COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Mawhinney v. Stewart,*
2023 BCCA 484

Date: 20231221
Docket: CA48998

Between:

David Mawhinney, Christopher Wilson, David Pasin, Wesley Mussio, Phyllis Tang, Angelo Isidorou, and Federico Fuoco

Appellants
(Plaintiffs)

And

Kennedy Stewart

Respondent
(Defendant)

Before: The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated March 20, 2023 (*Mawhinney v. Stewart*, 2023 BCSC 419, Vancouver Docket S211145).

Oral Reasons for Judgment

Counsel for the Appellants:	K. Suprynowicz
Counsel for the Respondent:	D.F. Sutherland, K.C. N. Rayani
Place and Date of Hearing:	Vancouver, British Columbia December 14, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 21, 2023

Summary:

This is an appeal from a costs order imposed under the Protection of Public Participation Act. The judge ordered costs to be assessed on a full indemnity basis. The appellant argues the judge applied an incorrect legal test under the relevant statutory provision and misapprehended the evidence. Held: appeal dismissed. The costs order is subject to a deferential standard of review. In light of the judge's legal and factual findings, it was open to her to conclude that full indemnity costs were warranted in the circumstances.

[1] **DEWITT-VAN OOSTEN J.A.**: The respondent, Kennedy Stewart, was sued in defamation for a press release he issued in January 2021, while the mayor of Vancouver.

[2] The appellants, David Mawhinney, Christopher Wilson, David Pasin, Phyllis Tang, Angelo Isidorou, Federico Fuoco, and Wesley Mussio, were the plaintiffs in the defamation action and members of a board of directors for a political association active in Vancouver's municipal politics.

[3] The respondent applied to have the defamation action dismissed under the *Protection of Public Participation Act*, S.B.C. 2019, c. 3. [*PPPA*], a statute that seeks to allay the adverse effects of "SLAPPs"—strategic lawsuits against public participation. These lawsuits often take the form of defamation actions and are filed against individuals or organizations to indirectly limit or "quell" their expression on issues of public interest: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at paras. 1–3, 16 [*Pointes Protection Association*]. See also *Christman v. Lee-Sheriff*, 2023 BCCA 363 at para. 2.

[4] The application was granted by a Supreme Court judge in July 2022 and the defamation action was dismissed. Reasons for judgment explaining the dismissal are indexed as 2022 BCSC 1243 [*"Dismissal Reasons*"].

[5] The judge found that the respondent had established that the press release was an "expression" relating to a "matter of public interest": *PPPA*, s. 4(1). Having reached that conclusion, she was required to dismiss the defamation action unless the appellants could establish there were grounds to believe their action had

"substantial merit", the respondent had "no valid defence" to the action, and the actual or likely harm claimed to arise from his expression was serious enough that the public interest in continuing the action outweighed the public interest in protecting the expression: *PPPA*, s. 4(2); *Christman* at paras. 6–8, 46.

[6] The judge was satisfied the defamation action was legally tenable and supported by evidence that was reasonably capable of belief. As such, there were grounds to believe the action had "substantial merit" as that term has been interpreted under s. 4(2) of the *PPPA.* However, the appellants failed to establish there were grounds to believe the respondent had no valid defence to the action. The appellants also failed to establish that the actual or likely harm claimed to arise from the respondent's expression was sufficiently serious to permit the action to continue.

[7] As part of his application to dismiss, the respondent sought damages and full indemnity costs relying on ss. 7–8 of the *PPPA*. These issues were addressed separately, after the judge delivered her reasons for dismissal.

[8] In March 2023, the judge ordered the appellants to pay full indemnity costs, estimated to exceed $100,000. The judge declined to award damages. Reasons for judgment explaining this decision are indexed at 2023 BCSC 419 ["*Costs Reasons*"].

[9] The appellants have not appealed the dismissal of their defamation action. However, with leave, they have appealed the order for full indemnity costs.

Reasons for Judgment

[10] Sections 7 and 8 of the *PPPA* provide:

> **Costs**
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> **7** (1) If the court makes a dismissal order under section 4, the applicant is entitled to costs on the application and in the proceeding, assessed as costs on a full indemnity basis unless the court considers that assessment inappropriate in the circumstances.

> (2) If, on an application for a dismissal order under section 4, the court does not dismiss the proceeding, the respondent is not entitled to costs on that application unless the court considers it appropriate in the circumstances.
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> **Award for damages**
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> **8** On an application for a dismissal order under section 4, the court may, on its own motion or on application by the applicant, award the damages it considers appropriate against a respondent if it finds that the respondent brought the proceeding in bad faith or for an improper purpose.
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> [Emphasis added.]

[11] Section 7 does not identify specific factors to consider in deciding a costs order. As such, for guidance on this issue, the judge turned to *Hobbs v. Warner*, 2021 BCCA 290.

[12] In *Hobbs*, this Court held that the "ultimate decision respecting costs of a motion to dismiss" under the *PPPA* is a "matter for the judge's discretion": at para. 102, citing *Fortress Real Development Inc. v. Rabidoux*, 2018 ONCA 686.

[13] Adopting the approach taken in *Fortress Real Development Inc.*, a case addressing a substantively similar costs provision in Ontario, the Court in *Hobbs* held that the starting point for the s. 7(1) analysis is full indemnity. Section 7(1) is intended to "… impose cost consequences that will serve as a strong deterrent to [filing] SLAPPs …" and encourage defendants to seek the "… quick termination of that kind of litigation …": *Hobbs* at para. 102, citing *Fortress Real Development Inc.* at paras. 60–64.

[14] However, in accordance with the plain wording of s. 7(1), full indemnity costs should not be ordered if doing so would be "inappropriate in the circumstances": *Hobbs* at para. 102.

[15] A court's discretion under s. 7(1) is to be guided by the same considerations that guide a costs analysis in other civil proceedings: *Hobbs* at para. 102. Consequently, any order made pursuant to this provision must be "… fair and

reasonable, having regard to all relevant factors, including the legislation": *Hobbs* at para. 103.

[16] The actions that defendants will seek to have dismissed under the *PPPA* necessarily:

> [104] … fall along a continuum ranging from lawsuits that have strong indicia of a true SLAPP to those where the competing interests of reputation and public expression are finely balanced. In those cases where there are strong indicia of a SLAPP, a full indemnity award may well be appropriate. The full indemnity starting point is clearly intended to disincentivize such litigation. On the other hand, when the proceeding bears little resemblance to a SLAPP but the public interest in protecting the expression leads to a dismissal of the action, it might well not be fair and reasonable to award full indemnity costs.
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> [*Hobbs*; emphasis added.]

[17] In light of *Hobbs*, this is how the judge framed the question before her:

> [4] … whether the action [brought by the appellants] is a case with a strong indicia of a strategic lawsuit against public participation (SLAPP), in which case full indemnity costs may be appropriate, or whether this action is one where the interests of reputation and public expression are finely balanced and full indemnity costs may not be appropriate.

[18] The judge found that at the time of the press release, the parties were engaged "in a political competition" and that filing the defamation action limited the respondent's "political expression" for more than one year, a "… state of affairs which could easily be seen as politically advantageous to [the appellants] and [their political association]": *Costs Reasons* at para. 8. These were findings of fact.

[19] The judge also found that in the context of the defamation action, the appellants took steps that appeared to be "… motivated by strategic, and not valid, concerns": *Costs Reasons* at para. 9. In particular, more than one attempt was made to prevent the respondent from retaining a lawyer of his choice for the purpose of advancing a defence.

[20] When the respondent challenged the conflict assertions, the appellants did not bring formal applications seeking to disqualify the respondent's counsel. The judge reviewed the material relevant to that issue and found it "difficult to see any

merit" in the conflict allegations: *Costs Reasons* at para. 13. These allegations increased the respondent's costs and "caused him anxiety": at para. 14. The judge was satisfied the appellants alleged the conflicts "… for strategic reasons, in an inappropriate attempt to limit and thwart [the respondent's] defence": at para. 14, emphasis added. This too, was a finding of fact.

[21] Given these findings, the judge concluded that the defamation action more closely resembled a SLAPP than a "… legitimate contest between reputation and public expression": *Costs Reasons* at para. 15. She gave effect to the s. 7(1) presumption and ordered that costs be assessed on a full indemnity basis.

[22] The judge declined to award the respondent damages because the costs order "fully address[ed] any harm" arising from the defamation action: *Costs Reasons* at para. 22. This aspect of her judgment is not under appeal.

Standard of Review and Issues on Appeal

[23] Appellate review of a costs order involves a highly deferential standard: *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329. This Court will interfere:

> [33] … only if, the judge misdirected himself or herself on the applicable law, made an error in principle, made a palpable error in assessing the facts or otherwise made an award that is so clearly wrong as to amount to an injustice …
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> [Internal references omitted.]

[24] The appellants say they meet the test for intervention. They allege the judge:

a) erred in principle in applying the legal test for costs under s. 7(1) by failing to consider whether the defamation action reflected the recognized ("hallmark") indicia of a SLAPP, as well as factors that apply to costs orders in civil actions, generally; and

b) misapprehended the evidence in finding that the defamation action more closely resembled a SLAPP than a legitimate civil dispute and was motivated by an improper purpose.

[25] The appellants ask that the order for full indemnity be set aside and the parties be ordered to bear their own costs in the court below. Alternatively, they ask that the respondent receive ordinary costs or, in the further alternative, uplifted costs.

Discussion

Parties' Positions

[26] The appellants argue that because the purpose of full indemnity costs under s. 7(1) is to disincentivize people or organizations from filing SLAPPs, the availability of these costs is highly dependent, if not determined by, how closely the dismissed action resembles a SLAPP. They say this is what the Court intended at para. 104 of *Hobbs*, when it noted that full indemnity "may well be appropriate" where "there are strong indicia of a SLAPP". If the dismissed action does not clearly reflect the hallmark indicia of a SLAPP, full indemnity costs are incongruent with the purpose of the scheme, "inappropriate in the circumstances", and a court must decline to order them.

[27] The appellants say the hallmark indicia of a SLAPP are those set out in *Platnick v. Bent*, 2018 ONCA 687, aff'd 2020 SCC 23. (See also *Pointes Protection Association* at para. 78.) The appellants submit that to decide whether a particular action is or closely resembles a SLAPP, a court is duty-bound under s. 7(1) to ask:

(1) whether the plaintiff had a history of using litigation or the threat of litigation to silence critics;

(2) whether there was a financial or power imbalance that strongly favoured the plaintiff;

(3) whether the action was animated by a punitive or retributive purpose; and

(4) whether the plaintiff suffered or is likely to suffer only minimal or nominal damages as a result of the defendant's conduct.

[See *Platnick* at para. 99.]

[28] The judge did not ask these questions and the appellants contend that consequently, she applied an incorrect legal test. Had she properly focused her attention on the hallmark indicia of a SLAPP and analyzed whether each of those indicia factually manifested themselves in the case, she would have appreciated, among other things, that the appellants did not have a history of using litigation to silence critics. From the appellants' perspective, this missing element should have made a material difference to the analysis.

[29] The appellants also say the judge misapprehended the evidence, wrongly interpreting steps taken within the context of the defamation action as having been motivated by an improper purpose and then attributing that improper purpose to the action itself. Had she fully considered and given proper effect to the record, including evidence that the appellants were prepared to resolve the dispute by way of an apology, she would have concluded that the defamation action was *bona fides* and motivated by genuine concerns about preserving the appellants' personal and business reputations.

[30] In response to these arguments, the respondent contends the appellants assert a legal test under s. 7(1) of the *PPPA* that is not supported by *Hobbs*. Whether a dismissed action is properly characterized as a SLAPP, or closely resembles one, is but one factor that may be considered in the s. 7(1) analysis. It might carry considerable weight in a particular set of circumstances; however, it is not determinative. The full indemnity costs enquiry is broader in scope and can take other factors into account, including litigation conduct.

[31] In any event, the respondent argues that since release of the *Costs Reasons*, the Supreme Court of Canada has made it clear that each of the hallmark indicia need not be present before an action may constitute or closely resemble a SLAPP. As such, even if a court is obliged to engage in this type of an analysis under s. 7(1), a failure to consider one or more of the hallmark indicia will not amount to reviewable error. In *Hansman v. Neufeld*, 2023 SCC 14, the Court noted that:

> [48] … SLAPPs do not always embody the hallmarks of the archetype. A SLAPP may be initiated by the rich and powerful, but not always. Similarly, the plaintiff may not have a history of using litigation or the threat of litigation to silence critics. In any case, however, the consistent defining feature of a SLAPP is that the proceeding acts to silence the defendant, and more broadly, to suppress debate on matters of public interest, rather than to remedy serious harm suffered by the plaintiff.
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> [Emphasis added.]

[32] Finally, the respondent argues that in challenging the full indemnity order, the appellants ignore or obfuscate the findings that resulted in dismissal of their action, including the existence of valid defences and a finding of insufficiently serious harm. These findings, once combined with the factual conclusions articulated in the *Costs Reasons,* provided ample bases for full indemnity.

Analysis

[33] The parties agree that in reviewing the costs order, this Court is entitled to consider both sets of reasons issued by the judge.

[34] In dismissing the defamation action, the judge found the respondent had raised four valid defences: (1) the press release was non-defamatory; (2) it amounted to fair comment; (3) it was protected by qualified privilege; and (4) it was justified as a means by which to denounce hate and extremism, and to exhort the appellants to do the same. The judge rejected any suggestion that the press release was motivated by malice.

[35] Specific to the question of harm, the judge concluded that the “majority” of the appellants had not established actual or likely harm for the purpose of her *PPPA* analysis. Instead, their claims consisted of “vague and bald assertions”: *Dismissal*

Reasons at para. 66. Of the remaining two appellants, one advanced a more specific allegation of harm, but did not identify any particular loss, suggesting that causation would be a "significant issue" for this appellant if the defamation action proceeded to trial: at para. 67. The last appellant, who attributed job loss to the press release, established that he "may have suffered some harm": at para. 68. On balance, the degree of harm shown by the appellants, individually and collectively, was not sufficient to outweigh the public interest in protecting the respondent's expression.

[36] These findings have not been challenged on appeal and they necessarily would have informed the judge's discretion under s. 7(1) of the *PPPA.* They grounded the dismissal, which, in turn, opened the door to the costs provision and a starting point of presumed full indemnity.

[37] In her *Costs Reasons*, the judge made it clear that from her perspective, the parties were in a "political competition" at the time of the press release. Furthermore, the filing of the defamation action limited the respondent's "political expression" for more than one year. Objectively, this curtailment "could easily be seen as politically advantageous" to the appellants: at para. 8.

[38] The judge also found that the appellants took steps within the litigation that were "strategic" and not motivated by "valid" concerns: *Costs Reasons* at para. 9. Those steps were considered devoid of merit: at para. 13.

[39] This was the overall context in which the judge decided that the defamation action more closely resembled a SLAPP than a "legitimate contest between reputation and public expression", and that full indemnity costs were not "inappropriate in the circumstances": *Costs Reasons* at paras. 15–16; *PPPA*, s. 7(1).

[40] The application of s. 7(1) requires an individualized assessment, informed by the unique matrix of the case and importantly, the court's legal and factual findings. In my view, the findings made in this case provided a sufficient foundation to give effect to the presumption of full indemnity.

[41] First, I disagree with the appellants that full indemnity costs are narrowly available under s. 7(1) and only after a court has analyzed each of the hallmark indicia of a SLAPP and determined that the case clearly reflects those indicia. I accept that in some cases, such as *Simpson v. Rebel News Network Ltd.*, 2022 BCSC 1160, the courts have looked to the hallmark indicia to guide the exercise of their discretion. (See paras. 96–98 of that decision.) It is not erroneous to do so and indeed, *Hobbs* contemplates that this type of an analysis may prove helpful. However, this does not mean that a failure to consider one or more of the hallmark indicia amounts to an error in principle that justifies appellate intervention.

[42] The plain language of s. 7(1) embeds no such requirement.

[43] Nor does *Hobbs* stipulate that an analysis of hallmark indicia is a legal pre-requisite to full indemnity costs. I agree with the respondent that at para. 104 of *Hobbs*, this Court simply acknowledged that when a dismissed action bears the "strong indicia of a SLAPP", it "may well" render a full indemnity order appropriate. In other words, it is a factor that may carry considerable weight, depending on the circumstances. I do not interpret *Hobbs* as stipulating that the presence or absence of "strong indicia of a SLAPP" is determinative of the analysis.

[44] Instead, consistent with the approach to costs in civil proceedings, generally, the non-appropriateness of a full indemnity order is a discretionary matter "… having regard to all relevant factors, including the legislation": *Hobbs* at para. 103, emphasis added; *Fortress Real Development Inc.* at paras. 62–64. As aptly noted in *Levant v. DeMelle*, 2022 ONCA 79:

> [81] … There will be many different factors that may impact on the exercise of [the costs discretion] depending on the circumstances of the individual case. Given the rarity of full indemnity awards, the presence or absence of factors that might drive an award of costs on a higher scale in regular civil litigation may be relevant to the exercise of the appropriateness discretion in these special cases. For example, claims borne of ulterior motives, which a SLAPP lawsuit represents, is an example of one such factor.
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> [Emphasis added.]

[45] Like the appellants in this case, the appellant in *Fortress Real Development Inc.* argued that Ontario's equivalent to s. 7(1) should be narrowly construed and that full indemnity is reserved for cases found to have been brought solely for a strategic purpose. The argument was rejected:

> [65] Fortress submits that the full indemnity costs provided for in s. 137.1(7) are reserved for those cases in which the motion judge is satisfied that the plaintiff has brought forward meritless litigation for strategic purposes. In effect, Fortress argues that a defendant should receive full indemnity costs under s. 137.1(7) only where the bringing of the action amounted to an abuse of process.
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> [66] The language of s. 137.1(7) offers no support for Fortress's narrow reading, nor does the legislative history of the provision. The language is clear. If the defendant is successful on the motion, the defendant should receive full indemnity costs, subject to the motion judge deciding that full indemnity is not an appropriate award in the circumstances. The starting point is not predicated on the basis upon which the defendant succeeds on the motion.
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> [67] The motion judge, in determining whether the circumstances warrant an order other than costs on a full indemnity basis, will consider a variety of factors, including any determinations made under ss. 137.1(4)(a) and (b), any findings made as to the motivation of the parties, and the manner in which the parties have conducted the proceedings.
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> [Emphasis added.]

[46] In *Hobbs*, this Court adopted Ontario's approach to assessing costs: at para. 103. In my view, that includes the breadth of the analytical parameters for a s. 7(1) determination as set out in para. 67 of *Fortress Real Development Inc*.

[47] The appellants' attempt to position the hallmark indicia of a SLAPP as a mandated element of the s. 7(1) test and a standard that must be considered and met before full indemnity is available, is also inconsistent with the Supreme Court of Canada's decision in *Pointes Protection Association.*

[48] In that case, the Court held that the hallmark indicia of a SLAPP, as identified in *Platnick,* only have relevance to an application under *PPPA*-type legislation "… *to the extent* that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature": at para. 79, italics in the original, underlining added.

[49] The text of s. 7(1) does not restrict full indemnity costs to actions of a certain type or ones that have been judicially determined to constitute or closely resemble a SLAPP. Nor does the provision indicate that the legislature explicitly contemplated this sort of a threshold before full indemnity can arise. To the contrary, the provision directs that when an action has been dismissed under the *PPPA*, the defendant is entitled to costs assessed on a full indemnity basis unless an order to that effect would be "inappropriate in the circumstances". Full indemnity is the default position. Section 7(1) is broadly worded and on its face, invites an open-ended enquiry in deciding whether a different order is warranted. As part of that enquiry, a court may elect to consider the hallmark indicia of a SLAPP. However, it is not mandated to do so and there are other factors relevant to the enquiry the court is obliged to undertake that may legitimately come into play, including the conduct of the parties in the litigation.

[50] Second, the appellants have not persuaded me that the judge misapprehended the evidence in deciding the issue of costs by not giving proper effect to the absence of a demonstrated history of SLAPPs or to an early-stage offer to resolve the matter by way of an apology. This argument is largely grounded in the absence of explicit reference to particular pieces of the record in the *Costs* Reasons, and respectfully, it fails to appreciate that the judge would have already considered the entirety of the record in determining whether to dismiss the action.

[51] It is also well-established that in reviewing reasons for judgment, an appeal court applies a functional and contextual approach, at all times mindful of the principles that:

> [19] [A] judge need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties. This applies to both the law and the evidence.
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> …
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> [45] … it has repeatedly been held that "[t]rial judges are presumed to know the law with which they work day in and day out": *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656, at p. 664, where the Court rejected the notion of a positive duty on trial judges to demonstrate that they have appreciated every aspect of the relevant evidence. The trial judge is not

> required to recite pages of “boilerplate” or review well-settled authorities in detail, and failure to do so is not an error of law.
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> [*R. v. R.E.M.*, 2008 SCC 51; emphasis added.]

[52] The fact that the judge made no reference to the absence of a history of initiating lawsuits (not a matter of dispute) or the appellants’ offer to resolve the matter through an apology does not mean that she failed to consider these items. More importantly, whether these parts of the record attracted weight, and how much, was for her to decide in the context of her analysis as a whole.

[53] I note, specific to the apology, that when the appellants approached the respondent about an apology, they attached multiple terms to it. These terms included admitting that the comments in the press release were “defamatory”, “unfounded”, “made without the proper information”, and “under an entire misapprehension of the real facts”. In other words, an admission of full liability. The respondent declined to apologize on that basis. Before us, counsel for the appellants acknowledged that after the respondent communicated his refusal, the appellants did not re-engage on the issue. Given the terms of the proposed apology and the lack of re-engagement, it is not at all surprising to me that this aspect of the procedural history was not mentioned by the judge in her s. 7(1) analysis.

[54] The appellants’ complaint about the judge’s approach to the evidence has been cast as a misapprehension; however, in my view, it is in substance a complaint about how she interpreted the evidence and the weight she assigned to it. I agree with the respondent that on appeal, the appellants seek to re-litigate the issue of costs and have the Court reach its own evidentiary conclusions from the record. This we cannot do.

[55] On a fair reading of the two sets of reasons, it is readily apparent to me why the judge gave effect to the s. 7(1) presumption in favour of full indemnity.

[56] Although she found that the appellants had shown there were grounds to believe their defamation action had substantial merit within the meaning of the *PPPA*, the judge was also satisfied the respondent had raised more than one valid defence to the action. She did not make a finding of serious harm and only two of the seven appellants were able to advance submissions about harm that consisted of more than bald assertions.

[57] The judge found that the defamation action limited the respondent's political expression to the appellants' advantage. As affirmed in *Hansman*, political expression is "the single most important and protected type of expression": at para. 91, citing *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 11, per McLachlin C.J. and Major J., dissenting in part, but not on this point.

[58] The appellants were also found to have engaged in litigation conduct that was strategic and improperly motivated. This conduct was not irrelevant to the s. 7(1) analysis: *Fortress Real Development Inc.* at para. 67. Moreover, it was a feature of the case that the judge could properly use to inform her perspective of the motivations underlying the defamation action as a whole.

[59] In light of the judge's findings, which have not been displaced on appeal, I would not interfere with her discretionary decision. On this record, it was open to her to conclude that full indemnity costs were not inappropriate in the circumstances.

Disposition

[60] For these reasons, I would dismiss the appeal.

[61] **FITCH J.A.**: I agree.

[62] **SKOLROOD J.A.**: I agree.

[63] **FITCH J.A.**: The appeal is dismissed.

[Discussion with counsel re: vacating a stay order made by Justice Frankel on July 5, 2023]

[64] **FITCH J.A.**: As a further order of the Court, contemplated by the order of Justice Frankel, the stay is no longer in effect.

"The Honourable Madam Justice DeWitt-Van Oosten"