Sidney marine engineer and long time project critic, claims the fast-ferry plan is a disaster which uses inappropriate technology and underpowered engines for B.C. waters. The ships will cost at least \$100 million each, he predicted. Clark dismissed Bob Ward as a "disgruntled bidder on this project who is constantly feeding misinformation on this issue." ...

- [8] The plaintiff had long been interested in the various kinds of high speed craft such as hydrofoils, hovercraft and surface effect vessels (catamarans) developed for commercial purposes in the last three or four decades. He concluded that the future lay in catamarans. He had been in touch with personnel of B.C. Ferries as early as the late '70s with regard to the possibility of such vessels being acquired by it. In 1990 and 1991, he had discussions with B.C. Ferries personnel in which he suggested the possibility of it using catamarans for the carriage of vehicles as well as passengers. In May 1992 he and others incorporated Pacific Fast Ferries Ltd. which was intended to sell, build and possibly operate very large car carrying catamarans in B.C. Later that year, he entered into an arrangement with Westamarin-Swedeship group which operated six shipyards in Scandinavia and had considerable experience and qualifications in the catamaran field. He obtained from Westamarin a licence to use their technology and to build ships of their design in this province as well as in the four states which touch on the Pacific Ocean.
- [9] During 1992, the plaintiff had correspondence and discussions with Mr. Rhodes, the then president of B.C. Ferries, with respect to the possibility of ships built to the Westamarin design being acquired by B.C. Ferries to replace the aging conventional vessels employed on the corporation's two northern routes based in Prince Rupert, one running to the Queen Charlotte Islands and the other to northern Vancouver Island. B.C. Ferries expressed some interest in the concept. As a result, the plaintiff presented on March 15, 1993 a detailed proposal for the northern routes. Its potential scope appears from these paragraphs in his covering letter:

As a result, utilizing a W-7100 and a dedicated Ro-Ro Truck Ferry on route 11 would end up costing the taxpayer \$68 million over 10 years versus an estimated \$160 million for a new conventional vessel. A saving of over \$80 million. While on route 10, the W-9500 would cost the taxpayer \$40 million versus an estimated, \$260,000,000 for a new conventional vessel - a saving of over \$180 million! We trust you find these projections and alternatives as attractive as we have. Of course, by placing an order with us we will have additional spin-offs in the B.C. Community. A technology transfer will take place when our new shipyard is built to construct these ferries here in Victoria as well as create jobs. These will be sustaining jobs as other clients follow the leadership provided by B.C. Ferries. We look forward to working with your staff further to refine these findings to meet your requirements.

Mr. Rhodes responded in writing to the effect that B.C. Ferries would embark on a thorough evaluation of the proposal; but that the evaluation process and review by the Board and Secretariat 'could take 6 months to complete'.

- [10] To that point, the communications between the plaintiff on one hand and B.C. Ferries and the government on the other appear to have been normally cordial and businesslike although nothing said by B.C. Ferries or the government amounted to more than promises to continue looking into the matter.
- [11] The plaintiff's response to Mr. Rhodes' letter of March 15 was by way of a decidedly testy letter to Mr. Harcourt, the then Premier, complaining about the failure of various cabinet ministers, including the defendant, to respond to correspondence. The plaintiff expressed hope that the Premier could convince his ministers to "clean up their acts and start taking their responsibilities to their constituents in a more serious and normal manner."
- [12] That complaint resulted in mildly encouraging responses from Mr. Rhodes and Mr. Charbonneau, the then minister responsible for B.C. Ferries. But nothing in the responses offered any assurance that the plaintiff would get the business which he sought. The gist of the replies continued to be that the writers were interested in the proposals but that further study and planning would be necessary before any definite response could be given. As the trial judge observed in para. 15 of his reasons, the defendant conceded that the plaintiff had not been treated properly by B.C. Ferries, that he had simply been "strung along" and that his proposals and concerns were never properly dealt with or answered.
- [13] At about this time, the plaintiff adopted the strategy, as the trial judge put it in para. 69 of his reasons, of 'criticizing and berating the government and B.C. Ferries for the purpose of pressuring them into giving him business'. His letter of 23 September 1993 to Mr. Rhodes, reproduced in large part in para. 15 of the trial judge's reasons, was insulting in tone and content. E.g. "Your Technical Department continues to operate like the Kremlin as it has done for a very long time. ...", and, "I think B.C.F.C. has become a moribund bureaucratic monster, ...". Mr. Rhodes responded politely but without making any commitment.
- [14] In November, 1993, Mr. Rhodes was succeeded as president by Michael Martin, a recently retired naval officer. The plaintiff then escalated his efforts to create pressure. On 14 December, after giving notice to the major media outlets in Vancouver and Victoria, he held a media conference to vent his complaints. The media provided wide coverage of that event. For instance, a headline in the Vancouver Sun stated: "B.C. Ferries fudging on catamaran offer, firm's CEO claims" and one in the Times Colonist said: "Time for B.C. Ferries to plan fleet replacement, says ship dealer". It should be noted that the plaintiff's complaints at this stage were directed at the failure of B.C. Ferries to commit itself to award his company the business which he sought in replacing the northern vessels. Mr. Martin, offended by this unusual way of trying to obtain business, sought the assistance of Westmarin in reining in its agent. Martin's letter of 21 December 1993, addressed to the president of Westmarin's parent, expressed objections to the "continuing pressures we ... are receiving from Pacific

Fast Ferries". That letter is reproduced in large part in para. 20 of the trial judge's reasons. In the circumstances, it seems reasonable in both tone and content. It apparently was seen that way by the managing director who responded by saying:

We highly regret this pressure, and assure you that we will do what is possible for us to stop these actions. We have already informed Mr. Bob Ward about your feelings in this matter. For good order sake we also wish to inform you that Mr. Bob Ward, and Pacific Fast Ferries, is not our agent on permanent basis. The reason for his representation of Westamarin in this project, is his presentation of the possible project to us. Since we of course still are interested in a possible new building for your company, we would appreciate if you could contact me, if or when it is actual.

- [15] Westamarin would seem to have been content to leave the matter there. But, on 16 May 1994, the plaintiff wrote to it the letter reproduced in para. 21 of the trial judge's reasons requesting it to come back to him 'with some sort of formal dismissal, so I can start the legal action which would bring us back to the bidding table at B.C. Ferries.' The plaintiff went on in that letter to suggest the wording that he wished to see in the letter of dismissal. Westamarin obliged him by terminating its relationship with him in the language suggested by him.
- [16] I note here that the defendant, who had been the minister responsible for B.C. Ferries from the Fall of 1991 until March, 1993, resumed that portfolio in November, 1993 and continued to hold it until he became Premier on February 22, 1996.
- [17] At about the time the defendant resumed responsibility for B.C. Ferries, the government decided that large catamaran vessels offered the best solution for solving the serious problems which had developed because of the ever increasing volume of traffic which had to be moved through the Horseshoe Bay terminal. It does not appear that serious consideration was given at that time to replacing the northern ferries which were the object of the plaintiff's proposals.
- [18] In August 1994, B.C. Ferries distributed to a long list of ship builders and ship designers around the world a "Request for Qualifications" to supply design services for the three catamaran vessels to serve the Horseshoe Bay-Nanaimo run. A request was sent to Westamarin. The evidence does not indicate that it showed any interest. Neither the plaintiff nor his company was on the list. That omission became one of the plaintiff's grounds for criticizing B.C. Ferries and the government.
- [19] The contract to design the ferries was awarded to Incat Designs, an Australian corporation said to have had much experience in the design and construction of such vessels. Its local agent was Mr. Sam Bawlf, well known as a former minister of the provincial Crown and as someone who had long been active in promoting projects of various kinds in this province.
- [20] During 1994, Mr. Ward's activities were restricted by serious health problems which were resolved only when he received a heart transplant late in that year. On 28 November 1994 he launched a defamation suit against B.C. Ferries and Michael Martin based on the letter sent

by the latter to Westamarin a year earlier. The "theory of the case" as it emerges from the statement of claim is that Mr. Martin's letter had resulted in the loss by him and his company of potential sales between \$100,000,000 and \$200,000,000 and a consequent loss of net profit in the range of \$8,000,000 to \$16,000,000.

- [21] The plaintiff's activities with respect to B.C. Ferries during 1995 were summed up thus by the trial judge:
- [25] In addition, in numerous interviews and articles during late 1994 to early 1995 the plaintiff launched various criticisms of B.C. Ferries' plan for fast-ferry service between Nanaimo and Horseshoe Bay. His allegations included unnecessary operating and capital costs, unrealistic travel times, unwarranted safety risks, engine problems owing to debris plugging, potential cracking and weakening of the aluminium crafts, and undesirable environmental impacts from serious wash and wake, noxious emissions and engine noise. [26] In a particular article appearing in the Nanaimo Daily Free Press on 20 April 1995, the plaintiff suggested that an accident such as the then recent St. Malo ferry disaster in the English Channel, which resulted in injuries to 50 passengers, could be repeated in British Columbia if B.C. Ferries insisted on going ahead with the proposed aluminium-hulled fast-ferries. [27] In a subsequent interview published in the April 28 - May 5, 1995 edition of The Georgia Strait (sic), a weekly magazine published in Vancouver, the plaintiff criticized the provincial government for hiring Sam Bawlf as a consultant on the grounds of alleged conflict of interest on his part as Bawlf's company had held exclusive Canadian rights to Incat Design's fast-ferry technology. [28] Thereafter, on 22 June 1995 the defendant made a statement in the Legislature asserting that the proposed 33,500 h.p. engines for the new fast-ferries would, fully loaded, be capable of carrying 1,000 passengers and 250 cars at 37 knots per hour. He further stated that the ferries would come in at a scheduled cost of \$70 million each. The plaintiff believed that this information was incorrect in all aspects. Accordingly, he briefed an opposition Member of the Legislative Assembly.
- [22] The trial record discloses that, in addition to the activities set out in those paragraphs, the plaintiff was interviewed at length by Mr. Rafe Mair on his radio program which is said by some to have greater influence on public opinion in this province than any other organ of the media. That interview was remorselessly critical of B.C. Ferries and the government and placed considerable emphasis on what Mr. Mair called 'the safety factor' which the plaintiff said was 'a terrible situation'. He gave reasons for his view that the catamaran ferries could not operate with reasonable safety on the chosen route.

Findings by the Trial Judge

- [23] At various points in his carefully considered reasons, the trial judge made findings of fact which are relevant to the issues before this Court. I will mention those findings in the order in which they appear in the reasons.

[24] Para. 9: In making the defamatory statement to the newspaper reporter, the defendant spoke 'in an impromptu manner, and in the pressure of the moment entailed by a legislative media scrum, when confronted by Beatty with plaintiff's criticisms of the fast-ferry project'.

[25] Paras. 33 and [34] state several important findings:

- The defendant knew that the plaintiff had made fast ferries proposals and had used high pressure tactics in a failed attempt to succeed with those proposals.

[5] The defendant knew the plaintiff to be a fast ferry proponent who had metamorphosed into a persistent, aggressive and outspoken critic playing to the media.

[6] The defendant had acted reasonably in seeking guidance from his own staff and consultants as well as B.C. Ferries officials and relied upon their advice that there was no foundation to any of the plaintiff's criticisms.

[7] The defendant made the statement in question while honestly believing what he was saying to be true. The defendant used the term "bidder" in reference to the plaintiff's previous proposals.

[8] The dominant intention of the defendant was to dismiss the plaintiff's criticisms on the ground that he lacked the objectivity necessary to make sound expert criticisms of the project.

[9] The defendant's statement was not motivated by malice.

[26] In para. [37], the trial judge held:

[10] What the plaintiff said in criticizing the construction, delays and cost overruns has, by and large, proved to be correct - the plaintiff was correct in saying that fast ferry travel time and carrying capacity expectations were unrealistic.

[11] However, the safety concerns raised by the plaintiff have not materialized.

[27] In finding the defendant's words defamatory, the trial judge said in para. [41]:

An ordinary person would have reasonably understood them to mean that the plaintiff, out of frustration at having his business solicitations rejected, was deliberately feeding the media with false information on the fast-ferries project.

In para [42], he held that the defendant must bear the responsibility for the defamatory consequences flowing from publication in the newspaper.

[28] On the subject of qualified privilege, the trial judge found that the defendant had an interest in, and a duty of, providing the public with a response to the plaintiff's criticisms. His conclusion that the evidence does not establish malice on the part of the defendant was based on findings that the defendant believed that what he was saying was true, that he was not reckless as to the truth but rather sought and reasonably relied upon the advice of his advisors and officials of B.C. Ferries, that his primary intention was not political gain, and

that there is no evidence that he was motivated by spite.

- [29] In paras. 52-53, the trial judge held that the defendant, because he was replying to the same audience to which the plaintiff had made his criticisms, did not exceed the limits of qualified privilege by reason of having made the defamatory statement to a reporter which led to it being "published to the world".
- [30] With all those findings I agree. The trial judge went on in paras. 54 - 60 to find that the defendant exceeded the limits of qualified privilege because his language was "disproportionate" and thus not germane and reasonably appropriate to the occasion. With that finding, which provides the sole ground of appeal by the defendant on liability, I respectfully disagree for reasons which I will explain at a later point.
- [31] In paras. 61-63, the trial judge rejected the defendant's submission that the defamatory statement should be broken into two imputations, the first of which (disgruntled bidder on this project) was true and should therefore succeed on the ground of justification. I agree with the trial judge that the submission is untenable. For present purposes, the significance of this passage in the reasons is in the finding that the word "bidder" was apt to describe the plaintiff in the circumstances of this case in spite of the fact there had been no formal bidding process. It follows that the phrase "Bob Ward is a disgruntled bidder" was true but it does not follow that it can be disregarded as part of the defamatory statement.
- [32] In this Court the plaintiff, while supporting the ground on which the trial judge found qualified privilege to have been exceeded, also contends that the judge erred in finding that the words were spoken on an occasion of privilege and also in finding that there was no express malice. Success on either of those two grounds would render academic the question whether the ground relied on by the judge was correct. I will therefore deal first with the plaintiff's submissions on occasion of privilege and malice.

OCCASION OF PRIVILEGE

- [33] On the question whether the occasion was privileged, the appellant's arguments are based entirely on the decision of the Supreme Court of Canada in *Jones v. Bennett*, [1969] S.C.R. 277. That is undoubtedly an important decision in relation to defamation actions against politicians. There are some interesting similarities between the facts of that case and this one but, in my view, the differences are more significant and are conclusive against the respondent's submission. To explain that view, I must refer to the facts and the unusual course which the case took as it wound its tortuous way through three levels of court.
- [34] I will digress to mention a link between that case and this which has no relevance to the issues but is of historical interest. The defendant in *Jones v. Bennett* was W.A.C. Bennett, Premier of this Province from 1951 to 1972, who is generally regarded as the father of B.C. Ferries. Conception took place in 1958 and birth two years later. That development arose from dissatisfaction on the part of the public and provincial government with the deteriorating service being provided by the C.P.R. between the Lower Mainland and

Southern Vancouver Island which, then as now, was the largest population centre on the island. C.P.R., through its British Columbia Coast Service, had served the Southern Island since the turn of the 20th century and had provided excellent service except for motor vehicles which, by the 1950s, had become the principal method of transportation throughout the province. C.P.R. provided a frequent ferry service between Vancouver and Nanaimo which, starting in 1953, encountered serious competition from Black Ball Ferries which put into service the Kahloke, a true "roll-on roll-off" vessel, on the Horseshoe Bay-Departure Bay route. That was so successful that Black Ball soon added the Chinook which had been operating between Victoria and Washington State ports. Each vessel made five return trips per day on the Horseshoe Bay route. C.P.R. increased its service, with a variety of vessels making a total of as many as 11 crossings per day. The residents of Nanaimo and the Island communities to the north were pleased but those in the Victoria area were not. Traffic to or from the Southern Island had to cope with a long and sometimes hazardous drive on the Island Highway to get to or from Nanaimo.

- [35] In 1958, the Deas Island Tunnel was nearing completion. The provincial government sought to persuade private ferry operators including the C.P.R. and Black Ball to provide a ferry service between Tsawwassen and Swartz Bay similar to that being operated on the Horseshoe Bay-Nanaimo route, but all declined.
- [36] That led the provincial government to institute its own ferry service. It acquired from Phillip Spaulding, a Seattle naval architect, the right to use the plans which he had drawn up for the MV "Coho" which had gone into service in 1958 on the route between Victoria and Port Angeles, and which still serves that route. The plans, with some modifications of which the most obvious was a loading door in the bow, were used to give orders to B.C. shipyards for the construction of the "Sidney" and "Tsawwassen". Those vessels went into service between Tsawwassen and Swartz Bay in the Spring of 1960, operating on the same four hour turn-around cycle in effect on the Horseshoe Bay route. By 1962, two larger ferries, the "Queen of Vancouver" and "Queen of Victoria" had been delivered, the government had acquired the Black Ball assets and operation, and the C.P.R. had virtually retired from the field.
- [37] Expansion was rapid. A total of seven vessels of the "Vancouver" class went into service in the 1960s as did the "Queen of Prince Rupert", running from Northern Vancouver Island to Prince Rupert. Before long, the vessels of the "Vancouver" class were "stretched" by about 100 feet to add more accommodation and several of them later were "raised" to provide an additional vehicle deck. During the 1970s, the five big double enders of the Cowichan class were ordered with the last one entering service in 1981. Many other ferries were built for less travelled routes so that, by the 1990s, B.C. Ferries was operating a total of about 40 ferries.

- [38] I have supplemented my own recollection of the birth and growth of B.C. Ferries in those distant times by taking some of the details of matters such as dates and names from *Ships of Steel*, subtitled *A British Columbia Shipbuilder's Story*, by T. A. McLaren and Vicki Jensen, published in 2000 by Harbour Publishing Co. Ltd.
- [39] With that digression, I return to *Jones v. Bennett*. The facts of the case are set out most fully in the reasons of Ruttan J., the trial judge, which are reported (1967), 59 W.W.R. 449. Briefly, they were as follows. Mr. Jones was appointed chairman of the provincial purchasing commission pursuant to a statute which provided for appointment 'during good behaviour'. In October 1964 the Attorney General caused criminal charges to be laid against him alleging unlawful acceptance of a benefit. An order-in-council was passed suspending him from his office. On the ground that the suspension was illegal because the statute provided for removal only on address of the legislative assembly, Jones barricaded himself in his office and purported to continue in his job.
- [40] In January, 1965, Jones was acquitted on the criminal charges. An appeal was launched and was pending on March 5 when the Premier gave the speech which gave rise to the slander action. The speech was given to the Social Credit Association, i.e., Mr. Bennett's political supporters, in the presence of reporters from the *Times* and the *Colonist*. The action was based on the Premier having said to the meeting, apparently in a departure from his prepared text:
- I am not going to talk about the Jones boy. I can say a lot, but just let me assure you this; the position taken by the government is the right position.
- [41] At the time the speech was given, a bill was pending in the House to provide for the retirement of Mr. Jones with compensation. It was hotly opposed by the opposition and therefore was not passed into law until March 26.
- [42] Both newspapers reported the speech including the Premier's comments about the "Jones boy".
- [43] The trial before Ruttan J. was the second trial. The first one, before McInnes J. and a jury, ended when the trial judge, at the close of the plaintiff's case, gave effect to the defendant's "no evidence" motion by holding that the words were not capable, in their natural and ordinary sense, of bearing a defamatory meaning. That decision is reported at (1966) 55 W.W.R. 143. This court ((1966) 57 W.W.R. 56), set aside that decision and ordered a new trial on the ground that it was for the jury to determine which of the several versions of the "Jones boy" comment had in fact been spoken, and that only after such a determination could the judge rule as a matter of law on the question whether the words were capable of conveying a defamatory meaning. Leave to appeal to the Supreme Court of Canada was refused.

- [44] The second trial was by judge alone. Ruttan J. found for the plaintiff on the ground that the words were defamatory, that the defence of qualified privilege must fail since the statement was not made in the discharge of a public or private duty, and that the defence of fair comment also failed.
- [45] On appeal to this court, the defendant's appeal succeeded and the action was dismissed. Each member of the court (Davey C.J.B.C., Bull and Branca J.J.A.) gave lengthy reasons to the effect that the statement was defamatory but the occasion was one of qualified privilege. The finding of qualified privilege was based on a concession made by Mr. Berger, counsel for Jones, in responding to an observation by the chief justice in the course of argument, to the effect that it appeared that the Premier had been making a report to the electorate on public affairs. That basis for qualified privilege is of long standing and had been recognized in two leading cases in the Supreme Court of Canada: *Douglas v. Tucker*, [1952] 1 S.C.R. 275; and *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203.
- [46] Having thus reached the conclusion that the occasion was privileged, this court turned its attention to the question whether there was express malice. That question was considered at great length in the reasons which provide a rich trove of reasoned discussion on that subject. All three members of the Court concluded that there was no malice and that the appeal therefore succeeded on the ground of qualified privilege.
- [47] In the Supreme Court of Canada, the Court intervened at the opening of the appeal to make it clear that it did not accept this court's view on "privileged occasion". What occurred was explained by Cartwright C.J.C. giving judgment for the Court. After outlining the facts and issues, he quoted a passage in the reasons of Bull J.A. which referred to Mr. Berger's concession that the dinner meeting at which the speech was made was an occasion of qualified privilege. He then went on to say:

It is clear that no such concession was made at any stage of the trial. At the opening of the appeal we informed counsel that each member of Court had read all of the reasons for judgment in the courts below, that we did not regard ourselves as bound by the admission made by counsel in the Court of Appeal and that we wished to hear full argument on the question whether the occasion on which the words complained of were uttered was one of qualified privilege having regard especially to the fact that, to the knowledge of the defendant, newspaper reporters were present at the meeting. Following this, we had the advantage of hearing full and able argument from both counsel.

- [48] Everything which preceded that paragraph was merely an outline of facts and issues. Cartwright C.J.C. then went on to say:

Paragraph 24 of the statement of defence in which the defence of qualified privilege is set up has already been quoted. It involves the assertion that whenever the holder of high elective political office sees fit to give an account of his stewardship and of the actions of the government of which he is a member to supporters of the political party to which he belongs he is speaking on an occasion of qualified privilege. I know of no authority for such a proposition and I am not

prepared to assent to it. I will assume for the purposes of this appeal that each subject on which the defendant spoke to the meeting was one of public interest. It is not suggested that at the date of the meeting an election was pending. The claim asserted by the defence appears to me to require an unwarranted extension of the qualified privilege which has been held to attach to communications made by an elector to his fellow electors of matters regarding a candidate which he honestly believes to be true and which, if true, would be relevant to the question of such candidate's fitness for office. It is, of course, a perfectly proper proceeding for a member of the Legislature to address a meeting of his supporters at any time but if in the course of addressing them he sees fit to make defamatory statements about another which are in fact untrue it is difficult to see why the common convenience and welfare of society requires that such statements should be protected and the person defamed left without a remedy unless he can affirmatively prove express malice on the part of the speaker. However, I do not find it necessary to pursue this line of inquiry further because, assuming, although I am far from deciding, that had no newspaper reporters been present the occasion would have been privileged, I am satisfied that any privilege which the defendant would have had was lost by reason of the fact that, as found by the learned trial judge:

The Premier must have known that whatever he did say would be communicated to the general public. The two reporters sat at a press table in full view of the speaker's table. This finding was concurred in by the court of Appeal and is amply supported by the evidence. In view of the unanimous judgments of this Court in *Douglas v. Tucker* [[1952] 1 S.C.R. 275.], particularly at pp. 287 and 288, and in *Globe and Mail Ltd. v. Boland* [[1960] S.C.R. 203.], it must be regarded as settled that a plea of qualified privilege based on a ground of the sort relied on in the case at bar cannot be upheld where the words complained of are published to the public generally, or, as it is sometimes expressed, "to the world".

On that basis, the Chief Justice held that the defence of qualified privilege failed. He gave further short reasons holding that the defence of fair comment could not succeed.

[49] The passage in the reasons which demonstrates why *Jones v. Bennett* does not support the respondent's position is this short paragraph which follows the longer passage, quoted *supra*:

The case at bar must be distinguished from such cases as *Adam v. Ward* [[1917] A.C. 309.], where a false charge had been published to the world and it was held that in refuting it the defendant was entitled to address the same audience as had been chosen by the maker of the charge.

That paragraph applies directly to the facts of this case in which, as in *Adam v. Ward*, a charge was published to the world so that, in refuting the charge, the defendant was entitled to address the same audience as had been chosen by the maker of the charge.

- [50] In considering the application of *Jones v. Bennett*, it is important to understand that the reference by Cartwright C.J.C. in the last paragraph of the long quotation, *supra*, to "a ground of the sort relied on in the case at bar" is directed to a case such as *Jones v. Bennett* where the defendant asserts qualified privilege on the ground that he was, when he spoke the defamatory words, a holder of high elective office giving an account of his stewardship.
- [51] That ground is not relied on in this case. The defendant, when he said what he said about Mr. Ward, was responding to charges and criticism made against the government of which he was a member and the Crown corporation for which he was the responsible minister, charges which were made to the whole world and in respect of which he was therefore entitled to respond to the same audience.

MALICE

- [52] I turn then to the issue of malice. In giving reasons for holding that the evidence did not establish malice the trial judge said:
- [51] ...As I have already stated, I accept that the defendant made the defamatory statement while believing what he was saying to be true. I further accept that the defendant was not reckless as to the truth. Rather, the evidence shows that he sought and reasonably relied upon the advice of his advisors and B.C. Ferries officials that the plaintiff's criticisms were baseless. In addition, I have found that in making the defamatory statement, which it cannot be forgotten was in the context of a media scrum, the defendant's dominant intention was to express his view that he was not concerned with the plaintiff's criticisms as the plaintiff lacked the objectivity needed to make valid technical criticisms of the fast-ferries project. His primary intention was not political gain and there is no evidence that he was motivated by spite. (*Reynolds v. Times Newspapers Ltd.* (1999), 3 W.L.R. 1010 at 1016.)

The submission of Mr. Christie on this point, as I understand it, is that the finding that the defendant's primary intention was not political gain cannot stand in view of the defendant's own evidence on cross-examination. He referred us to these passages:

Q And I heard you at one point say you would go to BC Ferries to rebut what Mr. Ward had said, did you use those words in your evidence earlier? A Sometimes I would ask BC - if there was a criticism from - Q Well, I used the word rebut for a reason, A Yes. Yes, and when, uh - if there was a criticism that was unresponded (sic) to - not responded to and I got it in the morning, for example, a clipping like this, I would say ask BC Ferries to prepare a response, or to rebut these remarks. Q To rebut the remarks? A Sure. Q Because obviously if you couldn't rebut the remarks it would be politically embarrassing to you as a either Premier or Minister, wouldn't it? A Yeah. Well, it's not a political motivation. These are very serious allegations around a - a very important question for British Columbia. Q Oh. Let me understand this. It's not a political motivation or your earlier evidence was - A Well, it's not - it's - okay - Q -- let me finish my question. Or your earlier evidence was that well, it was a part of the consideration. Well, which is it? A It's okay, it's a part of the consideration. A min (sic) - a relatively minor part when dealing with these kinds of questions. Q How long have you been a politician? A I've been elected for fourteen years. Q I

guess it was one of your objectives to be re-elected? A Of course. Q And to have credit for a wonderfully successful fast ferry program? A Yes. ... Q Well, I'm just not - not that sophisticated to realize that but did you ever inquire whether Mr. Rhodes had any training or experience in engineering? A Uh, no. I don't believe he did. Q And did you ever inquire about the expertise of any of the people you relied on to determine if they were able to assess the criticism that they were talking about? A No. I assume they would - they would consult with their staff who did have expertise if they did not. Q So you basically took orders from them as to how to respond and your view is that you were just responding according to their instructions? THE COURT: He didn't take orders. He took advice from them, surely. MR. CHRISTIE: Advice, yeah. Well, I use the word orders. I agree he said advice. A Yes, I took advice from them ... Q So you were aware you were speaking about a marine engineer, as far as the public was concerned? A Right, okay. Q And you were aware that you were accusing him of constantly spreading misinformation out of an ulterior motive, right? A Yes. Q And - and false information? A Correct. Q So you're accusing him of lying about very serious matters, weren't you? A Well, I didn't - I didn't call him a liar. I was simply trying to - Q I -- I realize you didn't call him a liar. A -- I was trying to rebut this constant criticism of Mr. Ward's that I as advised was - was false. Q I heard you say that many times. But my point is you were in a - you knew that you were alleging that he was deliberately spreading false information? A Well, I believed that he was clearly very disgruntled. When the series of escalating letters and criticisms and not getting work from BC Ferries, he proposed to lease ferries, he proposed to build fast ferries, and he was not getting anywhere and he was angry about that, he had press conferences criticizing the Corporation repeatedly. ... Q Mr. Clark, I've put it to you that you've actually tailored your evidence to fit within the defence of qualified privilege, isn't that correct? A No, I'm sorry. I don't - I'm not a lawyer and I wouldn't know what that defence is, precisely. Q Well, I suggest you've certainly taken advice on it, and that you're tailoring your evidence to fit within that. THE COURT: well - A Absolutely not. THE COURT: -- it's to be expected he would take advice on a libel suit. MR. CHRISTIE: Oh, yes. But not to tailor his evidence. I'm suggesting he's tailoring his evidence. A Of course not. It's ridiculous. Q Of course not, all right. What I'm asking you is if the - the suggestion I make to you that you were actually concerned about your political reputation, not protecting BC Ferries from fast criticism, or fast ferried from criticism? Unjust criticism? If that wasn't - if that wasn't your real objective, that is, the political objective of making yourself look good - THE COURT: I'm afraid I've got a bit confused of this question. MR. CHRISTIE: All right. I'll start - THE COURT: I think you should - don't - now, don't have too many questions in one. MR. CHRISTIE: All right., THE COURT: That would seem too many questions. Avoid it. MR. CHRISTIE: Q What could the public do to reprimand Mr. Ward, if he was making false statements about BC fast ferries? A Mr. Ward? Bob Ward? Q Yeah. THE COURT: What could the public do to reprimand Mr. Ward if he was making false statements about BC Ferries? Q I'll tell you the answer, is nothing. A Oh, okay. Q Well, is it - tell me what other answer is there? A I suppose - I suppose you're correct. Yes. Q But I'll tell you what the government could have done if you were really concerned about the reputation of BC Ferries. A Mmm. Q You could have sued Mr. Ward for defamation of the Corporation, couldn't you? A I suppose that's correct. Q Did you - did you ever take advice on that? A No. Q So really - A It's not - it's not generally the habit of cabinet ministers or people in in public life to sue critics,

because otherwise we'd be suing quite regularly. Q Well - A Especially me, unfortunately. Q Um-hmm. Well, let me put it to you this way. You were concerned about one person for political reasons and that was Bob Ward? True or false? A I'm sorry? Q You were concerned about one person for political reasons, and that was Bob Ward? True or false? A I don't quite understand the question and I'm not trying to be obtuse. I don't - Q All right. Maybe it's confusing. And it's my fault if it is. I suggest you were concerned for your political reputation because of Bob Ward's criticism? A Well, I - I think I was concerned about the project and I guess my political reputation is tied up in all the projects and things that I was associated with, in that respect. Q And you were - A I reject the notion that this is motivated solely by any political concern on my part. THE COURT: Sorry, could you keep you voice up please, Mr. Clark. THE WITNESS: I'm sorry. I just reject the notion that I was motivated solely by political consideration on - for me. Q Um-hmm. Well, you and your government? A Well, they're - they're in some ways inextricably linked. I mean, the success of the project, the management of the project, public safety. Obviously if we were designing a vessel which was unsafe that would be a disaster for the public and it would have impacts on the politician responsible so I - they are some relationship, I'm not trying to deny that, but um, these were very, uh - uh, very, very many different criticisms levied by Mr. Ward that required a rebuttal, in my view.

[53] I see nothing in any of those passages or indeed in any of the evidence which could reasonably lead to the conclusion that the defendant's real or dominant motive was to advance his own political interests. As the trial judge held, he had both an interest and a duty to respond to the plaintiff's sweeping charges of incompetence and bad judgment on the part of the government, B.C. Ferries and the officers and employees of B.C. Ferries and the government. As Mr. Clark acknowledged, his political reputation was "tied up in all the projects and things that I was associated with". It does not follow that the advancement of his political reputation was his dominant motive. I see no reason to disagree with the trial judge's conclusion that the defendant's dominant motive was to make the point with the public that, because the plaintiff was a disgruntled bidder, he lacked the objectivity needed to make valid criticisms of the fast ferries project. In matters of this kind, there is likely always to be a range of motives which may contribute to the defendant saying what he did. I think it is clear from the cases that an indirect motive sufficient to vitiate qualified privilege will be found only where it is clear that the overriding motive was an improper one. As an example of an appropriate case for finding an indirect motive I take the liberty of referring to my reasons in *Vogel v. C.B.C.* (1982), 35 B.C.L.R. 7 (B.C.S.C.) at p. 78:

What the law regards as malice is any indirect motive other than a sense of duty: *Gatley*, p. 326. The purported motive of the defendants was to serve the public interest by exposing corruption in high places, but the real motive was to enhance their own reputations by producing a sensational program. Their concern was not as to whether the allegations were true or as to whether the public interest was served. It was rather to give to allegations of scandal the appearance of truth to the extent necessary to succeed in achieving their goal. That attitude, in law, is malice.

[54] Here, the purported motive and the real motive were the same. It was to rebut the criticisms and accusations on the part of the plaintiff, criticisms and accusations which the defendant on reasonable grounds believed to be incorrect.

DISPROPORTIONATE LANGUAGE DOES NOT DESTROY QUALIFIED PRIVILEGE

[55] I turn to the issue raised by the appellant as to whether the trial judge erred in finding that the defendant had exceeded the limits of the qualified privilege defence. The relevant passage in the reasons is this:

[54] However, I am of the view, and so find, that the defendant has exceeded the limits of the qualified privilege defence by virtue of the defamatory statement not being germane and reasonably appropriate to the occasion. In that regard I follow the dicta of Cartwright J. in *Douglas v. Tucker*, supra at 286,

... In my view the appellant was entitled to reply to such a charge and his reply would be protected by qualified privilege, but I think it clear that this protection would be lost if in making his reply the appellant went beyond the matters which were reasonably germane to the charge which had been brought against him. It is for the judge alone to rule as a matter of law not only whether the occasion is privileged but also whether the defendant has published something beyond what was germane and reasonably appropriate to the occasion so that the privilege does not extend thereto. [55] I am persuaded that the occasion would have been within the qualified privilege defence had the defendant said words to the effect that he understood from his advisors that the criticisms levelled by Mr. Ward were untrue. This would be so notwithstanding that with hindsight the criticisms have proved to be generally valid. However, that is not at all what the defendant said. He said something that was disproportionate, something that was much more than that, something that brought him outside the privilege, namely, that the plaintiff was a disgruntled bidder in the sense of having sought and failed to obtain business and, because of this, was constantly feeding misinformation on the fast-ferry project. ... [58] I must also add that I do not see any basis in public policy or common convenience that would be served by attaching qualified privilege to this occasion. Absent such grounds, the law does not allow the defence of qualified privilege to protect politicians who, in responding to particular criticisms on matters of public interest, dismiss the critic or critics by way of an unqualified personal attack that does not focus on the merits of the criticism, namely, an *ad hominem* fallacy response. To afford the protection of such occasions under the defence of qualified privilege would unjustifiably undermine the delicate common law balance between the defendant's freedom of expression and the plaintiff's reputational interest. Furthermore, it would intrude upon the plaintiff's freedom of expression as a value embodied in the Canadian Charter of Rights and Freedoms and protected for the purpose of facilitating the pursuit of truth, to say nothing of participation in political life....

[56] With respect, those passages are based on an erroneous view of what is meant by the words 'germane and reasonably appropriate to the occasion' and a failure to give effect to the basic principles relating to qualified privilege. The words spoken by Mr. Clark were directed at

countering the criticisms made by Mr. Ward and they were therefore germane and reasonably appropriate to the occasion. The words were designed, as the trial judge said in para. 34 of his reasons, 'to dismiss the plaintiff's criticisms on the grounds that the plaintiff lacked the objectivity necessary to make sound expert criticisms of the fast-ferries project'. The error is illustrated by the learned judge's statement in para. 55 that words 'to the effect that he understood from his advisors that the criticisms levelled by Mr. Ward were untrue' would have been protected by qualified privilege, whereas the words actually spoken were not. The difference between the words spoken and those not spoken were that the former were moderately pungent and conveyed, by the use of the word "misinformation", a charge that was largely untrue, whereas the words not spoken are utterly bland and strictly factual. The law does not require either blandness or accuracy as a condition of successfully invoking qualified privilege. The law was stated thus by Lord Atkinson in *Adam v. Ward*, *supra*, at p. 173:

These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

[57] The phrase "germane and reasonably appropriate to the occasion" is derived from the reasons of Cartwright J. (later C.J.C.) in *Tucker v. Douglas*. In using those words, Cartwright J. was not considering whether the statement was bland, or factually correct or, in the words of Lord Atkinson, 'violent or excessively strong'. To understand what the phrase was directed at, regard must be had to the facts of the case. *Tucker v. Douglas*, like *Jones v. Bennett*, involved a renowned provincial premier overstepping the limits in giving a speech to his constituents. Mr. Tucker and Mr. Douglas were the leaders of opposing parties. In the heat of an election campaign, Mr. Tucker took to accusing Mr. Douglas of having the intention, should he be returned to office, to "socialize" the farm lands in the province with ruinous consequences for farmers. Mr. Douglas sought to meet that accusation by saying in a speech that Tucker and his party were the ones responsible for taking the lands and homesteads of farmers. As support for that assertion, he said that Tucker, then an officer of an investment company, had in 1930 signed a document providing for interest at the rate of 15% per annum as a result of which a farm family had lost its lands to the company. That rather petty exchange was the background to the one which was the basis of the action. It began with Tucker saying in a public meeting that the allegations regarding 15% interest were "entirely without foundation". On the next day Douglas, addressing a public meeting, responded by saying that Tucker was facing a charge of fraud laid before the courts in the previous year. It was to that exchange that Cartwright J. (later C.J.C.) was referring in the passage quoted by the trial judge in para. 54 of his reasons. The next paragraph in the reasons is more relevant to the case at bar:

In my view the claim of qualified privilege made on this basis in the case at bar fails. It is true as was said by Lord Shaw of Dunfermline in *Adam v. Ward* (supra) at page 347, that the whole question of the repudiation of a charge claimed to be false has not to be weighed in nice scales; but it was, I think, going entirely beyond anything that was necessary to the refutation of the charge made by the respondent to state that he was facing a suit for fraud and was said to have deprived certain persons of their property by fraud. The charge which the respondent had made against the appellant was in substance that the appellant had falsely stated that he, the respondent, had been a party to the exaction of 15 per cent interest on a mortgage. It was open to the appellant in replying to this charge to bring forward any matter going to shew that his statement was true but the allegation that the plaintiff had been sued for fraud and had taken other persons' property by fraud was unconnected with the matters in controversy.

[58] Nothing said by Mr. Clark to the Sun reporter was unconnected with the matters in controversy. Mr. Clark believed on reasonable grounds that Mr. Ward was "feeding misinformation" on the fast ferry issue. He knew Ward to be a disgruntled bidder. So it was germane and reasonably appropriate for him to suggest that as explaining why Ward would feed misinformation. It may not have been true, it may have been hurtful but it was germane and reasonably appropriate to the occasion.

[59] If a defamatory response meets that test, the law allows much leeway in the language used. In *Hill v. Scientology*, [1995] 2 S.C.R. 1130, Cory J., speaking for the Court, said:

144 The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.

[60] The point which was, with all respect, lost sight of in the decision under appeal is that expressed in the last sentence of that passage. The privilege is not absolute but can be defeated only by a finding that the dominant motive for publication is actual or express malice.

[61] Once the jury, or the judge as jury, reaches the conclusion that there was no malice, that should be the end of the inquiry with respect to qualified privilege.

[62] The only other case authority with which I will burden these excessively long reasons is *Stopforth v. Goyer* (1979), 8 C.C.L.T. 172, 97 D.L.R. (3d) 369, a decision of the Ontario Court of Appeal which has been cited with approval in a number of decisions of this Court. See, for instance, *Baumann v. Turner*, 82 B.C.L.R. (2d) 362 (B.C.C.A.) and *Parlett v. Robinson*, 5 B.C.L.R. (2d) 26, [1986] 5 W.W.R. 586 (leave to appeal to S.C.C. refused [1987] 1 W.W.R. lxviii). I refer to that case because of the remarkable similarity between its facts and those in the case at bar. The defence of qualified privilege was raised by Goyer, then the Minister of

Supply and Services of the Government of Canada, in relation to certain statements which he made outside the House in which he repeated statements which he had made under the absolute privilege of speaking within the House. The statement related to the plaintiff, a senior civil servant who had been removed from his function as deputy head of a major project involving the acquisition of new type of military aircraft. The statement made to the media outside the House was:

I will stand for my officials and I accept responsibility for errors of judgment, mistakes made 'in good faith'. But I do not believe that ministerial responsibility extends to cases of misinformation or gross negligence. Why should I pay for misinformation?

[63] The gist of the decision of the Ontario Court of Appeal is to be found in this passage in the reasons of Jessup J.A. at p. 372 (D.L.R.):

In my opinion, the electorate, as represented by the media, has a real and bona fide interest in the demotion of a senior civil servant for an alleged dereliction of duty. It would want to know if the reasons given in the House were the real and only reasons for the demotion. The appellant had a corresponding public duty and interest in satisfying that interest of the electorate. Accordingly, there being no suggestion of malice, I would hold that the alleged defamatory statements were uttered on an occasion of qualified privilege.

Similarly, the appellant here had a corresponding public duty and interest in satisfying the interest of the public in knowing whether there was any reason to doubt the reliability of Mr. Ward.

[64] The decision in *Stopforth v. Goyer* is of particular interest because in this case the sting of the libel arose from the word "misinformation" and in *Stopforth v. Goyer* from the rather more serious accusation of "misinformation or gross negligence".

[65] It follows that, in my view, the trial judge's conclusion that the defendant was not entitled to the protection of qualified privilege cannot stand.

OTHER GROUNDS ADVANCED ON BEHALF OF THE PLAINTIFF

[66] I have made no reference in these reasons to some arguments which loomed prominently in the submissions of plaintiff's counsel. That is because they seem not to fit within any aspect of the law of defamation as usually understood and are, in my view, without merit. But in case it be thought that I have overlooked what the respondent's counsel appeared to view as the heart of his case, I will touch upon them.

- [67] Mr. Christie based these arguments on the premise that the plaintiff was right and fair and reasonable in all that he did and said whereas the defendant was wrong, unfair, unreasonable and wicked in all that he said and did. That leads to the proposition, advanced through an unquenchable flow of indignant rhetoric, that the trial judge's findings in favour of the defendant, which substantially outnumber and outweigh those in favour of the plaintiff, must be wrong in law and perverse on the facts.
- [68] The specific foundation for this approach is the contention that the clearest demonstration of the defendant's wickedness is his categorization of the plaintiff as a "bidder" when he knew there had been no formal bid process in respect of the three Fast-Cat ferries. Because the plaintiff concedes that he was "disgruntled", no great offence is taken at that word.
- [69] This view of the paramount importance of "bidder" seems to have dominated counsel's reasoning from the beginning of the action. The statement of claim in its entirety save for the prayer for relief reads as follows:
1. The Plaintiff says that the Defendant, in a statement published on February 7, 1986 in the Vancouver Sun, defamed the Plaintiff by a false, malicious and deliberate statement. The Defendant dismissed the Plaintiff as "a disgruntled bidder on this project who is constantly feeding misinformation on this issue." 2. The Defendant was formerly the minister responsible for B.C. Ferries and knew that no bids were ever publicly sought or allowed. 3. The Defendant, in conflict of interest and improperly with Robert Williams and Sam Bawlf, had excluded bids from the process of selection of the new B.C. Ferries altogether. 4. The Plaintiff is by profession a Marine Engineer and Consultant who, by the remarks of the Minister (now Premier) was demeaned in his professional standing by the Defendants false remarks aforesaid.
- [70] While Mr. Ward had not been a bidder in the sense of having participated in a formal bidding process, he had been a bidder in the sense of having made a bid, i.e. attempt, to secure the business of B.C. Ferries. The word "bid" is used quite commonly in both senses, the appropriate one being determined by the context. Indeed, the word "bid" is used in the latter sense in the statement of claim delivered by Mr. Christie on behalf of the plaintiff in the action launched in November 1994 against Mr. Martin and B.C. Ferries. In para. 12, there is an allegation that Incat Designs was "a competitor of the plaintiff's principal, in the bid for B.C. Ferry business". There is at least one other use of the word in that document in a similar sense. I also note that Mr. Ward used the term "bidding table" in his letter to Westamarin which is referred to in para. 15 supra.
- [71] Another point pressed strongly by Mr. Christie is that the plaintiff was deprived of a fair trial by the admission into evidence of the facts regarding the outcome of that earlier case which came to trial before Mr. Justice Millward in 1997 and was dismissed on every conceivable ground. Millward J. held that there was no defamatory statement, that Mr. Martin's letter was fair comment written on an occasion of qualified privilege and that no damages had been proved. Most sadly for the plaintiff, his credibility suffered a serious blow when it came

out in cross-examination, after he had testified in direct to the effect that the letter of dismissal from Westamarin had been an absolute surprise and shock to him, that he was effectively the draftsman of that letter (see para. 15 supra). That sorry episode was, in my view, properly admitted into evidence in this case. It perhaps went most clearly to the issue of damages but, because it related to the same controversy which gave rise to this action, was also relevant to the question of the extent to which the plaintiff had ceased to be objective in relation to the government and B.C. Ferries.

- [72] The second major premise of Mr. Christie's argument was that the trial judge must have been wrong in making findings adverse to the plaintiff because he, after all, had been right about the suitability of the Incat designed catamarans for the Horseshoe Bay run and Mr. Clark had been wrong. As we are not here dealing with material issues, I will note without relying on any extension of the law of judicial notice that it now seems clear that Mr. Clark and his advisors have been shown in some respects to have been even more seriously wrong than Mr. Ward suggested in 1996. The ferries, when the first two finally entered service, had so little success that all three were withdrawn from regular service and put up for sale. The cost overruns were huge.
- [73] The point is that those facts are irrelevant to the issues in this action. The issues had to be decided having regard to the facts and the circumstances as they existed in February 1996 when the defamatory words were spoken. The ultimate outcome of the controversy is no more relevant than the fact that Mr. Douglas won the election against Mr. Tucker in Saskatchewan in 1948.

CONCLUSION

- [74] I would allow the appeal, dismiss the cross appeal and dismiss the action.

"The Honourable Mr. Justice Esson"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Hall"

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