COURT OF APPEAL FOR ONTARIO
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COUR D'APPEL DE LONTARIO

Court File No.: COA-24-CV-0004

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ROCCO GALATI

Appellant
(Plaintiff)

- and-

DONNA TOEWS (AKA "DAWNA TOEWS"), KIPLING WARNER, CANADIAN SOCIETY FOR THE ADVANCEMENT OF SCIENCE AND PUBLIC POLICY ("CSAPP"), DEE GANDHI, JANES AND JOHNS DOE

Respondents
(Defendants)

APPELLANT'S (PLAINTIFF'S) FACTUM

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PART I – STATEMENT OF THE CASE

1. This is an appeal from the judgement(s) of the Superior Court Chalmers. J., dated December 11th, 2023, striking the Appellant's action, and awarding costs dated February 3rd, 2024.

PART II – SUMMARY OF THE FACTS

2. The Plaintiff, called to the bar in 1989, is a highly regarded and sought out lawyer. He has twice, in 2014 and 2015, been named, by Canadian Lawyer Magazine as one of the top 25 influential lawyers in Canada, in 2015 awarded the OBA's highest award, the President's Award. He also served as an elected bencher between 2015 and 2019 and sat as a hearing panel member of the Law Society Tribunal from 2015 to 2021. He has seven front page magazine covers, extensive profile articles in such magazines as Canadian Lawyer and Saturday Night. He has litigated, at all level Courts, both Federal and Provincial Superior and Provincial Courts, in five (5) Provinces and has, as counsel well over 400 reported cases in the jurisprudence, including the Supreme Court of Canada. He has spoken, upon invitation at various Law conferences and universities from 1999 to the present, as well as being counsel at the student legal aid clinic at the University of Toronto Faculty of law. He is founder and executive director of the Constitutional Rights Centre Inc. ("CRC") since its inception in November, 2004. He has further exclusively produced three films and co-authored two books.[1] In his 36 years of practice, the Plaintiff has **never** been referred to a discipline hearing nor **ever** been found to engage in misconduct by the Law Society.

- **The Defendants**

3. The Plaintiff does not know, ever met, nor represented in any capacity, nor ever had any direct contact with any of the Defendants.[2]

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[1] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1705-1707 para 1-7

[2] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1707 para. 8-11

4. Vaccine Choice Canada and Action4Canada have been the Plaintiff's client since 2015 and 2020 respectively. The Plaintiff has absolutely NO role in their organizations whatsoever, except to provide legal services, on a fee for services basis.[3]

5. The Defendants Donna Toews and Kip Warner, engaged in actions to harm the Plaintiff as set out in paragraphs 20-37 of his affidavit of March 14th, 2023[4].

6. Kip Warner's actions to injure the Plaintiff, and interfere with his economic interests, included trying to enlist Alicia Johnson to convince the Plaintiff's clients, to fire the Plaintiff, report him to the LSO and have him charged with fraud. This is confirmed by both Alicia Johnson and Tanya Gaw (instructing officer for Action4Canada) in their affidavits.[5]

7. The Defendants Kip Warner and Dee Gandhi, published defamatory statements to others, and on the Society's website, set out in paragraph 41 of the Plaintiff's affidavit.[6]

8. Apart from the blatant false, untrue, and defamatory remarks in those publications, and apart from the blatant conspiracy to have members of the public make complaints about the Plaintiff on nebulous and unsubstantiated grounds, those publications further mislead and defame as set out in paragraph 42, of the Plaintiff's affidavit.[7]

9. Mr. Warner further, as recently as this March 2023, in a text conversation, with a British Columbia lawyer, Mr. Lee Turner, made malicious, untrue statements about the Plaintiff and, Mr. Peter Gall, where KW is Kip Warner and LT is Lee Turner in the following text

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[3] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1709 , para. 13-19
[4] Affidavit of Rocco Galati, Appeal Book Tab 6, pages 1710-1714 , para. 20-37
[5] Affidavit of Tanya Gaw, Appeal Book Tab 6, page 2611 para. 15 and Affidavit of Alicia Johnson, Appeal Book Tab 6, page 2662-2663, para. 10-16
[6] Affidavit of Rocco Galati, Appeal Book Tab 6, pages 1715-1719, para. 41
[7] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1719 para. 42; affidavit of Lee Turner, at Tab 10 Appeal Book page 3929-3930

exchange:

KW: Update: **As predicted, Peter Gall is a total waste of time and money**…

LT: **It's unfortunate that you took most of your time to criticize Peter Gall. I think your criticism was misdirected.**

KW**: I think your political correctness is misdirected. Remember that you also defended Rocco Galati.**

LT: Kip I dont know how suggesting we shouldn't be attacking each other when the court is the one deserving of criticism is politically correct. I read the decision. Your arguments were rejected also. I didn't see that explained in your update. I wish you all the best and hope you succeed. As I do for everyone else who has the courage to stand up for truth and freedom.

KW: We didn't have arguments Lee. I already told you that. You already said you didn't watch any of the hearing. Go and order transcripts and read them for yourself.

We are all being attacked when we're being robbed by Rocco's marketing arms. Rocco is a serial con artist and fraudster. Peter Gall is not as bad, but he is a grifter. The nurses are livid with him. Actually, so was Justice Coval. I think you'd do well to go and read the transcript, or at least listen to the DARS record.

And even the arguments Peter made weren't even really his. They were his junior's.

LT**: I strongly disagree with your character assassination of them.** I have spoken extensively with both of them. **You need to get your facts straight before you defame someone.**

KW: **Which facts are wrong about Rocco?**

LT: **Everything you said.**

KW: Be specific. **Tell** me what specifically on our FAQ is false about him.

http://www.suebonnie.ca/faq

Go and look and tell me.

Can you name a single important case that he has won?

Can you tell me how many times he has been investigated by the Law Society

> **of Ontario? Can you tell me if any of those complaints were instigated by the LSO itself?**
>
> Maybe you missed reading the rulings, but he's had two judges now in only a year, one at BCSC and another at the federal court describe his work as "bad beyond argument". https://canlii.ca/t/jvq68#par52 https://canlii.ca/t/jrnlm#par45
>
> We get complaints weekly, sometimes daily, **from former Rocco donors and affiliates alleging fraud, bad faith, and other irregularities.**[7]

10. Mr. Warner then took the position that the affidavit of Alicia Johnson was inadmissible due to a purported non-disclosure agreement and that the affidavit of Lee Turner is inadmissible due to solicitor-client privilege. Both Ms. Johnson and Mr. Turner deny Warner's assertions.[8] Ms. Johnson asserts no breach of the confidentiality agreement. (And if breached it does not go to inadmissibility on this motion, the remedy is against Ms. Johnson not the Plaintiff). Mr. Turner emphatically denies any solicitor-client relationship or occasion[9]. In fact, Mr. Warner refused to even answer questions on the purported "occasion" of the solicitor client privilege in his cross examination.[10] Mr. Turner was **not** cross-examined on his affidavit.
11. The Plaintiff's position is that this is one of two glaring instances where Mr. Warner has blatantly misled the Court. The other is in trying to hide when he first knew and met Ms. Toews. In his initial affidavit he misled by stating that he first met her in January of 2022 shortly **after** she made the Law Society Complaint against the Plaintiff. When later evidence showed that he had actually met her a **year earlier**, after she donated $10,000.00 to his Society, and that he in fact assisted and commandeered her complaint to the LSO, Mr.

[8] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1720-1721, para. 43
[9] Affidavit of Alicia Johnson, Appeal Book Tab 6 page 2661, Supplementary Affidavit of Alicia Johnson, Appeal Book Tab 10 page 4061, affidavit of Lee Turner, at Tab 10 Appeal Book page 3928-4059
[10] Compendium of Evidence Appeal Book Tab cross-examination of Kip Warner at Tab 14, page 4679- 4680

Warner changed his tune and stated it was a typo or mistake, as between years. This is belied by the fact that he referenced the timing of the Law Society Complaint in his initial lie to the Court.

12. The above is some of the evidence of the malice and conspiracy by the Defendants with respect to their conduct and actions, against the Plaintiff.
13. Ms. Toews, had no answer as to why she did not take up the donation issue with the recipients of the donation rather than their lawyer.[11]
14. With respect to justifying the statements made about the Plaintiff as a lawyer, the Defendants Mr. Warner and Mr. Gandhi, point to isolated, targeted, purported "losses" of the Plaintiff in order to distort and defame his reputation as a lawyer. They had no answers as to why their "research" did not have a "disregard to the truth", and absence of due diligence as to the Plaintiff's track record, "wins" and reputation. They hand-picked half a dozen out of the thousands of cases, and over 400 reported cases the Plaintiff has argued in the jurisprudence.
15. In his affidavit, Mr. Warner heavily relies on the publications of "Canuck Law", which is the website run by Alexandra Moore. Mr. Warner, in cross examination, stated that he has known Ms. Moore for approximately 2 1/2 years, spoke to her regularly, and had last spoken to her only two weeks prior to cross examination. Canuck Law and Ms. Moore are the Defendants in a separate action for having, and continue to publish, racist and anti-Semitic, and false allegations of "fraud". This included defamatory remarks that the Appellant is part of the "global Jewish cabal that owns the world", [sic] that he is a terrorist, a mobster, and fraud. Her defamation is summarized in paragraphs 49 and 50 of the Plaintiff's affidavit of March 14,

[11] Compendium of Evidence, cross-examination of Donna Toews, Appeal Book Tab 15, pages 4607-4611

2023.[12]

16. This is further indicia of Mr. Warner's malice and "reckless disregard for the truth" towards the Plaintiff, in his conspiracy with others to injure the Plaintiff and interfere with his economic interests. The non-reputational damage to the Plaintiff is set out at paragraphs 51 and 52 of the Plaintiff's affidavit of March 14th, 2023[13].

17. The Plaintiff's responses to the assertions made by Kip Warner are directly addressed, in his affidavit of March 14th, 2023, at paragraphs 53-94, while those of Dee Gandhi are directly addressed at paragraphs 95-107, and those of Donna Toews are directly addressed at paragraphs 108-112, and those of Federico Fuoco, at 113-123, confirmed by the affidavit of Tanya Gaw[14].

18. Since the issuance of this action, and retention of counsel, by the defendants, Kip Warner and the Society, continued to harass and post defamatory remarks.

19. The Defendants, through their actions, have caused damages to the Plaintiff as follows:

    (a) immense damage to reputation propagating the false statements, lies, an innuendos that: (i) the Plaintiff cannot practice in British Columbia; (ii) that the Plaintiff is "not a constitutional lawyer"; (iii) that the Plaintiff is not competent as a lawyer; (iv) that the Plaintiff "ask for too much money" and is a "greedy lawyer"; (v) that the Plaintiff is a "serial con artist", and "fraudster"; (vi) that the Plaintiff "misled" and is "derelict" in his duties;

    (b) Financial damages to the CRC and in turn the Plaintiff;

    (c) Inducement of breach of his contracts with his clients;

[12] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1725-1726 para. 49 and 50
[13] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1726 – 1727 para. 51 and 52
[14] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1727 – 1760 para. 53 – 123; Affidavit of Tanya Gaw, Appeal Book pages 2609 - 2616

(d) loss of dignity, mental anguish and anxiety, from the vile, hostile, treatment, and threats to his bodily integrity received as a result of the Defendants' statements.

- **Decision of Superior Court – Chalmers, J.**

20. In his decision, Chalmers, J. made the following rulings:

(a) That the Court could not consider the evidence of the text of Lee Turner because it occurred after the filing of the Statement of Claim.[15];

(b) That the Court could not consider the evidence of Alicia Johnson because it was the subject of a confidentiality agreement[16], notwithstanding that this was a contested fact, on issues going to credibility between Warner and Ms. Johnson;[17]

(c) that the expressions in the emails "do not relate to fraud, dishonesty or professional misconduct"[18], except that they do both explicitly and by innuendo, with malice, and that the evidence that Warner, in the text to Lee Turner, a lawyer, that Galati "is a serial con artist and fraudster" confirm the innuendo in the original posts as well as are evidence of malice;

(d) That the evidence of Alicia Johnson,[19]

> [54] As noted earlier in these reasons, it is my view that the statement attributed to Mr. Warner was a confidential statement and is inadmissible. However, if I am wrong about the admissibility of the statement, it is my view that the statement is not defamatory. This is Mr. Warner's opinion. It is in the nature of comment as opposed to a defamatory statement.

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[15] Decision of Chalmers. J. Appeal Book Tab 3, page 23, para. 27 -29
[16] Decision of Chalmers. J. Appeal Book Tab 3, page 23-24, para. 30-35
[17] Supplementary Affidavit of Alicia Johnson, Appeal Book Tab 10 pages 4061-4067, Affidavit of Lee Turner, at Tab 10, pages 3928-3931
[18] Decision of Chalmers. J. Appeal Book Tab 3, page 27, para. 52
[19] Affidavit of Alicia Johnson, Appeal Book Tab 6, pages 2661 - 2665 and Tab 10 pages 4061-4067

Notwithstanding that Ms. Johnson's evidence also sets out statements by Mr. Warner, and also confirms conduct going to the other torts pleaded in the action.

21. In his decision, Chalmers, J., with respect to whether or not the Defendants' statements had a "reckless disregard for the truth", did not consider and weigh the fact that the Defendants, in order to paint the Plaintiff as an unprofessional, greedy, and incompetent lawyer, handpicked and distorted six cases, or minor steps therein, out of 400 reported cases, which is not only a reckless disregard for the truth, but further is an indicia of malice, in its intentional distortion. Nor did Justice Chalmers deal with any of the Plaintiff's evidence in response to that reckless disregard and distortion[20]. The hyperlinks to their statements do not even constitute "half-truths".
22. Justice Chalmers further summarily, and without regard to what test he is using, strikes the other torts pleaded in the Statement of Claim, [21]without regard to the facts pleaded, and evidence led on those torts, and what test is being used: motion to strike test? In which facts pleaded are to be taken as proven? Or a s.137.1 test in which the evidence advanced is to be addressed, which it is not. Justice Chalmers then makes final findings as if this were a motion for summary judgement.
23. Justice Chalmers, in coming to his conclusions, makes palpable errors in findings of fact which are contrary to the evidence, and moreover completely ignore the Plaintiff's non-controverted evidence, such as:

    (a) With respect to CRC:

    > [91] I find that the Plaintiff has not established that he suffered any, much less serious, harm because of the expression. The only identifiable harm was with respect to the donations to CRC. CRC is a corporation and is not a plaintiff in this action. The Plaintiff cannot advance a claim for any loss of donations that may

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[20] Affidavit of Rocco Galati, Appeal Book Tab 6, page 1706, para. 4 Exhibit C at pages 1776-1798

[21] Decision of Chalmers. J. Appeal Book Tab 3, pages 28-29, para. 56 -65

> have been suffered by CRC. **In any event, the Plaintiff did not provide any detail with respect to the donations made to CRC before and after the impugned expression.**[22]

Notwithstanding that the full evidence was in the Plaintiff's motion record, and that the Plaintiff linked the damage to the CRC to his own loss, and did fully set out the obliterating lose to the CRC[23];

(b) Justice Chalmers does not recognize, contrary to Supreme Court of Canada's jurisprudence, that damage to reputation needs not to be qualified, and **alone** can base a claim in defamation[24];

(c) That:

> [79] Mr. Gandhi makes the comment that the Plaintiff wanted "far too much money to get started" and that "nothing much had been accomplished in Ontario" since the claim had been issued. The Plaintiff's clients have allegedly paid $400,000 with respect to the A4C action. By January 2021, six months after the delivery of the VCC action in Ontario, no Statements of Defence had been filed, and the action had not proceeded to the discovery phase. No injunction motion had been brought. The Defendants argue that a person could honestly express the opinion that **$400,000 was too much money to start the A4C action** and that not much had been accomplished in the Ontario action. I agree.[25]

Notwithstanding that the evidence that the $400,000.00 was **not** "to start" the proceeding, but a flat fee for the conduct of the proceeding through trial[26];

(d) That:

> [5] The Plaintiff, Rocco Galati, is a lawyer licensed to practice law in Ontario. Vaccine Choice Canada (VCC) and Action4Canada (A4C) are advocacy groups and have been the Plaintiff's clients since 2015 and 2020 respectively. The Plaintiff is the principal of Canadian Rights Centre Inc. (CRC) which is a corporation which receives funding for COVID-19 litigation. CRC is not a party to this action.[27]

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[22] Decision of Chalmers. J. Appeal Book Tab 3, page 34, para. 91
[23] Affidavit of Rocco Galati, Appeal Book Tab 6 page 1723 para. 46-47, pages 2005- 2026 Exhibits V,W,X,Y
[24] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645 at paragraph 76
[25] Decision of Chalmers. J. Appeal Book Tab 3, page 32, para. 79
[26] Affidavit of Tanya Gaw, Appeal Book Tab 6, page 2610, para. 10, and Appeal Book pages 4238-4239. Pg 1734 para 66
[27] Decision of Chalmers. J. Appeal Book Tab 3, page 15, para. 5

Notwithstanding that the Plaintiff is one of three (3) operational Directors of the CRC, was established in **November, 2004,** and was not, as the Defendants' alleged, and Court accepted, there to "receive funding for Covid-19 Litigation";

(e) moreover, throughout the decision, while Justice Chalmers accepts, contrary to the evidence, the Defendant's assertions, Justice Chalmers does not process nor weigh, or refer to any of the Plaintiff's evidence, even where uncontradicted, and in fact applies different yardsticks of measurements, which are asymmetrical, as between the parties.

PART III- ISSUES AND LAW

- **THE ISSUES**

24. Whether the Court erred, in law, in misapplying the test and jurisprudence on an Anti-SLAPP motion?

25. Whether the Court erred, in law, by exceeding jurisdiction, on an Anti-SLAPP motion, and usurping the function and jurisdiction of a trial judge, with respect to the determinations made on the motion, beyond the purview of the motions judge in accordance with the jurisprudence?

26. Whether the Court erred, in law, in applying different, asymmetrical standards in assessing evidence and the law, as between the Parties on the same issue(s) contrary to the jurisprudence in **R. v. Anwar [2017] 1 SCR 83 and R. v. Phan (2013) ONCA 787**, and further erred in misapplying the terms of the **Libel and Slander Act?**

27. Whether the Court erred, in law, in ruling that the evidence, on an Anti-SLAPP motion, is frozen as of the date of the statement of claim, with respect to the Plaintiff responding party, but fully open post pleading, for the Defendants moving parties?

28. Whether the Court erred, in law, in making palatable errors, in making final findings of fact at all, and further making findings of fact in disregard to the evidence?

- **THE LAW**

29. It is respectfully submitted that Chalmers, J. erred, and exceeded jurisdiction, on applying the test, under s.137.1 of the ***Courts of Justice Act***.

- **The Preliminary nature of the screening test under s.137.1**

30. In recent Ontario Court of Appeal case of ***Mondal v. Kirkconnell, 2023 ONCA 523***[28]**,** fully and extensively argued before Justice Chalmers, the Ontario Court of Appeal endorsed and re-iterated the law, from the Supreme Court of Canada, and which Justice Chalmers ignored in his judgement as follows:

(a) That.

> [29] … As the Supreme Court noted in 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22, [2020] 2 S.C.R. 587, at paras. 38, 50-51, **motions under s. 137.1 are situated between motions to strike, which are decided solely on the pleadings, and summary judgment motions, which involve a more extensive record and ultimate adjudication of the issues.** Section 137.1 motions are resolved on the basis of limited evidence and corresponding procedural limitations.
>
> [30**]** **The preliminary nature of s. 137.1 motions is apparent in the burdens imposed on the plaintiff (responding party to the motion). At the merits-based hurdle under s. 137.1(4)(a), the plaintiff need establish only grounds to believe – "a basis in the record and the law"** – for finding that the proceeding has substantial merit or that the defendant has no valid defence to the underlying proceeding: Pointes, at para. 39. At the public interest hurdle under s. 137.1(4)(b), **the plaintiff need not prove harm or causation; the court is tasked at this stage with drawing inferences of likelihood in respect of the existence of harm, its magnitude, and the relevant causal link: at paras. 70-71. Thus, a s. 137.1 motion is not an occasion for a "deep dive" into the evidence; only a limited assessment of the evidence is appropriate: at para. 52.**

(b) That,

> [50] As noted above, **the bar cannot be set too high at the merits-based hurdle. The plaintiff is not required to establish that the defendant has no valid defence to an action.** Section 137.1 **requires** only that the **plaintiff establish that there are *grounds to believe*** that the defendant has no valid

[28] ***Mondal v. Kirkconnell, 2023 ONCA 523***

defence. This is consistent with the early stage of proceedings in which the motion is brought.

(c) With respect to malice undercutting defenses, and merits-based test that,

> [54] Malice includes spite or ill-will **but may also be established by showing that a comment was made with an indirect motive or ulterior purpose, dishonestly, or in knowing or reckless disregard for the truth:** Walsh Energy Inc. v. Better Business Bureau of Ottawa-Hull Incorporated, 2018 ONCA 383, 424 D.L.R. (4th) 514, at para. 33; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, at para. 145.
>
> …
>
> [56] This argument must be rejected. **The appellant was required to** establish only, **on a standard less than the balance** of probabilities, **grounds to believe the respondents had no valid defence**. … As this court put the matter in Lascaris v. B'nai Brith Canada, 2019 ONCA 163, 144 O.R. (3d) 211, at para. 33, leave to appeal refused, [2019] S.C.C.A. No. 147:
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>> The burden on the appellant under s. 137.1(4)(a)(ii) is not to show that a given defence has no hope of success. To approach s. 137.1(4)(a)(ii) in that fashion risks turning a motion under s. 137.1 into a summary judgment motion.
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> …
>
> [58] **The significance of this conclusion should not be overstated**. The merits-based hurdle is considered at an early stage in the proceedings and **the burden on the plaintiff is not a high one.** Clearing that hurdle means only that Evans-Bitten's s. 137.1 motion fell to be determined at the public interest hurdle, which is addressed below.

(d) And, with respect to damages, that:

> [76] **The starting point is general damages, which are presumed to follow from defamatory expression. The presumption of such damages does not establish their magnitude**: Hansman, at para. 67. But reputational harm is a relevant consideration in determining whether, along with monetary damages pleaded, the harm is sufficiently serious. **In Bent, at para. 148, the Supreme Court emphasized the importance of professional reputation, even when it is not quantifiable at an early stage in the proceedings**, noting that harm to position and standing in a professional community may have the effect of exacerbating the harm suffered.

31. The Appellant states that not only did Justice Chalmers **not** apply this binding case from

the Ontario Court of Appeal to the facts and evidence before him, Justice Chalmers completely ignored it, and thus erred in law.

32. It is submitted that Justice Chalmers exceeded jurisdiction by making **final** factual and legal determinations, on heavily contested factual issues, much of them hinging on credibility, as well as questions of law, contrary to the statutory test under s.137.1, as well as the binding jurisprudence from the Supreme Court of Canada and Ontario Court of Appeal, which test Justice Chalmers clearly misapplied in disregard to the facts and evidence.

- **The clear jurisprudence preceding the Ontario Court of Appeal decision in** ***Mondal v. Kirkconnell, 2023 ONCA 523***

33. In the companion case to **1704604 Ontario Ltd. v. Pointes Protection Association 2020 SCC 22.** Supreme Court of Canada, **Bent v. Platnick, 2020 SCC 23** decided at the same time, and applying the principles delineated in **1704604 Ontario Ltd. v. Pointes Protection Association**, by the Supreme Court of Canada, is on the facts an law on all four with the within action and motion.

- **Threshold Burden – s.137.1 (3)**

34. The Plaintiffs states that the defamatory statements, fortuitous and personal attacks, in the within action are the only substance of the statements and Defendants' comments. The publications are nothing but "stings". The Plaintiff, **for the arguments delineated below** in this factum, states that there is no "public interest" in stand-alone defamatory, malicious, fortuitous and unnecessary personal attacks, and perpetual personal attacks on professionalism and false allegations of fraud targeting the private practice of a private lawyer, and that the Defendants fail on their **in limine** onus to set out "public interest" in their publications and statements.

- **Merits-Based Hurdle – s.137.1 (4) (a)**

35. With respect to the Plaintiffs' onus under these provisions, the Supreme Court of Canada, in **Bent v. Platnick** ruled as follows:

> [87] In *Pointes Protection*, **this Court clarifies the fact that unlike s. 137.1(3), which requires a showing on a balance of probabilities, s. 137.1(4)(a) expressly contemplates a "grounds to believe" standard instead**: para. 35. **This requires a basis in the record and the law** — taking into account the stage of the litigation — **for finding that the underlying proceeding has substantial merit and that there is no valid defence**: para. 39.
>
> [88] I elaborate here that, in effect, **this means that *any* basis in the record and the law will be sufficient**. By definition, **"*a* basis" will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief.** But the "crux of the inquiry" is found, after all, in . 137.1(4)(b), which also serves as a "robust backstop" for protecting freedom of expression: *Pointes Protection*, at paras. 48 and 53[29]

36. The Plaintiff states that he does not "take too much money", is not "greedy", is not incompetenet, is not a "**serial con artist**", nor a "**fraudster**", and that this is a basis alone for substantial merit and for which there is no valid defence for which the action should proceed. The later malicious indefensible and false statements of criminal conduct made in texts to Lee Turner, lawyer, and to Alicia Johnson orally, amplify and solidify the clear innuendo of the previous statements of Mr. Warner and Gandhi , as well as a manifestly malice which negates his defences.

37. It is not a matter of public interest where the expression is nothing more than a "sting", a stand-alone defamatory remark attacking or calling into question the person or the competence, professionalism, integrity, and honesty of that person, as ruled by the Ontario Court of Appeal, in **Sokoloff v Tru-Path Occupational Therapy Services**

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[29] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraph 87, 88

Ltd., 2020 ONCA 730[30].

- **Substantial merit – s. 137.1 (4) (a) (i)**

38. With respect to this onus, the Supreme Court of Canada further ruled:

> [90] In *Pointes Protection*, this Court defined "substantial merit" as 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": ** para. 49.
>
> 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.[31]

As in **Bent v. Platnick** the Plaintiffs state that there is no issue that these criteria are met in this case.

39. The Supreme Court of Canada further stated:

> [98] … **As I mentioned above, specific proof of harm is not necessary to establish a defamation claim, so I leave a more extensive analysis of the harm suffered by Dr. Platnick for consideration under** s. 137.1(4)(b) where it is better suited, as the inquiry there depends on whether the harm is sufficiently serious to allow the proceeding to continue.
>
> **[99] For now, the foregoing is sufficient to show that the third criterion for a defamation claim is met: the impugned words were defamatory in the sense that they would tend to lower Dr. Platnick's reputation in the eyes of a reasonable person.**
>
> **[100] Ultimately, Dr. Platnick's claim quite clearly satisfies the three criteria for making out a claim for defamation. His claim is legally tenable and supported by evidence that is reasonably capable of belief, such that it can be said to have a real prospect of success. Thus, there are grounds to believe that Dr. Platnick's defamation claim has substantial merit under s. 137.1(4)(a)(i).**[32]

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[30] Sokoloff v Tru-Path Occupational Therapy Services Ltd., 2020 ONCA 730 at paragraphs 18,19,20 32
[31] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraph 90
[32] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 97-100

The Plaintiff states that his case is, on the facts, even stronger grounds then in **Bent v. Platnick.** The Plaintiff has been targeted, with "reckless disregard to the truth", to be an incompetent, unprofessional lawyer who by expressed words and innuendo is a "serial con artist" and a "fraudster", all this uttered with malice. This malice is not just evident in the very words, but in Kip Warner's attempt to enlist Alicia Johnson to convince the Plaintiff's clients to fire the Plaintiff, report him to the LSO, and have the Plaintiff criminally charged[33], as well as his texts to Lee Turner.

- **No Valid Defence – s. 137.1 (4) (a) (ii)**

40. With respect to this onus, the Supreme Court of Canada ruled:

> [101] Section 137.1(4)(a)(ii) **requires Dr. Platnick to show that there are "grounds to believe" that Ms. Bent has "no valid defence" to his defamation proceeding.** As this Court states in *Pointes Protection*, at para. 60, **this inquiry "[m]irror[s]" the one under s. 137.1(4)(a)(i):** in other words, Dr. Platnick **must show that there are grounds to believe that Ms. Bent's defences have "no real prospect of success". In effect, "substantial merit" and "no valid defence" are "constituent parts of an overall assessment of the prospect of success of the underlying claim":** para. 59.
>
> [102] This makes sense because it reflects how defamation actions, like the one here, are typically litigated. **At trial, the plaintiff must first make a *prima facie* showing of defamation. This is what "substantial merit" captures**: *Pointes Protection*, at para. 59. **The burden then shifts to the defendant to advance a defence to escape liability:** *Torstar*, at paras. 28-29. **This is what "no valid defence" captures**: *Pointes Protection*, at para. 59.

- **Justification/Truth**

41. With respect to the justification defence, the Supreme Court of Canada ruled that:

> [107] **Once a *prima facie* showing of defamation has been made, the words complained of are presumed to be false**: *Torstar*, at para. 28. **To succeed on the defence of justification, "a defendant must adduce evidence showing that the statement was substantially true"**: para. 33. **The burden on the defendant is to prove the substantial truth of the '"sting', or main thrust,**

[33] Affidavit of Alicia Johnson, Appeal Book Tab 6 page 2661, Supplementary Affidavit of Alicia Johnson, Appeal Book Tab 10 page 4061

> **of the defamation"**: Downard, at §1.6 (footnote omitted**). In other words, "[t]he defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true"**: Downard, at §6.4.[34]

The Plaintiff states that is clearly present in the within action. Justice Chalmers ignored the Supreme Court of Canada jurisprudence in applying the test.

42. The Supreme Court of Canada went on to say that:

> [108] **Of particular importance here is the fact that partial truth is not a defence. If a material part of the justification defence fails, the defence fails altogether**: R. E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)), at pp. 10-88 to 10- 90 ("*Brown on Defamation*"). However, a defendant may justify only part of a libel "if that part is severable and distinct from the rest": p. 10-89 (footnote omitted). **This depends on the allegation being separate and self-contained rather than an "ingredient or part of a connected whole"**: p. 10-90 (footnote omitted).[35]

In the within case there is "grounds to believe", and "reasonably capable of belief", that the Plaintiff can succeed on at least **one of the "stings",** which he clearly can based on the statements, and law. **Again, Justice Chalmers ignored the binding Supreme Court of Canada jurisprudence.** Justice Chalmers finding that the assertions were backed up by hyperlinks, makes a final determination that they are "true". They are not. They are not even "partial truths" and Justice Chalmers does not deal with the Plaintiffs evidence in this respect.

43. Applying the facts, the Supreme Court of Canada further ruled:

> **[109] Applied to the facts of this case, the "sting" of the words is an allegation of professional misconduct**. In her email, Ms. Bent essentially alleges that Dr. Platnick either misrepresented or altered the opinions of other medical experts with a view to depriving a claimant of a catastrophic impairment classification to which he or she was entitled**. In effect, she alleges dishonesty and serious professional misconduct**. As mentioned above, Ms. Bent appears to accept that this is the "sting", or "innuendo", of the words in her email. **Therefore, she would have to lead evidence that the**

[34] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 107
[35] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 108

> **allegation of professional misconduct is substantially true in order for her defence of justification to succeed at trial**. Here, on a s. 137.1 motion, Dr. Platnick must show that there are grounds to believe that Ms. Bent has no real prospect of success in making that showing.
>
> **[110]In effect, then, the truth of just one of Ms. Bent's statements will be insufficient for the defence to succeed**….[36]

The Plaintiff states that the same holds in the within action. And further that:

> [118] **Thus, as the foregoing demonstrates, there is *a* basis in the evidentiary record to support a finding that the allegation that "Dr. Platnick changed [a] doctor's decision" is not substantially true. That basis is legally tenable and supported by evidence that is reasonably capable of belief**: *Pointes Protection*, at para. 50….
>
> **[120] In conclusion, I find that there are grounds to believe that Ms. Bent's defence of justification has no real prospect of success. As I established above, she would in fact have to justify *both* of the statements she made, as both would appear to make up constituent parts of the "sting", which is that Dr. Platnick is guilty of professional misconduct**. As I noted, there **are grounds to believe** that the statements are not severable, **not only in light of a common sense inference that ties them to a single sting, but also in light of Ms. Bent's express language connecting them**. Insofar as there is a basis in the record to support a finding that Ms. Bent's second statement — that Dr. Platnick "changed [another] doctor's decision from a marked to a moderate impairment" — is not substantially true, and in light of my conclusion that such a basis exists, then the defence of justification is foreclosed *at this stage*.
>
> **It must be borne in mind here that "grounds to believe" simply requires *a* (single) basis in the record and the law to support this finding**. The Dua Letter provides such a basis in addition to the evidentiary record that existed prior to that letter.[37]

Again, which is applicable to the within action, more than a single basis exists. **Justice Chalmers ignored this evidence and jurisprudence.**

- **Qualified Privilege**

44. With respect to the qualified privilege defence the Supreme Court of Canada rules:

> **[121] An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal,**

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[36] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 109-110

[37] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 118-120

> **to publish the information in issue to the person to whom it is published"** ***and*** **the recipient has "a corresponding interest or duty to receive it"**: Downard, at §9.6 (footnote omitted). Importantly, **"[q]ualified privilege attaches to the occasion** upon which the communication is made, **and not to the communication itself"**: *Hill*, at para. 143; *Botiuk*, at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": *Hill*, at para. 144; *Botiuk*, at para. 79. **However, the privilege is** ***qualified*** **in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind** the words was malice, such as where the speaker was reckless as to the truth of the words spoken**; or where the scope of the occasion of privilege was exceeded** (Downard, at §1.9; see also *Hill*, at paras. 145-47; *Botiuk*, at paras. 79-80).[38]

The Plaintiff states that the Defendants were reckless in their targeting the Plaintiff in an obsessively negative and distorted fashion in depicting him as incompetent, unprofessional, dishonest, and a fraud. The Supreme Court of Canada ruled:

> [128] **Qualified privilege may be defeated "<u>when the limits of the duty or interest have been exceeded</u>"**: *Hill*, at para. 146; *Botiuk*, at para. 80. **This is the case when the information communicated in a statement is not relevant to the discharge of the duty or the exercise of the right giving rise to the privilege, or when the information is not reasonably appropriate to the legitimate purposes of the occasion**: Downard, at §9.91; *Botiuk*, at para. 80; *Hill*, at
> paras. 146-47; *RTC Engineering Consultants Ltd. v. Ontario (Solicitor General)* (2002), 58 O.R. (3d) 726 (C.A.), at para. 18.
>
> [132] **<u>Lastly, the record reveals a lack of investigation or reasonable due diligence</u>** by Ms. Bent **<u>prior to making her serious allegations</u>**. [39]

The Plaintiff states that not only did the Society's website "FAQ" exceed this privilege but coupled with the email to Mr. Dicks, the Defendants went out their way to depict the Plaintiff as incompetent, unprofessional, and dishonest and a fraud. The Defendants' assertion that they were responding to queries as to the connection between them as the Plaintiff rings false. They could have simply stated that there was

[38] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 121
[39] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 128 and 132

no connection between them and the Plaintiff and left it there. Furthermore, their assertions of being flooded with queries and complaints about the Plaintiff also rings false as they could only produce one (1)[40] such query/complaint on cross-examination. Justice Chalmers ignored this binding jurisprudence.

The Supreme Court of Canada concludes with:

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

This was re-iterated by the Ontario Court of Appeal in **Canadian Union of Postal Workers and B'nai Brith Canada, 2021 ONCA 529**.[41] And further that malice can be gauged or found on the face of the defamation remarks themselves:

> [122]"By the end of the first quarter of the 19th century, a plea of malice became a mere formality since it was held that **malice could be implied from the mere publication of a defamatory remark.** Technically the plaintiff need not enter a plea of malice to sustain a cause of action in libel and slander, but the practice of doing so has continued. "[42]

45. The Supreme Court of Canada, in ***Bent v. Platnick,*** further stated:

> [137]….**It seems that Ms. Bent's email was sent without any investigation, even in the simplest sense of communicating with Dr. Platnick or checking her own records and files from a case that had taken place three years earlier**: C.A. reasons, at para. 92; A.R., vol. XIII, at p. 6. **In fact, Ms. Bent had never spoken to or met Dr. Platnick, yet she alleged that he had falsified a report simply because she had received two reports with an**

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[40] Compendium of Evidence, Appeal Book cross-examination of Kip Warner, at Tab 14, page 4671
[41] Canadian Union of Postal Workers v. B'nai Brith Canada, 2021 ONCA 529 **at para 31**
[42] Hiltz and Seamone Co. Ltd. v. Nova Scotia (Attorney General) et al., 1999 NSCA 22 (CanLII) at paragraph 122.

> **apparent discrepancy between them**…
>
> [138] **In any case, I conclude that, even assuming that qualified privilege attaches to the occasion upon which Ms. Bent's communication was made, there are grounds to believe that the defence is not valid under** s. 137.1(4)(a)(ii) because it may be defeated by virtue of Ms. Bent having exceeded the scope of the privilege, and perhaps even by her reckless disregard for the truth (i.e. malice). **My colleague would summarily dismiss Dr. Platnick's claim on this prong, definitively foreclosing even the opportunity for him to vindicate his reputation at a trial where ultimate assessments of credibility can be made and the aforementioned evidence can be properly tested. Instead, my colleague chooses to accept Ms. Bent's evidence over Dr. Platnick's at this early stage. With respect, this is not what is called for on a s. 137.1 motion.** As this Court makes clear in *Pointes Protection*, **Dr. Platnick needs to have established only a basis in the record and the law, taking into account the stage of the litigation, to support a finding that Ms. Bent's defences do not weigh *more* in her favour.** For the purposes of this motion, and for the reasons explained above, I am satisfied that there is such a basis here.[43]

The Plaintiff states that this also applies to the within action, and that **Justice Chalmers ignored this jurisprudence and did NOT deal with ant of the above, which was before him and argued by the Plaintiff**.

46. It is worth noting that, in the within action, all the facts on the findings by the Supreme Court of Canada **Bent v. Platnick** are more than present here in the within action. The Defendants, engaged in reckless statements and innuendo, without sober investigation, in a singularly distorted and targeted exercise of painting the Plaintiff as generally incompetent, unprofessional, dishonest, and a "fraud". Any defence of qualified privilege, on fair comment, or responsible publication is therefore defeated. **Justice Chalmers does not deal with this argument nor the evidence to support it.**

- **Fair comment & Responsible Communication/Publication**

47. It is submitted that the Defendants, in the circumstances, cannot make the Defence of Fair Comment, and furthermore any such defence is defeated by malice. The defence of

[43] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 135-136-137-138

Fair Comment, as delineated by the Supreme Court of Canada, is not available to the Defendants:[44] It is further submitted that the Defendants cannot meet the Defence of Responsible Communication, as delineated by the jurisprudence and is moreover defeated by malice in these circumstances.[45]

48. It is submitted that this defence cannot be made, and that there is grounds to believe that it cannot succeed, when due regard is had to the following facts and evidence: (a)The evidence of malice; (b) Lack of factual basis for the comments; and (c) presence of "reckless regard for the truth, and improper investigation and lack of responsible due diligence.[46]

49. The Ontario Court of Appeal has ruled, consistent with other jurisprudence, that:

> [33] I thus conclude that the motion judge had a basis in the record to find grounds to believe that the appellants' defences would fail. He was entitled to find that there was **evidence that the appellants acted on assumptions without exercising due diligence, and that this may be fatal to their defences of responsible communication and fair comment.** He was also entitled to find that there was evidence of malice that would undermine the appellants' defences.[47]

- **Damages caused by Defamation**

50. The Supreme Court of Canada went on to state and rule that:

> [144] **General damages are presumed in defamations actions, and this alone is sufficient to constitute harm**: *Pointes Protection*, at para. 71; *Torstar*, at para. 28. However, **the magnitude of the harm will be important in assessing whether the harm is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression**: *Pointes Protection*, at para. 70. General damages in the nominal sense will ordinarily not be sufficient for this

[44] WIC Radio Ltd. v. Simpson, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 31.
[45] **Canadian Union of Postal Workers v. B'nai Brith Canada, 2021 ONCA 529,** at paragraph 27; B.W. (Brad) Blair v. Premier Doug Ford, 2020 ONSC 7100 , at paragraph 44; Grant *v.* Torstar Corp., 2009 SCC 61, [2009] 3 S.C.R. 640 **at para 105, 109, 111, 113, 114, 119-120**
[46] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645
[47] Canadian Union of Postal Workers v. B'nai Brith Canada, 2021 ONCA 529 **at para 33**

purpose.[48]

And the Supreme Court of Canada, in **Bent**, strongly emphasized that reputational harm is at the highest scale of protection[49]:

> **[148] Thus, not only must the monetary harm pleaded by Dr. Platnick be considered in determining whether the harm is sufficiently serious, but so too must the reputational harm to Dr. Platnick's professional reputation be considered, even if it is not quantifiable at this stage**: *Pointes Protection*, at para. 71**. Indeed, the damaging effects that a defamatory remark may have on a plaintiff's "position and standing" in the professional community exacerbate the harm suffered as a result**:…..
> …
>
> [150] **Ultimately, the question here relates to the *existence* of harm, not to whether that harm was justifiably inflicted or suffered. Once the existence of harm is established, the next question depends on whether that harm was suffered *as a result* of the defendant's expression**…[50]

The Appellant states that the evidence is that, as a result of the defamatory publications the Plaintiff was subject to hostile and viscous reaction from the public at large, including threats to bodily harm, as well as an obliteration of donations to the Constitutional Rights Centre (CRC) as set out in the affidavit evidence.[51] **This evidence was not only ignored by Justice Chalmers, but stated not to exist, which is a palatable and blatant error.**

- **Public Interest Balance**

51. In determining the public interest balance, the Supreme Court of Canada, in **Bent v. Platnick** went on to rule:

> [163] **… in *Hill*, this Court noted that "defamatory statements are very tenuously related to the core values which underlie** s. 2 **(*b*)"**: para. 106. **In consistent fashion, this Court finds in *Pointes Protection* that there will be less of a public interest in protecting a statement that contains "gratuitous personal attacks" and that the "motivation behind" the**

[48] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 144
[49] ***Mondal v. Kirkconnell, 2023 ONCA 523***, at para and Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 146-147
[50] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 146-147-149-150
[51] Affidavit of Rocco Galati, Appeal Book Tab 6 page 1723, para. 46-47, pages 2005- 2026Exhibits V,W,X,Y

> **expression will be relevant to the inquiry**:
> paras. 74-75 (emphasis omitted).
>
> [164] **Accordingly, in determining the public interest** in protecting Ms. Bent's expression**, I need to consider the fact that she made a personal attack against Dr. Platnick, which cast doubt on his professional competence, integrity, and reputation. The personal attack was launched by Ms. Bent even though she and Dr. Platnick had never met or had a single discussion. It bears on my analysis that Ms. Bent never reached out to Dr. Platnick to confront him or to investigate her allegations against him.**[52]

And further that allowing the case to proceed "will not deter others from speaking out", "but deterring others unnecessarily singling out an individual that is extraneous or peripheral to the public interests":[53] None of the Defendants ever had any prior direct contact nor reached out to the Plaintiff. Their expressions were "gratuitous personal attacks" made in "reckless disregard to the truth". **Justice Chalmers completely fails to consider, let alone, weigh the evidence of the Plaintiff, or consider it, except to misstate it, in his balance. Most importantly, Justice Chalmers fails to consider and weigh the impact** of the clear and targeted interference of the solicitor-client relationship between a private lawyer and private clients albeit litigating issues of public importance, to the public interest of the administration of justice as pleaded and argued, namely the extremely high level of protection accorded to this relationship and its inseparable tie to the Rule of Law, in the jurisprudence[54].

52. In weighing the public interest, the Supreme Court of Canada concludes:

> **[171] This line of reasoning by my colleague is, respectfully, unmoored from a proper s. 137.1(4)(b) analysis. This Court in *Pointes Protection* squarely rejects any inquiry into the hallmarks of a SLAPP: "the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP"** (para. 79)…..

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[52] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 163-164
[53] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 166-167
[54] **Canada v. Federation of Law Societies [2015] 1 SCR 401, at paragraph 81-84, 97**

> [172] In light of the open-ended nature of s. 137.1(4)(b), courts have the power to "scrutinize what is really going on in the particular case before them": *Pointes Protection*, at para. 81. **On its face, this is not a case in which one party is vindictively or strategically silencing another party; it is a case in which one party is attempting to remedy seemingly legitimate harm suffered as a result of a defamatory communication. This is not the type of case that comes within the legislature's contemplation of one deserving to be summarily dismissed at an early stage, nor does it come within the language of the statute requiring such a dismissal.**[55]

The Plaintiff states, contrary to the Defendants' assertions, and decision of Justice Chalmers that the same applies to the within action.

- **Conspiracy**

53. It is respectfully submitted that, on the evidence, there are grounds to believe, that the conspiracy cause of action has substantial merit when due regard is had to:

    (a) The relationship between Warner, Gandhi, and Toews, and the co-ordination of Gandhi's defamatory e-mail to the journalist Dicks;

    (b) The website of the Society in Warner making false statements and encouraging members of the public to report the Plaintiff to the LSO if they have "concerns", albeit with admitted no knowledge of any wrong-doing;

    (c) The attempts by Warner to enlist Alicia Johnson to convince the Plaintiff's clients to fire, report to the LSO, and have the Plaintiff criminally charged for fraud;

    (d) The depravingly false and malicious statements made to Lee Turner that the Plaintiff is a "serial con artist" and a "fraudster", and that the Plaintiff has never won an important case.

54. It is further submitted that the law further recognizes the concept of overlapping conspiracies in that tort, as well as in the criminal law.

[55] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 171-172

55. Justice Chalmers further ignores and does not address the Plaintiff's submissions, and evidence supporting those submissions, on the conspiracy tort pleaded[56].

56. Justice Chalmers further ignores and does not address the Plaintiff's submissions and evidence supporting those submissions, contained in paragraphs 59 to 73 of the Plaintiffs factum before the Court[57].

- **The Defendants' motion to strike the evidence of Lee Turner and Alicia Johnson**

57. With respect to the affidavit and evidence of Lee Turner, the Plaintiff states, with respect, that this is a second glaring misrepresentation by Mr. Warner to the Court.

58. On cross-examination on his affidavit, Mr. Warner refuses to shed any light on the occasion of the privilege. In fact, his answers confirm NO occasions of privilege could be concluded or inferred. An occasion of solicitor-client privilege is not a privilege of convenience because the person wishes it so, to protect himself from calling the Plaintiff a "serial con artist", a "fraudster", and stating that the Plaintiff has **never** won an important case, which are bald, malicious, and false statements made to another solicitor. These statements are not covered by any solicitor-client privilege and Mr. Warner's invention of the privilege is a simple attempt to mislead the Court.

59. In response to Mr. Warner's assertion of his solicitor-client privilege, the lawyer in question, Mr. Lee Turner, categorically denies Kip Warner's assertions, as quoted and set out above in the within factum and in the evidence[58].

60. With respect to Alicia Johnson's affidavit, she denies that her affidavits are in breach of

[56] Plaintiffs Factum before the Court, at Tab 12 of the Appeal Book at pages 4161 - 4163, at para 46-52
[57] Plaintiffs Factum before the Court at Tab 12 of the Appeal Book at pages 4166 - 4171, at para 59-73
[58] Affidavit of Lee Turner, at Tab 10 Appeal Book pages 3928-4059

the NDA, nor does the terms and scope of the agreement support an assertion of its breach[59]. Furthermore, the conduct of Mr. Warner would vitiate any such agreement as being contrary to public policy.

61. It is thus admitted that, for the purposes of this motion, no privilege can be established so as to strike the evidence of the text messages in which Kip Warner calls the plaintiff a "serial con artist", a "fraudster", and that the Plaintiff has never won an important case. Nor can the evidence of Ms. Alicia Johnson be struck. Any issues of credibility on the issues are a matter for trial, or summary judgement motion.

62. At orbiting best, there is a credibility battle between Kip Warner, who has never retained Mr. Turner, nor ever been represented by Mr. Turner, and Mr. Turner himself. The same holds with respect to Ms. Johnson. Such a credibility battle cannot be resolved, and the issue determined on this motion for the reasons set out in **Bent v. Platnick**, where the Supreme Court stated:

> [138] **In any case, I conclude that, even assuming that qualified privilege attaches to the occasion upon which Ms. Bent's communication was made, there are grounds to believe that the defence is not valid** under s. 137.1(4)(a)(ii) because it may be defeated by virtue of Ms. Bent having exceeded the scope of the privilege, and perhaps even by her reckless disregard for the truth (i.e. malice). **My colleague would summarily dismiss Dr. Platnick's claim on this prong, definitively foreclosing even the opportunity for him to vindicate his reputation at a trial where ultimate assessments of credibility can be made and the aforementioned evidence can be properly tested. Instead, my colleague chooses to accept Ms. Bent's evidence over Dr. Platnick's at this early stage. With respect, this is not what is called for on a s. 137.1 motion.** As this Court makes clear in *Pointes Protection*, **Dr. Platnick needs to have established only a basis in the record and the law, taking into account the stage of the litigation, to support a finding that Ms. Bent's defences do not weigh *more* in her favour.** For the purposes of this motion, and for the reasons explained above, I am satisfied that there is such a basis here.[60]

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[59] Affidavit of Alicia Johnson, Appeal Book Tab 6 page 2661, Supplementary Affidavit of Alicia Johnson, Appeal Book Tab 10 pages 4062,

[60] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraph 138

Furthermore, it is well-established law that issues of credibility require **viva voce** evidence and cannot be determined on a paper record. The Supreme Court of Canada has made it clear, that natural/fundamental justice requires an oral hearing when credibility is an issue as it was here, as between Kip Warner and Lee Turner, and Ms. Johnson, wherein the Supreme Court of Canada ruled in ***Singh***, that **an oral hearing**, is required for credibility issues, **not** a paper record[45]. Similarly, the Ontario Court of Appeal, in ***R. v. Jetco Manufacturing Ltd. and Alexander*** **(1987), 57 (O.R) 2d 776,** and ***Regina v. B.E.S.T. Plating Shoppe Ltd. and Siapas*****,** **[1987] O.J. No. 165,** made the same ruling. In **Singh**, the Supreme Court of Canada ruled:

> [59] … **In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing.** Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, at pp. 806-08 (per Ritchie J.) **I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.** [61]

- **Treatment of Evidence and Law, Jurisdictional and Error of Law**

63. It is respectfully submitted that Justice Chalmers applied a different treatment of the evidence and law on the motion in that:

(a) he refused to take into account any evidence of the Plaintiff which postdated the issuance of the Statement of Claim, such as the texts to Lee Turner calling the Plaintiff a "serial con artist" and "fraud", while accepting and relying on post-statement of claim evidence tendered by the Defendants, and relying on it for his decision;

(b) applying the law, when in favour of the Defendants, in a summary and perfunctory

[61] ***Singh v. MEI [1985] S.C.R. 177 (SCC) at para. 59.***

fashion, but not referring to, nor mentioning any law or jurisprudence put forth by the plaintiff, in applying the test under S.137.1 of the *Courts of Justice Act*, or to other applicable, **binding jurisprudence**;

And thus erred, as set out by the Supreme Court of Canada in **R. v. Anwer**;

> 6. In our respectful view, the materially different levels of scrutiny to which the evidence of the two experts was subjected — none for the Crown expert and intense for the defence expert — was unwarranted, and it tended to shift the burden of proof onto the appellant[62].

And as summarized by the Ontario Court of Appeal in **R. v. Phan (2013) ONCA 787** at paragraphs 30 - 31:

> [30] Subjecting the evidence of the defence to a higher or stricter level of scrutiny v than the evidence of the Crown is an error of law…
>
> [31] In the event of such an error, the deference normally owed to the trial judge's credibility assessment is generally displaced. This court, in *Owen*, expressed this in the following passage, at para. 3:
>
> > While an appellate court must defer to a trial judge's assessment of credibility, intervention is appropriate where a trial judge's reasons reflect legal error in the method used to assess credibility. In particular, this court has held that the application of a stricter standard of scrutiny to the evidence of an accused than that used to assess the evidence of Crown witnesses amounts to legal error justifying appellate intervention.[63]

(c) It is further submitted that Justice Chalmers further exceeded jurisdiction in making final determinations going way past the "grounds to believe" test under S. 137.1, and final determinations of fact, largely and almost exclusively of contested facts, largely hinging on issues of credibility, contrary to the test set up by the Supreme Court of Canada in **Platnick** cited above, in the Supreme Court of Canada of Singh, and Ontario Court of Appeal in ***R. v. Jetco Manufacturing Ltd. and Alexander* (1987), 57**

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[62] **R. v. Awer [2017] 1 SCR 83, at paragraph #6**

[63] **R. v. Phan (2013) ONCA 787** at paragraphs 30 - 31

(O.R) 2d 776, and ***Regina v. B.E.S.T. Plating Shoppe Ltd. and Siapas*****, [1987] O.J. No. 165.**

- **Costs**

64. On the issue of costs, the Plaintiffs seek leave on costs, and further submit, on the basis of the submissions made on costs[64], that costs were not warranted in this case **regardless of outcome**, due to the statement of "serial con artists", and "fraud", and that the costs are excessive, based on this Court's ruling in: **Park Lawn Corporation v. Kahu Capital Partners Ltd., 2023 ONCA 129** wherein this Court ruled:

> [39] With this direction in mind and recognizing that an anti-SLAPP motion is meant to be efficient and economical, I would suggest that, as a guideline, the costs of such a motion **should not generally exceed $50,000 on a full indemnity basis**, although there will be exceptions and motion judges always have the power **to award less**, more **or nothing** as they see fit in the circumstances of each case.[2] If the parties and the motion judge focus on the purposes that animate the anti-SLAPP provision, the inquiry will not generally be a difficult one for a motion judge. Indeed, typically the conclusion should be obvious and one readily reached by a motion judge[65].

PART IV- ORDER REQUESTED

65. The Appellant therefore respectfully requests:

(a) that the decision of Chalmers. J. be set aside;

(b) that the matter proceed to trial/summary judgement motion;

(c) (i) costs of the motion and the within appeal in favour of the Plaintiff;

(ii) or, in the alternative, no costs to the Defendants regardless of outcome;

(d) such other or further relief as this Honourable Court deems fit.

All of which is respectfully submitted.

Dated this March 1st, 2024

Rocco Galati, B.A., LL.B., LL.M

[64] Cost Submissions, Appeal Book Tab 16, page 4791
[65] Park Lawn Corporation v. Kahu Capital Partners Ltd., 2023 ONCA 129

CERTIFICATE

I, Rocco Galati. lawyer for the Appellant hereby certify that:

(i) An order under Rule 61.09(2) is NOT required; and

(ii) The Appellant's oral argument, not including Reply, will take three (3) hours

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Schedule "A"

AUTHORITIES TO BE CITED

1. **Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645**
2. ***Mondal v. Kirkconnell, 2023 ONCA 523***
3. **1704604 Ontario Ltd. v. Pointes Protection Association**
4. **Sokoloff v Tru-Path Occupational Therapy Services Ltd., 2020 ONCA 730**
5. **Canadian Union of Postal Workers v. B'nai Brith Canada, 2021 ONCA 529**
6. **Hiltz and Seamone Co. Ltd. v. Nova Scotia (Attorney General) et al., 1999 NSCA 22 (CanLII)**
7. **WIC Radio Ltd. v. Simpson, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 31.**
8. **B.W. (Brad) Blair v. Premier Doug Ford, 2020 ONSC 7100 ,**
9. **Grant *v.* Torstar Corp., 2009 SCC 61, [2009] 3 S.C.R. 640**
10. **Canada v. Federation of Law Societies [2015] 1 SCR 401, at paragraph 81-84, 97**
11. ***R. v. Jetco Manufacturing Ltd. and Alexander* (1987), 57 (O.R) 2d 776,**
12. ***Regina v. B.E.S.T. Plating Shoppe Ltd. and Siapas*, [1987] O.J. No. 165**
13. ***Singh v. MEI [1985] S.C.R. 177 (SCC)***
14. **R. v. Awer [2017] 1 SCR 83,**
15. **R. v. Phan (2013) ONCA 787**
16. **Park Lawn Corporation v. Kahu Capital Partners Ltd., 2023 ONCA 129**

Schedule "B"
RELEVANT LEGISLATIVE PROVISIONS

N/A

Court File **COA-24-CV-0004**

Rocco Galati

Appellant

Donna Toews et al.

Respondents

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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