IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cousens v. Krause,*
2024 BCSC 1265

Date: 20240715
Docket: S217976
Registry: Vancouver

Between:

Scott Cousens

Plaintiff

And

Vivian Krause

Defendant

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Plaintiff:	G. Allen E. Coffin
Counsel for the Defendant:	D.W. Burnett, K.C.
Place and Date of Hearing:	Vancouver, B.C. May 13, 2024
Place and Date of Judgment:	Vancouver, B.C. July 15, 2024

Table of Contents

INTRODUCTION **3**
BACKGROUND **4**
ISSUES UNDER SECTION 4 OF THE *PPPA* **5**
DISCUSSION **6**
Threshold Burden: Does the proceeding arise from an expression relating to a matter of public interest (s. 4(1))? 6
Merits-Based Hurdle: Are there grounds to believe the proceeding has substantial merit and the moving party has no valid defence (s. 4(2)(a))? 8
Section 4(2)(a)(i) – Substantial Merit 9
The Defamatory Statements 10
Section 4(2)(a)(ii) – No Valid Defence 12
Justification 13
Fair Comment 16
Responsible Communication 20
Conclusion Regarding Defences 21
Public Interest Hurdle: Does the public interest in permitting the proceeding to continue outweigh the public interest in protecting the expression (s. 4(2)(b))? 21
CONCLUSION **24**

Introduction

[1] The plaintiff Scott Cousens is a former mining executive who, approximately fifteen years ago, claimed to have made the single largest philanthropic gift in Canadian sport history to create an athletic development centre in Burnaby, British Columbia. The defendant, Vivian Krause, is a writer who published letters about Mr. Cousens on her blog.

[2] Mr. Cousens sued Ms. Krause in defamation. This is an application by Ms. Krause for an order that Mr. Cousens' defamation action be dismissed under s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*].

[3] The *PPPA* is sometimes also referred to as "anti-SLAPP" legislation. SLAPP stands for "Strategic Lawsuit Against Public Participation" and refers to lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest.

[4] In *Hansman v. Neufeld*, 2023 SCC 14, the Court held that:

> [46] … A SLAPP is a tactical action that seeks to suppress expression on matters of public interest. The goal of a SLAPP is not necessarily a legal victory, but a political one: to intimidate and suppress criticism with the threat of costly litigation … A key feature of a SLAPP is thus the strategic use of the legal system to silence contrary viewpoints.

[5] Similarly, in *Simán v. Eisenbrandt*, 2024 BCCA 176, the Court of Appeal held:

> [32] As reviewed by the Supreme Court of Canada in *Hansman*, the *PPPA* is an example of legislation that targets strategic lawsuits against public participation ("SLAPP"). The "archetypal" SLAPP involves a powerful or wealthy plaintiff using litigation to silence criticism from a comparatively under-resourced defendant: *Hansman* at para. 47. However, not all SLAPPs fit within this archetype. The plaintiff may not be powerful or wealthy, and may not have a history of using litigation to silence criticism. The 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": *Hansman* at para. 48.

[6] In *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 [*Pointes*], the Court held in relation to the Ontario provisions equivalent to the *PPPA*:

> [2] … SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.

Background

[7] Ms. Krause deposes that she has a background in charity, having worked for UNICEF for ten years and having volunteered as a director of The Adoptive Families Association of B.C. for eight years. For the past 15 years, she has researched and written about matters of public interest, particularly with regard to the charitable sector, and has maintained a blog entitled "Fair Questions" since 2009. Initially, she wrote primarily about the funding of environmental activism.

[8] Mr. Cousens was an executive and investor in the mining industry until he retired in 2017. He has been a director of the Fortius Foundation ("Fortius") since 2007. He deposes that in 2008, Fortius purchased land in Burnaby, British Columbia, for the purpose of building the Fortius Sport & Health Centre (the "Fortius Centre") and provided funds for its construction. The Fortius Centre opened in 2013.

[9] On the evidence, which will be discussed more thoroughly below, it appears that Mr. Cousens sent approximately $17.55 million by way of cash and securities to his charitable foundation, New Dimensions Foundation ("NDF"). In 2009, NDF was wound up, and as a part of the winding-up, NDF gifted all of its assets to Imladris Foundation ("Imladris"), which itself was a registered charity controlled by Mr. Cousens. Between 2009 and 2019, Mr. Cousens donated further cash and securities to Imladris, totalling about $4.5 million. Imladris subsequently lent funds to Fortius for the purpose of building the Fortius Centre, first at a 20% interest rate and subsequently at a reduced rate of 5%, following an audit by the Canada Revenue Agency.

[10] In 2020, the City of Burnaby purchased the Fortius Centre from Fortius for $25.8 million.

[11] Mr. Cousens' defamation claim involves statements made by Ms. Krause, disputing statements made on behalf of Mr. Cousens that he donated $23 million to Fortius to create the Fortius Centre.

[12] The allegedly defamatory words were stated in three letters published on January 6, 2021, January 15, 2021, and January 28, 2021 (the "Letters"). Although the Letters were addressed to specific people, including Mr. Cousens, Blake Bromley, John Bromley, the Auditor General of British Columbia, the Royal Canadian Mounted Police, and the Mayor and Council of Burnaby, they were also published on Ms. Krause's blog.

[13] The allegedly defamatory words include the following:

> - Fortius has long said that it began with a donation of $23 million from Scott Cousens. However, financial statements and tax returns tell a different story. According to these records, Fortius Sport & Health Centre began with a loan for $17.1 million, not a gift of $23 million. The total amount of gifts to Fortius from the private foundation of Scott Cousens, is $130,000, not $23 million…
> - My guess is that what may have happened is this: Scott Cousens had a dream to build a big, spectacular sports centre but for whatever reason, he wasn't prepared to pay for it out of his own funds. So instead of making a true donation of $23 million, he became the front man of an elaborate scheme that involved loans, not true gifts.
> - If my analysis is correct then writ large, Fortius has engaged in a massive tax fraud scam whereby tax-receipted donations have been reported for donations that never existed. One of these bogus "donations" is the original, tax-receipted $17,885,500 that was reportedly gifted to New Dimensions Foundation … back in 2008 and 2009. As we now know, that wasn't gifted back to Fortius Foundation. Instead, Fortius got a loan for $17.1 million. If that tax-receipted donation had been given to Fortius as a gift, Fortius Foundation would not have needed the loan of $20 million at 10.25% interest from Romspen Investment Corp.
>
> [emphasis in original]

Issues under Section 4 of the *PPPA*

[14] Section 4 provides that:

> 4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[15] In order to determine this application, the Court's task is to address each part of s. 4 of the *PPPA*. Section 4 places an initial burden on the moving party – the defendant – to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that burden is satisfied, the burden shifts to the responding party – the plaintiff – to satisfy the judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defences, *and* that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression: *Hansman* at para. 53. The Court must dismiss the proceeding if the plaintiff does not meet both parts of this two-part burden.

[16] I will address each of these elements under s. 4 in turn.

Discussion

Threshold Burden: Does the proceeding arise from an expression relating to a matter of public interest (s. 4(1))?

[17] It is clear that the proceeding arises from an expression made by the defendant, Ms. Krause. Therefore, s. 4(1)(a) is satisfied. The next question to be determined is whether the expression relates to a matter of public interest as required by s. 4(1)(b).

[18] In *Pointes*, the Court cited its decision in *Grant v. Torstar Corp.*, 2009 SCC 61 and set out the following principles which govern this Court's determination of that question:

> [27] … 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).
>
> [28] The statutory language used in s. 137.1(3) confirms that "public interest" ought to be given a broad interpretation. Indeed, "public interest" is preceded by the modifier "*a matter* of". This is important, as it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest — there is no qualitative assessment of the expression at this stage. The question is only whether the expression pertains to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one.
>
> [29] Nonetheless, expression that *relates* to a matter of public interest must be distinguished from expression that simply *makes reference* to something of public interest, or to a matter about which the public is merely curious. Neither of the latter two forms of expression will be sufficient for the moving party to meet its burden under s. 137.1(3) (see *Torstar*, at para. 102).
>
> [Emphasis in original.]

[19] In this case, Ms. Krause submits that it is self-evident that the issue of whether someone is engaging in deception when contributing funds to the construction of public sporting facilities is a matter of public interest.

[20] In response, Mr. Cousens submits that it would have been in the public interest for Ms. Krause to raise questions about the conduct of Fortius, but that accusing individuals of criminal behaviour cannot meet the first criterion.

[21] In my view, the substance of the articles published by Ms. Krause is that Mr. Cousens is engaged in a scheme in which he has donated monies to his charitable corporation, and has therefore received tax receipts, but that the funds were never

actually used for charitable purposes. I am of the view that it is in the public interest to consider whether someone is illegitimately taking funds from the public purse.

[22] Further, I note that the Letters were all published in the context of the sale of the Fortius Centre to the City. In my view, it is in the public interest to know whether an asset sold by a charitable foundation to a municipality for $25.8 million was funded by charitable donations or otherwise.

[23] Finally, it is in the public interest to know whether a person has legitimately taken public credit for a donation to build a recreational facility for the community.

[24] As indicated in *Pointes* above, the test to determine whether an expression relates to a matter of public interest is purposefully not onerous, and the words "matter of public interest" ought to be construed broadly. Applying these principles to the case at bar, it is my view that the impugned expression pertains to a matter of public interest.

Merits-Based Hurdle: Are there grounds to believe the proceeding has substantial merit and the moving party has no valid defence (s. 4(2)(a))?

[25] As stated, the burden shifts to the plaintiff, Mr. Cousens, at the next stage of the analysis. It is clear from the language of s. 4 that Mr. Cousens must satisfy the Court of *both* parts of this test.

[26] In *Pointes*, the Court emphasized the importance of the words "grounds to believe":

> [36] The words "grounds to believe" plainly refer to the existence of a basis or source (i.e. "grounds") for reaching a *belief* or conclusion that the legislated criteria have been met.
>
> …
>
> [40] … this standard has been found to require "something more than mere suspicion, but less than … proof on the balance of probabilities" (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114).
>
> [Emphasis in original.]

[27] In *Pointes* at para. 52, the Court cautioned judges hearing an anti-SLAPP application to only engage in a limited weighing of the evidence. The Court went on to say, however, that the judge does not need to take the evidence presented at face value or to accept that bald allegations are sufficient. Rather, the judge is permitted to make a preliminary assessment of credibility and may therefore resolve conflicts in the evidence so long as the assessment does not transform the proceeding into a *de facto* summary judgment application.

Section 4(2)(a)(i) – Substantial Merit

[28] With respect to substantial merit, the Court in *Pointes* held:

> [46] … The use of the word "merit" … fundamentally calls for a determination of the prospect of success of the underlying proceeding. … Thus, given its ordinary meaning and when read in context, "merit" refers fundamentally to the strength of the underlying claim, as a stronger claim corresponds with a weaker justification to dismiss the underlying proceeding.

[29] Further, the Court held:

> [47] … it is clear from the legislative context that the words "substantial merit" are animated by a concern with making sure that, at a minimum, neither "frivolous" suits nor suits with only "technical" validity are sufficient to withstand a s. 137.1 [s. 4] motion. Substantial merit must mean something more.
>
> [48] However, while frivolous suits are clearly insufficient, "something more" cannot require a showing that a claim is likely to succeed either, as some parties have posited. Neither the plain meaning nor the legal definition of "substantial" comports with a "likely to succeed" standard.

[30] The "substantial merit" standard is more demanding than the "reasonable prospect of success" standard, but less stringent than the "strong *prima facie* case" threshold, which requires a "strong likelihood of success": *Pointes* at paras. 49–51.

[31] In *Bent v. Platnick*, 2020 SCC 23, the Court adopted *Pointes*' definition of "substantial merit":

> [90] In *Pointes Protection*, this Court defined "substantial merit" as a "real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff": para. 49.

[32] Reading this definition together with the law regarding "grounds to believe," the Court must be satisfied that there is a basis in the record and the law for reaching a belief or conclusion that the claim has a real prospect of success.

The Defamatory Statements

[33] It may be convenient at this point to reproduce the words which lie at the centre of Mr. Cousens' defamation claim:

> - Fortius has long said that it began with a donation of $23 million from Scott Cousens. However, financial statements and tax returns tell a different story. According to these records, Fortius Sport & Health Centre began with a loan for $17.1 million, not a gift of $23 million. The total amount of gifts to Fortius from the private foundation of Scott Cousens, is $130,000, not $23 million…
> - My guess is that what may have happened is this: Scott Cousens had a dream to build a big, spectacular sports centre but for whatever reason, he wasn't prepared to pay for it out of his own funds. So instead of making a true donation of $23 million, he became the front man of an elaborate scheme that involved loans, not true gifts.
> - If my analysis is correct then writ large, Fortius has engaged in a massive tax fraud scam whereby tax-receipted donations have been reported for donations that never existed. One of these bogus "donations" is the original, tax-receipted $17,885,500 that was reportedly gifted to New Dimensions Foundation … back in 2008 and 2009. As we now know, that wasn't gifted back to Fortius Foundation. Instead, Fortius got a loan for $17.1 million. If that tax-receipted donation had been given to Fortius as a gift, Fortius Foundation would not have needed the loan of $20 million at 10.25% interest from Romspen Investment Corp.
>
> [emphasis in original]

[34] The parties disagree on what these words mean, or what a reasonable person would understand them to mean.

[35] Mr. Cousens submits that they mean, and are understood to mean, that he has publicly lied regarding his philanthropic behaviours; that he never made any donations to the Fortius Centre directly or indirectly or, alternatively, that he made substantially smaller donations than he had publicly stated; that he orchestrated, aided or abetted criminal behaviour or a tax fraud scheme; that he created and

donated to the Fortius Centre for his own private gain, not for any charitable purpose; and that he is a criminal and has engaged in criminal activity.

[36] By contrast, Ms. Krause submits that the words mean, and are understood to mean, that Mr. Cousens did not make a true gift to Fortius with a true economic value of $23 million; that the claim of a $23 million donation to Fortius is misleading; and that Fortius began with a $17 million loan, not a $23 million donation.

[37] In my view, some of Mr. Cousens' pleas overstate the thrust of the defamatory words (read in their context), and some of Ms. Krause's pleas understate their thrust. In particular, in my view, Mr. Cousens' plea that the allegedly defamatory words identify him as a criminal is unwarranted. Although it is possible that tax fraud may be dealt with under the *Criminal Code*, R.S.C. 1985, c. C-46, there is nothing in the Letters, apart from the word "fraud" to suggest that Mr. Cousens engaged in criminal behaviour. Rather, it is my view that the words "tax fraud scam" mean, and would be understood to mean, a scheme to dishonestly avoid tax in a more general sense.

[38] Considering the Letters as a whole, in my view, the allegedly defamatory words mean, and would be understood to mean by a reasonable person, that:

a) Mr. Cousens lied when he stated that he donated $23 million to create Fortius or the Fortius Centre; and

b) his $23 million donation to NDF was part of a broader "tax fraud scam" (in the sense described above) or "scheme" that involved loans rather than true gifts.

[39] As the Supreme Court of Canada stated in *Bent* at para. 92, the tort of defamation is governed by a well-articulated test requiring that three criteria be met:

a) The words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;

b) The words complained of referred to the plaintiff; and

c) The impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

See also *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28.

[40] In my view, all three criteria are satisfied in this case. The first two criteria are easily met. Ms. Krause published the defamatory words on her blog and sent them to various individuals and authorities, including the RCMP. It is clear that they referred to Mr. Cousens.

[41] With respect to the third criterion, I have no difficulty finding that a statement that someone lied about their philanthropic activities, or was engaged in some scheme or scam to avoid tax, would lower that person's reputation in the eyes of a reasonable person.

[42] Accordingly, I find that there are grounds to believe that the proceeding has substantial merit.

Section 4(2)(a)(ii) – No Valid Defence

[43] As discussed, s. 4(2)(a)(ii) requires the respondent (plaintiff) to satisfy the court that "there are grounds to believe" that the applicant (defendant) has "no valid defence in the proceeding".

[44] The Court in *Pointes* held:

> [58] The word *no* is absolute, and the corollary is that if there is *any* defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. As with the substantial merit prong, the motion judge here must make a determination of validity on a limited record at an early stage in the litigation process — accordingly, this context should be taken into account in assessing whether a defence is valid. The motion judge must therefore be able to engage in a limited assessment of the evidence in determining the validity of the defence.
>
> [Emphasis in original.]

[45] Mirroring the "substantial merit" prong of the s. 4 test, the "no valid defence" prong requires the plaintiff, who bears the statutory burden, to show that there are

grounds to believe that the defences have no real prospect of success: *Pointes* at para. 60.

[46] In *Simán*, the Court of Appeal set out the "no valid defence" analysis:

> [42] … the structure of the "no valid defence" analysis is: (i) the responding party must satisfy the judge that there are grounds to believe that the defences have no real prospect of success, (ii) this requires a showing that there are grounds to believe the defences do not tend to weigh more in favour of the defendant, (iii) this means there must be 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 favour of the defendant: *Bent* at para. 103.

[47] Ms. Krause "puts in play" the defences of justification, fair comment, and responsible communication: *Pointes* at para. 56. I will address each of these defences in turn.

Justification

[48] In *Bent*, Justice Côté described the justification defence as follows:

> [107] . . . The burden on the defendant is to prove the substantial truth of the "'sting', or main thrust, of the defamation": Downard, at §1.6 (footnote omitted). In other words, "[t]he defence of justification will fail if the publication in issue is shown to have contained only accurate facts but the sting of the libel is not shown to be true": Downard, at §6.4.
>
> [108] Of particular importance here is the fact that partial truth is not a defence. If a material part of the justification defence fails, the defence fails altogether: R. E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* (2nd ed. (loose-leaf)) ("*Brown on Defamation*"), at pp. 10-88 to 10-90. However, a defendant may justify only part of a libel "if that part is severable and distinct from the rest": p. 10-89 (footnote omitted). This depends on the allegation being separate and self-contained rather than an "ingredient or part of a connected whole": p. 10-90 (footnote omitted).

[49] As discussed above, the meanings, or "stings," of the defamatory words in this case are that Mr. Cousens' assertions that he donated $23 million to create the Fortius Centre were untrue, and that his $23 million donation to NDF was part of a broader "tax fraud scam" or "scheme."

[50] Regarding the first of these defamatory meanings, Mr. Cousens asserts that "it is beyond controversy that the plaintiff has donated millions upon millions of dollars of his own personal wealth to fund the Sports Centre." However, in my view, while it may be clear that Mr. Cousens has in fact donated millions of dollars to NDF, there appears to be a real question as to whether the Fortius Centre was funded by a "donation."

[51] The basic facts of the transaction which lies at the core of this action are reasonably clear, but they bear repeating. Mr. Cousens sent approximately $17.55 million by way of cash and securities to his charitable foundation, NDF. He characterized these asset transfers as "donations," and he received tax receipts for them. In 2009, NDF was wound up, and as a part of the winding-up, NDF gifted all of its assets to Imladris, which itself was a registered charity that Ms. Krause characterized as "the plaintiff's private family foundation."

[52] Between 2009 and 2019, Mr. Cousens donated additional cash and securities to Imladris, totalling about $4.5 million. Imladris subsequently lent funds to Fortius for the purpose of building the Fortius Centre, first at a 20% interest rate and then at a reduced rate of 5%, following a CRA audit.

[53] Mr. Cousens concedes that Imladris was paid back the funds that it had lent to Fortius by a charity called Charitable Impact Foundation ("CHIMP"), which will be described further below. Imladris received approximately $29 million as payback.

[54] Mr. Cousens concedes that he did not donate the funds used to build the Fortius Centre directly to Fortius, but he asserts that he chose to structure his contribution to the Fortius Centre as loans from NDF and Imladris for "a variety of valid reasons."

[55] In my view, whether Mr. Cousens arranged this transaction for "valid reasons" is not the point, at least with respect to justifying this particular defamatory statement. The point is that in public materials, Mr. Cousens stated that he made a

$23 million donation “to create” the Fortius Centre, and this statement appears to have been untrue based on the admitted facts.

[56] On this issue, Ms. Krause states in her materials:

> Second and more fundamentally, a donation to NDF is not a donation to Fortius. NDF ***did no charity***. It used the money, under the plaintiff’s direction, to make a commercial business loan on very profitable terms.
>
> [Emphasis in original.]

[57] Ms. Krause gave evidence that NDF did nothing but issue one donation receipt to Mr. Cousens, and then became financially inactive for five years before it dissolved. It did not make any gifts.

[58] Moreover, according to Ms. Krause, Fortius’ financial statements show that the actual funds used to construct the Fortius Centre were provided by lenders, such as Romspen Investment Corporation, which made a loan to Fortius in excess of $20 million.

[59] In respect of the defamatory sting that Mr. Cousens lied in that he did not donate $23 million to create the Fortius Centre, it is my view that Mr. Cousens has not met the burden of establishing that there are grounds to believe that the justification defence has no real prospect of success.

[60] With respect to the issue of whether Mr. Cousens’ $23 million donation was part of a broader “tax fraud scam” or “scheme,” I will first consider whether this was a statement of fact or a comment.

[61] In *Lund v. Black Press Group Ltd.*, 2009 BCSC 937, this Court held:

> [140] In making the distinction between comment and facts the test is whether the matter would be recognizable to the ordinary reasonable man as a comment upon true facts, and not as a bare statement of fact. A comment is a statement of opinion about facts: *Ross v. New Brunswick Teachers Assn.*, above, para. 57. The scope of the term “comment” is generously interpreted: *WIC Radio Ltd. v. Simpson*, above, at para. 30. Even words that at first appear to be statements of fact may properly be construed as comment in an editorial context where loose, figurative or hyperbolic language is used in the context of political debate, commentary, media

campaigns and public discourse: *WIC Radio Ltd. v. Simpson*, above.

[62] In my view, the terms “tax fraud scam” and “scheme” are “loose, figurative or hyperbolic language” used in the context of commentary and public discourse, as described in the passage above. As indicated above, it is my view that the words “tax fraud scam” mean, and would be understood to mean, a scheme to dishonestly avoid tax in a general sense, but not necessarily in a criminal sense.

[63] For these reasons, it is my view that this defamatory statement is more appropriately analysed as comment. I will do so below.

Fair Comment

[64] The requisite elements of the fair comment defence are set out in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 1 [*WIC*]:

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

[65] As discussed above, the fair comment defence applies to the “sting” in the Letters that the transactions involving Mr. Cousens’ donations to NDF and Imladris, and Imladris’ subsequent loan to Fortius, were part of a broader “tax fraud scam” or “scheme.”

[66] Ms. Krause’s research and the Letters contain analyses and raise questions about many transactions other than the ones described above involving Fortius, NDF, and Imladris. Many of these other transactions involve a lawyer named Blake Bromley and companies controlled by him or his son. While the other transactions are tangential to those involving Fortius, NDF, and Imladris, they are relevant to the

defamatory statement that Mr. Cousens' donation to NDF was part of a broader "tax fraud scam" or "scheme."

[67] Mr. Cousens submits that he is "collateral damage" in Ms. Krause's pursuit of Mr. Bromley, about whom she has written extensively. His submission in this regard appears to be true to some extent. For instance, parts of the Letters concern issues regarding which no connection to Mr. Cousens has been shown. But that fact does not necessarily answer the questions to be determined on this application.

[68] Ms. Krause deposes that by 2018, the interest Fortius owed to Imladris was $9.6 million and that Fortius and Imladris were subsequently involved in a circular, suspicious exchange of "gifts."

[69] In particular, CHIMP – a charity created by Mr. Bromley – made a gift of $74.7 million to Fortius, which in turn used the money to repay debts it owed to five different Bromley-created charities, including the debt to Imladris (which became $29 million with interest). But then all five of those charities made gifts back to CHIMP in the same or slightly greater amounts. As Ms. Krause deposes:

> This appeared suspect to me, as there appears to have been a series of circular, self-cancelling transactions between the Bromley Charities. The gift from CHIMP was used to pay the debts, which were to charities that then made gifts of notes receivable to CHIMP. Thus, the ultimate beneficiary of the $74.7 million "gift" from CHIMP is CHIMP itself. In my opinion, this means that the $74.7 million from CHIMP to Fortius Foundation was not a true gift.

[70] While it is beyond the scope of this application to make any conclusive findings regarding whether these transactions occurred as Ms. Krause alleges, or whether the transactions had some legitimate purpose, I note that Mr. Cousens does not appear to deny the basic facts underlying Ms. Krause's allegations.

[71] Rather, Mr. Cousens accuses Ms. Krause of misunderstanding the transactions. In his submissions, he states that:

> The funding model for the Sports Centre was a model on which Mr. Cousens and the related entities took extensive accounting advice. The decisions to structure the funds were based on this advice.

> Rather than attempting to understand the funding model for the Sports Centre, the defendant has brazenly labelled the model as tax fraud because it is different from the funding model she appears to have expected.

[72] Upon reviewing the facts of the circular loans and gifts described in Ms. Krause's affidavit, it is my view that the first four parts of the *WIC* fair comment test are satisfied in respect of Ms. Krause's labelling of the facts as a "tax fraud scam" or "scheme":

a) I have already concluded that the comment is on a matter of public interest.

b) The comment appears to be based on the facts described by Ms. Krause.

c) In my view, the comment is recognizable as comment.

d) Finally, I accept that there are grounds to believe that, on the facts described, a person could honestly express the opinion that Mr. Cousens' $23 million donation was part of a broader "tax fraud scam" or "scheme."

[73] Mr. Cousens cites *Marks v. Allen*, 2022 BCSC 2024 in support of his argument that Ms. Krause has "baked an inordinate amount of hyperbole into the supposed facts, which prevents those facts from forming a substratum of facts upon which any comment can be based." In that case, such a finding led the Court to conclude that the fair comment defence had no real prospect of success: para. 51. However, in my view, *Marks* is distinguishable from the case at bar.

[74] In *Marks,* the defendant submitted that the facts on which his comment was based included "facts" such as "Mr. Marks works for Wayne Moser, who is a well-known scofflaw": paras. 6, 50. In those circumstances, the Court unsurprisingly held that these facts were "an amalgam of potential fact and editorial commentary" and included "hyperbole baked into the supposed facts": para. 51.

[75] The underlying facts are much clearer in this case. Those facts concern the circular loans and gifts described by Ms. Krause. In turn, the editorial commentary is

that Mr. Cousens' $23 million donation was part of a broader "tax fraud scam" or "scheme."

[76] For these reasons, in my view, Mr. Cousens has not satisfied the Court that there are grounds to believe that the fair comment defence has no real prospect of success, subject to the issue of malice.

[77] An otherwise sound fair comment defence can be defeated if the defendant's statements were motivated by malice. In the trial decision in *Neufeld v. Hansman*, 2019 BCSC 2028 at para 138, the Court quoted from the decision in *Pan v. Guo,* 2018 BCSC 2137 as follows:

> [142] However, even if the defendant successfully invokes the fair comment defence, he may still be liable if the plaintiff can establish malice. Malice focuses on the personal motives of the defendant. The burden of proving malice is on the plaintiff: *WIC Radio* at para. 28. In *Smith v. Cross*, 2009 BCCA 529, Madam Justice Kirkpatrick summarized the circumstances in which a finding of malice can be made at para. 34:
>
> A defendant is actuated by malice if he or she publishes the comment:
>
> i) Knowing it was false; or
>
> ii) With reckless indifference whether it is true or false; or
>
> iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; or
>
> iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

[78] Mr. Cousens alleges that Ms. Krause's statements were motivated by malice. He submits that Ms. Krause's allegations against him were plainly ancillary to her broader campaign against Mr. Bromley. In support of such allegations, Mr. Cousens refers to the fact that Ms. Krause went to the RCMP and other public officials with her allegations, and submits that she "recklessly levied allegations of criminal conduct" against him.

[79] Further, he points out that on one occasion, Ms. Krause asked Mr. Cousens for a response to her allegations and then sent her letter to the RCMP before the deadline.

[80] In response, Ms. Krause deposes:

> In the absence of an explanation and evidence to the contrary, it is my honest opinion that the plaintiff's claim that he made a $23M donation is a deception, a scam, a sham and a fraud.

[81] Obviously, Ms. Krause's affidavit evidence alone cannot be definitive, but, in my view, her assertion that her opinion is honestly held is supported by her answers on cross-examination, in which she refuses to resile from the conclusions that form the subject of this action.

[82] With respect to whether Ms. Krause acted with reckless indifference as to whether her statements were true or false, Ms. Krause points to her extensive research and her repeated offers to obtain Mr. Cousens' explanations for the transactions about which she intended to write.

[83] Finally, I have considered whether malice can be found because Ms. Krause intended to "injure the plaintiff out of spite or animosity, or for some other improper purpose": *Hansman* at para. 115, citing *WIC* at paras. 100-101.

[84] In my view, the submissions advanced by Mr. Cousens on the malice issue demonstrate some overzealousness on Ms. Krause's part. However, in my view, proof of overzealous conduct does not establish malice.

[85] For these reasons, Mr. Cousens has not satisfied the Court that there are grounds to believe that the fair comment defence has no real prospect of success.

Responsible Communication

[86] The test for responsible communication is set out in *Grant* at para. 126. As a starting point, the communication must have been on a matter of public interest. If the court concludes that the communication was on a matter of public interest, it must assess whether "[t]he publisher was diligent in trying to verify the allegation," having regard to various factors such as the seriousness of the allegation, the public importance of the matter, and whether the plaintiff's side of the story was sought and accurately reported.

[87] Given that it is not necessary to make a determination on the defence of responsible communication given my conclusions regarding the other defences above, I decline to do so.

Conclusion Regarding Defences

[88] Having found that Mr. Cousens has not met his burden under s. 4(2)(a)(ii) in respect of the defences of justification (in respect of the factual aspects of the defamatory statements) or fair comment (in respect of the commentary aspects), Ms. Krause's application will be allowed, and the action dismissed.

Public Interest Hurdle: Does the public interest in permitting the proceeding to continue outweigh the public interest in protecting the expression (s. 4(2)(b))?

[89] In case I am incorrect regarding the "no defence" prong of the analysis, I will assess the balance between the public interest in permitting the proceeding to continue and the public interest in protecting the expression, which the Court in *Pointes* describes as the "crux" or the "core" of the analysis: see paras. 18, 30, 48, 61, 82.

[90] As stated above, s. 4(2)(b) requires Mr. Cousens to satisfy the Court that:

> (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[91] In *Pointes*, the Court held:

> [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.
>
> [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.
>
> [Emphasis in original.]

[92] In *Simán,* the Court of Appeal described s. 4(2)(b) as a "robust backstop" for the judge to dismiss "even technically meritorious claims" if the balancing exercise favours protecting the impugned expression: para. 43, citing *Pointes* at paras. 53, 62.

[93] The language of s. 4(2)(b) suggests that it is appropriate to look first at the harm which likely has been, or will be, suffered by the plaintiff as the result of the defendant's expression. In *Hansman*, the Court held:

> [67] Although general damages are presumed in defamation law, s. 4(2)(b) prescribes a weighing exercise which requires that the harm to the plaintiff be serious enough to outweigh the public interest in protecting the defendant's expression. While the presumption of damages can establish the *existence* of harm, it cannot establish that the harm is "serious" … Rather, to succeed on the weighing exercise, a plaintiff must provide evidence that enables the judge "to draw an inference of likelihood" of harm of a magnitude sufficient to outweigh the public interest in protecting the defendant's expression (*Pointes*, at para. 71; *Bent*, at para. 154). Presumed general damages are insufficient for this purpose, as are bare assertions of harm.
>
> [68] Even where the extent of harm suffered by the plaintiff is serious, however, the legislation also requires some evidence that enables the judge to infer a causal link between the defendant's expression and the harm suffered (*Pointes*, at para. 71). Where the defendant is not the only one speaking out against the plaintiff, inferring a causal link between the defendant's expression and the harm suffered by the plaintiff becomes both more important (para. 72), and more difficult.

[94] In this case, Mr. Cousens has provided the Court with scant evidence regarding the harm he has suffered.

[95] He deposes that he has been seeing a therapist for anxiety, but admits that he has not raised the defamatory statements during his therapy sessions.

[96] He asserts that he suffers from migraine headaches but concedes that their onset preceded the defamatory statements that are the subject of this action.

Further, under cross-examination, Mr. Cousens agreed that the CRA's audit of his charitable foundation, which ultimately led to the revocation of its charitable status, played a large part in causing his headaches.

[97] Ms. Cousens has been retired for many years and therefore cannot point to any specific pecuniary loss arising from the defamatory statements.

[98] While he deposes that his relationships with others have been affected, he does not provide any specifics. It is possible that if he is being shunned or treated differently by previous colleagues or acquaintances, that treatment is not necessarily a result of the defamatory statements in this case. For example, in 2018, *The Globe and Mail* published a lengthy article entitled, "Inside the charity network that has helped wealthy donors get big tax breaks – and their donations back." Although the article was about Mr. Bromley, it referred to, and quoted, Mr. Cousens as being one of Mr. Bromley's clients.

[99] Mr. Cousens cites the decision in *Holden v. Hanlon*, 2019 BCSC 622 at paras. 64–66, for the proposition that the Court can infer that materials posted online have been viewed, but that proposition was stated in an assessment of whether defamatory words were *published*, and not in an assessment of harm suffered by a plaintiff.

[100] By contrast, Ms. Krause deposes that she has been unable to get articles published as a result of this legal action. She has given evidence regarding the stress she has suffered and the drain on her resources, impairing her ability to research and write on these issues and others.

[101] The Court in *Pointes* held that the open-ended nature of the statute "provides courts with the ability to scrutinize what is really going on" in a particular case: para. 81. Is this a more "standard" defamation case, in which a plaintiff is truly seeking vindication of his reputational rights through a lawsuit, or one in which a deep-pocketed plaintiff is seeking to silence a less well-resourced critic?

[102] Most cases will not fall neatly into one category or the other. That said, Mr. Cousens acknowledges that he has substantial financial means at his disposal. He has sufficient resources to dispute Ms. Krause's allegations in the "court of public opinion" if he wishes to do so.

[103] Although Ms. Krause has been raising funds for her defence through a "GoFundMe" webpage, it is clear that she does not have the resources that Mr. Cousens has.

[104] For all of these reasons, in balancing the competing public interests under s. 4(2)(b), I would find that the harm Mr. Cousens likely suffered, or will likely suffer, as a result of Ms. Krause's expression is not serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

Conclusion

[105] Ms. Krause's application under s. 4 of the *PPPA* is allowed, and Mr. Cousens' action is dismissed.

[106] Ms. Krause shall have her costs of the action at Scale B.

"The Honourable Justice Loo"