Court File No. CV-22-683322-0000

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

RESPONDING (PLAINTIFF'S) FACTUM
(Response to s.137.1 Motion Returnable September 12th, 2023)

ROCCO GALATI LAW FIRM PROFESSIONAL CORPORATION
1062 College Street, Lower Level Toronto, Ontario M6H 1A9
Rocco Galati, B.A., LL.B., LL.M.
Tel: (416) 530-9684
Fax: (416) 530-8129
Email: rglfpc@gmail.com
Lawyer for the Plaintiff on his own behalff

TO:
Tim Gleason
DEWART GLEASON LLP
02-366 Adelaide Street West
Toronto, ON M5V 1R9,
LSO No. 43927A
Email: tgleason@dgllp.ca
Amani Rauff,
LSO No. 78111C
Email: arauff@dgllp.ca
Telephone: 416-971-8000
Facsimile: 416-971-8001
Lawyers for the Defendants

PART I – THE FACTS

- **The Plaintiff**

1. The Plaintiff relies on the facts set out in his affidavit, sworn March 14th, 2023 in his Responding motion record to the s.137.1 motion, as well as the facts set out in his affidavit, sworn June 28th, 2023, in the response to the Defendant's motion to strike the affidavit of Lee Turner and Alicia Johnson, as well as exhibits attached hereto to his affidavits. The Plaintiff further relies on the Transcripts of the cross-examinations. The Plaintiff highlights some of those facts and evidence as set out below.

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 Presidential 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 of 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 2004. He has further exclusively produced three films and co-authored two books.[1] In his 35 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.

[1] Responding (Plaintiff's) Motion Record, affidavit of Rocco Galati, at Tab 2, pp. 1-8

- **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]

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.

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.[4]

7. The Defendants Kip Warner and Dee Ghandi, published defamatory statements to others, and on the Society's website, set out in paragraph 41 of the Plaintiff's affidavit.[5]

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.[6]

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[2] Responding (Plaintiff's) Motion Record, affidavit of Rocco Galati, at Tab 2, para. 8-11
[3] Responding (Plaintiff's) Motion Record, affidavit of Rocco Galati, at Tab 2, para. 13-19
[4] Responding (Plaintiff's) Motion Record, at Tab 3 and 5
[5] Responding (Plaintiff's) Motion Record, affidavit of Rocco Galati, at Tab 2, para. 41
[6] Responding (Plaintiff's) Motion Record, affidavit of Rocco Galati, at Tab 2, para. 42

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 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. 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.[8][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. Warner changed

[7] Responding (Plaintiff's) Motion Record, affidavit of Rocco Galati, at Tab 2, para. 43
[8] Responding (Plaintiff's) Motion Record affidavit of Alicia Johnson, at Tab 5
[9] Responding (Plaintiff's) Motion Record (to strike affidavits), affidavit of Lee Turner, at Tab 1 and affidavit of Alicia Johnson at Tab 2.
[10] Defendants Transcript Brief, cross-examination of Kip Warner at Tab 4, pages 132-134

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 indication of the malice and conspiracy by the Defendants with respect to their conduct and actions.

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. Ghandi, point to isolated, targeted, "losses" of the Plaintiff in order to distort his reputation as a lawyer. They had no answers as to why their "research" had 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 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". Her defamation is summarized in paragraphs 49 and 50 of the Plaintiff's affidavit of March 14, 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

[11] Defendants Transcript Brief, cross-examination of Donna Toews, at Tab 2, pages 41-47
[12] Responding (Plaintiff's) Motion Record, affidavit of Rocco Galati, at Tab 2, pp. 49 and 50

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.

17. The Plaintiff's responses to the assertions made by Kip Warner are directly addressed, in his affidavit off March 14th, 2023, at paragraphs 53-94, while those of Dee Ghandi 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.[13]
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;
    (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.
20. The Defendants, on the s.137.1 motion, with respect to defamation, pleads the following defences: (a)Truth; (b) Fair comment; (c) Good faith on occasions of absolute and qualified

[13] Responding (Plaintiff's) Motion Record

privilege; (d) Responsible communication; (e) and that ss.5(1) and (6) of the ***Libel and Slander Act*** were not complied with. The Plaintiff responds that: (a) The statements are not true; (b) Not privileged either absolute or qualified; (c) Were not responsible communication; (d) That the defendants were not entitled to notice because they are not a "broadcaster" or "newspaper" and in any event did not comply with s.8 as to entitle them to notice. The Plaintiff further states that the statements were made in "reckless disregard to the truth", without adequate investigation, and with no due diligence, and constituted personal attacks, and were malicious, and that malice further defeats any possible defence **to** fair comment, qualified privilege, or responsible communication.[14]

21. The Defendants further assert that: (a) No harm was caused to the Plaintiff; (b) The Plaintiff commenced this action in bad faith or improper purpose; (c) This action has caused the Defendants damage. The Plaintiff responds that: (a) Damage has been caused to the Plaintiff for which evidence has been provided both reputational and economic; (b) There is no evidence of bad faith or improper purpose in the Plaintiff commencing this action; (c) There is no evidence of any damage caused to the Defendants.

PART II- THE ISSUES & THE LAW

- **THE ISSUES**

22. Whether the publication of the defamatory remarks "arise from an expression made by a person that relates to a matter of public interest"?

23. If the expressions were made relating to a matter of public interest whether:

    (a) there are grounds to believe that,

[14] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645 **; Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130**

(i) the proceeding has substantial merit, and (ii) the moving party has no valid defence in the proceeding?; and

(b) Whether the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression?

- **THE LAW**

24. This is a motion, by the Defendants, under s.137.1 of the **Courts of Justice Act** from an action commenced by the Plaintiffs. The relevant provisions of this motion are sub-sections 137.1(3) and (4).

25. In recent 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.

26. The majority judgment in **Bent v. Platnick**, supra, the Supreme Court of Canada, in dealing with s.137. 1, in a motion in an action by a medical doctor, ruled as follows:

> …
> **However, in addition to protecting expression on matters of public interest, s. 137.1 must also "ensur[e] that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it**": para. 46. Applying the framework that this Court unanimously adopts in *Pointes Protection*, I ultimately reach the same conclusion as the Court of Appeal for Ontario: Ms. Bent's s. 137.1 motion should be dismissed and Dr. Platnick's defamation claim should be allowed to proceed.[15]

- **Threshold Burden – s.137.1 (3)**

[15] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645 at paragraph 74

27. 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)**

28. 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 s. 137.1(4)(b), which also serves as a "robust backstop" for protecting freedom of expression: *Pointes Protection*, at paras. 48 and 53.[16]

29. The Plaintiff states that he does not "take too much money", is not "greedy", 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

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

indefensible and false statements of criminal conduct, amplify and solidify the clear innuendo of the previous statements of Mr. Warner.

30. 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 hostility of that person, as ruled by the Ontario Court of Appeal, in **Sokoloff v Tru-Path Occupational Therapy Services Ltd., 2020 ONCA 730**.[17]

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

31. 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.[18]

As in **Bent v. Platnick** the Plaintiffs state that there is no issue that the Defendants in the within action (re) published and uttered the comments for which they have been sued. The Plaintiffs further state that they refer to the Plaintiff, and that the words are defamatory, explicitly, or by innuendo, and tend to lower the Plaintiffs' reputation in the eyes of a reasonable person.

32. The Supreme Court of Canada further stated:

> [98] This is buttressed even further by evidence that within weeks of the impugned email, Dr. Platnick was receiving "mass cancellations": A.R., vol. VI, at p. 15. He alleges a direct financial impact of $578,949 as a result, and has filed

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

> an accountant's report supporting that figure, which was generated in light of his previous earnings and the "blacklist" process that occurred after the publication of the defamatory words: p. 17. **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).[19]

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 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.[20]

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

33. 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.

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[19] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 97-100
[20] Responding (Plaintiff's) Motion Record, affidavit of Alicia Johnson, at Tab 5

> [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**

34. 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, 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.[21]

The Plaintiff states that is clearly present in the within action.

35. 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).[22]

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.

36. 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

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

> 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 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**….[23]

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.[24]

Again, which is applicable to the within action.

- **Qualified Privilege**

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

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[23] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 109-110
[24] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 118-120

> [121] **An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" *and* the recipient has "a corresponding interest or duty to receive it"**: Downard, at §9.6 (footnote omitted). Importantly, **"[q]ualified privilege attaches to the occasion** upon which the communication is made, **and not to the communication itself"**: *Hill*, at para. 143; *Botiuk*, at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": *Hill*, at para. 144; *Botiuk*, at para. 79. **However, the privilege is *qualified* in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind** the words was malice, such as where the speaker was reckless as to the truth of the words spoken**; or where the scope of the occasion of privilege was exceeded** (Downard, at §1.9; see also *Hill*, at paras. 145-47; *Botiuk*, at paras. 79-80).
>
> [122] For this reason, a precise characterization of the "occasion" is essential, as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused.[25]

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>**. [26]

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

[25] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 121-122
[26] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 128 and 132

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 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) such query/complaint on cross-examination. There 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".

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**.[27] 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. "[28]

38. 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**

[27] Canadian Union of Postal Workers v. B'nai Brith Canada, 2021 ONCA 529 **at para 31**
[28] Hiltz and Seamone Co. Ltd. v. Nova Scotia (Attorney General) et al., 1999 NSCA 22 (CanLII) at paragraph 122.

> **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 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.[29]

The Plaintiff states that this also applies to the within action.

39. It is worth noting that, in the within action, all the facts on the findings by of 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.

- **Damages caused by Defamation**

40. 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

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

> 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 purpose.[30]

And further:

> [146] In addition, reputational harm is eminently relevant to the harm inquiry under s. 137.1(4)(b). **Indeed, "reputation is one of the most valuable assets a person or a business can possess**": *Pointes Protection*, at para. 69 (citing "agreement" with the words of the Attorney General of Ontario at the legislation's second reading). **This Court's jurisprudence has repeatedly emphasized the weighty importance that reputation ought to be given. Certainly, "[a] good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws"**: *Hill*, at para. 107; see also *Botiuk*, at paras. 91-92.
>
> [147] **The import of reputation is only amplified when one considers *professional* reputation**…
>
> [148] **Thus, <u>not only must</u> the monetary harm pleaded by Dr. Platnick be considered in determining whether the harm is sufficiently serious, <u>but so too must the reputational harm to Dr. Platnick's professional reputation be considered, even if it is not quantifiable at this stage</u>**: *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**…[31]

The Plaintiff 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

[30] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraph 144
[31] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 146-147-149-150

to bodily harm, as well as an obliteration of donations to the Constitutional Rights Centre (CRC) as set out in the affidavit evidence.[32]

- **Public Interest Balance**

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

> [163] In *Pointes Protection*, this Court finds that the public interest in protecting an expression can be determined by reference to the core values that underlie s. 2 (*b*) of the Canadian Charter of Rights and Freedoms , such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing: para. 77. **That said, 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 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.[33]**

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":[34] None of the Defendants ever had any prior direct contract nor reached out to the Plaintiff. Their expressions were "gratuitous personal attacks" made in "reckless disregard to the truth".

42. 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**

[32] Responding (Plaintiffs) Motion Record, affidavit of Rocco Galati at Tab 2, para. 46-47, Exhibits V,W,X,Y
[33] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 163-164
[34] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 166-167

> **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)…..
>
> [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.**[35]

The Plaintiff states, contrary to the Defendants' assertions, that the same applies to the within action.

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

43. 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 Fair Comment, as delineated by the Supreme Court of Canada, is not available to the Defendants:[36] 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.[37]

44. 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.[38]

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[35] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645, at paragraphs 171-172
[36] WIC Radio Ltd. v. Simpson, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 31.
[37] **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**
[38] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645

45. 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.[39]

- **Conspiracy**

46. 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.

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

- **Pointed Response to Defendants' Factum**

[39] Canadian Union of Postal Workers v. B'nai Brith Canada, 2021 ONCA 529 **at para 33**

48. In addition to what the Plaintiff has pleaded above in his factum, the Plaintiff further makes pointed responses to the Defendants' factum as set out below.

49. With respect to paragraph 7-37 of the Defendants factum, the Plaintiff states that he has addressed those assertions in his affidavit of March 14th, 2023, as well as his cross examination of that affidavit upon both of which he relies.[40]

50. With respect to paragraphs 38-46 of the Defendants factum, the Plaintiff states that these facts confirm, and are in line with the Plaintiff's conspiracy cause of action. The Plaintiff again points out that the Defendant, in his initial affidavit, dated January 27th, 2023, in support of his s.137.1 motion, misled the Court in the stating that he met Ms. Toews **in 2022**, **shortly after** she made her LSO complaint. Only when presented with evidence, in the Plaintiff's affidavit of March 14th, 2023, did Mr. Warner feign confusion over the year which, loudly signals false because the evidence establishes that Ms. Toews had made a $10,000 contribution to the Society in early **2021**, and had been volunteering for the Society. Mr. Warner's reference to 2022 in his initial affidavit could not have been an error because **it pegs the year shortly after the LSO complaint which was in early 2022, in which complaint he took a guiding role.**

51. With respect to paragraphs 47-50, and the Plaintiff's damages, the Plaintiff states that, above and beyond reputational damages, which according to the Supreme Court of Canada do **not** require quantifying[41], **he has, at this stage, for the purposes of the motion**, proved financial damages in accordance with the Supreme Court of Canada decision in **Bent v. Platnick**[42].

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[40] Responding (Plaintiffs) Motion Record, affidavit of Rocco Galati at Tab 2
[41] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645
[42] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645 at para. 138;144;146;150

52. With respect to paragraph 51 of the Defendants' factum, the Plaintiff states that the quote attributed to the Plaintiff is irrelevant to this motion and furthermore simply reflects what is contained in the statement of claim, filed with the Superior Court, and covered by absolute privilege.

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

53. With respect to paragraph 54 of the Defendants' factum, and striking the affidavit of Lee Turner, the plaintiff states, with respect, that this is a second glaring misrepresentation by Mr. Warner to the Court.

54. 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.

55. In response to Mr. Warner's assertion of his solicitor-client privilege, the lawyer in question, Mr. Lee Turner, in part, in categorically denying Kip Warner's assertions, states the following:

> [11] **I have never been on record for Mr. Warner nor for CSAPP. I have never been retained by Mr. Warner or CSAPP. There has never been any suggestion by Mr. Warner or myself that any communications we had were confidential or protected by solicitor and client privilege. There has never been a solicitor-client relationship between myself and Mr. Warner nor CSAPP. Neither Mr. Warner nor CSAPP have ever been a prospective client of mine.**
>
> [12] Specifically, there was no solicitor client relationship or privilege in our text exchange with respect to Mr. Gall and Mr. Galati contained in Exhibit "S" to Mr. Galati's affidavit.
>
> .
>
> …
>
> [14] **Contrary to what Mr. Warner states at question 274 of Exhibit "D", I have never approached him wanting to provide legal advice nor have I ever given him any legal advice. Neither Mr. Warner nor CSAPP have ever approached me to request any legal advice…**
>
> [15]**Neither Mr. Warner nor his counsel contacted me before making the assertions in Mr. Warner's affidavit that we had a solicitor-client relationship and that the occasions of the text messages were covered by solicitor-client privilege**
>
> [16]If there were any reasonable possibility that a solicitor-client relationship existed between myself and Mr. Warner or CSAPP, or the text message exchange in question gave rise to solicitor-client privilege I would not have disclosed this information to Mr. Galati.
>
> [17]**I have never had a solicitor client relationship with Mr. Warner or CSAPP nor is their any prospect of us having such a relationship.**[43]

56. With respect to Alicia Johnson's affidavit, she denies that her affidavits are in breach of the NDA, nor does the terms and scope of the agreement support an assertion of its breach. Furthermore, the conduct of Mr. Warner would vitiate any such agreement as being contrary to public policy.

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[43] Responding (Plaintiff's) Motion Record to strike affidavits, Lee Turner affidavit at Tab 1, para 11-17

57. 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.

58. 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 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.[44]

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

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

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.

59. With respect to paragraphs 55-57 of the Defendants' factum, and the public interest onus of the Defendants, the Plaintiff states that they have not met their threshold for the argument set out above in the within factum.

60. With respect to paragraph 58 of the Defendants' factum, the Plaintiff states, for the arguments set out above in the within factum, that this claim has substantial merit in that making claims that a lawyer is incompetent, unprofessional, "takes too much money", is "greedy" and is a "serial con artist", and a "fraudster", is **prima fascie** defamatory and that the Defendants have advanced **no** evidence as to the truth of those statements and assertions, have been "reckless as to the truth" of those statements/assertions, and furthermore that any claim to any qualified privilege, fair comment, or responsible communication are not made out in law, and moreover are defeated by an absence/excess of any such privilege, **and by malice**, which according to the jurisprudence can be inferred from the "sting" itself. Reckless and false statements of incompetence, unprofessionalism, being dishonest, and being a "serial con artist" and a "fraudster", are on their face malicious. The Defendants have no defence for the purposes of this motion and the matter ought to proceed to trial.

61. With respect to paragraphs 59 and 60 of the Defendants' factum, and the absolute privilege of making a LSO complaint, the Plaintiff states:

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

(a) Ms. Toews is not being sued strictly for abusive of process, akin to malicious prosecution, but also in conspiracy, and interference with economic interests **outside the context of her LSO complaint**;

(b) With respect to the absolute privilege accorded to the LSO complaint, the Plaintiff states that such complaint must be; (i) **bona fide**; (ii) from a client;

(c) The fact that the common-law interpreting that provision to be absolute, requires a revisiting in light of ***Charter*** values and rights, in that:

(i) the Supreme Court of Canada has ruled that the symbiotic solicitor-client relationship is s.7 ***Charter*** protected;[46]

(ii) that the common-law is subject to constitutional norms and scrutiny;[47]

(iii) that a lawyer's reputation engages s.7 ***Charter*** values in protecting personal integrity.[48]

62. Ms. Toews is also being sued in her in the conspiracy to interfere with the Plaintiff's economic interests, as well to injure the Plaintiff, as witnessed by her connection with Kip Warner, Kip Warner's role in commandeering the LSO complaint, and both the attempts of Ms. Toews and Mr. Warner to hide this from the Court and not provide any answers, on cross-examination, as to why Ms. Toews issue with her $1,000.00 donation was to be addressed by the Plaintiff rather than the Plaintiff's clients.

63. With respect to paragraph 61 and 62 of the Defendants' factum, and the conspiracy action, the Plaintiff states that there are overlapping conspiracies as between Mr. Warner, Mr.

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[46] Canada (Attorney General) *v.* Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 S.C.R. 401
[47] ***R. v. Salituro, 1991 CanLII 17 (SCC), [1991] 3 SCR 654***; ***RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 SCR 573***; **Dagenais v. Canadian Broadcasting Corp., 1994 SCC, 1994] 3 SCR 835**
[48] Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130

Gandhi, and the Society, and between Mr. Warner and Ms. Toews, all aimed at injuring the Plaintiff by interfering with his economic interests, as well as damaging his reputation, albeit that defamation is not plead against Ms. Toews. **Defamation is not the only means by which to damage reputation**.

64. With respect to paragraph 63 of the Defendants' factum, and the intentional infliction of mental suffering, the Plaintiff states that he has met that test in that: (a) falsely calling a lawyer incompetent, unprofessional, dishonest, "greedy", "wants too much money", a "serial con artist", and a "fraudster" are flagrant and outrageous; (b) they are calculated to produce harm, as was the engineering of the LSO complaint, by Mr. Warner, particularly in light of the fact that the Society's website encourages and invited LSO complaints against the Plaintiff; and (c) loss of dignity, as protected by ss. 7 and 15 of the ***Charter*** is provable illness. Lastly, the Plaintiff states that these do not have to be proven at this stage, but as the Supreme Court of Canada reiterated many times, at this stage the Plaintiff only has the onus of showing a "provable claim".[49]

65. The Plaintiff further states, with respect to the Defendants' **other** torts, apart from defamation, insofar as it does **not** relate to defamation, the non-defamation torts are not the proper purview of this motion because s.137.1's scope is the public debate in the public interest, which necessarily restricts itself to expression, and not the non-expression **conduct** amounting to separate torts.

66. With respect to paragraph 64 of the Defendants' factum, the Plaintiff states that the Defendants' conduct does amount to harassment in that the website continuously reproduces and renews the same defamatory comments. Furthermore, Mr. Warner and other supporters,

[49] Bent *v.* Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645

at the cross examination of the Plaintiff and other affiants on his behalf, in the action against Alexandra Moore and Canuck Law, appeared at the cross examination and insisted on remaining as "observers". Furthermore, trying to enlist Alicia Johnson to convince the Plaintiff's clients to fire him, report him to the LSO, and have him charged with fraud, is also part of that harassment. His comments to Lee Turner are further part of that harassment. It is reasonable to infer that Mr. Warner does not restrict this type of depraved defamation to Mr. Turner but shares it at large.

67. With respect to paragraph 64-104 of the Defendants' factum, the Plaintiff states, for the argument set out above in the within factum, that the Defendants', keeping in mind the test to be applied on the within motion, have no defence to stating and publishing that the lawyer is incompetent, unprofessional, "takes too much money", is "greedy", "dishonest", a "serial con artist" and a "fraudster".

68. With respect to paragraphs 105-110 of the Defendants' factum, the Plaintiff states, for the reasons delineated by the Supreme Court of Canada in **Bent v. Platnick**, which more than apply to the within case, that allowing the proceeding to continue outweighs the public interest in falsely stating that a lawyer is incompetent, unprofessional, "takes too much money", is "greedy", a "serial con artist" and a "fraudster", as well as interfering with the solicitor client relationship a s.7 ***Charter*** protected relationship.[50] As well as distorting, with "reckless regard to the truth", intentionally, and by non-investigation, and absolute absence of due diligence, the lawyer's 35-year track record. Such (re)published harm is self-evident. Above and beyond reputational harm, evidence of financial harm has also been established, and more than sufficient for the purpose of this motion. The Defendants' **conjecture** for the

[50] Canada (Attorney General) *v.* Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 S.C.R. 401; R. *v.* Burlingham, [1995] 2 S.C.R. 206

possible reasons for the now near complete disappearance in donations to the CRC is without evidence while the Plaintiff's claim is supported by evidence.

69. With respect to paragraphs 101-117 of the Defendants' factum, the Plaintiff states that these assertions are without merit. These assertions are both made in the dark, and without evidence. Above and beyond the cited "successes" in "COVID litigation", none of the Plaintiff's cases have been dismissed with prejudice. The Defendants' postulation about what is proper, or improper, in the taking of instructions from clients, is conjecture and without evidence. These issues are not the purview of resolution at this motion but for trial.

70. The fact is, to date, most Covid-Litigation cases in Canada have been dismissed at the early stages. In contrast, the Plaintiffs cases have fared much better, as set out in the Plaintiffs affidavit.[51] In any event, none of this justifies the defamation.

71. It is submitted, with respect, that this action was **NOT** launched by the Plaintiff as on abusive process, improper purpose, nor in bad faith, and that such submission, by the Defendants is offensive, and should deprive the Defendants' of costs, and that costs should be awarded against them on this motion.

72. Nothing in paragraphs 105-117, addresses or justifies why s.137.1, or this Honourable Court, should protect the expression of the Defendants', and why the public interest weighs more to the Defendants then the Plaintiff, in the context of the Defendants' personal, irrelevant, untruthful, **ad hominem** attacks that the Plaintiff, in the context of **his own clients**, who have absolutely no relationship to the Defendants', in calling and painting the Plaintiff as a lawyer who is incompetent, unprofessional, "takes too much money", is "greedy", is a "serial con

[51] J.W.T. v. S.E.T., 2023 ONSC 977

artist", and a "fraudster", and grossly interfering with the ***Charter***-protected solicitor-client relationship.

73. With respect to paragraph 118 of the Defendants' factum, and the seeking of $40,000.00 in damages, the Plaintiff states: (a) No such cause for damages has been established; and (b) No evidence of such damages has been tendered to justify the damages of $40,000.00, or any damages for that matter.

PART IV- ORDER SOUGHT

74. The Respondent therefore respectfully requests:

(a) that the motions of the Defendants be dismissed;

(b) costs of this motion;

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

All of which is respectfully submitted.

Dated this 15th, day of August 2023

ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
Rocco Galati, B.A., LL.B., LL.M.
1062 College Street, Lower Level
Toronto, Ontario M6H 1A9
TEL: (416) 530-9684;FAX: (416) 530-8129
Email: rglfpc@gmail.com

Lawyer for the Plaintiff on his own behalf

"SCHEDULE A"
Authorities

1. *1704604 Ontario Ltd. v. Pointes Protection Association 2020 SCC 22*
2. *B.W. (Brad) Blair v. Premier Doug Ford, 2020 ONSC 7100*
3. *Bent v. Platnick, 2020 SCC 23, [2020] 2 S.C.R. 645*
4. *Canada (Attorney General) v. Federation of Law Societies of Canada, 2015 SCC 7, [2015] 1 S.C.R. 401*
5. *Canadian Union of Postal Workers v. B'nai Brith Canada, 2021 ONCA 529*
6. *Dagenais v. Canadian Broadcasting Corp., 1994 SCC, 1994] 3 SCR 835*
7. *Grant v. Torstar Corp., 2009 SCC 61, [2009] 3 S.C.R. 640*
8. *Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130*
9. *Hiltz and Seamone Co. Ltd. v. Nova Scotia (Attorney General) et al., 1999 NSCA 22 (CanLII)*
10. *J.W.T. v. S.E.T., 2023 ONSC 977*
11. *R. v. Burlingham, [1995] 2 S.C.R. 206*
12. ***R. v. Salituro, 1991 CanLII 17 (SCC), [1991] 3 SCR 654***
13. *Regina v. B.E.S.T. Plating Shoppe Ltd. and Siapas, 1987 CanLII 4056 (ON CA)*
14. *Regina v. Jetco Manufacturing Ltd. and Alexander, 1987 CanLII 4436 (ON CA)*
15. ***RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 SCR 573***
16. *Singh v. MEI [1985] S.C.R. 177 (SCC)*
17. *Sokoloff v Tru-Path Occupational Therapy Services Ltd., 2020 ONCA 730*
18. *WIC Radio Ltd. v. Simpson, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 31*.

"SCHEDULE B"
Statutory Provisions

1. s.137.1 of the Courts of Justice

Dismissal of proceeding that **limits debate**

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote **broad participation in debates on matters of public interest;**

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation **by the public in debates** on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section, "expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person **if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.** 2015, c. 23, s. 3.

No dismissal

(4) **A judge shall not dismiss a proceeding** under subsection (3) **if the** responding party satisfies the judge that,

(a) **there are grounds to believe that,**

(i) **the proceeding has substantial merit, and**

(ii) **the moving party has no valid defence in the proceeding; and**

(b) **the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.** 2015, c. 23, s. 3.

2. Charter of Rights and Freedoms ss. 7 and 15

Section 7 - Life, liberty, and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 guarantees the life, liberty and personal security of all Canadians. It also requires that governments respect the basic principles of justice whenever they intrude on those rights. Section 7 often comes into play in criminal matters because an accused person clearly faces the risk that, if convicted, his or her liberty will be lost.

Equality rights – section 15

Equality before and under law and equal protection and benefit of law
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
Affirmative action programs

- **(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability**.

Section 15 of the Charter makes it clear that every individual in Canada – regardless of race, religion, national or ethnic origin, colour, sex, age or physical or mental disability – is to be treated with the same respect, dignity, and consideration. This means that governments must not discriminate on any of these grounds in its laws or programs.

The courts have held that section 15 also protects equality on the basis of other characteristics that are not specifically set out in it. For example, this section has been held to prohibit discrimination on the grounds of sexual orientation, marital status, or citizenship.

The Supreme Court of Canada has stated that the purpose of section 15 is to protect those groups who suffer social, political, and legal disadvantage in society. Discrimination occurs when a person, because of a personal characteristic, suffers disadvantages or is denied opportunities available to other members of society. At the same time as it protects equality, the Charter also allows for certain laws or programs that aim to improve the conditions of disadvantaged individuals or groups. For example, programs aimed at improving employment opportunities for women, Indigenous peoples, visible minorities, or those with mental or physical disabilities are allowed under subsection 15(2).

Court File No.: CV-22-683322-0000

Rocco Galati

Plaintiff

-and-

Kipling Warner et al.

Defendants

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ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

FACTUM

Name: ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
Rocco Galati
Address: 1062 College Street
Lower Level
Toronto ON M6H 1A9

Telephone No.: 416-530-9684
Fax No.: 416-530-8129

Lawyer for the Plaintiff,
on his own behalf