CITATION: *Paul v. The Corporation of the Township of Madawaska Valley,* 2021 ONSC 4996
COURT FILE NO.: CV-21-00000002-0000
DATE: 2021/08/06

SUPERIOR COURT OF JUSTICE

RE: Roger Anthony Paul, Danielle Marie Paul and Madvalley Media

Plaintiffs

AND

The Corporation of the Township of Madawaska Valley, Kim Love, Carl Bromwich, Ernest Peplinski, David Shulist and Mark Willmer

Defendants

BEFORE: Justice A. Doyle

COUNSEL: Plaintiffs: Self represented

Counsel for the Defendants: J. Paul R. Cassan and Tim J. Harmar

DATE: May 19, 2021 via Videoconferencing in Pembroke

Written submissions completed on June 16, 2021

DECISION ON ANTI-SLAPP MOTION

[1] The Plaintiffs, the owners of a small newspaper, have sued the Defendants, the local municipality and various elected officials, for defamation and misfeasance in public office. The Defendants move for an order dismissing the Plaintiffs' claim pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. 43, commonly referred to as an anti-SLAPP motion. The Defendants have also brought a motion for an order striking out portions of the Plaintiffs' affidavits.

[2] The Plaintiffs claim that the Defendants defamed the Plaintiffs and that their vindictive conduct towards them was aimed at punishing them for speaking out against the Defendants in the Madawaska Valley Current newspaper (the "Current"). According to the Plaintiffs, the Defendants

are attempting to use public office to stop investigative journalism. The Defendants deny these allegations and argue that they have acted properly and in accordance with their public duty and obligations to the public they serve.

[3] At this early stage on a s. 137.1 motion, the Court is not to engage in a “deep dive into the record and make definitive findings of fact and credibility” which should be left to a summary judgment motion or a trial: see *Di Franco v. Bueckert*, 2021 ONCA 476, at para. 2.

[4] For the reasons that follow, I strike portions of the Plaintiffs’ affidavits as set out below and I dismiss the Defendants’ s. 137.1 motion.

Background

[5] The Plaintiffs, Roger Anthony Paul (“Mr. Paul”) and Danielle Marie Paul (“Mrs. Paul”) own the Plaintiff company Madvalley Media. They have run a not-for-profit community newspaper known as the Madawaska Valley Current since January 2018. The Current is distributed for free online and in print and relies on advertising revenue from local businesses to help meet its operating costs.

[6] The Current’s self-declared objective is to provide local community news and act as a “watchdog” over local government and other institutions.

[7] The Defendant, the Corporation of the Township of Madawaska Valley (the “Township”), is a municipal corporation in the County of Renfrew.

[8] The Defendant, Kim Love, is the mayor of the Township and the Defendants Ernest Peplinski, David Shulist and Mark Willmer are members of the Township Council. The Township is a small municipality with approximately 4000 ratepayers.

[9] The individual Plaintiffs were previously involved in litigation with the Township including the following:

- A claim to the Human Rights Tribunal of Ontario by Mrs. Paul ("HRTO action") under the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as a result of a complaint lodged against an individual at the Township. This matter was ultimately resolved by Minutes of Settlement on the eve of the hearing.

- An appeal to the Privacy Commissioner by Mrs. Paul regarding a request for information pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. that the Township had denied her ("information application"). She succeeded in obtaining an order dated July 4, 2019, that the Township complete a further search of their records for documents that she requested (including documents from January 12, 2016 to July 11, 2016, at a time when she was an employee).

[10] In addition, the Current published articles:

- Critical of the Township's involvement with a previous Integrity Commissioner's claim against the Township; and

- Commenting on the Township's actions, such as expressing concerns regarding the anomalies in a new Code of Conduct and Integrity Commissioner Protocol.

[11] After the settlement of the HRTO action, Mr. Paul sent an unsolicited letter dated August 18, 2019 (the "August 18, 2019 letter") to the Township expressing his concerns regarding the use of public funds to pay for the Township's lawyers in the HRTO action. Included in these concerns is that Mrs. Paul had offered mediation at the institution of the action which was refused at that time and the action was ultimately settled on the eve of the hearing via mediation.

[12] The August 18, 2019 letter opined that the substantial legal fees were unnecessarily incurred in the HRTO action and the information application.

[13] Mr. Paul advised the Township that it should bring a claim against their previous solicitor to recover approximately $60,000 which the municipality spent in defending the HRTO action rather than pursuing mediation. He also indicated that he had practiced civil litigation for almost 30 years and that he could be considered an "expert witness".

[14] In his letter to the Township, dated August 27, 2019 (the "opinion letter"), Mr. Cassan, from Wishart and Law (the law firm acting for the Township), advised against bringing a claim against their former solicitors and expressed a number of concerns. Mr. Cassan indicated that he had attempted to verify Mr. Paul's claimed legal experience and did a search of online directories and reported cases in Canada and the U.K.

[15] In the opinion letter, Mr. Cassan stated: "I have read Mr. Paul's claim that he was a lawyer in the U.K. I have not been successful in finding Mr. Paul was ever called to the Bar or practiced law in any province or territory in Canada."

[16] Mr. Cassan also indicated that Mr. Paul could not be an expert witness as, being the spouse of Mrs. Paul, he would not fit within the ambit of the rule requiring expert witnesses to be impartial.

[17] The opinion letter also suggested that, due to the history of voluminous correspondence from Mr. Paul that required immense time and effort from the Township's small staff, all future communication from Mr. Paul be directed by staff to Council, who would ultimately determine what resources would be expended.

[18] The opinion letter was discussed at the August 27, 2019 Council meeting. Council waived solicitor-client privilege. The opinion letter was distributed to the Council members in attendance at that meeting and, after a very brief discussion and the passing of the resolution, the letter was returned to the city clerk and shredded after the meeting.

[19] At the meeting, the Chief Administrative Officer ("CAO") did not attach a copy of the opinion letter to her report to Council nor did she read out its contents aloud to the Council.

[20] The Township did not distribute the opinion letter to the public nor did it disclose it to third parties, though it did provide one copy of the opinion letter to Mr. Paul at the Council meeting as a courtesy.

[21] Council discussed the need to manage the flow and allocation of municipal resources associated with the communications from Mr. Paul.

[22] After deliberation, the Township passed Resolution 2019-25-082 and a confirming by-law which directed the CAO as follows:

1. Accept the recommendation from Wishart and Law not to pursue legal costs against Templeman Menninga (the Township's former solicitors); and

2. Forward all future correspondence from Mr. Paul to Municipal Council for consideration at a regular Council meeting so Council can decide what public resources will be allocated to Mr. Paul.

[23] After the meeting, Mr. Paul forwarded a letter to the Township providing proof of his call to the Ontario Bar and demanded an apology and that the Township donate $500 to a not-for-profit organization. He indicated that Council should have known he had practiced law as it was on the Current's website and on his LinkedIn profile.

[24] Mr. Cassan responded that he was unable to verify Mr. Paul's credentials online but that this was only one of the reasons why he would not qualify to be an expert for the township.

[25] Mr. and Mrs. Paul published seven articles about these matters in the Current. In these articles, the Plaintiffs published their own statements regarding the Council meeting, the Township's Resolution and confirming by-law.

[26] The Plaintiffs' Statement of Claim dated December 13, 2019 alleges that the causes of action of defamation pursuant to the *Libel and Slander Act*, R.S.O. 1990, c. L.12 and misfeasance in public office arise from the following:

- Statements made by Councillor Peplinski at the February 2019 Council meeting directing derogatory comments and names to Mr. Paul. These remarks included the following:

    - F….Jerk off A..H…,

    - F…you…A..H

- A…H..
- F….come here, ….A..H…
- I'll kill you A…H..
- A…Hole.

- The opinion letter presented at the Council meeting questions Mr. Paul's honesty concerning public statements that he made indicating that he had previously been a lawyer and, consequently, is an attack on his reputation.
- The Resolution and confirming by-law stipulating that all communications from Mr. Paul would be relayed to Council affects his reputation in the community as it portrays him as a nuisance to the Township.
- A councillor's oral statement made at the August 27, 2019 Council meeting that Mr. Paul should apologize to ratepayers and write a cheque for $60,000.

[27] The Statement of Claim was brought against the Township and its individual councillors for damages for, among other things:

- General and special damages of $50,000 for misfeasance in public office;
- General damages and special damages of $50,000 for defamation under the *Libel and Slander Act*; and
- Punitive and exemplary damages of $25,000.

Preliminary Matter – Are the Defendants bound by the statements set out in the Plaintiffs' November 19, 2020 Request to Admit to which they failed to respond?

[28] The Plaintiffs served two Requests to Admit dated November 19, 2020 and December 29-30, 2020, via email.

[29] The Defendants' counsel's office was closed over the Christmas holidays and staff emails were set to return an automatic response stating that the office would re-open on January 4, 2021.

[30] On January 15, 2021, the Defendants' counsel told the Plaintiffs they would be requesting instructions from their clients and may require a few extra days beyond the timelines contemplated in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*"). Counsel also notified the Plaintiffs that the letter was not to be construed as an admission of the Request to Admit being properly sent or permitted.

[31] On January 20, 2021, the Defendants counsel advised the Plaintiffs that they denied all of the statements set out in the Request to Admit dated December 29-30, 2020 and maintained their position that this request was contrary to the timelines set out in Master Kaufman's September 10, 2020 endorsement and constituted a fresh step which was not permitted under s. 137.1 of the *Courts of Justice Act.*

[32] Through inadvertence, the Defendants failed to respond to the Request to Admit dated November 19, 2020.

The Defendants' position

[33] The Defendants submit the following:

- Master Kaufman "crystallized" the evidentiary record and the Request to Admit was a tactic by the Plaintiffs' to circumvent the timelines set by Master Kaufman for the evidence;

- A Request to Admit is a fresh step as in *Muskoka Lakes (Township) v. 169753 Ontario Ltd.*, 2011 ONSC 1997, [2011] 206 O.R. (3d) 540, Justice Ferrier found a response to a request to admit was a fresh step; and

- The statements contained in the November 2020 Request to Admit constitute argument rather than facts.

The Plaintiffs' Position

[34] The Plaintiffs submit that:

- In accordance with r. 51, the Defendants are deemed to admit the facts set out in the Request to Admit;

- At no time did they deal with this Request to Admit save and except in the s. 137.1 factum, thereby not giving the Plaintiffs an opportunity to reply and respond in an appropriate procedural way; and

- The facts set out in the Request to Admit are related to matters of public record.

Analysis

[35] For the purposes of this s. 137.1 motion, I will exercise my discretion and not hold the Defendants to have admitted the statements set out in the November 19, 2020 Request to Admit for the following reasons:

- Rule 1.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, indicates that the *Rules* shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

- Rule 2.01 provides that a failure to comply with the *Rules* is an irregularity and does not render a proceeding, or a step, document or order in a proceeding, a nullity. Rule 2.01((b) indicates that a court may set aside the proceeding or step, if it is necessary in the interest of justice.

- Rule 2.03 provides that the court may dispense with compliance with any rule at any time, only where and as necessary in the interest of justice.

- Although it is not incumbent on the Plaintiffs to follow up with the Defendants regarding this Request to Admit, the Court notes that the Plaintiffs had received the response to their December 29-30, 2020 Request to Admit. No further mention was made of the Defendants' failure to respond to the earlier Request to Admit until the filing of the factum materials for the s. 137. 1 motion.

- Clearly, this was an oversight on the Defendants' counsel's part to not have responded to this Request to Admit as they clearly took steps to respond to the December 29-30, 2020 Request to Admit.

- It is in the interest of justice to conclude that this oversight by counsel does not result in an admission against the Defendants' interests at this stage of the proceedings.

Motion #1: Should the Court strike out parts of the documents filed by the Plaintiffs on the ground that they contain opinion and argument?

Defendants' Position

[36] The Defendants move for an order striking out portions of the affidavits and supplementary affidavits of the individual Plaintiffs, Roger Paul and Danielle Paul, in accordance with Schedules A to D attached to their notice of motion or, in the alternative, for an order striking out the aforementioned affidavits in their entirety. The majority of the objections are based on the allegation that the impugned portions of the affidavits are replete with improper argument, legal conclusions, irrelevant information and information "inserted solely for colour".

[37] They rely on rules 4.06(2), 25.11 and 39.01(4) of the *Rules*.

Plaintiffs' Position

[38] This motion ought not have been brought as it conflicts with Master Kaufman's endorsement made at the case conference on September 10, 2020.

[39] The Defendants are attempting to prevent the Plaintiffs from presenting relevant factual evidence.

[40] These challenges have been rendered moot because of the completion of the argument on the s. 137.1 motion without any challenge being made to the Plaintiffs' evidence during their argument.

Legal framework

[41] Rule 4.06(2) of the *Rules* provides:

> (2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

[42] Rule 39.01(4) again sets out the contents of an affidavit:

> (4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[43] Firstly, it is trite law that affidavits, or portions of them that simply express opinions on the very issues raised, may be struck, and the affidavit should be limited to factual information.

[44] If an affidavit contains particularly offensive content, a party may move to strike the offending paragraphs.

[45] Pursuant to r. 25.11, the Court has the power to strike documents which offend these rules:

> 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> (a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the court.

[46] It is now settled law that a 'document' includes an affidavit within the meaning of r. 25.11: *Allianz Global v. Attorney General of Canada,* 2016 ONSC 29 and *Holder v. Wray*, 2018 ONSC 6133.

Analysis

Preliminary Matter

[47] At the hearing, I granted the Plaintiffs two weeks to file a factum to deal with the merits of this motion. The Defendants were entitled to file a reply factum.

[48] The Plaintiffs' factum went beyond the scope of the Court's endorsement, which permitted them to file a factum regarding the Defendants' motion to strike pleadings. Instead, the factum delved into other areas, including discussing the merits of the s. 137.1 motion and the Request to

Admit to which the Defendants failed to respond. The Plaintiffs also alleged that the Defendants' evidence was replete with non-admissible evidence and were thus imposing a "double standard".

[49] The Court will only consider portions of the Plaintiffs' factum that deal with the motion to strike portions of their affidavits.

Bringing of the Motion

[50] For the reasons set out below, I find that the Defendants' motion to strike portions of the Plaintiffs' affidavits was properly brought.

[51] Master Kaufman's September 10, 2020 endorsement reads as follows:

> The defendants wish to bring a separate motion to strike portions of the plaintiffs' responding affidavits on the basis that they contain hearsay, argument and opinion evidence. I decline to schedule this motion as well because the defendants' concerns can be addressed at the hearing of the s. 137.1 motion…

[52] There may be occasions where these motions should be heard before the main motion. Motions can be brought before the main motion so that the Judge on the main motion has the legal written record. In this case, the Defendants raised their concerns early in the process.

[53] Master Kaufman deemed it to be appropriate for the Judge on the main motion to hear this argument.

[54] In addition, the motion was properly served in accordance with the timelines set out the *Rules*.

[55] Therefore, the Defendants' motion is properly before the court.

Is this motion moot?

[56] The Plaintiffs argue that this motion is moot for a number of reasons including:

- The Defendants' s. 137.1 motion has been fully argued;

- No objection was made by the Defendants directly on any paragraph of the Plaintiffs' evidence during their argument of the s. 137.1 motion; and
- The Plaintiffs were able to argue against the s. 137.1 motion without reference to the allegedly inadmissible portions of their affidavits.

[57] This Court proceeded with the s. 137.1 motion on the basis that the decision would be reserved and the Court would at the same time consider what evidence contained in the Plaintiffs' affidavits was admissible.

[58] Therefore, this motion is not moot, and the Court will determine below which impugned portions of the Plaintiffs' motion will be struck.

Analysis

[59] The Defendants' motion lists 117 instances of impugned paragraphs set out in the Plaintiffs' affidavits.

[60] Clearly, it is important that the parties understand what evidence the Court is relying on in its determination of the s. 137.1 motion.

[61] It is not enough to say that the Court will "ignore any portions of the affidavits" that offend a legal rule.

[62] The Court makes the following general comments:

- In some instances, the Plaintiffs indicate that the paragraphs provide "context" or "narrative" and the Defendants argue that the paragraphs are primarily legal argument and conclusions;
- Some facts are intertwined with the legal argument: the Court should not have to parse each paragraph to separate legal argument from fact;
- Some paragraphs belong in a factum not in an affidavit; and
- Opinion evidence is inadmissible unless given by an expert. Personal opinions or a deponent's reaction to evidence are nothing more than an argument in the guise of

> evidence. Arguments only add depth to the court file and confuse the fact-finding exercise.

[63] I note that the Defendants have already responded to these affidavits and cross-examined the Plaintiffs on these affidavits.

[64] Although, the Plaintiffs are not lawyers, Mr. Paul, as a previous litigator for 30 years, is assumed to have more knowledge than the average individual of the rules of the Court and pleadings.

[65] The Plaintiffs' materials consist of the Mr. and Mrs. Paul's argument regarding the Township's view of them and the Current. The affidavits set out why the Plaintiffs believe Mr. Paul's reputation has been lowered in the eyes of the community. The Plaintiffs' affidavits are replete with argument mixed in with observations. They also argue that the Township should have consulted them before they discussed the opinion letter at the August 2019 Council meeting.

[66] This evidence is helpful to the extent that it explains the Plaintiffs' perspective with respect to this litigation and how they believe they were targeted by the Township and the Defendants, who they believe did not act in good faith in their dealings with Mr. and Mrs. Paul.

[67] However, this is a s. 137.1 motion. The affidavit that expresses opinions and argument is more than I need to consider in the context of this motion. I am not making a final determination of the merits of the lawsuit nor is this a summary judgment motion.

[68] Many paragraphs of the affidavits do read as arguments that should be found in a factum.

[69] Affidavits in support of motions and applications are not permitted to contain legal argument and opinions, with few exceptions, nor can they contain comments on the legal position of the opposite party.

[70] Accordingly, the following paragraphs will be struck:

Mr. Paul's affidavit of February 13, 2020

- Para. 2: argument and belongs in a factum;
- Para. 6: argument and belongs in a factum;
- Para. 10: argument and belongs in a factum;
- Para. 14: argument and the last sentence is speculative;
- Para. 16: argument and belongs in a factum;
- Para. 20: argument and belongs in a factum;
- Para. 21: first sentence is speculative;
- Para. 24: argument and belongs in a factum;
- Para. 32: argument and belongs in a factum; and
- Para. 33: argument and belongs in a factum.

Affidavit of Mrs. Paul dated February 13, 2020

- Paras. 10, 12, 13 and 14: opinion and argument and belongs in a factum;

Affidavit of Mrs. Paul dated April 6, 2020

- Para. 3: argument and belongs in a factum;
- Para. 4: argument and belongs in a factum;
- Para. 5: argument and belongs in a factum;
- Para. 7: argument and belongs in a factum;
- Para. 21: opinion;
- Para. 22: argument and belongs in a factum;
- Para. 23: argument and belongs in a factum;
- Para. 24: argument and belongs in a factum;

- Para. 25: argument and belongs in a factum;
- Para. 26: argument and belongs in a factum; and,
- Para. 27: argument and belongs in a factum.

[71] The supplementary affidavit of Mr. Paul, dated April 28, 2020, is struck in its entirety. It reads like an argument and would be properly found in a factum.

[72] Despite the above order, the record is sufficient for me to proceed with the Defendants' s. 137.1 motion.

[73] The Record consists of the pleadings, the transcripts, the affidavits filed by the Defendants, the balance of the Plaintiffs' affidavits that have not been struck, numerous exhibits and documentary evidence.

Motion #2 Should the Plaintiffs' claim be dismissed under s. 137.1?

Defendants' Position

[74] The Defendants submit that the Plaintiffs' action arises out of the passing of a certain resolution and confirming by-law by the Township to manage the flow of communication as between the Township and Mr. Paul. Mr. Paul had sent multiple complaints and repetitive requests taxing the limited resources of the Township and its staff. The by-law did not prevent Mr. Paul from communicating with the Township. Rather, it established a protocol for vetting such communications such that they could be appropriately addressed without unnecessarily burdening the Township staff.

[75] The opinion letter from the Township's counsel in response to Mr. Paul's unsolicited correspondence simply stated that they could not find evidence that Mr. Paul had practiced law in Ontario and that he therefore could not act as an expert witness.

[76] Mr. Paul's response was combative, and he distributed the opinion to third parties, including a local radio station, and published it in the Current.

[77] The Defendants submit that this action arises from the councillors' statements during Council meetings, the opinion letter and the Township's Resolution and confirming by-law, which are all expressions relating to the public interest. Therefore, the Defendants have met their burden.

[78] The Plaintiffs' claims do not have substantial merit and they will be unable to show that the Defendants' defences are not valid, as required by *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22.

[79] In addition, the Plaintiffs are unable to demonstrate that the weighing of the public interest favours permitting the proceeding to continue.

[80] The claim has been brought against the Township and individual councillors to intimidate the Township and control decisions as to how municipal resources are spent. The Defendants perceive this litigation as an attempt by the Plaintiffs to punish individual councillors for actions they have taken to govern the municipality of 4000 ratepayers.

[81] The Defendants submit that the Defendants' expressions and conduct were motivated by the public interest and that there was no misfeasance in public office.

[82] The Defendants note that the Plaintiffs did not bring an application to quash the Resolution and confirming by-law nor have they pled facts to support the allegation that the protocol for Mr. Paul's communications with the Township in any way inhibited his ability to communicate with the Township.

[83] The Defendants have put defences "in play" in their motion materials.

Plaintiffs' Position

[84] Firstly, the Plaintiffs submit that there is no basis for a finding that the Plaintiffs brought this action to "manipulate the judicial system", such that their claim could be classified as "strategic". The Defendants are attempting to use public office to stop the investigative journalism of the Current.

[85] The evidence indicates that the Defendants have demonstrated extensive compelling and unchallenged hostility towards the Plaintiffs for the following reasons:

- The Current's investigative reports included criticism of the Defendants' lack of transparency and accountability.
- In February 2018, the Current began investigating proceedings against the Township by the Integrity Commissioner.
- On March 6, 2018, the Current published an opinion regarding the micromanaging of the Township's administration by some members of Council, causing the mayor to make disparaging comments about the Current.
- In October 2018, the Current reported on the "ad hoc reprioritization" of repairs and improvements of roads where some Council members had their residences.
- In February 2019, during a Council meeting, Councillor Peplinski directed profanities and threatened Mr. Paul, who was present as the Current's publisher. No apology was forthcoming.
- In July 2019, Mr. Paul wrote to Mr. Cassan about the Township's recently adopted new code of conduct and Integrity Commissioner protocol and inquired why Madawaska Valley's Code and protocol placed more obstacles in the way of residents making complaints than most municipalities. In this correspondence, Mr. Paul advised Mr. Cassan that he had practiced law for more than 30 years.

[86] Secondly, the Defendants' expressions were motivated by self-interest and not the public interest.

[87] Mr. Paul had represented to the community that he had practiced law. The opinion letter puts his statements to the community into question. After seven months, the Township finally published a statement confirming that Mr. Paul had previously practiced law.

[88] Mr. Paul also takes issue with the fact that the opinion letter wrongfully accuses him of inflicting "voluminous" and unnecessary communications on the Defendants.

[89] The Plaintiffs state that:

- They did not have an opportunity to refute the opinion letter before the August 27, 2019 meeting;
- They were given no opportunity to speak at that meeting;
- The opinion letter was dated the same day as the meeting thereby providing no opportunity to correct the record; and
- Council did not contact him ahead of time to clarify his previous employment status.

Legal Framework

[90] Section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, was established to provide an expedited procedure to dismiss unmeritorious litigation that arises from expressions on matters of public interest.

[91] The Supreme Court of Canada's decision in *Pointes* sets out the comprehensive process required in a s. 137.1 motion.

[92] Firstly, the Defendants have the initial burden of satisfying the Court, on a balance of probabilities, that:

1. The proceeding arises from an expression made by the Defendant; and
2. That the expression relates to a matter of public interest.

[93] Once the Defendants have met their burden, the burden then shifts to the Plaintiffs to satisfy the Court of all the following elements:

1. There are grounds to believe the proceeding has substantial merit;
2. The Defendants have no valid defence; and
3. Once the above two criteria have been established, then the Plaintiffs must satisfy the Court that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. In doing so, the Plaintiffs must establish:

    a. The existence of harm (monetary or non-monetary); and

b. That the harm was caused by the Defendants' expression.

[94] At para. 71, the Supreme Court stated that the Plaintiffs do not have to establish actual harm but must provide an evidentiary foundation that would enable the Court to infer the existence of harm and the causal link.

[95] If the Court finds that the harm that has been suffered or is likely to be suffered by the Plaintiffs, as a result of the Defendants' impugned expressions, is outweighed by the public interest in protecting the expression, then the Court should dismiss the action.

[96] As stated by Justice Gomery in *Smith v. Nagy*, 2021 ONSC 4265, at para. 27:

> [27] However, a decision on an anti-SLAPP motion is "unequivocally not a determinative adjudication of the merits of a claim": *Bent v. Platnick*, at para.4. Section 137.1 does not provide another form of summary judgment: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 ("*Pointes Protection* ONCA"), at para. 73; see also *Pointes Protection* SCC, at para. 38. Its purpose is instead to assess whether, for the sake of protecting debate on matters of public interest, a hearing on the merits of some cases ought never to take place. That is the why the balancing exercise in the final stage has been described as the fundamental crux of the s. 137.1 analysis: *Pointes Protection* SCC, at para. 18.

Analysis

Step 1: Have the Defendants met their burden in proving that the statements are expressions?

[97] 'Expression' is given an expansive meaning in s. 137.1(2). In *Pointes*, at para. 24, the Supreme Court stated that "arises from" is to be given a broad and liberal interpretation and the proceeding need not arise directly from the expression. Therefore, this section can apply to a varied number of proceedings and not just defamation suits.

[98] I find that the following statements, which form the subject of this claim, are "expressions" within the meaning of s. 137.1(2), as articulated by the Supreme Court of Canada in *Pointes*:

- Councillor Peplinski's offensive remarks made *sotto voce* at the Council meeting in February 2019, which were caught by the transcriber under the voice of the mayor, who was speaking at the time. They were expressions directed at Mr. Paul.

- Mr. Cassan, in his opinion letter, stated that he was unable to find any evidence through his research that Mr. Paul had been licensed to practice law in Canada and his opinion that Council establish a communication protocol to deal with Mr. Paul's communication. These expressions were in response to Mr. Paul's letter suggesting that he could act as their expert witness in a claim that he advised the municipality to make against their former legal counsel.

- The statement by the councillor suggesting that Mr. Paul apologize to ratepayers and pay $60,000 to the ratepayers of the Township is an expression.

- The municipality's Resolution and confirming by-law establishing the communication protocol to facilitate dealing with what the municipality found to be voluminous correspondence from Mr. Paul. In my view, resolutions and the confirming by-law are part of the Council's form of decision-making and the expression of that decision to the public and ratepayers. They are expressions. See s. 5 of the *Municipal Act, 2001*, S.O. 2001, c. 25, which enables the Municipal Council to act by by-law or resolution.

Step #2: Are the expressions relating to matters of public interest?

[99] This is a relatively low hurdle that is generally cleared by the Defendants as they need only show that some segment of the public has a genuine interest in knowing about the expression.

[100] In my view, the public has a genuine stake in knowing about matters pertaining to Council, its discussions and its decisions.

[101] At para. 27, the Court in *Pointes* said the following:

> [27] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a "matter of public interest". The same principles apply in the present context. The expression should 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" (paras. 101-2). While there is "no single 'test'", "[t]he public has a genuine stake in knowing about

> many matters" ranging across a variety of topics (paras. 103 and 106). This Court rejected the "narrow" interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, "[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence" (para. 106).

[102] The Supreme Court in *Pointes* further expanded on this topic at para. 75 when it indicated that "a statement that contains deliberate falsehoods, [or] gratuitous personal attacks ... may still be an expression that relates to a matter of public interest."

[103] The published information can be a matter of public interest even if the information is demonstrably false and the language used is intemperate or "even harmful to the public interest": *Pointes*, at paras. 55 and 65.

[104] Regarding the offensive comments made by Councillor Peplinski at the February 2019 Council meeting, during the Council proceedings, these comments are certainly insulting. I note that *Pointes* indicates that gratuitous personal attacks do not mean that an expression loses its quality of being related to a matter of public interest just because it contains insulting or degrading language. "…people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others": *Pointes,* at para. 100.

[105] The other three expressions are expressions that "the public has a genuine stake in knowing": *Pointes,* at para. 27.

- The opinion letter was solicited by the Township to deal with Mr. Paul's letter. The suggestion of a lawsuit made by Mr. Paul involved the use of public funds. The option that all future correspondence with Mr. Paul should be directed to Council was an opinion dealing with the municipality's limited resources. Therefore, the opinion letter was part of the Township's obligation to deal with public funds in accordance with its legislative duty.

- The statement made by the councillor to Mr. Paul was part of this context and also related to a matter of public interest.

- Also, the Resolution and confirming by law, which stipulates that the Township would not bring a claim against their previous solicitors and that future correspondence from

> Mr. Paul would be directed to Council, pertained to a matter of public interest. It informed the public and the ratepayers of its decision regarding the claim and Mr. Paul's future correspondence.

Step #3: Have the Plaintiffs met their burden to show that their causes of action have substantial merit?

Introduction

[106] The test for this stage requires the Court to determine if success in the action is within the range of conclusions reasonably available on the motion record: see *Pointes*.

[107] At para. 54, the Supreme Court stated that the Plaintiffs must satisfy the Court that the claim is "legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success."

[108] Justice Côté described in *Pointes* the standard as requiring "something more than mere suspicion" but being less onerous than proof on the balance of probabilities. She also indicated that the test is a subjective one – that is, the particular motion judge (not simply a "reasonable trier of fact") must assess the record and determine that there is a basis in fact and in law that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

[109] On the first prong of the merits-based hurdle, the Plaintiffs must establish that their claims have "a real prospect of success". This does not require that the Plaintiffs show that their claim is "likely" to succeed. Rather, it requires that, taking into account the stage of the proceeding, the Plaintiffs prove that the claim is "legally tenable and supported by evidence that is reasonably capable of belief."

[110] This Court must reach its own conclusion based on an assessment of the record: see *Pointes* and *Bent v. Platnick*, 2020 SCC 23. It must look at the potential merit of the action and whether any valid defences exist. In *Pointes*, at paras. 41-42, Justice Côté stated:

> [41] Importantly, the assessment under s. 137.1(4)(a) must be made from the motion judge's perspective. … The clear wording of s. 137.1(4) requires "the judge" hearing the motion to determine if there exist "grounds to believe". Making the application of the standard depend on a "reasonable trier" improperly excludes the express discretion and authority conferred on the motion judge by the text of the provision. The test is thus a subjective one, as it depends on the motion judge's determination.
>
> [42] Taking all of the foregoing together, what s. 137.1(4)(a) asks, in effect, is whether the motion judge concludes from his or her assessment of the record that there is a basis in fact and in law — taking into account the context of the proceeding — to support a finding that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

[111] The Supreme Court emphasized that anti-SLAPP motions are distinct from motions to strike and summary judgment motions. In distinguishing summary judgment motions, the Court explained that s. 137.1 motions arise earlier in the litigation process and have corresponding procedural and evidentiary limitations. Thus, while the motion judge need not accept the record at face value or accept bald allegations, the motion judge should only engage in a limited weighing of the evidence and should not make any ultimate determinations on credibility or the merits. Justice Côté repeated the Court of Appeal's warning that courts must not turn s. 137.1 motions into *de facto* summary judgment motions.

Defamation claim

[112] To prove a claim in defamation, the Plaintiffs must establish all of the following on a balance of probabilities:

- That the impugned words were defamatory, in that they would tend to lower the Plaintiffs' reputation in the eyes of a reasonable person;
- That the words in fact referred to the Plaintiffs; and
- That the Defendants published the words in that they communicated the words to another third party or third parties.

[113] At common law, defamation covers any communication that tends to lower the esteem of the subject in the minds of ordinary members of the public. The perspective measuring the esteem is highly contextual and depends on the view of the potential audience of the communication and their degree of background knowledge. Probably true statements are not excluded, nor are political opinions, unless explicitly stated as such. Intent is always presumed, and it is not necessary to prove that the defendant intended to defame. Where a communication is expressing a fact, it can still be found to be defamatory through innuendo suggested by the juxtaposition of the text or picture next to other pictures and words.

[114] I find the following:

February 2019 comment by Councillor Peplinski

- The words in fact referred to the Plaintiffs.

- It was a comment made during a public Council meeting while proceedings were ongoing. The comments were transcribed. They were directed at Mr. Paul and presented him in a bad light.

- The impugned words were certainly insulting but not necessarily defamatory, as it would not tend to lower the reputation of the Plaintiff in the eyes of a reasonable person.

Opinion letter

- A member of the public could infer that Mr. Paul was not a lawyer based on the fact that the Township's lawyer was not able to find evidence through various sites, including that of the Law Society of Ontario, that he was previously a member of the Bar in Ontario or Canada. However, Mr. Paul's experience as a lawyer was on the Current's website.

- Those words could be considered as defamatory given that Mr. Paul indicates that he had represented himself to the public as a former lawyer.

- Although the Defendants argue that the Township did not publish the statement nor were the contents read aloud at the Council meeting, and that all copies that were handed out were retrieved and shredded, the Council meeting was a public meeting and the gist of the opinion letter was described at this public forum.

- The opinion letter also contained the advice to the Township to direct all of Mr. Paul's communications to Council, based on the premise that he had sent voluminous correspondence to the Township, thereby causing a burden to the Township.

- This allegation was also discussed at the Council meeting and could be considered defamatory as it could lower Mr. Paul's reputation in the public's eyes and suggest that he was a nuisance. The comments were discussed in the public domain.

Resolution and confirming by-law

[115] This Resolution and confirming by-law, which are public documents and thereby the means by which the municipality communicates its decisions to the public, require that all communications from Mr. Paul be directed to Council for their consideration. These could be considered defamatory in that they would tend to lower the Plaintiffs' reputation in the eyes of a reasonable person.

[116] Regarding the Resolution and confirming by-law, the Plaintiffs allege that this would lead people to believe that Mr. Paul is a "crackpot" and/or a "chronic complainer" whose communications are not deserving of serious consideration. I find that that the Resolution and confirming by-law resulting from the opinion letter could tend to lower the Plaintiffs' reputation in the eyes of a reasonable person.

Councillor told the Pauls that they should apologize to the ratepayers and they should pay the $60,000

[117] These words could be considered defamatory as they suggest that the Pauls have done something wrong in pursuing their previous claims and should pay back the municipality.

[118] This could lower the Plaintiffs' reputation in the eyes of the public.

[119] These words were directed at the Plaintiffs who attended the public Council meeting.

Conclusion

[120] Therefore, I find that the Plaintiffs have met their burden to show that the defamation lawsuit has a prospect of success, although not amounting to a likelihood of success, and does tend to weigh more in favour of the Plaintiffs.

Public misfeasance in public office

Introduction

[121] In *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, at para. 20, the Court of Appeal for Ontario summarized the law in this area, including the elements which must be proven by the Plaintiffs, on the balance of probabilities, in order to succeed in their claim:

> Misfeasance in public office is an intentional tort. The tort is meant to provide a measure of accountability for public officials who do not exercise their duties of office in good faith. To make out this tort, a plaintiff must prove four elements:
>
> - The public official deliberately engaged in unlawful conduct in the exercise of public functions;
> - The public official was aware that the conduct was unlawful and was likely to injure the plaintiff;
> - The public official's tortious conduct was the legal cause of the plaintiff's injuries; and
> - The injuries suffered are compensable in tort law.

[122] The Supreme Court of Canada added the following in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 32:

> [32] To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[123] In the recent Ontario Court of Appeal decision of *Meekis v. Ontario* 2021 ONCA 534 at para. 70 referred to *Ontario (Attorney General) v. Clark* 2021 SCC 18, at para.22 where the court summarized this tort by saying:

> A successful misfeasance claim requires the plaintiff to establish that the public official engaged in deliberate and unlawful conduct in his or her capacity as a public official, and that the official was aware that the conduct was unlawful and likely to harm the plaintiff.

[124] This tort brings mistreatment by a public official to public attention and holds officials accountable if they misuse powers entrusted to them.

Position of the Defendants

[125] The Defendants argue that the Township, Mayor Love and the councillors had the authority to pass the Resolution and confirming by-law. They were acting lawfully when, as Council, they obtained and accepted their lawyer's legal opinion and carried out their mandate under the *Municipal Act*, 2001, S.O. 2001, c. 25, to manage public funds when staff had to deal with the numerous communications from Mr. Paul.

[126] The Defendants rely on the principle set out in *St. Elizabeth Home Society v. Hamilton (City*), at para. 20: "in this way, the required mental element achieves a balance between curbing unlawful, dishonest behaviour and enabling public officials to do their jobs free from claims by those adversely affected by their decisions."

[127] The Defendants argue that the Resolution and confirming by-law were passed by Council to manage the communication from Mr. Paul, for the benefit of the entire community. At the Council meeting, the mayor stated that a significant amount of resources was invested in responding to their correspondence. Council was made aware of communications with the Pauls to ensure that Council is fiscally responsible and accountable to ratepayers.

[128] This was recommended by their legal counsel and did not prevent Mr. Paul from communicating with the Township. Rather, it set up a protocol which directs the CAO to forward

all correspondence to Council for its consideration, who can then determine what resources to allocate to Mr. Paul's communication to the Township.

Position of the Plaintiffs

[129] The Plaintiffs argue that the Defendants acted unlawfully and not in good faith. The Plaintiffs, specifically Mr. Paul, were targeted and the Resolution and confirming by-law could be characterized as "reprisal conduct". The allegations of this targeted behaviour are outlined in the Statement of Claim, including:

- In May 2016, the Council interfered with Mrs. Paul's complaint to the HRTO regarding a complaint she had made against Councillor Peplinski;
- In 2016, the Defendants denied Mrs. Paul's request that her husband be permitted to represent her in the Human Rights investigation;
- In July 2017, while the HRTO action was pending, a witness had been forbidden to have any contact, even social contact, with the individual Plaintiffs for fear of losing his job;
- In October 2017, after the settlement of the HRTO action, Council refused to read into the record Councillor Peplinski's apology;
- In 2018, in an action by a previous Integrity Commissioner, the mayor criticized the Current as being over critical of the Council;
- The mayor publicly criticized the Current article that stated that "MV is not a CAO friendly environment"; and
- In April 2018, when an independent body of citizens entered into negotiations with the Township to re-open the Barry's Bay Railway station as a museum and cultural center, where Mrs. Paul had previously worked, the mayor imposed a condition that Mrs. Paul not be hired in any capacity.

[130] The Plaintiffs argue that the Council's Resolution and confirming by-law demonstrate an abuse of power. The above history of reprisals constitutes an abuse of the Township's power, motivated by malicious motives and bad faith for the purposes of s. 448 of the *Municipal Act*.

Analysis

[131] I find that the Plaintiffs have met the burden of proving that this claim has a real prospect of success that tends to weigh more in favour of the Plaintiff.

[132] There is evidence of the ill feelings between the parties, and certainly the expressions of two councillors at the February and August 2019 meetings demonstrated their sentiments regarding Mr. Paul by calling him derogatory names in the former meeting, and telling him that he needed to apologize and pay up in the latter meeting.

[133] There is evidence of one councillor privately admitting that some councillors expressed *animus* against the Plaintiffs and that he wanted no part of it.

[134] I find that this claim is "legally tenable and supported by evidence that is reasonably capable of belief". In other words, the public officials acted unlawfully and did so in a manner that they knew would likely injure the Plaintiffs. I find that there could be evidence capable of belief that the Defendants had an intention to act beyond their powers and thereby abuse their authority.

Whether a trier of fact could reasonably conclude that the Defendants have "no valid defence"?

Introduction

[135] For the reasons that follow, I find that there are grounds upon which the defences could realistically be rejected, based on the law and on the record.

[136] The onus is on the Plaintiffs to satisfy the motion judge that, looking at the motion record through the reasonableness lens, a trier of fact could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the Plaintiffs have met their onus.

[137] There remains an "evidentiary burden" on the Defendants to put a defence "in play" by filing material that is "sufficiently detailed to allow the motion judge to clearly identify the legal and factual components of the defences advanced". They have done so.

[138] As stated by Justice Côté in *Pointes*, there must be “a basis in the record and the law – taking into account the stage of litigation at which s. 137.1 motion is brought – for finding that the underlying proceeding has substantial merit and that there is no valid defence”: see para. 39. That is, the Plaintiffs are only “required to show that there is *a* basis in the record and the law — taking into account the stage of the proceeding — to support a finding that the defences … do not tend to weigh *more* in [the defendant’s] favour”: see *Bent*, at para. 103.

[139] Recently, the Court of Appeal in *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26, allowed an appeal where a s. 137.1 motion was granted and found that the motion judge erred in law by applying a standard higher than the standard articulated in the recent Supreme Court cases in *Pointes* and *Bent.* The Court found that the defence of responsible communication did not tend to weigh *more* in Canadian Broadcasting Corporation’s favour at this stage of the proceeding: leave to the Supreme Court of Canada denied on July 15, 2021, see case no. 39607.

[140] The Court of Appeal in *Subway* stated at para. 56:

> [56] “A determination that a defence ‘could go either way’ in the sense that a reasonable trier could accept it or reject it, is a finding that a reasonable trier could reject the defence”: *Bondfield Construction Company Limited v. The Globe and Mail Inc.,* 2019 ONCA 166, at para. 15.

[141] As well, in *Canadian Union of Postal Workers v. B’nai Brith Canada* 2021 ONCA 529, the Court of Appeal, upheld the motion Judge’s decision and held at para. 32 and 33 regarding a defence:

> [32] I do not accept that the motion judge erred. To be clear, the motion judge stated that he was “not … making a finding of malice”. He merely concluded that there was evidence before him that “may support such a finding”, based on the presence of an ulterior motive or recklessness about the truth of the underlying facts, or based on an inference from the appellants’ conduct. He underscored that “[t]his is not a summary judgment motion and it is not appropriate to take a ‘deep dive’ into the evidence.” I see no error in the motion judge’s approach or conclusion.

> [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.

[142] The Court of Appeal found that the motion judge did not adjudicate these defences on the merits and he only decided that the CUPW's defamation action could proceed.

Defamation defences

[143] The Defendants submit that the defences set out below are applicable.

Justification

[144] To succeed in the defence of justification, the Defendants must adduce evidence showing that the statement was substantially true: see *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 33.

[145] The Plaintiffs allege that the opinion letter is defamatory in two respects:

- That there was no evidence online that he was a practicing lawyer; and
- That due to the volume of correspondence received from Mr. Paul, all future correspondence should go to Council.

[146] The opinion letter stated that they were unable to find evidence that he had been licensed and that Mr. Paul could not act as an expert witness, although Mr. Paul argues that he was not offering himself up as an expert witness.

[147] Regarding his status as a previously practicing lawyer, a member of the public could certainly have inferred that, despite Mr. Paul's pronouncements to the contrary, he was not a lawyer.

[148] On this aspect of the opinion letter, Mr. Paul agrees that there was nothing on certain websites that would confirm he had practiced law in Ontario in the 80's, except that it was noted on the Current's website and his LinkedIn profile. Therefore, in this respect, the opinion letter could be considered true.

[149] However, the correspondence goes further and refers to Mr. Paul "communicating frequently and frivolously with staff": see the opinion letter, at p. 3. The letter speaks of the cost of responding to his August 18, 2019 letter.

[150] The opinion letter recommends that all correspondence be directed to Council, who will then decide whether the correspondence warrants a response. A member of the public could infer that Mr. Paul was overzealous to the point of sending unnecessary correspondence to the municipality. In other words, he was an irritant who monopolized the municipality's resources and whose correspondence should not be considered seriously and should be treated differently from other citizens.

[151] However, despite this allegation of voluminous communications, which was also set out in the CAO's (Ms. Klatt) affidavit, the evidence and disclosure filed by the Plaintiffs shows that there were communications from the Pauls from 2016 to August 27, 2019 (including 14 after the August 2019 Council meeting), of which 27 emails were related to the HRTO and Mrs. Paul, 56 were from the Current and 44 were dealing with the HRTO and IPC approval.

[152] There were 218 emails from the Plaintiffs to the Wishart Law firm. As this firm is not a party to the proceedings, these emails are not relevant.

[153] Consequently, a trier of fact could reasonably conclude that the above statements were false, and, as such, dismiss a justification defence regarding expressions of voluminous correspondence made in this opinion letter.

[154] Therefore, on the whole, I find that, based only on the evidence filed by the Defendants on this motion, their justification defence is more likely than not to fail. They have not established,

on the motion, that the Plaintiffs burdened the municipality with voluminous and unwanted correspondence that required it to delegate the authority to deal with this correspondence to Council. The defence of justification therefore cannot be considered to weigh more in favour of the Defendants such that it may be considered valid for the purpose of the test set under s. 137.1(1)(ii).

[155] This finding for the purposes of this s. 137.1 motion does not mean that a court will not accept this defence once it hears all the evidence and makes credibility findings. As a Judge on a s. 137.1 motion, my role is not to adjudicate the merits of the claim but rather to assess the paper record before me.

Opinion letter was subject to solicitor-client privilege

[156] This is not a valid defence as the Township Council waived this privilege. The opinion letter was discussed at the public Council meeting and Mr. Paul received a copy. Though it was never published, Council confirmed they were accepting their lawyer's advice and proceeding with the Resolution and confirming by-law.

[157] The transcript from the August 2019 Council meeting indicated that the Mayor confirmed that the motion was carried and that the Council waived privilege. She stated that the "opinion letter is now a public document and it will be provided after meeting to the public".

[158] However, the evidence confirms that the opinion letter was not distributed and was collected from the councillors and shredded by the CAO. Mr. Paul received and kept a copy.

[159] Therefore, this defence would not be considered to weigh more in favour of the Defendants such that it would be considered valid for the purpose of the s. 137.1(4)(a)(ii) test.

Qualified privilege

[160] The defence of qualified privilege is set out in the *Law of Libel in Canada*, 4th ed. (Toronto: LexisNexis Canada, 2018), at p. 168. Peter Downard summarizes the defence of qualified privilege as follows:

> The common law rule is that an occasion is privileged if the publisher 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 person to whom it is published has a corresponding interest or duty to receive it. It is necessary to establish this reciprocal interest or duty of both the communicator and the person receiving the communication.

[161] Proof that the communication was made maliciously may defeat a defence of qualified privilege. The privilege is exceeded if the communication is made "to an audience extending beyond those with a legitimate interest in the communication or a duty to receive": see Downard, *Law of Libel in Canada*, at p. 192.

[162] The Supreme Court of Canada further added that "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself": see *Hill v. Church of Scientology of Toronto*, [1995] 2. S.C.R. 1130, at para. 143.

[163] Further, a trier of fact could reasonably conclude that, even if the qualified privilege defence could apply, the impugned statements exceeded the limits of the duty or interest:

- February 2019 comments by councillor;
- August 2019 comments by councillor;
- Opinion letter – communicating frequently and frivolously; and
- Requirement that Mr. Paul's communications be forwarded to Council.

[164] If qualified privilege applies to a statement, it means that the person suing for defamation must prove that the person who made the defamatory statement acted intentionally, recklessly, or with malice, hatred, spite, ill will or resentment, depending on the applicable law.

[165] Given these submissions, each of which have some merit in my view, I am satisfied that the Plaintiffs have met their burden under s. 137.1(4)(a)(ii). They have shown that a reasonable trier of fact could conclude that the defence of qualified privilege could reasonably be accepted or rejected, in the circumstances. At this stage, this defence does not weigh more in favour of the Defendants.

Absolute privilege

[166] In addition, the Defendants argue that the four expressions noted above may also be protected by absolute privilege.

[167] In *Gutowski v. Clayton*, 2014 ONCA 921, [2014] 124 O.R. (3d) 185, the Court of Appeal for Ontario wrote that absolute privilege could be extended to Council meetings when the legislative controls over proceedings and members under ss. 223.2 and 223.3 of the *Municipal Act, 2001*, regarding the adoption of codes of conduct and the appointment of integrity commissioners, have been instituted: see para. 18. The Defendants argue that these controls existed in the Township at the relevant time.

[168] Absolute privilege is an old common law privilege that protects members of lawmaking bodies from charges of defamation for statements made "on the floor" of their legislative bodies, without regard for whether the words are stated in good faith.

[169] No evidence was provided in the record that the Township has these controls in place to avail themselves of the defence of absolute privilege and the record is not sufficient for me to determine whether the defence of absolute privilege extends to the expressions of the Defendants.

[170] Also, as stated in *Gutowski* at para. 28:

> On a motion for the determination of a question of law prior to trial, the onus is on the moving party – the appellants in this case. In my opinion, they have not shown that it is "plain and obvious" the defence of absolute privilege extends to the speech of municipal councillors made in the course of municipal council meetings. Indeed, the law as it presently stands in Canada is to the contrary. To the extent the appellants seek to extend the scope and application of the law to provide municipal

> councillors with the immunity of absolute privilege, a Rule 21 motion is not the appropriate vehicle, as noted above. Such decisions should be based on a fully developed evidentiary record – an approach the appellants have expressly declined to follow.

[171] I also find that a s. 137.1 motion is not the forum to decide whether the defence of absolute privilege is applicable in this case.

[172] Therefore, at this time, and based on the evidence as a whole, I find that the defence of absolute privilege has not been made out as a valid defence and the Plaintiffs have met their onus on this defence.

Defences to Misfeasance in public office

Immunity

[173] The Defendants submit that the municipal councillors are entitled to immunity as per s. 448 of the *Municipal Act, 2001*, which presumptively applies to any act done in good faith or intended performance of a duty or authority under the Act or a by-law passed under it. The communication protocol found in the Resolution and confirming by-law was passed to further the Council's mandate to allocate municipal resources for the benefit of the public. It also followed their lawyer's advice.

[174] Again, this defence is grounded in good faith. However, there is evidence on the record that the Pauls were targeted by the Defendants. The councillors' statements further support this vendetta. Ultimately, the Resolution and confirming by-law, which accepted the advice in the opinion letter, could be considered an act to muzzle the Pauls.

[175] The Defendants argue that the Resolution and confirming by-law are not illegal as Council has a statutory mandate to allocate the Township's resources for the interests of all ratepayers. The Plaintiffs have chosen not to avail themselves of s. 273 of the *Municipal Act, 2001*, which provides a process for citizens to apply to quash by-laws they believe to be illegal.

[176] The Plaintiffs' decision not to proceed through s. 273 of the *Municipal Act, 2001* is not a bar to this action.

[177] For the reasons that follow, I find that there is evidence that would enable a trier of fact to reasonably conclude that the proposed defences are not valid, and, as such, I find that the Plaintiffs have met their onus under this requirement of s. 137.1(4)(a). I address each of these defences below.

Have the Plaintiffs shown that the harm caused or likely to be caused by the expression are outweighed by the public interest in protecting the Defendants' expressions? Balancing the interests?

Introduction

[178] For the reasons set out below, I conclude that the Plaintiffs have met their onus under the last step set out in s. 137.1(4)(b).The harm that has been suffered by the Plaintiffs as a result of the above-noted expressions is sufficiently serious that the public interest in permitting this action to proceed to a hearing on the merits outweighs the public interest in protecting the municipality's expressions.

[179] Justice Côté in *Pointes* stated that the weighing exercise was not simply an inquiry into the hallmarks of a SLAPP. The Court is to focus on the harm suffered or potentially suffered by the Plaintiffs, and to consider both the public interest in allowing the proceeding to continue and the public interest in protecting the expressions at issue.

[180] In *Pointes*, Justice Côté outlined the factors the Court should consider in this analysis at paras. 78 to 82:

> [78] I outline below some further factors that may bear on the public interest weighing exercise under s. 137.1(4)(b). I note that in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99, Doherty J.A. made reference to recognized "indicia of a SLAPP suit" (emphasis omitted). He recognized four indicia in particular: (1) "a history of the plaintiff using litigation or the threat of litigation to silence critics"; (2) "a financial or power imbalance that strongly favours the

plaintiff"; (3) "a punitive or retributory purpose animating the plaintiff's bringing of the claim"; and (4) "minimal or nominal damages suffered by the plaintiff" (para. 99). Doherty J.A. found that where these indicia are present, the weighing exercise favours granting the s. 137.1 motion and dismissing the underlying proceeding. The Court of Appeal for Ontario has since applied these indicia in a number of cases (see, e.g., *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211).

[79] I am of the view that these four indicia may bear on the analysis *only to the extent* that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature. This is because 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. Therefore, for this reason, the only factors that might be relevant in guiding that weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

[80] Accordingly, additional factors may also prove useful. For example, the following factors, in no particular order of importance, may be relevant for the motion judge to consider: the importance of the expression, the history of litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise.

[81] Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability *to scrutinize what is really going on in the particular case before them*: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy. (*emphasis added*)

[82] In conclusion, under s. 137.1(4)(b), the burden is on the plaintiff — i.e. the responding party — to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is *a result* of the expression

established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a s. 137.1 motion.

[181] I find the following:

1. There is a history of the Plaintiffs using litigation to achieve their goals. They do have a history with the municipality with respect to municipal politics, the HRTO action and access to information proceedings. They are claiming to promote the objective of the Current as a "watchdog", that is, to comment on the activities of the Township, *not* to silence it. Complaints to regulatory bodies are a form of litigation, and forcing a small township to defend such complaints, where they are voluminous and/or have no merit, would prevent it from doing the things it is supposed to be doing. The Pauls may see themselves as watchdogs, but that belief does not shield their actions from scrutiny.

2. The financial or power imbalance strongly favours the Defendants rather than the Plaintiffs. I do not agree with the Defendants that the Plaintiffs have more power by virtue of their "unlimited time to devote to these requests", as opposed to the Township that must provide services to their ratepayers: Reply Factum filed May 17, 2021.

3. There is no punitive or retributory purpose animating the Plaintiffs' bringing of the claim. I do not find any evidence on the record before me that the Plaintiffs' actions against the municipality, and its councillors, were motivated by any desire for revenge or improper purpose. Rather, the actions appear to be motivated by the belief that their reputation has been tainted and that they have been targeted.

Damages

Introduction

[182] I find that the Plaintiffs have suffered more than minimal or nominal damages.

[183] In *Subway*, Justice Thorburn stated:

> [83] In assessing the harm likely to be suffered by a plaintiff, both monetary and non-monetary harm are relevant: *Pointes*, at para. 69.

> [84] The court in *Pointes* cited with approval the words of then Attorney General of Ontario, Madeleine Meilleur, in discussions preceding the enactment of the legislation that “reputation is one of the most valuable assets a person or a business can possess” (Legislative Assembly of Ontario (2014), at p. 1971).
>
> [85] Neither reputational harm nor monetary harm is more important than the other. Nor is harm synonymous with the damages alleged. The text of the provision does not depend on a particular kind of harm, but expressly refers only to harm in general: *Pointes*, at paras. 11-13.
>
> [86] A plaintiff must simply “provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link”: *Pointes*, at para. 71.

[184] Further at para. 55, she stated:

> [55] Given the early stage of the proceeding, that damage assessment can be an ongoing process, and that such motions are meant to weed out clearly defective claims, there is only a limited assessment of the evidence from the motion judge’s perspective: *Pointes*, para. 39. If the motion record raises serious credibility issues or inferences to be drawn from competing primary facts, the motion judge must avoid taking a “deep dive” into the ultimate merits and instead, engage in a much more limited analysis: *Pointes* (CA), at para. 78.

The strength of the damages claim

[185] The “kind of case that should be removed from the litigation process through s. 137.1(4)(b)” is one where the plaintiff may have a “technically valid cause of action”, but suffers “insignificant harm”: *Pointes*, at para. 98.

[186] The Plaintiffs filed a schedule of damages which provides financial projections made by the Plaintiffs for the first three years of the paper’s existence. It has some projections regarding the advertising dollars spent by the Township that they became aware of through the Township’s financial statements, which are available to the public. The Current had no advertising dollars from the Township and, at this point in the litigation, it is unclear how much of the projections included funds from the Township.

[187] Their projections have not come to fruition and they point to this failure as a result of the expressions of the Defendants.

[188] What is noteworthy is that the readership increased by more than double during the paper's first two years from 3169 to 6604.

[189] The Plaintiffs have not set out the financial losses in their advertising revenue as a result of the Defendants' actions.

The evidence of financial damages

[190] At this stage, the Plaintiffs have made "bald assertions" of financial damage and have filed little specific and credible evidence of potentially significant pecuniary damages flowing from the defamatory statements.

The evidence of general damages for harm to Mr. Paul's reputation

[191] Not only must the monetary harm pleaded by the Plaintiffs be considered in determining whether the harm is sufficiently serious, but so too must the harm to the Plaintiffs' professional reputation, even if it is not quantifiable at this stage: *Pointes*, at para. 71.

[192] In *Hill*, at para. 185, the Supreme Court relied on the leading text of Richard O'Sullivan, *Gatley on Libel and Slander in a Civil Action*, 4th ed. (London: Sweet & Maxwell, 1953), at pp. 592-93, in which the author set out the factors which can be considered in determining general damages:

> 1451. Province of the jury. In an action of libel "the assessment of damages does not depend on any legal rule." The amount of damages is "peculiarly the province of the jury," who in assessing them will naturally be governed by all the circumstances of the particular case. They are entitled to take into their consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology, and "the whole conduct of the defendant from the time when the libel was published down to the very moment of their verdict. They may take into consideration the conduct of the defendant before action, after action, and in court

> at the trial of the action," and also, it is submitted, the conduct of his counsel, who cannot shelter his client by taking responsibility for the conduct of the case. They should allow "for the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused." They should also take into account the evidence led in aggravation or mitigation of the damages.

[193] General damages are presumed from the publication of libel, even in the absence of any proof of actual loss: see *Hill*, at para. 164.

[194] The Plaintiffs are not expected, at this preliminary stage, to present a fully-developed damages brief. Assuming the claim meets the merits-based analysis that precedes the balancing exercise, "a common sense reading of the claim, supported by sufficient evidence to draw a causal connection between the challenged expression and damages that are more than nominal will often suffice"; see *Montour v. Beacon Publishing*, 2019 ONCA 246, at para. 30, citing *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, at para. 90

[195] In the present case, there is evidence that Mr. and Mrs. Paul were very involved members in this small community. Mr. Paul had made it known in his activities that he was previously a lawyer and that the Current's mandate was to be a watchdog for the community regarding politics. He prides himself as being a source of trusted local journalism. If these impugned expressions are found to have been defamatory, it would affect his reputation in the community who placed trust in him as a previous legal professional.

[196] Even as a retired lawyer, Mr. Paul is continuing his community work and representing himself as a previous professional who wishes to bring his particular expertise to the table, e.g. on fighting for local community events and institutions, such as the museum, or the issue of land development.

[197] In my view, this is a stronger claim for the Plaintiffs than the alleged pecuniary loss.

[198] At para. 146, Justice Côté stated in *Bent:*

> 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.

[199] Regarding the tort of misfeasance in public office, calculable economic loss is not discernable at this stage, but I note that damages are available for harm to his reputation.

[200] If the conduct of the public officials here is found to be particularly egregious, an award of aggravated or punitive damages may also be made.

[201] Again, it is not the role of the Court on an anti-SLAPP motion to assess general damages. However, the above evidence demonstrates a "sufficiently serious" claim by the Plaintiffs for general damages, which could amount to "more than nominal" damages and could serve as the basis for the Plaintiffs to proceed with their claim.

Causation

[202] The Plaintiffs need not prove harm or causation but must simply provide evidence for the motion judge to draw an inference of likelihood with respect to the existence of the harm and the relevant causal link.

[203] The Plaintiffs have led some evidence of business and reputational loss that, if connected in whole or in part to any of the allegedly defamatory statements, would result in a significant damage award in their favour.

[204] I find that the Plaintiffs have established a temporal connection and have provided potentially credible evidence that the impugned expressions caused reputational harm.

The strength of the public interest in Defendants' expressions

[205] In the present case, the public interest in the Defendants' expressions is high. Certainly, the Township has a right and authority to obtain legal opinions and pass resolutions and by-laws which follow their lawyer's advice. Councillors can also express their opinions in the public forum of Council meetings if they have views about how private citizens have conducted themselves. It is certainly in the public interest that municipalities be able to perform their function and duties to their public. The Defendants argue that the communication protocol was passed with the objective of allocating municipal resources for the benefit of the public.

[206] In *Buck v. Morris et al.*, 2015 ONSC 5632, the Court determined that, a finding that the Council relied on legal advice weighs against finding that the act was done with malice.

[207] The expressions of the Defendants as municipal players are important as a function of their roles in municipal government. Their roles in managing public funds and in being entitled to act in ratepayers' interests are crucial and the Resolution and confirming by-law were, according to them, done in good faith pursuant to legal advice.

[208] The Resolution and confirming by-law were a lawful act and it was within the mandate of the Township to determine how it should best allocate its resources. Section 273 of the *Municipal Act, 2001* sets out a process by which citizens can apply to quash a by-law. The Plaintiffs did not engage in this process. The by-law remains in full force and effect even with this litigation.

[209] The Defendants argue that the Plaintiffs should have brought an application to quash the by-law under s. 273 of the *Municipal Act, 2001*. Rather, they named councillors individually seeking to intimidate them when they have nothing to do with these allegations.

Balancing damages and public interest in Defendants' expressions

[210] The quality of the expression or motivation of the speaker are relevant factors in measuring the extent to which there is a public interest in protecting that expression. A statement that contains deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language may still be an expression that relates to a matter of public interest. However, the public interest in protecting that

speech will be less than would have been the case had the same message been delivered without the lies, vitriol, and obscenities: *Pointes*, at para. 75.

[211] In the balancing test, the Court should consider whether the litigation "smells of a genuine controversy", in which case it should be tried on its merits, or whether the litigation has the characteristics of "SLAPP suits which reek of the plaintiff's improper motives, claims of phantom harm, and bullying tactics": *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, at para. 28.

[212] The final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis. Section 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: it is intended to optimize the balance between the public interest in allowing meritorious lawsuits to proceed, and the public interest in protecting expression on matters of public interest. To do so, it open-endedly engages with the overarching public interest implications that this statute, and anti-SLAPP legislation generally, seeks to address.

[213] The Court must consider whether there is any evidence that public debate has been unduly chilled due to this lawsuit or whether it will be chilled if this lawsuit is permitted to proceed.

[214] Allowing this action to proceed to a determination on the merits gives appropriate weight to the public interest in seeing harm arising from defamatory statements remedied, while also addressing the public interest in protecting the type of expression in which the defendants engaged.

[215] At the heart of the action is whether the Defendants, who represent the ratepayers, targeted the Plaintiffs, or whether their expressions are protected by the defences put forward.

[216] The continuation of the action should not deter other municipalities from expression but should deter others from making remarks or singling out individuals unless done in good faith: *Bent*, at para. 167.

[217] The public interest in the Defendants' freedom of expression in performance of their obligations is not without some form of restraint. It must be viewed and considered in light of the

public interest in the Plaintiff's private interest in protecting his reputation, in protecting individuals' reputation from being attacked without impunity and in ensuring that the Township acts in good faith when passing resolutions and enacting by-laws.

[218] For the reasons I discussed above, the evidence establishes that the Plaintiffs could succeed on their claims for financial and reputational harm. The Plaintiffs have led evidence of "sufficiently serious" harm.

[219] As a result, I conclude that the Plaintiffs' lawsuit is not classic SLAPP litigation, and that a judge hearing the merits could reasonably conclude that the Plaintiffs have suffered more than nominal damages.

[220] I conclude that the public interest weighs in favour of allowing the action to proceed to a determination on its merits.

[221] Accordingly, the Defendants' s. 137.1 motion is dismissed.

[222] If the parties are unable to agree on the issue of costs of these motions and the previous court attendances before me, the Defendants shall file their 2-page costs submission along with offers to settle and bill of costs by September 3, 2021. The Plaintiffs shall file their 2-page costs submissions along with any offers to settle and bill of costs by September 24, 2021. The Defendants may file their one-page reply by October 8, 2021.

Adriana Doyle J.

Justice A. Doyle

Date: August 6, 2021

CITATION: *Paul v. The Corporation of the Township of Madawaska Valley,* 2021 ONSC 4996
COURT FILE NO.: CV-21-00000002-0000
DATE: 2021/08/06

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Roger Anthony Paul, Danielle Marie Paul and Madvalley Media

Plaintiffs

AND

The Corporation of the Township of Madawaska Valley, Kim Love, Carl Bromwich, Ernest Peplinski, David Shulist and Mark Willmer

Defendants

DECISION ON ANTI-SLAPP MOTION AND STRIKING OF AFFIDAVITS

Doyle J.

Released: August 6, 2021