Court File No. CV-22-683322

*ONTARIO*
SUPERIOR COURT OF JUSTICE

B E T W E E N:

**ROCCO GALATI**

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**

Defendants

# REPLY FACTUM
# OF THE MOVING PARTY DEFENDANTS

(motions pursuant to section 137.1 of the *Courts of Justice Act* and to strike evidence returnable September 12, 2023)

September 5, 2023

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## I. OVERVIEW

1. The defendants make the following submissions in reply to the plaintiff's submissions in his factum:

a. The plaintiff's submissions are focused on alleged statements and conduct for which he has not sued the defendants.

b. The plaintiff's submissions appear to conflate his claim with the facts in *Bent v Platnick.*

c. The plaintiff has not raised grounds to believe that he can establish the elements of any of the intentional torts described in his factum.

d. The plaintiff's submissions on absolute privilege and the *Charter* have no basis in the law.

e. The plaintiff has not established that there are grounds to believe that the defendants exceeded the scope of the privileged occasions on which they expressed themselves.

f. The plaintiff has misstated the law on malice and is incorrect as to its application here.

g. The plaintiff misconstrues the weighing of interests in the final stage of the test.

## II. REPLY SUBMISSIONS

### A. Factual issues

#### 1. The allegations not pleaded in the statement of claim

2. The plaintiff's submissions are not grounded in the facts of this case. Instead, he relies on the facts in other cases (*Bent v Platnick*), and on statements he alleges that the defendants made, but upon which he has not sued them.

3. The facts alleged in the statement of claim are discrete. The pleading alleges the following statements made by the defendants:

a. On January 15, 2022, Ms. Toews filed a complaint with the Law Society of Ontario which alleged that the plaintiff "misled" and "failed to act with integrity".[1]

b. At an unidentified time, Mr. Warner communicated orally to an unidentified person that he wanted "to see to it that Rocco Galati is disbarred and charged with Fraud".[2]

c. At an unidentified time, Mr. Warner said to Vaccine Choice Canada President Ted Kuntz that he had "filed first" and that "the Action4Canada British Columbia claim, which VCC supported, had to be withdrawn and all donations to Action4Canada had to be returned, with the implication that the donations be forwarded to him to support his litigation instead".[3]

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[1] Statement of claim issued June 26, 2022 ["**SOC**"] at ¶43, supplementary motion record of the moving party defendants dated May 30, 2023 ["**moving record #4**"] (containing the plaintiff's responding record), tab 1, p 22.

[2] SOC at ¶45, moving record #4, tab 1, p 23.

[3] SOC at ¶45, moving record #4, tab 1, p 23.

d. On February 1, 2021, Mr. Gandhi made the following statements in an email to an independent journalist:[4]

> Hey Dan,
>
> Hope you are doing well. I just wanted to update you on the fact that the Canadian Society for the Advancement of Science in Public Policy (CSASPP) has filed their pleadings against the Crown and Bonnie Henry (Provincial Health Minister) as of January 26th, 2021. Please see link : https://www.scribd.com/document/492237670/Notice-of-Civil-Claim
>
> You are welcome to share this with anyone and everyone.
>
> This is our certificate of Incorporation: https://www.scribd.com/document/492256545/CSACPP-Certificate-of-Incorporation
>
> Now that we have started the litigation process we are still in need of Funding. Action 4 Canada has still not filed with Rocco. Legally at this point Rocco can't really file in BC anymore. The case law is that for class actions, it's the first to the court house that generally has carriage of the file. If you would be so kind to share with everyone so to help the cause.
>
> https://www.gofundme.com/f/bc-supreme-court-covid19-constitutional-challenge
>
> This might interest you further.
>
> Here are some talking about regarding Action 4 Canada and Rocco
>
> (1) Rocco isn't licensed to practice here in BC. He can always be retained in Ontario and in turn retain counsel in BC. But then you are paying for two law firms. You can verify that he is not licensed to practice here in BC at this page.
>
> <https://www.lawsociety.bc.ca/lsbc/apps/lkup/mbr-search.cfm>
>
> (2) The lawyer Rocco wishes to retain here in BC is named Lawrence Wong. He specializes in immigration law. He was sanctioned in 2010 for his conduct by a Federal Court judge and fined. See for yourself:
>
> <http://canlii.ca/t/2bz73>

[4] SOC at ¶48, moving record #4, tab 1, p 24–26.

> (3) A Federal Court judge wrote in his judgment a few years ago that Rocco was found to have excessively billed for his time:
>
> <http://canlii.ca/t/gfl0p#par7>
>
> (4) The same judgment questioned Rocco's competency in constitutional law: <http://canlii.ca/t/gfl0p#par9>
>
> (5) Rocco is not a "constitutional law" lawyer. There is no such professional designation in Canada, nor in particular in BC. That's not to say, however, that a lawyer cannot have an area of expertise like personal injury, strata, mergers and acquisitions, class actions, and the liked. But in Rocco's case his area of expertise is tax law.
>
> <https://tgam.ca/3n8Zuyo>
>
> (6) Every lawyer I know that has reviewed Rocco's Ontario pleadings said it was very poorly drafted. It will most likely get struck and never make it to trial to be heard on its merits. The reason being is he brings in all kinds of other topics that aren't necessary (Gates, 5G, vaccines, etc.) to obtain the order that he wants. This is how it likely would be struck:
>
> http://canlii.ca/t/8lld#sec9_5
>
> (6) Rocco wants far too much money to get started. This seems in line with (2);
>
> (7) Nothing has been accomplished in Ontario since Rocco filed around six months ago. The defendants haven't even filed replies, despite the option to apply for a default judgment being available for the majority of that time;
>
> (8) Even if he won in Ontario, it wouldn't have any direct bearing on us here in BC because health care is under a provincial mandate under s 92(13) of the constitution. In other words the Ontario Superior Court of Justice has no jurisdiction over what cabinet ministers do in BC. See:
>
> <https://bit.ly/2Li6Baw>
>
> (9) We are (CSASPP) a non-profit, non-partisan, and secular society. We are legally required to have a certain level of accounting controls and transparency;
>
> Thank you Dan, and I look forward to your response and your help.

e. Mr. Warner and CSASPP published the following statements on a 'frequently asked questions' page of its website (the "FAQ"):[5]

[5] SOC at ¶48, moving record #4, tab 1, pp 26–27.

> Are you affiliated with Rocco Galati? If not, why?
>
> We receive communications regularly from Mr. Galati's past donors with concerns. We are asked what became of the substantial funds that the community raised for him or his third-party fundraising arms. We do not have any information, were not involved in raising funds for either, nor did we ever seek to retain Mr. Galati. If you have concerns about his conduct, any member of the general public can submit an electronic complaint to the Ontario Law Society to initiate a formal investigation.
>
> We are not affiliated with Mr. Galati. There are many reasons.
>
> Mr. Galati is not licensed to practise law in British Columbia for any extended period of time. He can always be retained in Ontario, and in turn retain counsel in British Columbia. This is not unusual. However, then you are paying for two law firms. Anyone can verify whether a lawyer is licensed to practise law in British Columbia here.
>
> We were advised directly by Mr. Galati himself that the lawyer he wished to retain in British Columbia is Lawrence Wong. Mr. Wong was personally sanctioned in 2010 for his conduct by a Federal Court judge with a fine.
>
> A Federal Court judge noted in his reasons for judgment that some of Mr. Galati's billings were "excessive and unwarranted" in a separate proceeding. The same judge declined to award the full amount sought by Mr. Galati for his legal fees in that constitutional proceeding. The outcome has been discussed by other lawyers.
>
> Mr. Galati is sometimes described by his followers as our nation's "top constitutional law" lawyer, yet there is no such professional designation in Canada, nor in particular in British Columbia. That is not to say that a lawyer cannot have an area of expertise like personal injury, strata, mergers and acquisitions, class actions, and the like. According to Mr. Galati, he studied tax litigation at Osgoode Hall. The Globe and Mail reported Mr. Galati "makes his money from doing tax law, not constitutional cases."
>
> Mr. Galati filed a COVID-19 related civil proceeding in the Superior Court of Justice in Ontario on 6 July, 2020. To the best of our knowledge, as of 30 October, 2021, none of the twenty-one named defendants have filed replies, despite the plaintiff being at liberty to apply for a default judgment for the majority of that time. In an interview published 2 September, 2020, Mr. Galati claimed he intended to do his best to have an interlocutory mask injunction application heard before the Christmas holidays of 2020. As of 11 June, 2021, we are not aware of any scheduled hearings and no orders appear to have been made.

4. Except for the alleged statement that Mr. Warner wished to see the plaintiff disbarred and charged with fraud, all of the alleged statements that the plaintiff has pleaded were plainly true. The defendants have the defence of justification.

5. The unparticularized allegation that Mr. Warner stated that he wanted to see the plaintiff disbarred and charged with fraud was later supported by an affidavit from Alicia Johnson (the "Johnson evidence").[6] That evidence is disputed and inadmissible. It is discussed below.

6. No other defamatory statements are alleged in the statement of claim. In particular, the plaintiff's submissions in his factum concerning alleged statements to Lee Turner[7] are misplaced. He has not sued on these statements, nor could he, because they are privileged communications.[8]

7. The plaintiff also makes extensive submissions about statements he alleges Alexandra Moore and Canuck Law made.[9] Ms. Moore is not a defendant in this action, and the plaintiff has not pleaded her statements in the statement of claim. These submissions are misplaced.

8. Notably, the statements upon which the plaintiff does sue the defendants, the Law Society of Ontario complaint, the FAQ and Mr. Gandhi's email, do not refer to fraud, dishonesty or professional misconduct. These publications are measured and accurate. They cannot fairly be described as reflecting a "reckless disregard for the truth."[10]

9. Finally, the plaintiff's submissions appear to focus primarily on the facts in *Bent v Platnick,* as if those are the facts in the case at bar. They are not. In *Bent,* the defendant published a statement alleging that a doctor misrepresented or altered the opinions of other medical experts in

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[6] Affidavit of Alicia Johnson sworn March 11, 2023 ["**Johnson affidavit**"] at ¶14, moving record #4, tab 1, p 994.

[7] Responding (plaintiff's) factum dated August 15, 2023 ["**plaintiff's factum**"] at ¶¶9, 29, 32, 39, 46, 54, 57, 60, 64, 66–68, 72.

[8] Affidavit of Kipling Warner affirmed April 12, 2023 ["**Warner affidavit #3**"] at ¶¶10–30, motion record of the moving party defendants dated April 12, 2023 ["**moving record #3**"], tab 2, pp 7–10.

[9] Plaintiff's factum at ¶¶15, 66.

[10] Plaintiff's factum at ¶16.

his own expert reports. There is no similar allegation in the statement of claim in this action.

2020 SCC 23 at ¶8 ["***Bent***"]

10. Notoriously, the plaintiff relies on findings in *Bent* that the evidence in that case revealed a lack of investigation and due diligence prior to making serious allegations of professional misconduct.[11] In the case at bar, the evidence is to the contrary: experienced counsel prepared the Law Society complaint, and it is clear that Mr. Gandhi, Mr. Warner and other members of CSASPP were careful and scrupulous in preparing the FAQ and Mr. Gandhi's email. The FAQ and Mr. Gandhi's email included hyperlinks to the sources and foundation for the statements. All of the statements were true.

### 2. Inadmissible evidence

11. The plaintiff's reliance on the Johnson evidence is improper. He has not pleaded the alleged statements with particularity as required by the *Libel and Slander Act*, and the Johnson evidence is inadmissible.

12. The Johnson evidence was obtained in breach of a non-disclosure agreement. Although the alleged statements are disputed, in any event any communications between Mr. Warner and Ms. Johnson were subject to privilege.

*Slavutych v Baker et al*, [1976] 1 SCR 254 at 260–263

13. If the court accepts Ms. Johnson's evidence, the statements she alleges that Mr. Warner made were clearly comment. The basis for these opinions is found in the factually accurate statements in the FAQ.

[11] Plaintiff's factum at ¶37, referring to *Bent* at ¶128.

14. The communication with Ms. Johnson, which was subject to a written confidentiality agreement, was an occasion of qualified privilege. Ms. Johnson had an interest in receiving Mr. Warner's views, and she executed a non-disclosure agreement for that purpose.

15. Further, Ms. Johnson deposed that she did not believe nor agree with Mr. Warner's statements to her, which were private, and she did not repeat them.[12] Accordingly, none of the harm that the plaintiff alleges can be attributed to these alleged statements.

### B. Conspiracy

16. The plaintiff's submissions do not address his failure to plead the elements of the torts he baldly alleges in his statement of claim and factum.

17. The plaintiff argues in his factum that his allegations of conspiracy have substantial merit because he has alleged coordination in the publishing of Mr. Gandhi's email, the publishing of statements in the FAQ inviting members of the public to make complaints to the Law Society of Ontario, Mr. Warner's alleged efforts to enlist Ms. Johnson to persuade clients to fire the plaintiff, and the statements Mr. Warner is alleged to have made to Mr. Turner.[13] The plaintiff has not pleaded most of these allegations, and they are not part of this action. Regardless, the plaintiff has failed to plead or adduce evidence of the required elements for the tort of conspiracy.

18. To plead civil conspiracy, a statement of claim must state with precision and clarity material facts as to:

> a) the parties to the conspiracy and [the] relationship of one to the other;
>
> b) the agreement between or amongst the defendants to conspire, including particulars as

[12] Johnson affidavit at ¶¶17–18, moving record #4, tab 1, p 995.

[13] Plaintiff's factum at ¶46.

> to the time, place and mode of agreement;
>
> c) the precise purpose or object of the conspiracy;
>
> d) the overt acts alleged to have been done by each of the alleged conspirators in pursuance and furtherance of the conspiracy, including the time, and place and nature of the acts; and
>
> e) the injury and damage caused to the plaintiff as a result of conspiracy.
>
> *Ontario Consumers Home Services v Enercare Inc.*, 2014 ONSC 4154 at ¶24 ["***Enercare***"]

19. Because conspiracy is "an intentional tort and a serious allegation[,] the material facts must be pleaded with heightened particularity". The plaintiff "is under a heavy burden as a consequence of seeking to plead such a serious cause of action as that of conspiracy". It is "insufficient to simply 'lump some or all of the defendants together into a general allegation that they conspired'".

> *Enercare* at ¶¶25–27

20. The plaintiff's conspiracy pleading alleges few facts. He says that Ms. Toews, Mr. Warner, Mr. Gandhi and CSASPP and unnamed "duped conspirators" conspired to undermine his relationships with his clients.[14] It is impossible to be a "duped conspirator": a conspiracy requires intention and agreement.

21. The purpose of the alleged conspiracy is not identified in the statement of claim, but it is suggested that Mr. Warner's objective was to claim carriage rights over COVID-19 related litigation in British Columbia on behalf of CSASPP.[15]

22. The pleading is fatally deficient, but even the evidence on this motion fails to address the requirements for the tort of conspiracy. There is no evidence of any agreement between the

[14] SOC at ¶54, moving record #4, tab 1, p 30.

[15] SOC at ¶46, moving record #4, tab 1, p 24.

defendants to do anything unlawful. The only evidence of any act by Ms. Toews is the filing of a complaint to the Law Society of Ontario, which is protected by absolute privilege:

> In *Hamalengwa v. Duncan*, 2005 CanLII 33575 (ON CA), […] the Court of Appeal made it clear that a letter that initiates a Law Society investigation and/or hearing is not actionable as defamation or as any other cause of action. Cronk J.A. stated the point as pointedly as possible (at para. 8): "The respondent's letter was sent to the Law Society, the quasi-judicial body that is statutorily responsible for investigating and disciplining lawyers in Ontario, and so is protected by absolute privilege".
>
> *Hedary Hamilton PC v Dil Muhammad, et al*, 2013 ONSC 4938 at ¶50

23. The plaintiff alleges that Mr. Warner conspired with her to do so, but there is no evidence or allegation that Ms. Toews's (or any defendant's) primary purpose was to harm the plaintiff.

24. Similarly, there is no allegation, or evidence, of any agreement by Mr. Gandhi or CSASPP to do anything that was unlawful, or for the primary purpose of harming the plaintiff.

25. While the plaintiff relies on the Johnson evidence to establish that Mr. Warner bore ill will toward the plaintiff, even if that were the case, the plaintiff does not plead that Mr. Warner's primary purpose was to harm the plaintiff. On the contrary, the plaintiff pleads that Mr. Warner sought to divert fundraising to his own organization's litigation.[16] Regardless, Mr. Warner cannot conspire with himself.

26. Finally, had the plaintiff properly pleaded conspiracy, in this case it is entirely derivative of the plaintiff's defamation claim, and will consequently fail with it.

27. The plaintiff has not pleaded a conspiracy. There are no grounds to believe that the conspiracy claim has merit.

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[16] SOC at ¶¶45–46, moving record #4, tab 1, pp 23–24.

### C. Absolute privilege

28. The plaintiff argues that absolute privilege does not protect Ms. Toews because he claims against her for other torts "outside the context of her LSO complaint."[17] This ignores that the only facts he has pleaded, and the only evidence before this Court, concern her making a complaint to the Law Society of Ontario. There is no allegation or evidence that she took any other step against the plaintiff, or otherwise.

29. The plaintiff suggests that section 7 of the *Charter* overrides absolute privilege.[18] There is no basis in law for this submission. The plaintiff purports to expand the application of the *Charter* to the protection of his business relationship with his clients.[19] This activity does not engage the plaintiff's *Charter* rights:

> Section 7 of the *Charter* does not protect the right to practise a profession and the right to engage in the economic activity of one's choice: see *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 2004 CanLII 48653 (ON CA), 74 O.R. (3d) 1 at paras. 39-43 (C.A.), *R. v. Schmidt*, 2014 ONCA 188 at para. 38 and *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at paras. 35-45 ("***Tanase***").
>
> *Shaulov v Law Society of Ontario*, 2022 ONSC 2732 at ¶72 [emphasis in original]

30. The plaintiff relies on the Supreme Court's decision in *Canada (Attorney General) v Federation of Law Societies of Canada* for his novel argument that section 7 of the *Charter* undermines the defence of absolute privilege. That case stands for the proposition that penal consequences for lawyers in breach of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 violated section 7 of the *Charter* because they restricted lawyers'

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[17] Plaintiff's factum at ¶61.

[18] Plaintiff's factum at ¶61.

[19] Plaintiff's factum at ¶62.

liberty. The Court said nothing about a lawyer's reputation or the law of defamation. The Court held:

> There is no dispute that these provisions engage the liberty interests of lawyers. If lawyers do not comply with the Act's requirements, they are liable to prosecution and imprisonment. Section 74 provides that the failure to comply with certain provisions of the Act (including the search provisions) can lead to the imposition of a fine of up to $500,000 or imprisonment of up to five years, or both. This includes failure to comply with ss. 6 and 6.1 of the Act, which set out the general verification and record keeping obligations. It also includes the failure of persons in charge of law offices subject to searches to give FINTRAC "all reasonable assistance" during a search conducted under the authority of s. 62, as well as the failure to comply with a request for documents made by FINTRAC under s. 63.1.
>
> 2015 SCC 7 at ¶71

31. The plaintiff also relies on the Supreme Court's decision in *Hill v Church of Scientology* for the novel proposition that section 7 of the *Charter* modifies the application of the law of defamation. That case stands for the opposite proposition:

> In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it.
>
> [1995] 2 SCR 1130 at ¶141 ["***Hill***"]

32. In *Hamalengwa v Duncan*, the Court of Appeal rejected the submission that the *Charter* vitiated absolute privilege.

> 2005 CanLII 33575 (ON CA) at ¶16 ["***Hamalengwa***"]

33. The absolute privilege in this case attaches to steps taken to make a complaint to the Law Society of Ontario. The law is settled that communications for the purposes of making a complaint to the Law Society of Ontario are protected, and that the privilege is absolute.

> *Hamalengwa* at ¶¶7–8
> *D'Mello v Law Society of Upper Canada*, 2014 ONCA 912
> *Isaac v Tinney-Fischer et al*, 2019 ONSC 6964 at ¶¶30–51

> *Isaac v Mesiano-Crookston et al*, 2019 ONSC 6973 at ¶61
> *Wickham v Hamdy*, 2019 ONSC 1960

34. Finally, it is irrelevant that the plaintiff seeks to dress up his defamation claim in the guise of other torts. The privilege applies regardless of how the action is framed:

> In my view, the same principles apply to the case at bar. It matters not whether the action is framed in libel or slander, in defamation, intentional infliction of mental suffering, intentional interference with economic interest, or abuse of process.
>
> *Dooley v CN Weber Ltd.*, 1994 CanLII 7300 (ON SC), aff'd ONCA in separate proceedings 1995 CanLII 866 (ON CA)

### D. Qualified privilege

35. The plaintiff is incorrect that the defendants exceeded the scope of the privileged occasions on which they made their comments.

36. The plaintiff appears to submit that the defendants exceeded the scope of the occasion because they "were reckless in their targeting [him] in an obsessively negative and distorted fashion in depicting him as incompetent, unprofessional, dishonest and a fraud".[20]

37. He further asserts that "[t]here is a clear manifestation of a 'lack of investigation' and 'reasonable due diligence' and in fact clear indication of knowingly and malicious distorting the truth, 'with reckless disregard to the truth".

38. He does not provide specifics as to inquiries he alleges the defendants should have made that he alleges they did not. He appears to assert in support of his position that the defendants'

[20] Plaintiff's factum at ¶¶37–39.

evidence that they had received inquiries into what had become of the funds donated toward the various proceedings for which the plaintiff had been retained "rings false".[21]

### 1. Regard for the truth

39. The plaintiff does not point to any evidence in support of his submission that there is a "clear manifestation" of a reckless disregard for the truth. The record does not support this assertion: Mr. Gandhi's email and the FAQ on CSASPP's website are measured, and careful to cite to authoritative sources including, generally, judicial commentary, for all assertions.[22] The impugned publications demonstrate that the defendants took seriously the task of relaying accurate information and providing their sources for the information.

### 2. References specific to the plaintiff

40. With respect to the plaintiff's references to "targeting" and the defendants going "out of their way" to comment on him, making specific references to an individual only exceeds the scope of a privileged occasion if the references "were not necessary to the discharge of the duty giving rise to the privilege". Here, they were necessary to the discharge of the duty.

*Bent* at ¶129

41. The communication of a concern regarding a particular individual in whose conduct the public may have an interest does not, because it identifies an individual, exceed the scope of the privileged occasion. The importance of such a communication can even be what *gives rise* to the

[21] Plaintiff's factum at ¶¶37–39.

[22] Email correspondence from Deepankar Gandhi to Dan Dicks dated January 29, 2021 ["**Gandhi email**"], motion record of the moving party defendants dated January 31, 2023 ["**moving record #1**"], tab 3, exhibit A, pp 1578–1581 (see schedule C to the defendants' initial factum); Canadian Society for the Advancement of Science in Public Policy, "Frequently Asked Questions" (16 August 2022 version) ["**FAQ**"], moving record #1, tab 2, exhibit OOO, pp 1451–1462 (see schedule D to the defendants' initial factum).

privileged occasion. The Supreme Court has noted that "suits against politicians expressing concerns to the electorate about other public figures" was an example of "a strong duty and interest" important enough for courts to "moderate the strictures of qualified privilege".

*Grant v Torstar Corp.*, 2009 SCC 61 at ¶35

42. Here, the information that the defendants had a duty to communicate concerned the plaintiff himself. It was the plaintiff whose litigation and billing approach the defendants considered to be a matter of concern to the segment of the public involved in their movement. Their references to the plaintiff were necessary to warning donors about the quality of the plaintiff's work, which he was performing for various organizations that raised public funds to retain him.

### 3. Inquiries concerning donations

43. The plaintiff argues that the defendants' "assertions of being flooded with queries and complaints about [him] also rings false as they could only produce one (1) such query/complaint on cross-examination", reflecting a "reckless disregard to the truth".[23] The plaintiff does not point to any of the transcripts of his cross-examination of the defendants for this assertion, nor could he, because the assertion is inaccurate.

44. The following is the entirety of the exchange that the plaintiff had with the one deponent whom he cross-examined on this point, Mr. Warner:

> Rocco Galati: Well, no, when you say you were burdened, how many complaints were you getting?
>
> Kipling Warner: Quite a few. I remember on one occasion our receptionist who is on the phone for almost an hour listening to an Eastern European couple that were quite upset with something to do with you, money that they had given you or…

[23] Plaintiff's factum at ¶37.

> Rocco Galati: Right. And wouldn't the simple answer would be, "We have nothing to do with Mr. Galati, please take it up with Mr. Galati"?
>
> Kipling Warner: Well, I believe our FAQ says that, and you sued us for that.[24]

45. Mr. Warner has deposed, and confirmed on cross-examination, that CSASPP regularly receives communications as to what had become of the funds that the public had donated toward the claims the plaintiff has commenced.[25]

46. Even Ms. Gaw has commented publicly that she is receiving inquiries into what became of the funds.[26]

47. The defendants' not having published the names of those who have contacted them is a reasonable decision considering the plaintiff's apparent willingness to commence legal proceedings against anyone involved in this dispute, including his own clients for simply forwarding a listserv email:

> Rocco Galati: So, I would like to know where both of these documents came from. And this along with Mr. Thomas...Tim, this question goes to the John and Jane Does of the conspiracy pleading in my case. **I intend to enjoin Mr. Thomas as a party and these two people who forwarded Mr. Warner these emails, because obviously they are moles within my client-base who are engaged in this conspiracy, because everything I communicate with them, Mr. Warner seems to get his hands on. So, I need those names**. […].[27]

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[24] Transcript of the cross-examination of Kipling Warner on May 23, 2023 ["**Warner transcript**"], qq 232–235, transcript brief of the moving party defendants dated July 25, 2023 ["**transcript brief**"], tab 5, p 130.

[25] Affidavit of Kipling Warner affirmed January 26, 2023 ["**Warner affidavit #1**"] at ¶¶52–54, moving record #1, tab 2, pp 8–17.

[26] Reid Small, "BC's unvaccinated doctors want to get back to work – and they hope a billboard helps them" (26 August 2022) *West Coast Standard*, Warner affidavit #1, exhibit BB, moving record #1, tab 1, p 305; Reid Small, "Action4Canada leadership under fire after claim tossed" (9 September 2022) *West Coast Standard*, Warner affidavit #1, exhibit DD, moving record #1, tab 1, p 312.

[27] Warner transcript, qq 338–350, transcript brief, pp 135–136 [emphasis added].

48. The plaintiff has similarly commenced two actions against the Law Society of Ontario and one of its intake and resolution counsel for their simply seeking a response from him to complaints the Law Society has received about him.[28]

### E. Malice

49. The plaintiff appears to submit that there are grounds to believe that a trier of this action will infer express malice on the defendants' part based on their allegedly having a reckless disregard for the truth or based on the "face of the defamation remarks". The plaintiff has adduced no evidence upon which a trier could conclude that the defendants had a reckless disregard of the truth, and the impugned words fall far below the level of extremity required for a court to infer malice on their face.

50. The plaintiff takes the 1999 decision of the Nova Scotia Court of Appeal in *Hiltz and Seamone Co. Ltd. v Nova Scotia (Attorney General) et al* out of context in the final quote at paragraph 37 of his factum. As is clear from the decision, and even the passage that the plaintiff excerpted, the issue the Court was considering was whether the plaintiff in that case should have specifically pleaded malice for the trial judge to consider whether malice defeated the defences of fair comment and qualified privilege. That decision does not stand for the proposition that a court may imply express malice from the mere publication of a defamatory remark.

1999 NSCA 22

51. The plaintiff has misstated the law in respect of the approach courts are to take in considering malice in the context of the defences to defamation. The common law presumes

[28] Statement of claim in Court File No. CV-22-683833 issued July 12, 2022, affidavit of Rocco Galati sworn March 14, 2023, exhibit "NN", moving record #4, pp 677–706.

malice once a plaintiff establishes *prima facie* defamation. However, by establishing the elements of fair comment or qualified privilege, the defendant has rebutted the presumption of malice, and it is replaced with a presumption of good faith. Accordingly, it falls on the plaintiff to establish that the defendant acted in bad faith or had malicious intent.

> *Whitehead v Sarachman*, 2012 ONSC 6641 (Div Ct) at ¶34 ["***Whitehead***"], quoting *Prud'homme v Prud'homme*, 2002 SCC 85 at ¶57
> *Senft v Vigneau*, 2020 YKCA 8 at ¶¶60, 63, 77–79, 82 ["***Senft***"], leave to appeal to SCC ref'd 2020 CanLII 68953 (SCC), citing *Creative Salmon Company Ltd. v Staniford*, 2009 BCCA 61 at ¶32 ["***Creative Salmon***"], leave to appeal to SCC ref'd 2009 CanLII 34733 (SCC)

52. "Malice" requires that in publishing the words at issue a defendant had as their "dominant motive" an improper purpose.

> *Creative Salmon* at ¶34

53. A lack of honest belief in the truth of the impugned words can be indicative of malice, but does not necessarily establish it, as the ultimate question is still whether a defendant had an improper motive: "[…] knowledge of or recklessness as to falsity is not a separate head of malice [but rather] simply a way [o]f establishing that the defendant was acting from an improper motive".

> *Senft* at ¶90, quoting *Creative Salmon* at ¶¶32–34

54. The plaintiff must prove "actual" or "express" malice which "goes beyond the malice ordinarily presumed upon the mere publication of libelous words".

> *Whitehead* at ¶36

55. A plaintiff's onus in proving malice, "as is reflected in a legion of cases, '[…] is not a burden that is easily satisfied'".

> *Whitehead* at ¶¶45, 57

### 1. Honest belief

56. The law presumes a defendant's honest belief in the truth of what they publish on an occasion of qualified privilege until the contrary is proven.

> *Whitehead* at ¶45
> *Senft* at ¶¶60, 63, 77–79, 82, citing *Creative Salmon* at ¶32

57. To defeat the presumption of honest belief, the plaintiff will have to persuade a trier that the defendants "spoke dishonestly, or in knowing or reckless disregard for the truth".

> *Whitehead* at ¶46, quoting *Hill* at ¶145

58. The Supreme Court has explained that:

> A distinction in law exists between "carelessness" with regard to the truth, which does not amount to actual malice, and "recklessness", which does. In *The Law of Defamation in Canada, supra*, R. E. Brown refers to the distinction in this way (at pp. 16-29 to 16-30):
>
> > . . . a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice.
>
> *Botiuk v Toronto Free Press Publications Ltd.*, [1995] 3 SCR 3 at ¶96

59. There is no evidence upon which a trier could find that the defendants made their comments with a knowing or reckless disregard for the truth.

60. Mr. Gandhi and Mr. Warner have both deposed to their honest belief in the impugned words.[29] Even with respect to the disputed Johnson evidence, Ms. Johnson testified on cross-examination that this was the case:

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[29] Warner affidavit at ¶¶82–83, moving record #1, tab 2, p 40; affidavit of Deepankar Gandhi affirmed January 27, 2023 at ¶¶18–21, moving record #1, tab 3, pp 1572–1576.

> Tim Gleason: Okay. Did Kip tell you, when he walked you through these things about reprimanded for overcharging, the lawyer in Vancouver, that Rocco was taking advantage of Action4Canada financially, and it was in Action4Canada's best interest to have him removed as their counsel[—]Did he tell you he believed all those things to be true?
>
> Alicia Johnson: I do believe he believed all those things to be true.[30]

61. The plaintiff has not shown that the defendants' statements were untrue and certainly has not shown that the defendants were reckless as to whether their statements were true.

### 2. Improper purpose

62. There are no grounds to believe that there is any other basis on which a trier will find express malice.

63. The plaintiff appears to allege malice on the basis that the defendants "could have simply stated that there was no connection between them and the Plaintiff and left it there".[31] That would not have met the purposes for which they published the statements. These purposes included informing the public of the reasons for which the Society was pursuing overlapping goals separately from the organizations on whose behalf the plaintiff had commenced proceedings. In the context of the movement having finite resources, and considering the matters at issue to be urgent, the defendants sought to relay their views to those who had donated money toward what was, in their view, substandard, ineffective and counterproductive legal work in pursuit of a cause that the Society endorsed.[32]

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[30] Transcript of the cross-examination of Alicia Johnson on May 26, 2023 ["**Johnson transcript**"], q 116, transcript brief, tab 7, p 488.

[31] Plaintiff's factum at ¶15.

[32] Warner affidavit at ¶¶78–80, moving record #1, tab 2, p 33.

64. Importantly, even if the defendants had, as the plaintiff alleges and the defendants deny, attempted to have the plaintiff's clients terminate their retainers of his services, to have the plaintiff's professional regulator investigate him, or to have the plaintiff charged with civil fraud, none of these purposes would be "improper" in the sense required to defeat the defamation defences. Even if the purpose for the defendants' expression was to persuade donors to donate to them rather than to the organizations' that the plaintiff represents, that, similarly, would not be an improper purpose giving rise to a finding of express malice.

65. The Divisional Court has explained:

> An "improper purpose", in this context, means some "bad, corrupt, dishonest, evil, guilty, illegitimate, improper, indirect, oblique, selfish, unjustifiable, ulterior, wicked, wrongful or even sinister purpose or motive."
>
> However, it is not sufficient to show that the defendant was moved by spite to say the things he said. The plaintiff must show that the defendant's "dominant motive" was improper: "[i]t is the defendant's primary or predominant motive in publishing the defamatory remark that is determinative." "In this context malice means not just ill will towards another but any ulterior motive which conflicts with the interest or duty created by the occasion." […]
>
> As indicated above in respect to intrinsic malice, words published in these circumstances must not be weighed too delicately in considering the intent and motives of the writer.
>
> > …. [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… on the contrary, he will be protected, even though his language should be violent or excessively strong….
>
> The requirement to show an improper purpose as the "predominant motive" is a significant hurdle for a plaintiff:
>
> > […] Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. […]

> The trial judge made a finding that Mr. Whitehead published the impugned words "to re-enforce his own political goals and to discredit his opponents, and in particular, their spokesman [Mr. Sarachman]." With respect, this description could be used in respect to a great deal of political debate, defamatory and otherwise. It is not an illegitimate purpose for a politician to seek to "re-enforce his own political goals". It is not "some private advantage unconnected with the duty or interest which constitutes the reason for the privilege". Rather, that might be part of a politician's job description. Similarly, although it may seem distasteful, "discrediting one's opponents" may be an essential aspect of political debate. If this is done without an honest belief in the truth of the published words, then qualified privilege fails, of course. But the two analyses should not be conflated.
>
> *Whitehead* at ¶¶54–58

66. The Divisional Court similarly explained in *Chopak v Patrick*, with respect to fair comment (which it referred to as 'honest opinion'):

> […] A person must be entitled to express one's opinions about an individual that the speaker may dislike, perhaps intensely, and even wish that people will think less of that person as a result of what they say, but so long as the ill will is not the dominant motive the honest opinion defence protects the speaker. To be deprived of the defence simply due to the existence of ill-will or dislike of a person, would undermine the breadth of the "honest opinion" element, and inappropriately infringe the right of free speech: see, *e.g.*, *Whitehead v. Sarachman*, […] at paras. 54-57.
>
> 2012 ONSC 6641 (Div Ct) at ¶58

67. Even if the defendants sought to end the plaintiff's career or have him charged with civil fraud, these would not be corrupt or ulterior motives.

68. It is clear from the defendants' publications, and the defendants have deposed, that they are of the sincere view of that the plaintiff's litigation approach is ineffective, is a waste of the courts' and the public's resources, and undermines the credibility of groups with legitimate concerns about governments' policy choices in response to the pandemic.[33]

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[33] Supplementary affidavit of Kipling Warner affirmed March 29, 2023 at ¶¶4–5 ["**Warner affidavit #2**"], supplementary motion record of the moving party defendants dated March 29, 2023 ["**moving record #2**"], tab 1, p 3.

69. The defendants' coming to this conclusion is reasonable considering the plaintiff's conduct. The plaintiff has, *inter alia*, started an action with a statement of claim that the Law Society of British Columbia refers to in its licensee training materials as an "example of wholly inadequate pleadings".[34] He did this despite the courts' having warned him on several previous occasions that his incoherent and prolix pleadings will be struck.[35] In the Action4Canada proceeding, it appears that his clients believe that the striking of their statement of claim was the result of being "up against very corrupt individuals" and was at least in part a "win", with the action's continued success to be attributed to "Rocco and his well thought out strategy and quality of work".[36]

70. In the federal employee lawsuit, the plaintiff's instructing clients have emailed the several hundred plaintiffs in that lawsuit a letter from the plaintiff seeking a further $200.00 from each of them, beyond the $1,000.00 they had already each paid, to appeal from an order striking the "bad beyond argument" statement of claim the plaintiff had prepared.[37]

71. The plaintiff's assertion that he is simply acting on clients' instructions is unpersuasive considering that courts have condemned pleadings the plaintiff prepared in various matters in which he was representing different clients. Furthermore, as Justice Ross noted in striking Action4Canada's claim, it is "counsel's obligation to draft pleadings that do not offend the

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[34] Warner affidavit #2 at ¶35, moving record #2, tab 1, pp 12–13; excerpts from the Law Society of British Columbia's Civil Professional Legal Training Course 2023 materials dated February 2023, Warner affidavit #2, exhibit I, moving record #2, pp 53–54.

[35] See paragraph 26 of the moving defendants' initial factum.

[36] Email correspondence from Tanya Gaw to 'A4C plaintiffs' dated September 1, 2022, Gaw affidavit, exhibit F, moving record #4, tab 1, p 963; email correspondence from Tanya Gaw to A4C plaintiffs dated November 3, 2022, Gaw affidavit, exhibit F, moving record #4, tab 1, p 964; American Rights Watch, "Action4Canada -The win that you thought was a loss!" (5 September 2022), Warner affidavit #1, exhibit S, moving record #1, tab 1, p 211.

[37] Email correspondence from 'Federal Employee Lawsuit' dated February 24, 2023, and enclosure, Warner affidavit #2, exhibit K, moving record #2, p 61.

mandatory requirements of" the relevant rules.

*Action4Canada v British Columbia (Attorney General)*, 2022 BCSC 1507 at ¶51

72. None of these defendants had any involvement with the plaintiff prior to the events at issue:[38] the opinions they have formed arise from the plaintiff's involvement in the same movement as them.

73. There is no incongruence between the indisputable facts, and the views that the defendants hold as a result of them, that could give rise to an inference of express malice.

74. Even if these defendants held a significant personal dislike for the plaintiff, it would be the reasonable result of the manner in which he has conducted himself and not for any improper or illegitimate reason.

75. Accordingly, even if the plaintiff adduced admissible and persuasive evidence at trial that the defendants do not believe that he should be practicing law and believe that he should be charged with fraud for the way he is using publicly raised funds, this would not constitute an "ulterior" or "wicked" motive. It would simply follow from the reasonable assessment, based on publicly available and indisputable information, that the plaintiff is not being forthright with his clients and is overcharging them significantly for legal work that falls far below any reasonable standard, and that the plaintiff should know, at least as early as when he commenced the Action4Canada claim, is seriously deficient.

76. The plaintiff may disagree with this assessment of what he is doing, or his motivations for his conduct, but what matters is that there is nothing so extraordinary about the defendants holding

[38] Affidavit of Rocco Galati sworn March 14, 2023 at ¶¶8–12, moving record #4, tab 1, pp 38–39.

these opinions, in light of the evidence, that it could give rise to an inference that the defendants have a wrongful motive for their comments.

77. Finally, with respect to the plaintiff's assertion that a trier may infer malice from the words of the impugned publications themselves, the defendants' words do not rise to nearly the level of ferocity necessary for such an inference.

78. In *Whitehead v Sarachman*, the Divisional Court ordered a new trial and commented that "the learned trial judge would have benefitted from a detailed review [by counsel] of the case law" that considered whether to infer malice from the words of the publication themselves. The panel observed that the defendant's references to the plaintiff in that case as "a destructive mean spirited liar that does not deserve the time of day", which the trial judge had found to be a "direct attack on the integrity and reputation" of that plaintiff and to be "malicious and demeaning" were, in fact, "rather mild compared to other cases where courts have rejected a finding of intrinsic malice". The Court explained, quoting from Professor Brown's treatise:

> In respect to intrinsic malice,
>
> > [i]solated expressions should not be examined hypercritically. A court should not too readily draw an inference of malice from mere exaggeration or extravagance in the use of language. Any warmth or force of expression may properly be attributed by the jury to an earnest endeavor on the part of the defendant to honestly achieve his or her purpose. The language must be extreme before an inference of malice will be drawn.
>
> *Whitehead* at ¶¶39–41

## F. The weighing exercise

### 1. Harm

79. Even if this Court admitted the Johnson evidence and accepted her version of events, which the defendants dispute, her evidence confirms that the plaintiff did not suffer any harm as a result

of Mr. Warner's alleged statements. His reputation is intact in her mind and to the select few to whom she conveyed the alleged comments, including Ms. Gaw.[39]

80. Recently, in *Boraks v Hussen*, this Court found that, while the plaintiff lawyer in that case "may indeed have suffered some reputational harm", he had not suffered *serious* reputational harm triggering the weighting exercise because of the existence of significant public debate in relation to the propriety of the lawyer's conduct other than that involving the defendants in that case. This case is analogous: these defendants are far from the only voices in the debate over the appropriateness of the plaintiff's litigation style and value for money he provides. Other individuals, news sources, courts and the Law Society of British Columbia have all made comments that were equally likely to damage the plaintiff's reputation as these defendants' publications.[40] Notably, the plaintiff's statement of claim, evidence and factum focus largely on the publications of Alexandra Moore and Canuck Law, who are not defendants in this action.

2023 ONSC 4294 at ¶184

**2. Weighing**

81. The plaintiff emphasizes the defendants' specific references to him, characterizing them as "gratuitous personal attacks", as a reason that this Court should find that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendants' expression.

82. As set out at paragraphs 40 through 42 above, the defendants' references to the plaintiff

[39] Johnson transcript, qq 85, 121–123, 151–153, transcript brief, tab 7, pp 482, 489–490, 494.

[40] Warner affidavit #1, moving record #1, tab 2, exhibits U–NN, pp 222–366; see also: paragraph 69 above.

were not gratuitous and were required to be personal to him if they were to be effective in informing the public of the concerns at issue.

83. Commentary as to the services a professional provides will necessarily concern the professional whose services are at issue. The defendants' comments are specific to the plaintiff because the plaintiff has placed himself in a position in which it is reasonable for the public to discuss the quality of his work. He is engaged in very public campaigns for funds for his services.

84. While anyone offering services to the public for fees has placed the quality of those services within the realm of reasonable public discourse, the plaintiff has done so to a greater degree than even other professionals. By his own account, the plaintiff is a well-known and notorious lawyer. He relies, on this motion, on Canadian Lawyer Magazine's having included him in a list of "the top 25 influential lawyers in Canada" and on having "seven front page magazine covers [and] extensive profile articles in such magazines as Canadian Lawyer and Saturday Night".[41] He has placed himself at the helm on matters that are of significant interest to the public and to which the public has donated significant funds, and has made media appearances in relation to them. He has opened the door to commentary as to how effectively he pursues such matters, and has himself given rise to the strong public interest in such commentary.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

September 5, 2023

Tim Gleason and Amani Rauff
Dewart Gleason LLP

[41] Plaintiff's factum at ¶2.

## SCHEDULE A

## LIST OF AUTHORITIES

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1. *Bent v Platnick*, 2020 SCC 23
2. *Slavutych v Baker et al*, [1976] 1 SCR 254
3. *Ontario Consumers Home Services v Enercare Inc.*, 2014 ONSC 4154
4. *Hedary Hamilton PC v Dil Muhammad, et al*, 2013 ONSC 4938
5. *Shaulov v Law Society of Ontario*, 2022 ONSC 2732
6. *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7
7. *Hill v Church of Scientology*, [1995] 2 SCR 1130
8. *Hamalengwa v Duncan*, 2005 CanLII 33575 (ON CA)
9. *D'Mello v Law Society of Upper Canada*, 2014 ONCA 912
10. *Isaac v Tinney-Fischer et al*, 2019 ONSC 6964
11. *Isaac v Mesiano-Crookston et al*, 2019 ONSC 6973
12. *Wickham v Hamdy*, 2019 ONSC 1960
13. *Dooley v CN Weber Ltd.*, 1994 CanLII 7300 (ON SC), aff'd ONCA in separate proceedings 1995 CanLII 866 (ON CA)
14. *Grant v Torstar Corp.*, 2009 SCC 61
15. *Hiltz and Seamone Co. Ltd. v Nova Scotia (Attorney General) et al*, 1999 NSCA 22
16. *Whitehead v Sarachman*, 2012 ONSC 6641 (Div Ct)
17. *Prud'homme v Prud'homme*, 2002 SCC 85
18. *Senft v Vigneau*, 2020 YKCA 8, leave to appeal to SCC ref'd 2020 CanLII 68953 (SCC)
19. *Creative Salmon Company Ltd. v Staniford*, 2009 BCCA 61, leave to appeal to SCC ref'd 2009 CanLII 34733 (SCC)
20. *Botiuk v Toronto Free Press Publications Ltd.*, [1995] 3 SCR 3
21. *Chopak v Patrick*, 2012 ONSC 6641 (Div Ct)
22. *Action4Canada v British Columbia (Attorney General)*, 2022 BCSC 1507
23. *Boraks v Hussen*, 2023 ONSC 4294

## SCHEDULE B

## RELEVANT PROVISIONS OF STATUTES, REGULATIONS, AND BY-LAWS

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N/A

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|---|---|---|---|
| **GALATI**<br>Plaintiff | - and - | **TOEWS et al.**<br>Defendants | Court File No.: CV-22-683322 |

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

# REPLY FACTUM OF THE MOVING PARTY DEFENDANTS

(motions pursuant to section 137.1 of the *Courts of Justice Act* and to strike evidence)


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