Court File No. CV-20-00652918-0000

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

B E T W E E N:

DR. KULVINDER KAUR GILL AND DR. ASHVINDER KAUR LAMBA

Plaintiffs

and

DR. ANGUS MACIVER, DR. NADIA ALAM, ANDRE PICARD, DR. MICHELLE COHEN, DR. ALEX NATAROS, DR. ILAN SCHWARTZ, DR. ANDREW FRASER, DR. MARCO PRADO, TIMOTHY CAULFIELD, DR. SAJJAD FAZEL, ALHELI PICAZO, BRUCE ARTHUR, DR. TERRY POLEVOY, DR. JOHN VAN AERDE, DR. ANDREW BOOZARY, DR. ABDU SHARKAWY, DR. DAVID JACOBS, TRISTAN BRONCA, CARLY WEEKS, THE POINTER, THE HAMILTON SPECTATOR, SOCIÉTÉ RADIO-CANADA AND THE MEDICAL POST

Defendants

# FACTUM OF THE MOVING PARTIES, TRISTAN BRONCA AND THE MEDICAL POST

**(motion returnable September 27 to 30, 2021)**

August 19, 2021

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Defendants

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Defendants

# FACTUM OF THE DEFENDANTS, TRISTAN BRONCA AND THE MEDICAL POST

## PART I – OVERVIEW

1. The defendants, Medical Post and Tristan Bronca ("**Bronca**"), seek to have the plaintiffs' defamation claims against them dismissed pursuant to the anti-SLAPP provisions of the *Courts of Justice Act* ("***CJA***") (section 137.1), along with 21 other defendants.

2. The plaintiffs, Dr. Kulvinder Kaur Gill ("**Dr. Gill**") and Dr. Ashvinder Gill Lamba ("**Dr. Lamba**"), claim over $12 million dollars in damages from fellow physicians, scientists,

reporters, columnists and media organizations for their criticism of Dr. Gill's controversial views about the public health response to the global Covid-19 pandemic. The plaintiffs also make allegations of defamation arising out responses to the plaintiffs' criticism of the Ontario Medical Association ("**OMA**") in 2018. This lawsuit appears to be a classic strategic lawsuit against public participation ("**SLAPP**").

3. The claim against Medical Post arises from an article published in its online version on September 10, 2018, which the plaintiffs claim is defamatory. The claim against Bronca, advanced only by Dr. Gill, arises from a single tweet posted to his Twitter account on August 6, 2020 in response to Dr. Gill's controversial tweets promoting the drug Hydroxychloroquine as a solution to the global Covid-19 pandemic and her subsequent attack on the defendant Andre Picard.

4. The claims against both Medical Post and Bronca should be dismissed in their entirety. The expressions at issue relate to matters of public interest. Medical Post and Bronca both have valid defences. Most importantly, the plaintiffs have not presented any evidence of harm linked to these defendants, let alone harm that is sufficiently serious to outweigh the public interest in protecting these defendants' expression.

**PART II - THE FACTS**

5. Medical Post publishes both a print magazine and an online newsletter for Canadian doctors. The online newsletter is published daily and is only available to registered users or subscribers. The frontpage of the online newsletter indicates the proprietor, publisher, and address of the publication.

Cross examination of Colin Leslie ("**Leslie Cross**"), held on July 9, 2021, Joint Transcript Brief ("**JTB**"), Tab 12, p. 5, Q. 7-11

Affidavit of Colin Leslie, sworn April 1, 2021 ("**Leslie Affidavit**"), Defendants' Motion Record ("**Def. MR**"), Tab 2, p. 28, para. 3

Supplemental Affidavit of Colin Leslie, sworn July 27, 2021 ("**Leslie Supp. Affidavit**"), Defendants Supplementary Motion Record ("**Def. Supp. MR**"), Tab 1, p. 9, paras. 3-6 and Exhibit "A", Tab 1A

Statement of Claim, Def. MR, Tab 4, p. 112, para. 38

Exhibit 1, Cross Examination of Dr. Gill held on July 28, 2021 ("**Gill Cross**"), JTB Tab 10A

6. The plaintiff Dr. Gill is well known in the Ontario physician community. She is the co-founder of the organization Concerned Ontario Doctors ("**COD**") and was a member of the OMA's governing council.

Leslie Affidavit, Def. MR, Tab 2, p. 28, para. 5

7. The Plaintiff Dr. Lamba is a board member of COD and was also a member of the OMA's governing council.

Statement of Claim, Def. MR, Tab 4, p. 108, paras. 11, 13 and 15

8. From approximately August 2016, there was much division in the Ontario physician community that arose when the OMA membership voted to defeat a very controversial OMA fee agreement with the Ontario government called the "tentative Physician Services Agreement" (the "tPSA"). Then-OMA president Dr. Virginia Walley received unsavoury and inappropriate emails in relation to the tPSA, which were reported to the College of Physicians and Surgeons of Ontario. Two doctors were found guilty of professional misconduct in June 2018 for sending abusive emails to Dr. Walley.

Leslie Affidavit, Def. MR, Tab 2, p. 28-29, para. 6 and Tab 2C

9. On September 4, 2018, the defendant Dr. MacIver posted a tweet from his personal Twitter account in which he used offensive language in respect of the plaintiffs. On September 8, 2018, Dr. MacIver apologized on Twitter. Colin Leslie, the Editor in Chief of Medical Post ("**Leslie**") learned of Dr. MacIver's tweet when his September 8, 2018 apology was brought to Leslie's attention. Leslie wrote an article titled "Physician apologizes for vulgarity in Twitter comments about COD doctors" (the "**Article**") that was published by Medical Post online on September 10, 2018.

10. The Article reads as follows:

> Physician apologizes for vulgarity in Twitter Comments about COD doctors
>
> Toronto - A general surgeon practising in Stratford, Ont. has apologized after using vulgar language to describe two doctors who are leaders of Concerned Ontario Doctors (COD), a watchdog group that is critical of the Ontario Medical Association.
>
> In a tweet on Sept. 4, Dr. Angus MacIver wrote: "The effing best is that these overpaid but whining corksoakers still have me on their list but have effing blocked me … the Ash and Kulvinder twats."
>
> Dr. Kulvinder Gill is the president of COD and Dr. Ashvinder Kaur is the secretary of COD. Dr. Gill said, in a tweet, the words Dr. MacIver used are slang for "cock sucking cunts."
>
> Dr. MacIver, who was until 2017 a member of the 250-plus member OMA Council, apologized on Twitter "for the poor choice of words used in a recent tweet, despite clarification and deleting the tweet with two subsequent apologies." He added: "I'm quite happy to apologize … and gender issues were not intended. Their attitude with blocking everyone who disagrees with them prevents constructive discussion."
>
> The incident continued to reverberate on Twitter and Sunday night OMA president Dr. Nadia Alam tweeted in reply to someone's comment: "I spoke to Dr. MacIver. By then he had already apologized to the physicians on Twitter and over email. He is

> blocked by them so unclear if it got through. He agreed, there is no place for this type of language between colleagues. Ever."
>
> The OMA also provided the *Medical Post* with a further comment from Dr. Alam: "In March, the OMA board passed a set of principles to guide member conduct that was endorsed by council (in) April. We want to drive a physician culture that is open, fair, collegial and safe, one that values dignity, diversity and respect. Council also asked that, with the OMA's help, a committee of physicians create a dispute resolution process to openly and fairly manage conflict between members. This incident highlights the need for such a process; social media, for all its strengths, is not the right place to adjudicate such issues."
>
> Leslie Affidavit, Def. MR, Tab 2A, p. 33

11. On September 11, 2018, the plaintiffs sent an email to the Medical Post alleging the Article was incorrect and misleading and seeking its removal from Medical Post's website. The email alleged that Dr. MacIver had not apologized to the plaintiffs. The plaintiffs also complained that COD was called "a watchdog group that is critical of the OMA", when it is a "registered not-for profit organization of Ontario physicians that advocates for the interests of Ontario's patients and front-line physicians."

> Leslie Affidavit, Def. MR, Tab 2, p. 29, para. 9 and Tab 2E, p. 54

12. Dr Gill testified that she sent this email to Medical Post on her own behalf and that of Dr. Lamba. She testified that prior to sending the email she obtained Dr. Lamba's consent to send the email to Medical Post on Dr. Lamba's behalf.

> Gill Cross (Hayward), JTB, Tab 10, p. 10, Q. 16

13. Given the disciplinary action against two physicians for abusive emails to Dr. Walley in June 2016, the story of a physician who apologized for comments about other physicians

that went too far was a matter of public interest to the audience of the Medical Post, Canadian physicians. Leslie testified:

> …[I]t was definitely in the public interest. The physician community was definitely debating what's appropriate and inappropriate language between professionals.

Leslie Cross, JTB, Tab 12, pp. 9-10, Q. 24
Leslie Affidavit, Def. MR, Tab 2, p. 29, para. 8 and Tab 2C

14. Dr Gill purported to serve a Notice under s. 5 of the *Libel and Slander Act* (the "***LSA***") on Medical Post in relation to the Article on or after October 20, 2020.

Gill Cross (Hayward), JTB, Tab 10B

***Tristan Bronca***

15. From 2015 through August 24, 2020, Bronca was a staff writer and editor with the Medical Post. Bronca knew Dr. Gill through his work with Medical Post. In 2017, Dr. Gill advised Leslie that she did "not trust Tristan to report or quote us accurately" and asked that another reporter be assigned to stories requiring responses from her.

Affidavit of Tristan Bronca ("**Bronca Affidavit**"), Def. MR, Tab 3, p. 59, para. 2, 6, 9-10 and Tab 3D, p. 84

16. Bronca also uses his personal Twitter account to express his personal views on a variety of issues, including information on Covid-19, and has done so for many years.

Bronca Affidavit, Def. MR, Tab 3, p. 59, para. 3

**August 6, 2020 Tweet**

17. On August 6, 2020, Bronca read a tweet by the Defendant Andre Picard, whom he follows on Twitter:

> It's quite shocking to see a Canadian physician leader @dockaurG saying we don't need a #coronavirus vaccine, we just need t-cell immunity, hydroxychloroquine and "the Truth". #Covid19.

Bronca Affidavit, Def. MR, Tab 3, p. 61, para. 12 and Tab 3E, p. 89

18. There were two tweets by Dr. Gill visible in Mr. Picard's tweet. Her August 4, 2020 tweet stated:

> "If you have not figured out that we don't need a vaccine, you are not paying attention. #Factsnotfear".

Bronca Affidavit, Def. MR, Tab 3, p. 61, para. 13

19. The second tweet of Dr. Gill stated:

> #Humanity's existing effective defences against #COVID19 to safely return to normal life now:
>
> -The Truth
> -T-cell Immunity
> -Hydroxychloroquine

Bronca Affidavit, Def. MR, Tab 3E, p. 89

20. Dr. Gill's statements ran counter to all the public health advice and scientific opinion Bronca was aware of at the time. Dr. Gill's tweet concerned him, especially given her job as a physician. Bronca was aware of other social media communications and tweets by Dr. Gill that were of the same vein.

Bronca Affidavit, Def. MR, Tab 3, p. 61, para. 14

Bronca Cross, JTB, Tab 15, p. 12, Q. 43

21. Bronca also saw Dr. Gill's response attacking Mr. Picard on August 6, 2020:

> It is quite shocking that a journalist with absolutely no medical training is attacking a MD for stating scientific facts. Not surprising given @picardonhealth is a Pierre Trudeau Foundation Mentor & on its Trudeau "#COVID19 Impact Committee" to drive the political WHO narrative.

Bronca Affidavit, Def. MR, Tab 3, p. 61, para. 15 and Tab 3F, p. 92

22. Bronca believed that Dr. Gill's attack on Mr. Picard had made Mr. Picard the target of negative comments and criticism on Twitter. Bronca took a screenshot of the tweets of Mr. Picard and Dr. Gill and added his own opinion in his tweet, which stated:

> "The country's top health journalist (accurately) points out that this doctor maybe shouldn't be pushing a drug that is now primarily pushed by conspiracy theorists. She responds with a conspiracy-minded smear about how he's in bed with the WHO. Remarkable work.
>
> (the "**Bronca Tweet**")

Bronca Affidavit, Def. MR, Tab 3, pp. 61-62, para. 16 and Tab 3A, p. 67

23. The "country's top health journalist" refers to Andre Picard. "This doctor" refers to Dr. Gill. The drug referred to in the Bronca Tweet is hydroxychloroquine.

Bronca Cross, JTB Tab 15, p. 5, Q. 7-10
Bronca Affidavit, Def. MR, Tab 3, p. 62, para. 17

24. Through his work with Medical Post, Bronca had been immersed in reports of the studies and analysis being done relating to the efficacy of hydroxychloroquine as a treatment for Covid-19. Bronca testified that, at that time, covering Covid-19 was constant work reading

up on developments and speaking with experts. He had also spoken with medical experts who were well versed on the scientific literature on the topic of hydroxychloroquine who did not believe it was an effective treatment for Covid-19. By August 6, 2020, Bronca understood that the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19.

Bronca Cross, JTB Tab 15, p. 13, 24, Q. 49-50, 86
Bronca Affidavit, Def. MR, Tab 3, p. 62, para. 18-19

25. Further, Bronca was also aware that hydroxychloroquine had been endorsed by noted conspiracy theorist Alex Jones, and websites like "The Gateway Pundit" which have a history of promoting conspiracy theories.

Bronca Affidavit, Def. MR, Tab 3, p. 62, para. 20

26. The second sentence of Bronca's tweet addresses Dr. Gill's attack on Mr. Picard, that accused Mr. Picard of driving "the political WHO narrative". Bronca understood that "WHO" refers to the World Health Organization. He understood the word "narrative", as used by Dr. Gill, is a common buzzword used by some to characterize the allegedly nefarious activities of global or high-powered organizations and the alleged lies they tell to cover up these activities.

Bronca Affidavit, Def. MR, Tab 3, p. 62, para. 21

27. Dr. Gill's attack on Mr. Picard suggested that he was an active part of those allegedly nefarious activities and lies. Bronca had seen no evidence that Mr. Picard was so involved.

It appeared to him that by using the language she did, Dr. Gill was attempting to smear Mr. Picard and subject him to negative comments and online hate.

Bronca Affidavit, Def. MR, Tab 3, p. 63, para. 22

28. At the time of Bronca's Tweet on August 6, 2020, questions surrounding the development of effective treatments for Covid-19 and the development of vaccines for the prevention of Covid-19 were matters of great public interest to both the medical profession and the public at large. Bronca believes he should be able to publicly express his concerns about statements that run counter to public health advice and scientific opinion without the risk of lengthy and costly litigation for doing so.

Bronca Affidavit, Def. MR, Tab 3, p. 63, para. 23

29. Bronca denies any knowledge of any conspiracy or agreement between any of the co-defendants, with respect to Dr. Gill, or at all.

Bronca Affidavit, Def. MR, Tab 3, p. 63, para. 24

30. Dr. Lamba makes no claim against Bronca. She has filed no affidavit evidence in support of her position against Medical Post on this motion, despite being able to do so.

Gill Cross (Winkler), JTB, Tab 3, page 4, lines 5-14

31. Dr. Gill's evidence on harm suffered amounts to bald allegations contained in her affidavit. She provides no detailed evidence of harm suffered, monetary or otherwise, or other facts from which the motion judge could infer harm linked to either the Article or Bronca's Tweet.

Gill Affidavit, Plaintiffs Motion Record ("**Plaintiff MR**"), p. 64, para. 52

## PART III – ISSUES

32. There are four issues on this motion:

**Issue 1:** Do the expressions of Medical Post and Bronca relate to matters of public interest?

**Issue 2:** If so, pursuant to s. 137.1(4)(a) of the *CJA*, does the plaintiffs' claim have substantial merit?

**Issue 3:** If so, can the plaintiffs satisfy the court that Medical Post and Bronca have no valid defence in this proceeding?

**Issue 4:** Pursuant to s. 137.1(4)(b) of the *CJA*, have the plaintiffs produced evidence to satisfy the court that due to the alleged harm suffered because of these defendants' expression it is preferable to allow the proceeding to continue rather than protecting the expression of these defendants?

## PART IV – ARGUMENT

33. SLAPPs, or strategic lawsuits against public participation have recently been described as:

> lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claims is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.
>
> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("***Pointes Protection***") at para. 2, Joint Book of Authorities ("**Joint BOA**"), Tab 1

34. Section 137.1 of the CJA allows a court to dismiss a proceeding arising from an expression on a matter of public interest (the "**threshold burden**") unless a plaintiff can demonstrate that (a) there are grounds to believe the proceeding has "substantial merit" and the defendant has "no valid defence" (the "**merits-based hurdle**"), and (b) the harm to the plaintiff is sufficiently serious such that the public interest in proceeding continuing outweighs the public interest in protecting the expression (the "**public interest hurdle**").

S. 137.1(3) *CJA*

Pointes Protection, at para. 18, Joint BOA Tab 1

**Issue 1: Threshold burden**

35. The moving party must show, on a balance of probabilities, that the proceeding arises from an expression made by the moving party, and the expression relates to a matter of public interest.

S. 137.1(3) *CJA*
Pointes Protection, at para. 18, Joint BOA Tab 1

36. The statute defines expression expansively: "any communication, regardless of whether it is made verbally, non-verbally, whether is it made publicly or privately, and whether or not it is directed at a person or entity." No qualitative assessment of the expression is undertaken at this stage. This is not meant to be an onerous burden.

S. 137.1(2) *CJA*

Pointes Protection, at para. 28, Joint BOA Tab 1

37. The proceeding must arise out of that expression. To determine whether the expression relates to a matter of public interest, the expression is to be assessed as a whole and it must

be asked whether "some segment of the community would have a genuine interest in receiving information on the subject."

*Grant v. Torstar Corp.*, 2009 SCC 61 ("**Torstar**") at paras. 101-102, Joint BOA Tab 8

***Medical Post meets threshold burden***

38. The Article clearly falls within the expansive statutory definition of expression. The plaintiffs' claim against Medical Post clearly "arises from" the Article. The issue of what was appropriate language between physicians was an issue in the medical profession and had been for at least two years. The subject was of genuine interest to subscribers to the Medical Post, Canadian physicians. Medical Post has met the threshold burden.

***Bronca meets threshold burden***

39. The Bronca Tweet clearly falls within the statutory definition of expression, which is expansive. Dr. Gill's claim against Bronca clearly "arises from" the Bronca Tweet. In August 2020, and for many months prior to and after, the issue of treatments for and vaccinations for Covid-19 were matters of great public interest due to the global Covid-19 pandemic. Clearly, the Bronca Tweet, which responded to misleading information regarding hydroxychloroquine as treatment for Covid-19, related to a matter of public interest.

**Issue 2: Merits-Based Hurdle – Substantial merit**

40. At the second stage of the test, the motion judge is asked to review the merits of the claim and the defences. The burden is shifted to the plaintiffs.

41. With respect to the plaintiffs' own case, they must satisfy the motion judge that there "are grounds to believe" that their case "has substantial merit". The plaintiff must have a real prospect of success, meaning there must be a basis in the record and the law to conclude that the claim is "legally tenable and supported by some evidence that is reasonably capable of belief."

*Pointes Protection*, at paras. 49 and 54, Joint BOA Tab 1

***Claim against Medical Post has no real prospect of success***

42. The plaintiffs complain that the statements in bold below from the Article are defamatory:

> **A general surgeon practising in Stratford, Ont. has apologized after using vulgar language to describe two doctors who are leaders of Concerned Ontario Doctors (COD), a watchdog group that is critical of the Ontario Medical Association.**

43. In their statement of claim, the plaintiffs allege that the words complained of are defamatory because:

i) the statement that Dr. MacIver apologized to the plaintiffs is not true;

ii) the statement the Dr. MacIver apologized to the plaintiffs was not properly investigated by Medical Post;

iii) COD is not a "watch dog group", but rather a public interest and advocacy group;

iv) the "slant" of the article is against the plaintiffs;

iv) the article is "laced with sexist, misogynist, and racially overt overtures."

Statement of Claim, Def. MR, Tab 4, p. 118-119, paras. 67-74

44. Defamation requires that the words complained of were published, refer to the plaintiffs, and that 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.

> *Bent v. Platnick* 2020 SCC 23, at para. 92, Joint BOA Tab 2

45. The plaintiffs can satisfy the first criteria. However, the words complained of by the plaintiffs relate to the statements that Dr. MacIver apologized and that the COD is described as a "watch dog group". Neither of these statements are in reference to the plaintiffs.

46. The term "watch dog group" was clearly used in relation to COD, not the plaintiffs. COD is a corporation that is not a party to this proceeding. The plaintiffs cannot claim defamation on behalf of non-parties.

47. With respect to the defamatory meaning, the statement regarding Dr. MacIver's apology, does not tend to lower the plaintiff's reputation in the eyes of reasonable people. To the contrary, the fact that Dr. MacIver apologized for his vulgar comments is more likely to lower Dr. MacIver's reputation in the eyes of reasonable people.

48. The "slant" of the Article, read as a whole, is not against the plaintiffs, and cannot reasonably be read as being "particularly slanted against" them. The thrust of the article relates to Dr. MacIver's vulgar and inappropriate comments and the ensuing fallout.

> *Color Your World Corp v CBC*, 1998 CarswellOnt 535 (CA), at para. 34, Joint BOA Tab 18

49. Further, the Article, read as a whole, is not "laced with sexist, misogynist and racially overt overtures" as baldly alleged by the plaintiffs.

50. With respect to their claim against Medical Post, the plaintiffs have not satisfied the criteria of the test for defamation. This claim should be struck.

**Issue 3: Merits-Based Hurdle - No valid defence**

51. With respect to the defendants case, the plaintiffs bear the burden of satisfying the motion judge that the defendants have "no valid defence". The plaintiffs must show that the defences put forward are not legally tenable and are not supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. If any defence has a prospect of success, the plaintiff has not met its burden and the underlying claim should be dismissed.

*Pointes Protection*, paras. 58-59, Joint BOA Tab 1

***(i) No grounds to believe Medical Post has no valid defences***

*(a) Limitation period*

52. The plaintiffs failed to serve a libel notice or commence an action within the requirements of sections 5 and 6 of the *LSA*. The plaintiffs' failure to do so constitutes an absolute bar to their action against Medical Post.

53. Section 5 of the *LSA* requires that a plaintiff give written notice of the matters complained of to the defendant newspaper within six weeks of the alleged libel coming to the plaintiffs' attention. The plaintiffs did not serve such a notice until on or after October 20, 2020.

Gill Cross (Hayward), JTB Tab 10B

54. In addition, section 6 of the *LSA* requires that an action for libel against a newspaper shall be commenced within three months after the libel has come to the attention of the person defamed.

55. "Newspaper" is defined in the *LSA* as "a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year.

S. 1(b) *LSA*

56. The word "paper" has been interpreted broadly and has been found to be broad enough to encompass a newspaper that is published on the internet. In Ontario, "the purpose and scheme of the notice provision in the *Libel and Slander Act* are to extend its benefits to those sued in respect of a libel in a newspaper irrespective of the method or technique of publication. … "[A] newspaper is no less a newspaper because it appears in an online version."

Weiss v.Sawyer, (2002) 61 O.R. (3d) 52 (C.A.), at paras. 24-25, Joint BOA Tab 51

57. Medical Post both a print publication and an online publication. The printed edition is published six times a year, while the online version is published daily (approximately 250 times a year). The Article appeared in the online version. Medical Post meets the definition of newspaper in the *LSA* and is entitled to the benefit of the strict limitation period provisions therein. In compliance with s. 8 of the *LSA*, the proprietor, publisher and address of publication are on the front page of the online publication.

Weiss v.Sawyer, (2002) 61 O.R. (3d) 52 (C.A.), at paras. 25, Joint BOA Tab 51

Exhibit 1 to Gill Cross (Hayward), JTB Tab 10A

Leslie Supp. Affidavit, Def. Supp. MR, Tab 1, p. 9, paras. 3-6 and Exhibit A, Tab 1A

58. The alleged libel in the Article came to the attention of the plaintiffs no later than September 11, 2018 when they sent an email to Medical Post demanding it be removed from the site.

Gill Cross (Hayward), JTB Tab 10, p. 9-10, Q.12, 14-15

Exhibit E to Leslie Affidavit, Def. MR, Tab 2E, p. 54

59. To comply with the requirements of the *LSA*, the plaintiffs were required to provide written notice of the alleged libel by October 23, 2018 and commence their action against Medical Post by December 11, 2018. The plaintiffs did not meet these deadlines. Their failure to do so is an absolute bar to this proceeding against Medical Post.

*(b) Justification*

60. To succeed on the defence of justification, a defendant must adduce evidence showing that the statements of fact was substantially true in their "plain and ordinary meaning". The burden is on the defendant to prove the substantial truth of the "sting" or main thrust of the defamatory publication.

*Bent v. Platnick* 2020 SCC 23, at para. 107, Joint BOA Tab 2

61. Here, the Article contains the statement Dr. MacIver "has apologized after using vulgar language to describe two doctors who are leaders of Concerned Ontario Doctors". The plaintiffs allege this statement is not true.

62. Dr. MacIver did, in fact, apologize on Twitter. On September 8, 2018 he tweeted: "@OnCall4ON I again apologize for the poor choice of words used in a recent tweet, …".

> Exhibit D to Leslie Affidavit, Def. MR, Tab 2D, p. 49

63. There is nothing in the Article that is not substantially true. Medical Post has a valid justification defence.

***(ii) No grounds to believe Bronca has no valid defence***

*(a) Fair Comment*

64. The Bronca Tweet constitutes fair comment on a matter of public interest. This defence has been described as one that:

> protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.
>
> *WIC Radio Ltd. V. Simpson*, 2008 SCC 40 ("**WIC**"), at para. 49, Joint BOA Tab 3

65. The five part test for the defence of fair comment are:

(a) the comment must be on a matter of public interest;
(b) the comment must be based on fact;
(c) the comment, though it can include inferences of fact, must be recognizable as comment;
(d) the comment must satisfy the following objective test: could any person honestly express that opinion on proved facts?
(e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves the defendant was actuated by express malice.

> *WIC*, at para. 49, Joint BOA Tab 3

66. To be of public interest the subject "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, …". The Bronca Tweet was clearly on a matter of public interest for the reasons set out at paragraph 39 above.

> *Torstar* at paras. 105, Joint BOA Tab 8

67. The Bronca Tweet was based on facts. As of August 6, 2020 the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19. In addition, the use of hydroxychloroquine in the treatment of Covid-19 had been promoted by Alex Jones and on websites like the Gateway Pundit, both of which had a history of promoting conspiracy theories. With respect to the second sentence of the Bronca Tweet, it is a fact that Dr. Gill accused Mr. Picard of "driv[ing] the political WHO narrative" in her August 6, 2020 response to Mr. Picard.

68. The Bronca Tweet was also recognizable as comment by a reasonable reader of the tweet. What constitutes comment has been set out by the Supreme Court as follows:

> … includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Brown's *The Law of Defamation in Canada* … cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used… in the context of political debate, commentary, media campaigns and public discourse.
>
> *WIC*, at para. 26 and 27, Joint BOA Tab 3

69. Bronca's references to "conspiracy-minded smears" and "conspiracy theorists" are, in their pith and substance, comment. These words are Bronca's conclusions drawn from Dr. Gill's statement that Mr. Picard was "driv[ing] the WHO political narrative" and Bronca's own observations of individuals and other entities that had promoted hydroxychloroquine as an effective treatment. Bronca's tweet included screenshots of three prior tweets of Dr. Gill and one of Mr. Picard and in doing so, sufficiently indicated the factual foundation of his comment.

*WIC*, at para. 34, Joint BOA Tab 3

70. The "gravamen" of the defence of fair comment is the whether the comment reflects honest belief. This test is not a high threshold for defendants to meet. If *any* person could honestly express the same opinion Bronca did, based on proven facts, the defence of fair comment will succeed. The Bronca Tweet expressed an honestly held opinion that many other defendants in this litigation clearly shared.

*WIC*, at paras. 37 and 50, Joint BOA Tab 3

71. Although actual or express malice can defeat the defence of fair comment, the plaintiffs have not put forward any credible evidence to support a finding of malice against Bronca.

72. Accordingly, there are grounds to believe that Bronca's defence of fair comment has a real prospect of success and action against him should be dismissed.

**Issue 4: Public Interest Hurdle**

73. This step of the test is the crux of the analysis. It is meant to serve as a "robust backstop" for judges to dismiss "technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue". The legislative requirement is that one consideration outweighs the other, not simply that the considerations be balanced against one another.

Pointes Protection, at para. 62 and 67, Joint BOA Tab 1

74. To succeed at this stage, the plaintiff must show: 1) the existence of harm; 2) that the harm was suffered as a result of the expression; and, 3) if the harm is established and linked to the expression, that the harm is sufficiently serious to make it preferable to allow the proceeding to continue, rather than protecting the expression.

Pointes Protection, at para. 82, Joint BOA Tab 1

75. Both monetary and non-monetary harm are relevant to the analysis. The test does not require the plaintiff to provide full particulars of the harm or that the harm be monetized. Bald assertions are not sufficient. The plaintiff must provide evidence of the existence of harm, or evidence from which the motion judge can draw an inference of the existence of harm and the relevant causal link to the expression at issue.

Pointes Protection, at para. 71, Joint BOA Tab 1

***(i) No evidence of harm***

76. It is the obligation of the plaintiffs to provide evidence for the motion judge to draw an inference of the likelihood of the existence of the relevant causal link between the harm and the expression at issue. The plaintiffs have failed to provide any evidence that either the Article or the Bronca Tweet are linked to any harm.

> Pointes Protection, at para. 71, Joint BOA Tab 1

77. Dr. Gill has not produced any evidence of harm at this stage of the proceeding, as is her burden. She has merely made bald assertions of harm, which are clearly not sufficient.

78. Dr. Lamba has not filed an affidavit at all, despite being competent to do so. Her failure to do so supports an inference that she has not suffered any harm, or harm sufficiently serious to warrant the continuation of this litigation.

79. The magnitude of the harm suffered due to the defendants expression is a key factor in assessing whether the harm is sufficiently serious that the public interest in the proceeding continuing outweighs the public interest in protecting the expression. While general damages are presumed in defamation actions, nominal general damages will ordinarily not be sufficient.

> Pointes Protection, at para. 71, Joint BOA Tab 1
>
> *Bent v. Platnick* 2020 SCC 23, at para. 144, Joint BOA Tab 2

***(ii) Public interest weighing favours Medical Post and Bronca***

80. The weighing exercise is to be informed by s. 2(b) of the Charter jurisprudence which grounds the level of protection afforded to expression in the nature of the expression: the search for truth, participation in political decision-making, and diversity in forms of self fulfilment and human flourishing. At this stage, the court will consider both the quality of the expression and the motivation behind it.

> Pointes Protection, at para. 77, Joint BOA Tab 1

81. In *Blair v. Premier Ford*, the court held:

> The importance of freedom of expression cannot be overstated. One quote from the case law is sufficient. Free expression is the matrix, the indispensable condition of nearly every other form of freedom … and [is] little less vital to man's mind and spirit than breathing is to his physical existence.
>
> *Blair v. Premier Ford*, 2020 ONSC 7100 at para. 72, Joint BOA Tab 15, citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at para. 105, Joint BOA Tab 7

82. Medical Post is a media organization whose expression plays a fundamental role in a democracy. There is nothing in the quality of or the motivation behind the Article to diminish a high degree of protection for Medical Post's expression.

83. The Bronca Tweet is similarly entitled to protection on the higher end of the spectrum. The importance of freedom of expression cannot be overstated. Bronca uses Twitter to express his personal views on many issues, including Covid-19, and should be able to continue to do so without fear of a costly, time consuming multi-million dollar lawsuit.

84. The open-ended nature of this section provides courts with ability to "scrutinize what is really going on in the particular case before them" allows "motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit – a fundamental value in it own right in a democracy – affects, in turn, freedom on expression and its corresponding influence on public discourse and participation in a pluralistic democracy.

> Pointes Protection, at para. 81, Joint BOA Tab 1

85. In this case, there is ample evidence to support that this proceeding is not a bona fide attempt by the plaintiffs to vindicate their reputations but are rather pursuing a political agenda.

86. In the weighing of the two interests pursuant to s. 137(4)(b), the plaintiff cannot satisfy the requirement that the harm suffered by the plaintiffs, as a result of the expression of Medical Post or Bronca, is sufficiently serious that the public interest in permitting the plaintiffs action to continue outweighs the public interest in protecting that expression.

## PART V - ORDER REQUESTED

87. Medical Post and Bronca request an Order:

(a) dismissing the plaintiffs proceeding pursuant to s. 137.1 of the *Courts of Justice Act*;

(b) for costs of this motion and proceeding on a full indemnity basis pursuant to s. 137.1(7) of the *Courts of Justice Act*; and,

(c) such further and other relief as to this Honourable Court may seem just.

All of which is respectfully submitted.

August 19, 2021

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## SCHEDULE "A"

### List of Authorities Cited

1. *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22
2. *Grant v. Torstar Corp.*, 2009 SCC 61
3. *Bent v. Platnick* 2020 SCC 23
4. *Color Your World Corp v CBC, 1998 Carswell Ont* 535 (CA)
5. Weiss v.Sawyer, (2002) 61 O.R. (3d) 52 (C.A.)
6. *WIC Radio Ltd. V. Simpson*, 2008 SCC 40
7. *Blair v. Premier Ford*, 2020 ONSC 7100

## SCHEDULE "B"

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

**PREVENTION OF PROCEEDINGS THAT LIMIT FREEDOM OF EXPRESSION ON MATTERS OF PUBLIC INTEREST (GAG PROCEEDINGS)**
**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.

**No further steps in proceeding**

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

**No amendment to pleadings**

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

**Costs on dismissal**

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

**Costs if motion to dismiss denied**

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

**Damages**

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

**Procedural matters**
**Commencement**

**137.2** (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

**Motion to be heard within 60 days**

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

**Hearing date to be obtained in advance**

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

**Limit on cross-examinations**

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

**Same, extension of time**

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

***Libel and Slander Act*, R.S.O. 1990, c. L. 12**

**Definitions**

**1** (1) In this Act,

"broadcasting" means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

(a) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or

(b) cables, wires, fibre-optic linkages or laser beams,

and "broadcast" has a corresponding meaning; ("radiodiffusion ou télédiffusion", "radiodiffuser ou télédiffuser")

"newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year. ("journal") R.S.O. 1990, c. L.12, s. 1 (1).

**Limitation of action**

**6** An action for a libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action. R.S.O. 1990, c. L.12, s. 6.

**Application of ss. 5 (1), 6**

**7** Subsection 5 (1) and section 6 apply only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario. R.S.O. 1990, c. L.12, s. 7.

**Publication of name of publisher, etc.**

**8** (1) No defendant in an action for a libel in a newspaper is entitled to the benefit of sections 5 and 6 unless the names of the proprietor and publisher and the address of publication are stated either at the head of the editorials or on the front page of the newspaper. R.S.O. 1990, c. L.12, s. 8 (1).

**Copy of newspaper to be admissible evidence**

(2) The production of a printed copy of a newspaper is admissible in evidence as proof, in the absence of evidence to the contrary, of the publication of the printed copy and of the truth of the statements mentioned in subsection (1). R.S.O. 1990, c. L.12, s. 8 (2).

**Justification**

**22** In an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges. R.S.O. 1990, c. L.12, s. 22.

**Fair comment**

**23** In an action for libel or slander for words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved. R.S.O. 1990, c. L.12, s. 23.

DR. KULVINDER KAUR GILL ET AL. -and- DR. ANGUS MACIVER ET AL.
Plaintiffs Defendants

Court File No. CV-20-00652918-000

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

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE MOVING PARTIES,**
**TRISTAN BRONCA AND THE MEDICAL POST**
**(motion returnable September 27 to 30, 2021)**

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