IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lavigne v. Coleman,*
2024 BCSC 1415

Date: 20240806
Docket: S23022
Registry: Nelson

Between:

Luc Lavigne

Plaintiff

And

Gregory Coleman

Defendant

Before: The Honourable Madam Justice Lyster

Reasons for Judgment

Appearing on his own behalf:	L. Lavigne
Counsel for the Defendant:	M. Scheffelmaier
Place and Dates of Trial/Hearing:	Nelson and Rossland, B.C. June 19 and 26, 2024
Place and Date of Judgment:	Nelson, B.C. August 6, 2024

Introduction

[1] This is an application for summary judgment brought by the defendant, Gregory Coleman, with respect to the plaintiff, Luc Lavigne's, defamation lawsuit

[2] The background to the matter can be found in a previous decision I rendered in respect of a claim brought by a company Mr. Coleman controls, 600835 B.C. Ltd. (the "Septic Corporation") against Mr. Lavigne: *600835 v. Lavigne*, 2023 BCSC 2373 (the "Decision"). The Septic Corporation provides septic services to residents of Grandview Properties, a development developed by another company controlled by Mr. Coleman, Coleman Properties Ltd. ("Coleman Properties"). Mr. Lavigne and his wife are owners of a home in Grandview Properties.

[3] The Decision addressed the Septic Corporation's claim that the Lavignes had installed their septic system and connected it to the Septic Corporation's septic system contrary to the terms of the Sewer Services Agreement which governs the Septic Corporation's provision of septic services to residents of Grandview Properties.

[4] In the previous proceeding, the Septic Corporation sought judgment in the amount of $9,091.25, a builders lien and a certificate of pending litigation ("CPL"). The Septic Corporation was successful, but only in part. I ordered that in order to cancel the builders lien and CPL, Mr. Lavigne was required to pay the sum of

$4,620.00. I further ordered that, on payment of those damages, plus a turn-on fee of $50.00, the Septic Corporation was required to enable the Lavignes' septic service. In view of the parties' divided success, I ordered that each party was to bear its own costs.

[5] The present defamation action arises out of a letter from Mr. Coleman to the owners in Grandview Properties dated October 27, 2023 (the "Letter"). As I will describe in greater detail, in the Letter Mr. Coleman sought to justify the legal expenses incurred by the Septic Corporation in the previous litigation. That issue arose in the context of the Septic Corporation imposing an extraordinary levy on the owners to pay $30,000 in legal fees incurred in relation to the previous dispute. In his notice of civil claim, Mr. Lavigne asserts that Mr. Coleman defamed him in the Letter.

[6] Mr. Coleman denies that the Letter was defamatory. In respect of those parts of the Letter that he concedes are potentially defamatory, he relies on the defences of justification and qualified privilege. He also submits that the Letter was not published by him in his personal capacity, but rather in his capacity as the Director of the Septic Corporation, and that he is therefore not personally liable.

[7] Mr. Lavigne maintains that the Letter is defamatory and that it is protected neither by the defence of justification nor the defence of qualified privilege. In that latter context, he submits that any claim of qualified privilege is defeated by malicious intent. Mr. Lavigne submits that the Letter was written by Mr. Coleman in his personal capacity, and that he is therefore personally liable in defamation.

[8] Both parties agree that the matter is suitable for determination by way of summary trial. I have been able to decide whether Mr. Coleman is personally liable for any defamation, and whether the Letter is defamatory. I have also been able to decide whether the defence of justification applies to any parts of the Letter, and whether the Letter was written on an occasion of qualified privilege. Regrettably, I have concluded that, in the circumstances of this case, the issue of whether the defence of qualified privilege is defeated by malice is not suitable for determination

in a summary trial. I am, therefore, ordering that the parties will have an opportunity to provide oral evidence and final submissions with respect to malice, as well as any damages if malice is established.

The Context of the Letter

[9] On October 15, 2023, a letter was sent to all owners. It was not signed, but was on Septic Corporation letterhead. Under the heading “Legal Fees, Extraordinary Levy”, the following was stated:

> **2) Legal Fees, Extraordinary Levy**
>
> The Septic Corp is a net-zero operation. This means the company does not profit from providing septic service.
>
> Recent events are dramatically affecting the financial operability of the Septic Corporation. To protect its operation thereof, the Septic Corp spent over $30,000 in legal fees in 2022-2023. This legal cost has been paid initially from the Reserve Fund; however, all Owners will be required to replenish the Reserve Fund through an Extraordinary Levy. Each Owner will be receiving this notification and invoice by the end of November.
>
> It should be noted that this legal situation is not yet resolved, and an owner remains disconnected from service until such time that all fees and associated costs are paid to the Septic Corp, Additional information on this matter will be included in the notification of the levy.
>
> The Septic Corp proposes an annual legal expense of $4,000 be added to the budget.

[10] On October 23, 2023, Mr. Lavigne wrote a letter to all owners in response. Under the heading “Litigation”, he wrote:

> **Litigation**
>
> 600835 BC Ltd. (the Plaintiff) filed a Notice of Civil Claim against Lavigne (the Defendant) in the BC Supreme Court to claim costs for the installation of a sewer curb stop valve on assets owned by the Septic Corporation for septic service to Lot 5. The Plaintiff was subsequently served with a Counterclaim and a Notice of Application by the Defendant to hear the trial in Judges Chambers.
>
> In submissions to the Court, the allegation from the Septic Corporation that it was forced into litigation in order “to protect its operation thereof’ (Coleman, 2023) was shown to be false, with testimony from 600835 BC Ltd. deemed by the presiding judge to be “not credible and contradictory” (Hon. L. Lyster, 2023). On August 9, 2023, Madam Justice Lindsay M. Lyster pronounced a verdict in the matter of *600835 BC Ltd.* v. *Lavigne.* In her summation. Judge Lyster held each party responsible for its own legal costs.

[11] In this letter, Mr. Lavigne went on to pose a number of questions with respect to the Septic Corporation's authority to shift responsibility for the legal fees associated with the previous litigation onto the owners.

[12] On October 27, 2023, Mr. Coleman wrote the Letter in response. It is not signed and is not on Septic Corporation or Coleman Properties' letterhead, but there is no dispute that Mr. Coleman wrote it. In light of its centrality to this case, I reproduce it in full. I have added paragraph numbers for ease of reference:

> Septic Corporation, re: Legal Costs Incurred 2022-2023
>
> 1. At the outset in 2001, one of the conditions of subdivision was to create a community septic system, which would be operated by a Septic Corporation. Pursuant to that requirement, I agreed to be the owner and director of the Grandview Septic Corporation.
> 2. The Sewer Services Agreement was drafted to describe the obligations of each party involved. The Septic Corporation is obligated to provide septic service to all owners who have both signed the Sewer Services Agreement and have paid all applicable fees. The Agreement clearly describes the obligations of the Septic Corporation, and it clearly describes the terms and conditions to be met by the owners at Grandview.
> 3. My obligation as director of the Septic Corporation has been to ensure the continued provision of septic services to the owners who are not in breach of the Sewer Services Agreement. Furthermore, this obligation also includes having permission from the governing bodies to continue operating this septic service.
> 4. To ensure that the government does not withdraw their permission for the Septic Corporation to operate and provide services, the Septic Corporation needs to provide a service that meets or exceeds the government regulations & guidelines. For example, if the government requires that septic tanks are to be inspected on an annual basis, then I will impose that rule upon the owners, including myself.
> 5. But, when someone breaches the Sewer Services Agreement in a way that breaches the government's regulations, and the Septic Corporation does nothing about it, then all the users get exposed to the risk that the government could pull the Septic Corporation's permit. This would leave everyone without septic service, and that would be a disaster for all.
> 6. Equally concerning, even if the government doesn't notice that someone is operating outside of the rules, allowing someone to connect to, or to remain connected to the community septic system without following the rules for installation, inspection or maintenance, still exposes the entire community septic system to the risk of being damaged by the owner in breach. Damage to the system could shut

down the provision of septic services for a long time and could cost tens of thousands of dollars or more to repair. This too, would be a disaster for all users.

7. Mr. Lavigne installed a system at his house without complying with the Sewer Services Agreement. He did not get the required approvals before installing his system. He did not inform the Septic Corporation that he was installing a system, nor did he allow us to inspect that installation. Also, his system was installed without the direct supervision of a Registered Onsite Wastewater Practitioner ("ROWP"). Then, he had his contractor connect his system to our Septic System with neither my knowledge nor approval, which was another significant breach. By doing so, Mr. Lavigne exposed all users of the system to the risks described above. All of these things should have been done pursuant to the Sewer Services Agreement.
8. In my effort to protect the community septic system, I took the necessary steps to disconnect Mr. Lavigne from the septic system.
9. According to the Sewer Services Agreement, the Septic Corporation is operated as a net-zero corporation, meaning that it does not make any profits. The only income that the Septic Corporation earns is to cover its Operating Expenses and its contributions to its Reserve Funds.
10. In an attempt to recover the disconnection costs that Mr. Lavigne caused the Septic Corporation to incur, the Septic Corporation registered a Builders Lien against Mr. Lavigne's property. The Septic Corporation's intention was to stop incurring any further costs by simply waiting for Mr. Lavigne to pay. But instead, we ended up in Court because Mr. Lavigne responded to the Builders Lien by implementing a rule within that Act which forced the Septic Corporation to bring an action or, lose its lien against his property. Once the Notice of Claim was filed, he brought a number of applications: first to try and have the claim dismissed, which was unsuccessful, then to have the claim converted to a summary trial for hearing.
11. In reality, it was Mr. Lavigne that drove this lengthy and expensive litigation forward, not the Septic Corporation.
12. In Mr. Lavigne's recent letter, he says the Septic Corporation's claims were proven to be false and that I was found not to be credible. This is not true. The judgment was pronounced orally and was far more nuanced than that. Ultimately, Mr. Lavigne was found to have installed his system without the appropriate approvals and was ordered to pay the Septic Corporation for a portion of the costs incurred in relation to his disconnection. If you would like a copy of the Court Order, I will send it to you once it has been filed.
13. In the future, I will assess the severity of any other breach of the Sewer Services Agreement with the lessons learned from this experience in mind. However, I believe we could have successfully appealed both this decision and the decision about Court costs, but it

was not economically viable to do that given the amount of money we were fighting over.

14. I hope it is perfectly clear that I do not want to be involved in any kind of dispute with any of the users of the Septic Service or otherwise. I really just want everyone to follow the rules. I also hope that you can understand how difficult it is to disconnect, or file a lien, or start a court action. In this case, I had no idea what kind of system Mr. Lavigne had connected to the community system, I had no idea how he connected it, and I knew that he was willing to proceed without communicating with me.
15. I believed I was making the most reasonable decision possible to protect the septic users as a collective, and I acted with that intention in mind. Had I done nothing, and the system was damaged, I have no doubt that many users would be concerned about my inaction in the same way as many of you are concerned now.
16. The Court gave their determination on August 9th, 2023. As of today, the Septic Corporation has yet to receive this Court ordered payment from Mr. Lavigne, so I continue to communicate with him to collect that amount. In the meantime, his residence remains disconnected from the system.

Analysis

Is Mr. Coleman the proper defendant?

[13] Mr. Coleman submits that he was at all times, and in particular in writing the Letter, acting in his capacity as the sole Director of the Septic Corporation. He denies “publishing” the Letter, and submits that the Septic Corporation is the sole proper defendant to this action. Mr. Lavigne disagrees. He submits that Mr. Coleman’s personal identity and that of the Septic Corporation are conflated in the Letter.

[14] In this connection, Mr. Coleman relies on the decision of the Court of Appeal in *Merit Consultants International Ltd. v. Chandler*, 2014 BCCA 121 [*Merit BCCA*]. In that case, Redfern hired Merit as a construction manager for a project. Redfern became concerned about the quality of Merit’s work, and terminated the contract. In response, Merit sued Redfern, seeking damages. Redfern’s parent company Redcorp issued a press release notifying current and prospective shareholders of the action, and its intention to make a counterclaim. Redfern and Redcorp sought protection from their creditors, and Merit’s action against Redfern was stayed as a

result. Merit then sued Redcorp's directors personally for defamation for the press release.

[15] In *Merit Consultants International Ltd. v. Chandler*, 2012 BCSC 1968 [*Merit BCSC*], the summary trial judge, Mr. Justice McEwan, dismissed Merit's action against the Redcorp directors. He held that the press release was protected by qualified privilege. In *obiter*, he held at para. 48 that there was no evidence that the directors had personally published anything, or had ever acted outside of their capacities in relation to the companies, and that Redcorp was the proper defendant. He ordered special costs against Merit.

[16] Merit appealed the dismissal of its action against the directors, as well as the special costs order. On appeal, the Court of Appeal dismissed the appeal on the merits of the defamation claim. Dealing with the issue of the personal liability of the directors, the Court referred at para. 21 of *Merit BCCA* to its decision in *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 66 for the following:

> The fact that a director, officer or employee was acting within the course of employment and the corporation is vicariously liable for his negligence does not preclude a claim in negligence against the employee personally. However, in my view, the *London Drugs* principle requires that claim against the individual must be based on the breach of a duty of care that would support an action against the individual personally. The material facts that support that personal claim in tort must be specifically pleaded to establish a possible cause of action under R. 15(5)(a)(iii). [At para. 66.] [Emphasis in original.]

[17] At para. 22 of *Merit BCCA* the Court cited its previous decision in *XY v. Zhu*, 2013 BCCA 352 at para. 73 for the following:

> .. it appears to be the law in Canada that as long as tortious conduct on the part of an employee or agent of a corporation (or any other employer) is properly pleaded and proven as an "independent" tort by the employee or agent, the wrongdoer can be held personally liable notwithstanding that he or she may have been acting in the best interests of (and at the behest of) the employer or principal. I see no reason in principle or policy why such liability should be restricted to cases involving physical damage (as *Said v. Butt* may have

> suggested in 1920), or to claims in negligence (as referred to in *London Drugs*, *Hildebrand* and *Neilson*.) Certainly the Ontario Court of Appeal did not so restrict it in *ADGA*. ... [At para. 73.] [Emphasis in original.]

[18] The Court concluded on the issue of the personal liability of the directors at para. 23 as follows:

> [23] Without attempting to reconcile all the case law, it seems to me that the case at bar lies at the far 'no liability' end of the spectrum of directors' personal liability. No "independent" or "personal" tort was pleaded and no allegation was made that the Directors had acted other than *bona fide* in the best interests of Redfern and Redcorp. More importantly, it cannot be said on the evidence before the Court that the conduct of the Directors exhibited a "separate identity or interest" from that of the companies; that there was some activity that took the Directors "out of the role of directing minds of the corporation", as referred to in *ScotiaMcLeod* at 720; nor that the conduct complained of consisted of physical injury, property damage or nuisance as referred to in *ADGA* at para. 26, or fraud or dishonesty, as referred to by Professors P. Burns and J. Blom in *Economic Interests in Canadian Tort Law* (2009) at 76. (See also *ScotiaMcLeod*, *supra*, and *Kepic v. Tecumseh Road Builders* (1987) 18 C.C.E.L. 218 (Ont. C.A.).)

[19] The authorities make clear that there is no absolute bar to a director of a company being liable for defamation. In *Merit BCCA*, Madam Justice Newbury explicitly did not attempt to reconcile all of the case law, but found that the facts in the case before her lay at the "far 'no liability' end of the spectrum of directors' personal liability".

[20] It is, therefore, necessary to examine the evidence in the case at bar to see where the Letter written by Mr. Coleman lies on that spectrum.

[21] In the Letter, Mr. Coleman states that he is the owner and director of the Septic Corporation. He is its directing mind.

[22] In the Letter, Mr. Coleman frequently refers to himself as "I" and his actions as "my actions". For example, he says that "I agreed to be the owner and director of the Grandview Septic Corporation". He refers to "my obligation as director", and says that "I will impose that rule upon the owners, including myself". He refers to Mr. Lavigne taking certain actions without "my knowledge or approval". He says that "I

took the necessary steps to disconnect Mr. Lavigne". He says that "I believed I was making the most reasonable decision possible". These are only a few of many examples of Mr. Coleman using the first person singular to refer to himself and his actions in the Letter.

[23] In my view, Mr. Coleman's conduct in writing the Letter occupies a position somewhere close to the opposite end of the liability spectrum referred to by Newbury J.A. in *Merit BCCA*. Mr. Coleman chose to write the Letter, and described Mr. Lavigne's conduct and sought to justify his own conduct in personalized terms. To repeat a phrase used by Mr. Coleman's counsel in the course of submissions, Mr. Coleman's individual person has seeped into the Letter. Mr. Coleman published the Letter, and if it is found to be defamatory, he is personally liable for that defamation. The contrary conclusion would mean that Mr. Lavigne could sue only the Septic Corporation, which would result in the owners being liable for any damages or costs ordered. In the circumstances of this case, it would be unjust to permit Mr. Coleman to hide behind the Septic Corporation's corporate veil to evade liability for any defamatory comments included in the Letter.

Is the Letter defamatory?

[24] Madam Justice Adair set out the elements of the tort of defamation as follows at para. 315 of *Casses v. Canadian Broadcasting Corp.*, 2015 BCSC 2150 [*Casses*]:

> [315] A plaintiff in a defamation action is required to prove three things to obtain judgment and a remedy: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed. See *Grant v. Torstar Corp.*, 2009 SCC 61, at para. 28.

[25] Justice Adair further explained at para. 117 of *Casses*:

> [117] On January 4, 2006, the College responded by letter to Mr. Caskey's October 25, 2005 letter. In accordance with the general practice, Dr. Casses received a copy of the College's letter. The letter read in part:

> In summary, the [Quality of Medical Performance] committee was critical of the care provided by Dr. Casses. The committee was critical of his decision to proceed with more extensive surgery at the time of the planned hernia repair, when the indication for the more extensive surgery was primarily cosmetic and not initiated by you. The committee also did not believe that Dr. Casses had obtained adequate informed consent before proceeding with this more complicated surgery. The committee considered it inappropriate to proceed with more extensive surgery based on a brief preoperative discussion.

[26] As explained at para. 319 of *Casses*, the court applies an objective test in determining if a publication is defamatory. The court cited *Lewis v. Daily Telegraph Ltd.*, [1963] 2 All E.R. 151 (H.L.) at pp. 154-–55 for the following proposition:

> Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning…

[27] I conclude that the Letter includes a number of defamatory statements, as set out below.

[28] There is no dispute that the Letter was published to all owners in Grandview Properties.

[29] The first six paragraphs do not refer to Mr. Lavigne by name. The first four paragraphs begin by describing in general terms the Septic Corporation, Mr. Coleman's relationship to it, and its obligations to owners in Grandview Properties. Mr. Lavigne takes no issue with the first four paragraphs.

[30] Mr. Lavigne alleges that the next two paragraphs, while they do not refer to him by name, defame him. The first of these paragraphs refers to "someone" breaching the Sewer Services Agreement, thereby exposing all owners to the risk that the government could pull the Septic Corporation's permit. The second of these paragraphs refers to "someone" "operating outside of the rules", thereby exposing the whole system to damage by the owner breaching the rules.

[31] In context, given the previous dispute, the two preceding letters from Mr. Coleman and Mr. Lavigne, and the rest of the Letter, which refers to Mr. Lavigne by name, an owner in the Grandview Properties would understand the “someone” mentioned in these two paragraphs to be a reference to Mr. Lavigne. To be accused of breaching the Sewer Services Agreement and operating “outside the rules”, thereby exposing the other owners to having no sewer service, or having their septic system damaged, would tend to injure Mr. Lavigne’s reputation in the eyes of a reasonable person.

[32] The majority of the remainder of the Letter refers to Mr. Lavigne by name. The seventh paragraph asserts that Mr. Lavigne installed a system at his house without complying with the Septic Services Agreement in several respects, thereby exposing all users to the risks already described. The sting of this assertion is that Mr. Lavigne is a rule-breaker who by his actions exposed all owners to the risk of damage to the sewer system, interruption of sewer services and financial costs. This assertion would tend to injure Mr. Lavigne’s reputation in the eyes of a reasonable person.

[33] The eighth paragraph states that in an effort to protect the community system, Mr. Coleman took the steps necessary to disconnect Mr. Lavigne. The implication that Mr. Lavigne is a person whom it is necessary to protect the community system from would tend to injure his reputation in the eyes of a reasonable person.

[34] The ninth paragraph is a factual statement that the Septic Corporation operates on a net zero basis. Mr. Lavigne does not take issue with this paragraph.

[35] The tenth paragraph states that the Septic Corporation registered a builders lien against the Lavigne property to recoup its costs, and that it intended not to incur any costs by waiting for Mr. Lavigne to pay, but they ended up in court because Mr. Lavigne forced them to bring an action or lose their lien. Mr. Lavigne does not take issue with this part of the tenth paragraph. He takes issue with the remainder of the paragraph, which states that he then brought a number of applications, first to try to have the action dismissed and then for summary judgment.

[36] In my view, this particular portion of the Letter would not tend to diminish Mr. Lavigne's reputation in the eyes of a reasonable person. There is nothing morally blameworthy in and of itself about bringing a number of applications within a court case. Mr. Coleman did not state or imply that Mr. Lavigne was a vexatious litigant, which would tend to diminish a person's reputation in the eyes of a reasonable person. Mr. Lavigne has not met the burden of establishing that the impugned portion of the tenth paragraph of the Letter is defamatory.

[37] The same cannot be said of the eleventh paragraph. In that paragraph, Mr. Coleman wrote that "in reality, it was Mr. Lavigne that drove this lengthy and expensive litigation forward, not the Septic Corporation". The objective meaning of this paragraph is that Mr. Lavigne is to blame for the previous litigation, making it lengthy and expensive. In the eyes of the audience to whom the Letter is written, this statement would tend to diminish Mr. Lavigne's reputation, as the sting is that he is to blame for the litigation costs they were being asked to bear.

[38] Mr. Lavigne takes issue with the part of the twelfth paragraph in which Mr. Coleman states that the court found him to have installed his system without appropriate approvals and to have been ordered to pay a portion of the Septic Corporation's costs incurred in relation to the disconnection. I find that the reference to Mr. Lavigne having been found to have installed his system without appropriate approvals would tend to lower his reputation in the eyes of a reasonable person.

[39] Mr. Lavigne does not take issue with the thirteenth paragraph of the Letter. He does take issue with the first sentence of the fourteenth paragraph, in which Mr. Coleman wrote that "I hope it is perfectly clear that I do not want to be involved in any kind of dispute with any of the users of the Septic Service or otherwise." This is a statement about Mr. Coleman's intentions, not Mr. Lavigne. I find that it would not tend to lower Mr. Lavigne's reputation.

[40] Mr. Lavigne does not take issue with the fifteenth paragraph. He does take issue with the sixteenth paragraph. I understand his concern here to centre on the statement that "as of today, the Septic Corporation has yet to receive this Court

ordered payment from Mr. Lavigne." I find that the assertion that Mr. Lavigne has failed to satisfy a court judgment would tend to injure his reputation in the eyes of a reasonable person.

Is the justification of truth available?

[41] Where the three elements of defamation are established, falsity and damage are presumed: *Casses* at para. 315. The burden shifts to the defendant to establish a defence. In the case at bar, Mr. Coleman relies on the justification of truth for some of the defamatory statements made in the Letter. Justice Adair described the justification of truth as follows at para. 550 of *Casses*:

> [550] Justification is an absolute defence to defamation. It applies to statements of fact. It will succeed if the defendant proves, on a balance of probabilities, the truth of what is alleged to be defamatory. However, what is required to be proven is not the truth of each and every word or the literal truth of the statement. Rather, a defendant must only prove on a balance of probabilities that the gist or sting of the defamation was true, and it is sufficient if the defendant proves that a defamatory expression was substantially true. Minor inaccuracies do not preclude a defence of justification so long as the publication conveyed an accurate impression. The test is whether the defamatory expression, as published, would have a different effect on a reader or listener than what the pleaded truth would have produced. See *Cimolai v. Hall*, at paras. 171-173; *Wilson v. Switlo*, 2011 BCSC 1287, at paras. 440-441; and *Jay v. Hollinger Canadian Newspapers*, 2002 BCSC 1840, at para. 4.

[42] I will deal here with whether Mr. Coleman has established the justification of truth with respect to each part of the Letter that I have found to be defamatory and which Mr. Coleman submits are substantially true.

[43] Mr. Coleman submits that the statements made in paragraphs one to six are substantially true. He submits that, taken together, these paragraphs are a broad statement of his responsibilities, the Septic Corporation's responsibilities and the obligations of users to follow the rules. He further submits that these paragraphs discuss the risks arising from failures to follow the rules.

[44] I accept that Mr. Coleman's general statements about his and the Septic Corporation's responsibilities, and the responsibilities of users of the system to

follow the rules are substantially true. It will be recalled that I found that the references to “someone” were references to Mr. Lavigne. Mr. Coleman has not established that Mr. Lavigne’s actions breached government regulations, or that he exposed all of the users to the risk that the government could pull the Septic Corporation’s permit, leaving everyone without septic service. Nor has he established that Mr. Lavigne’s actions exposed the entire system to the risk of being damaged and that could shut the system down for a long time and cost tens of thousands of dollars or more to repair. All of this is, on the evidence before me, speculative. Therefore, insofar as these paragraphs refer by implication to Mr. Lavigne, Mr. Coleman has not established that they are substantially true.

[45] I will deal next with paragraph seven. Mr. Coleman conceded, as I have found, that some of the statements in paragraph seven could be viewed as defamatory. However, he submits that paragraph seven consists of six statements which are substantially true. I will deal with each of them.

[46] One, Mr. Coleman wrote that Mr. Lavigne installed a system at his house without complying with the Sewer Services Agreement. Mr. Coleman relies on para. 85 of the Decision for the truth of this and the following statements. Paragraph 85 reads as follows:

> [85] The Septic Company submits that Mr. Lavigne breached the Septic Agreement by purchasing and installing a septic system, not receiving approval for the installer, not providing the Septic Company with an opportunity to supervise the installation, burying the septic system without inspection, having his plumber connect to the connection pump, and refusing to allow Greg Coleman onto the property. A fundamental problem with the Septic Company’s position is that all of those things occurred prior to the Lavigne's signing the Sewer Services Agreement. As I have said, Mr. Lavigne cannot have been in breach of an agreement he had not yet agreed to.

[47] Mr. Coleman submits that that paragraph amounts to a finding that all of those things occurred. I do not agree. The recitation of Mr. Lavigne’s alleged breaches of the Agreement contained in para. 85 of the Decision is not a finding that all of those things occurred. That paragraph is a finding that all of the things the Septic Corporation submitted Mr. Lavigne did occurred before he signed the Sewer

Services Agreement and that he, therefore, could not have been in breach of the Agreement in doing them. One must look elsewhere in the Decision to determine what I found Mr. Lavigne to have done or not done.

[48] The Lavignes signed the Agreement on or about May 18, 2022: Decision at para. 63. As of September 1, 2021, the Lavignes had installed a septic tank, but it was not yet connected to the community septic system: Decision at para. 39. The septic system was installed, but not yet connected, before the Lavignes signed the Agreement. It is not substantially true that they installed a system without complying with the Agreement.

[49] Two, Mr. Coleman wrote that Mr. Lavigne did not get the required approvals before installing his system. It is true that the Lavignes did not obtain any approvals prior to installing their system: Decision at paras. 70–72. However, the same problem arises. The approvals in question are those required under the Agreement which the Lavignes had not signed at the time they installed their system. It is, therefore, not substantially true that they had not obtained “the required approvals”.

[50] Three, Mr. Coleman wrote that Mr. Lavigne did not inform the Septic Corporation that he was installing a system. As outlined in the Decision, there was a significant amount of communication between Mr. Lavigne on the one hand, and Mr. Coleman and persons acting as his agents on the other, about the installation of a septic system. At para. 29, I found that Mr. Lavigne and Mr. Coleman located the sewage pipe to connect the Lavigne septic system to the community system in or about September 2019. At para. 30, I found that Mr. Lavigne sent Mr. Coleman an email on August 31, 2020 asking him for guidance in selecting a septic tank. As previously mentioned, I found that the Lavignes had installed a septic tank, although not connected it to the community system, by September 2021. Considering the evidence as a whole, I find that the Septic Corporation was well aware of the fact Mr. Lavigne was installing a septic system. It is not substantially true to say that Mr. Lavigne failed to inform the Septic Corporation that he was installing a system.

[51] Four, Mr. Coleman wrote that Mr. Lavigne did not allow the Septic Corporation to inspect the installation. There was a significant amount of discussion in the Decision about the Septic Corporation's efforts to inspect the Lavigne system. At para. 43 of the Decision, I held that Mr. Coleman attended at the Lavigne home on April 22, 2022, and discovered that Mr. Lavigne had already installed and buried his septic system. At paras. 44–45, I held that Chris Coleman entered the Lavigne home and inspected the septic system. At para. 47, I held that Chris Coleman had no particular expertise in septic systems, and that the Septic Corporation had not inspected the system and had no means of knowing if it was installed correctly as of April 2022. At para. 49, I held that Chris Coleman returned to the Lavigne home on April 28, 2022 and took more photographs of the septic system. At para. 55, I held that Mr. Coleman and Chris Coleman went to the Lavigne home with a WSA technician on May 16, 2022, but Mr. Lavigne did not permit them on his property. At para. 61, I held that on June 7, 2022, Chris Coleman attended the Lavigne property and took photos of a cut pipe. At para. 68, I held that on June 20 and 21, 2022, Chris Coleman and others attended the Lavigne home and did some excavation work. At para. 69, I held that Chris Coleman returned the next day with Mr. Karthein and Mr. Sapriken. It can fairly be said that the Septic Corporation inspected the system on June 22, 2022.

[52] Considering the evidence on this issue as a whole, it is not substantially true to say that Mr. Lavigne did not allow the Septic Corporation to inspect his septic system. He did, albeit belatedly, which is what resulted in the costs incurred to excavate the system in order for the Septic Corporation to inspect it: Decision at para. 102.

[53] Five, Mr. Coleman wrote that Mr. Lavigne installed his system without the direct supervision of a Registered Onsite Wastewater Practitioner ("ROWP"). I find that this statement is substantially true. The system was installed without the direct supervision of a ROWP.

[54] Six, Mr. Coleman wrote that Mr. Lavigne had his contractor connect his system to the septic system without his knowledge or approval. As mentioned earlier, I held at para. 39 of the Decision that, as of September 1, 2021, the Lavigne system was installed but not connected to the community system. At para. 62, I noted the lack of clarity in the evidence as to whether the Lavignes' septic system had been connected to the community system in June 2022. At para. 68, I held that the Septic Corporation was unable to locate the connection.

[55] I do not believe I made a clear finding in the Decision as to whether the Lavigne system was connected to the community system and, if so, whether that was done without Mr. Coleman's knowledge or approval. In view of the evidence considered in the Decision as a whole, I find it is likely that the Lavigne system was connected, but not discharging effluent, to the community system, without Mr. Coleman's knowledge or approval. I find that this statement is substantially true.

[56] Mr. Coleman submits that paragraph eleven is substantially true, that is that Mr. Lavigne was driving the litigation forward. In this regard, he refers to paragraph thirteen of the Letter where Mr. Coleman wrote that going forward he will assess the severity of any breach of the Septic Services Agreement with the lessons learned from this experience in mind, and paragraph fifteen, where he wrote that he thought he was making the most reasonable decision possible to protect the users of the system.

[57] Mr. Coleman's subjective feelings and motivations for his actions in the previous dispute do not determine the truth or falsity of the statement that Mr. Lavigne drove the litigation forward.

[58] In summary, what occurred in the previous litigation was that the Septic Corporation filed the lien in the amount of $9,091.25. In response, Mr. Lavigne filed a notice to commence an action. In response to that notice, the Septic Corporation filed its notice of civil claim. Mr. Lavigne filed his response to civil claim in response. As set out in the Decision at para. 12, Mr. Lavigne filed a notice of application seeking to dismiss the notice of civil claim, but he failed to plead Rule 9-7 of the

Supreme Court Civil Rules, B.C. Reg. 168/2009. As set out at para. 13 of the Decision, on consent, I made directions for the parties to file amended materials so that Mr. Lavigne's summary trial application could be heard. In the Decision, I ordered Mr. Lavigne to pay $4,620.00, and that on payment of that amount and a $50.00 turn-on fee, the Septic Company was to enable his septic service.

[59] On the facts of the history of the previous litigation, it is not substantially true to say that Mr. Lavigne drove the litigation forward. The litigation was triggered by the Septic Corporation's decision to file a builders lien in an amount essentially twice what I ultimately found Mr. Lavigne liable to pay to have his septic system enabled. He did file the application that resulted in the summary trial, which did move the litigation forward, but did so in a manner that was ultimately to the benefit of both parties, as it allowed the underlying dispute to be resolved summarily rather than after a conventional trial.

[60] In this connection, it is also relevant to note that, as I recounted in the Decision at paras. 94–98, the Lavignes attempted to engage the dispute resolution provided in the Sewer Services Agreement, but the Septic Company refused to engage in any negotiation, thereby failing to comply with paragraph 27(a) of the Agreement. I also held at para. 101 that had a more reasonable position been taken by the Septic Corporation in September 2022, it was open to question whether the previous proceeding would have been necessary at all.

[61] Mr. Coleman has not established that the statement that Mr. Lavigne drove the litigation forward was substantially true.

[62] In summary, Mr. Coleman has established that some of the statements in the Letter were substantially true. In particular, he has established that the following two statements were substantially true: that Mr. Lavigne installed his system without the direct supervision of an ROWP; and that Mr. Lavigne connected his septic system to the community system without Mr. Coleman's knowledge or approval. He has, therefore, established the justification of truth for those two statements. Mr. Coleman

has not established that the remaining defamatory statements in the Letter were substantially true.

Is the Letter protected by qualified privilege?

[63] Mr. Coleman relies on the defence of qualified privilege with respect to the entirety of the Letter.

[64] In *Moises v. Canadian Newspaper Co. (c.o.b. Times-Colonist)*, [1996] B.C.J. No. 1205, at para. 19, the Court of Appeal described the defence of qualified privilege as follows:

> [19] The law protects the publisher of an otherwise defamatory statement under the defence of qualified privilege provided the publisher is able to establish that he or she had an interest or a duty to communicate certain information and that the recipient had a corresponding duty or interest to receive the information. This was made clear in Adam v. Ward, [1917] A.C. 309 at 334 (H.L.), where Lord Atkinson stated:
>
> > ... a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.
>
> There are a number of factors which a court must consider when deciding whether or not any given occasion is one of qualified privilege. In Sapiro v. Leader Publishing Co. Ltd., [1926] 2 W.W.R. 268 at 271, 20 Sask. L.R. 449 (Sask. C.A.), Lamont J.A. said:
>
> > In determining whether or not it is so privileged, the Judge will consider the alleged libel, who published it, why, and to whom, and under what circumstances. He will also consider the nature of the duty which the defendant claims to discharge, or the interest which he claims to safeguard, the urgency of the occasion, and whether or not he officiously volunteered the information, and determine whether or not what has been published was germane and reasonably appropriate to the occasion.

[65] Mr. Coleman submits that the Letter was written on an occasion of qualified privilege. In his submission, he was acting as the Director of the Septic Corporation to explain to the owners, in response to Mr. Lavigne's letter, why the levy to cover legal expenses was reasonable. He submits that he had both an interest and a duty

to do so, and that the owners had a corresponding interest and duty to receive the information.

[66] I agree with Mr. Coleman that the Letter was written on an occasion of qualified privilege. The question of whether the owners should be required to pay a levy to cover the Septic Corporation's legal fees in the previous dispute was one which all owners had an interest in. Mr. Coleman had a legitimate interest in explaining hisand the Septic Corporation's actions within that context.

If so, is qualified privilege negated by malice?

[67] As explained by the Court of Appeal in *Smith v. Cross*, 2009 BCCA 529 [*Smith*] at para. 30, "the defence of qualified privilege can be defeated by a finding of malice on the part of the defendant or by a finding that the limits of the privilege were exceeded". At para. 34, the Court set out four categories under which a finding of malice can be made, as follows:

> i) Knowing it was false;
>
> ii) With reckless indifference whether it is true or false; *or*
>
> ii) 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.

[68] During submissions, I raised the issue of whether the question of whether malice has been established was suitable for determination in a summary trial. In response, counsel for Mr. Coleman drew my attention to the *Merit* case to which I have already referred. *Merit BCSC* was heard as a summary trial. On appeal, the Court of Appeal agreed with the summary trial judge that the press release in issue was written on an occasion of qualified privilege, and that the limits of the occasion were not exceeded: *Merit BCCA* at para. 32.

[69] The Court of Appeal went on at paras. 33–36 to consider Merit's argument on appeal that the summary trial judge had erred in failing to deal with malice. The Court held that Merit had failed to present any evidence of malice. Merit was

required to put its best foot forward at summary trial, and having failed to introduce any evidence of malice, its argument that the summary trial judge erred failed.

[70] *Merit BCCA* suggests that malice can be determined on a summary trial, provided that the court is able to make the necessary findings on the evidence before it.

[71] Mr. Lavigne submits that the Letter was published dishonestly, with reckless indifference to whether the statements made in it were true or false, and with an improper or indirect purpose such as malice, spite or animosity. He submits that the statements made in the Letter were not supported by the Decision. He further submits that the narrative was selective and vague, and that Mr. Coleman failed to state all the relevant facts. In this regard he notes that Mr. Coleman could have, and he submits should have, provided the owners with a copy of the court's Decision, rather than his own subjective account. Mr. Coleman denies having acted out of malice. He submits that he had good reason to believe that the contents of the Letter were substantially true, and denies writing the Letter with the dominant purpose of injuring Mr. Lavigne.

Conclusion

[72] I have concluded that I cannot determine whether Mr. Coleman's defence of qualified privilege is defeated by malice on the evidence and submissions before me. I have come to this conclusion with some regret, as both parties wished to have the action resolved through a summary trial, and in my view it would be to the benefit of both parties to have this dispute finally resolved. However, I am unable to make the necessary determinations with respect to Mr. Coleman's state of mind, including whether he acted dishonestly or with reckless disregard for the truth, or with the dominant purpose of injuring Mr. Lavigne, without hearing *viva voce* testimony.

[73] I have been able to determine the other issues raised by the parties on the basis of the evidence and submissions received at the summary trial. I will, therefore, order a hybrid procedure, pursuant to which the parties will have the opportunity to provide oral evidence and any further relevant documentary evidence

solely with respect to malice and damages, and to make final submissions on those issues. I will conduct a case management conference to determine any procedural issues related to the oral hearing to be held. The parties are to contact Supreme Court Scheduling within one week of this decision to schedule a case management conference for 45 minutes, preferably to be conducted on the September 9, 2024 assize.

"L.M. Lyster J."

LYSTER J.