COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Simán v. Eisenbrandt,* 2024 BCCA 176

Date: 20240507
Docket: CA48979

Between:

Ricardo Simán

Appellant
(Plaintiff)

And

Matthew J. Eisenbrandt

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Horsman
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated March 14, 2023 (*Simán v. Eisenbrandt*, 2023 BCSC 379, Vancouver Docket S198230).

Counsel for the Appellant:	R.D. McConchie A. McConchie
Counsel for the Respondent:	D.W. Burnett, K.C.
Place and Date of Hearing:	Vancouver, British Columbia March 13, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 7, 2024

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Justice Winteringham

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Summary:

The appellant appeals the dismissal of his defamation action under the Protection of Public Participation Act. The action concerned a book authored by the respondent about the assassination of Archbishop Óscar Romero in El Salvador in 1980. The appellant alleged that there were passages in the book that conveyed the inferential defamatory meanings that he had conspired in the assassination and had financed death squads in El Salvador. The chambers judge concluded that there was substantial merit to the appellant's claim that the words were defamatory. However, he dismissed the action on the basis that the appellant did not show grounds to believe that the defence of responsible communication had no real prospect of success.

Held: Appeal dismissed. The judge erred in his analysis of the defence of responsible communication in finding that the impugned statements could constitute reportage. However, the error does not affect the overall conclusion that the appellant did not meet his onus to show there are grounds to believe that the defence had no prospect of success. Although the order dismissing the action may be upheld on this basis alone, the appellant also failed to show that the public interest in allowing the proceeding to continue outweighed the public interest in protecting the respondent's expression.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] The *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*] mediates the tension between the public interest in allowing individuals to vindicate their reputation from unjust attack through civil actions, and the public interest in protecting certain forms of free expression. The *PPPA*, and analogous legislation enacted in other provinces, targets actions that "disproportionately suppress free expression on matters of public interest", by allowing such actions to be dismissed on a pre-trial application: *Hansman v. Neufeld*, 2023 SCC 14 at para. 2. This appeal concerns the application of the *PPPA* to a defamation action arising from unusual circumstances.

[2] The respondent (defendant), Matthew Eisenbrandt, is an American human rights lawyer, who currently works in a non-practicing capacity at a law firm in British Columbia. He is the author of a book entitled "*Assassination of a Saint: The Plot to Murder Óscar Romero and the Quest to Bring His Killers to Justice*", which was published in 2017. Archbishop Óscar Romero was murdered in El Salvador in 1980.

The Archbishop was noted for his devotion to human rights, and was declared a martyr and a saint by the Catholic Church. The respondent, and others, have devoted considerable effort over time to identifying those responsible for the assassination. He reports on those efforts in *Assassination of a Saint*.

[3] The appellant (plaintiff), Ricardo Simán, lives in El Salvador. He is an executive of a family retail store business that operates in El Salvador and other countries in Central America. The appellant is identified by name in *Assassination of a Saint*. The appellant alleges that statements about him in the book are defamatory, in that they convey the inferential meanings that he conspired with others to assassinate Archbishop Romero, and that he financed death squads in El Salvador. The appellant denies any involvement in the killing of Archbishop Romero, or in the financing of death squads. In 2019, he filed a defamation action in the Supreme Court of British Columbia against the respondent.

[4] The respondent applied to dismiss the defamation action pursuant to the *PPPA*. This application was successful. The judge below found that there were grounds to believe that *Assassination of a Saint* contained statements that bore the inferential defamatory meanings alleged by the appellant. However, he held that the appellant had not discharged his burden to show there were grounds to believe that the respondent had no valid defence. The judge concluded, on the record before him, that the defence of responsible communication tended to weigh more in favour of the respondent than the appellant. On this basis, he dismissed the appellant's action.

[5] On appeal, the appellant argues that the judge made legal errors in his analysis of the defence of responsible communication. He says that once the errors are corrected, it is plain that he did satisfy his onus to show there were grounds to believe the respondent had no valid defence to the action. The appellant further contends that, in light of the seriousness of the allegation, the public interest weighs more heavily in favour of allowing the action to proceed than in protecting the

respondent's speech. He seeks an order setting aside the order dismissing the action.

[6] The respondent counters that the judge made no legal error in his analysis of the defence of responsible communication, and that his findings are owed deference on appeal. He says the judge did err in concluding that statements in *Assassination of a Saint* are capable of the defamatory meaning alleged by the appellant, and this is an alternative basis to uphold the dismissal order. If it is necessary to weigh the public interest at the final stage of the test for dismissal, then he says the public interest favours dismissal of the action given the lack of evidence that the appellant suffered serious harm as a result of the alleged defamation.

[7] For the reasons that follow, I would dismiss the appeal. While the judge erred in his analysis of the defence of responsible communication, the error does not undermine his overall conclusion that the defence weighs more in favour of the respondent. Furthermore, and in any event, the appellant did not meet his onus of demonstrating that the public interest in allowing the proceeding to continue outweighs the public interest in protecting the respondent's speech.

Factual Background

Background to the publication of *Assassination of a Saint*

[8] Archbishop Romero was a vocal critic of violence and human rights abuses perpetrated in El Salvador during a period of escalating civil unrest in that country. Through his weekly sermons, the Archbishop condemned the kidnapping, torture, and murder of Salvadoran citizens, which was being carried out on a wide scale by "death squads", paramilitary groups comprised of armed forces personnel and civilians. For his efforts in advocating for the victims of this violence, Archbishop Romero received frequent death threats. On March 24, 1980, he was shot to death while leading a Catholic mass in the Chapel of the Hospital of Divine Providence in San Salvador.

[9] No person has ever been held criminally responsible for the Archbishop's death. The circumstances of his assassination have, however, been the subject of various non-criminal investigations over time.

The Truth Commission

[10] In 1993, the United Nations Commission on the Truth for El Salvador (the "Truth Commission") published a report, "*From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*", following its investigation into atrocities committed before or during the civil war in El Salvador, including the assassination of Archbishop Romero. The Truth Commission heard from witnesses, some of whom testified confidentially, and received documentary evidence. The evidence included a diary belonging to Álvaro Rafael Saravia—a former captain in the Salvadoran military—which had been seized in a raid in May 1980. Other evidence reviewed by the Truth Commission implicated former Major Roberto D'Aubuisson in the murder plot.

[11] The findings of the Truth Commission, as set out in the report, include that D'Aubuisson ordered the assassination of Archbishop Romero, and gave precise instructions to members of his security service, acting as a "death squad", to organize and supervise the assassination. The Commission found that Saravia, among others, was actively involved in planning and carrying out the assassination.

[12] The Truth Commission also addressed the activities of death squads in El Salvador more generally. The Commission found that between 1980 and 1991, human rights violations were committed in a "systematic and organized manner" by groups operating as death squads. The Commission heard evidence from witnesses, both members of the armed forces and civilians, describing their involvement in the organization, operation, and financing of death squads. In commenting on the group formed by D'Aubuisson, the Commission stated:

> Former Major D'Aubuisson drew considerable support from wealthy civilians who feared that their interests would be affected by the reform programme announced by the Government Junta. They were convinced that the country faced a serious threat of Marxist insurrection which they had to overcome.

> The Commission on the Truth obtained testimony from many sources that some of the richest landowners and businessmen inside and outside the country offered their estates, homes, vehicles and bodyguards to help the death squads. They also provided the funds used to organize and maintain the squads, especially those directed by former Major D'Aubuisson.
>
> (at p. 134.)

[13] The Truth Commission found that for decades in El Salvador there had been "a tradition of impunity for officials and members of the most powerful families who commit abuses": at p. 132. The Commission described the difficulty of establishing links between private businesspeople and death squads due to the "clandestine nature" of their operations: at p. 137.

The civil lawsuit against Saravia

[14] In 2003, the respondent was working as a staff attorney with a non-profit organization, the Center for Justice and Accountability (the "CJA"), in the United States. The CJA, along with a private firm acting as co-counsel, filed a civil lawsuit—on behalf of an individual using the pseudonym "J. Doe"—against Saravia in the United States District Court for the Eastern District of California ("*Doe v. Saravia*"). The suit sought damages against Saravia for his role in the assassination of Archbishop Romero. The plaintiff asserted that the federal District Court had personal jurisdiction over Saravia based on evidence that he had lived in the United States for several years, most recently in California.

[15] In developing the evidence for the civil action, the respondent, as a member of the legal team, was involved in a year-long investigation that included interviewing witnesses in El Salvador. The respondent deposes that the CJA legal team had hoped that the lawsuit would be an avenue for accountability against Saravia, and also against others who may have been complicit in Archbishop Romero's assassination, including those associated with D'Aubuisson's death squad. Ultimately, Saravia was the only individual named as a defendant. The CJA listed "Does 1–10" as what the respondent describes in *Assassination of a Saint* as "placeholder defendants": at p. 63.

[16] Saravia did not enter an appearance or defend the case. The lawsuit ended in a default judgment. Nevertheless, the Court held a five-day evidentiary hearing, and published a 92-page (redacted) "Findings of Fact and Conclusions of Law" in holding that the claims were made out. The Court ordered Saravia to pay the plaintiff $10 million in compensatory and punitive damages.

The Loose Sheets

[17] The appellant was not named in the Truth Commission's report, or in the Findings of Fact and Legal Conclusions of the California court in the civil action. As the appellant emphasizes, his name is not found in any portion of the transcript of the proceedings in *Doe v. Saravia*.

[18] For the purpose of understanding the disputed issues in this proceeding, it is important to note that the appellant's name does appear in a handwritten list of names contained on one of three loose-leaf sheets of paper that, according to the respondent, were seized along with Saravia's diary in May 1980 (the "Loose Sheets"). The Loose Sheets were photocopied together on a single page. As the respondent acknowledges in *Assassination of a Saint*, there is disagreement among the experts over the significance of the Loose Sheets, and their connection to the assassination of Archbishop Romero.

[19] The appellant says that the respondent has no personal knowledge that the Loose Sheets were seized along with the Saravia diary. The respondent counters by pointing to a substantial body of credible evidence to support that both the diary and the Loose Sheets were seized in the raid. Regardless, it is common ground that no inference can be drawn from the Loose Sheets alone that the appellant was involved in Archbishop Romero's assassination, or the financing of death squads. The respondent maintains that the Loose Sheets are a piece of evidence deserving of further investigation. The appellant maintains that he has no knowledge of why his name appears on one of the Loose Sheets, but it certainly has nothing to do with his involvement in any of these events.

[20] The Loose Sheets, including the appellant's name, were entered as an exhibit in *Doe v. Saravia*. They have also been published in other forums, including in an open session of the United States Senate in 1981, and, more recently, on various Internet sites.

The publication of *Assassination of a Saint*

[21] The respondent began working seriously on *Assassination of a Saint* in 2007. He completed the book in his spare time over the ensuing decade. He says that his intention was not to conduct new research or investigation, but rather to base the book on information and evidence that was already in the public record and that the legal team had gathered in *Doe v. Saravia*.

[22] The respondent identified the appellant in two places in *Assassination of a Saint*. Both references were in chapter five of the book, entitled "A Bed to Drop Dead In: The Search for Álvaro Saravia and the Death Squad Financiers". In the first reference, at p. 63, the respondent wrote:

> Despite the denials that date back decades, there is circumstantial evidence that some wealthy Salvadorans provided direct support to D'Aubuisson's and other paramilitary groups. If true, this could implicate them, even if indirectly in the Romero assassination. At our deadline for filing against Saravia, we don't feel we have enough proof to bring anyone else into the case, but alongside Saravia's name, the court papers list "Doe 1" through "Doe 10" as placeholder defendants. We hope to have sufficient evidence later to specify who they are. …
>
> Our best evidence, better even than the Miami Six cable, is the Saravia Diary seized at Finca San Luis in May 1980, two months after the assassination. Its pages, and the loose sheets captured with it, are filled with recognizable Salvadoran names. In addition to Alfonso Salaverría, they include men like Ricardo Simán, the president of a major department store chain; … But their inclusion in the diary does not tell us precisely what contributions they made. Did they provide financing for the death squad? Did they have meetings with D'Aubuisson? Were they part of his ostensibly political organization, FAN? The description of the Saravia Diary as "informational goulash" was correct at least in its ability to conclusively answer those questions.
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> [Emphasis added.]

[23] The second reference to the appellant is in an endnote to the passage underlined in the above text ("endnote 10") at p. 191, which states:

> 10. Saravia Diary. A witness told the Truth Commission that Simán was a death squad financier. Testimony of confidential source to the Truth Commission, "Report on the Death Squads in the Files of the El Salvador Truth Commission," n.d., in author's possession.
>
> [Emphasis added.]

[24] The "Report on the Death Squads in the Files of the El Salvador Truth Commission" is the respondent's English translation of an unpublished document entitled "Informe Sobre Los Escuadrones de la Muerte en los archivos de la Comisión de la Verdad para El Salvador" (the "Informe Document"). It contains an apparent summary of the testimony of confidential witnesses to the Truth Commission, including a witness referred to as "FC2". The Informe Document reports that FC2 testified to the Truth Commission that the appellant was a financier and founder of death squads.

[25] The respondent deposes that the legal team in *Doe v. Saravia* was given a copy of the Informe Document by multiple contacts in El Salvador. He says that he and his colleague met with FC2 in El Salvador in 2004 during their investigation related to *Doe v. Saravia*. He says at that time, FC2 provided a sworn declaration affirming that the Informe Document accurately summarized the evidence FC2 gave to the Truth Commission.

[26] FC2 is the witness that the respondent refers to in endnote 10.

[27] There is no dispute that the respondent did not communicate with the appellant before the publication of *Assassination of a Saint* to obtain the appellant's side of the story. The appellant says that if he had been contacted, he would have truthfully told the respondent that he has never met or communicated with Saravia, does not know who created the Loose Sheets or what their purpose was, and that the handwriting on the Loose Sheets is not his. He would also have denied any involvement in financing death squads or in the assassination of Archbishop Romero.

The defamation proceeding

[28] The appellant became aware of *Assassination of a Saint* in December 2018, when his godson brought the book to his attention. He commenced the defamation action in July 2019. In his notice of civil claim, the appellant alleges that passages in the book convey the inferential meanings that:

(a) the appellant conspired to assassinate Archbishop Romero, and

(b) the appellant financed death squads.

Each of these meanings is alleged to be false, malicious, and defamatory.

[29] The notice of civil claim further alleges that the respondent defamed the appellant during a March 20, 2018 speech at Duke University in North Carolina, which was recorded and later published on YouTube. During the speech, the respondent spoke about *Assassination of a Saint*, and the evidence gathered in *Doe v. Saravia*. At one point during the speech, the Loose Sheets, with the appellant's name visible, were projected on a large screen. In his speech, the respondent described the list of names as including "some of the most prominent oligarchs in El Salvador". The appellant alleges that the words and images published by the respondent during the speech conveyed the inferential meaning that the respondent is an oligarch who conspired with other oligarchs to assassinate Archbishop Romero.

[30] In his response to civil claim, the respondent pleaded the defences of justification and responsible communication. He disputes that the impugned passages of *Assassination of a Saint* bear the "exaggerated meanings" alleged in the notice of civil claim. He pleads that the true meanings of the words are that a witness told the Truth Commission that the appellant provided financing to death squads, and that the appellant's name appears in the Saravia diary or in Loose Sheets captured with the diary. He further pleads that these meanings are true or substantially true.

[31] In November 2021, the respondent applied to dismiss the action pursuant to s. 4 of the *PPPA*. In addition to the pleaded defences of justification and responsible communication, the notice of application raised the defences of fair comment and qualified privilege for fair reporting.

Section 4 of the *PPPA*

[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.

[33] Anti-SLAPP legislation, such as the *PPPA*, creates a procedure for the pre-trial dismissal of actions that target speech on matters of public interest. In British Columbia, this procedure is contained in s. 4 of the *PPPA*:

> **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
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> (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.

[34] Section 4 is nearly identical to the anti-SLAPP pre-trial screening device contained in s. 137.1 of Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 137.1 was analyzed in two decisions of the Supreme Court of Canada: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 [*Pointes*], and *Bent v. Platnick*, 2020 SCC 23. Section 4 of the *PPPA* was also directly before the Court in *Hansman*. Collectively, these decisions establish a clear framework for analysis of an application for pre-trial dismissal of an action under s. 4 of the *PPPA*.

The applicant's threshold burden under s. 4(1)

[35] Section 4(1) of the *PPPA* places a threshold burden on the applicant (defendant) to demonstrate, on a balance of probabilities, that: (i) the proceeding arises from an expression made by the applicant, and (ii) the expression relates to a matter of public interest. If the applicant fails to meet this burden, then the action will not be dismissed: *Pointes* at paras. 21–23. The words "matter of public interest" in s. 4(1)(b) of the *PPPA* are to be given a "broad and liberal interpretation": *Pointes* at para. 26. The expression must 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": *Pointes* at para. 27, citing *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 101–102.

The responding party's burden under s. 4(2)

[36] If the applicant discharges their threshold burden under s. 4(1), then the burden shifts to the respondent under s. 4(2) to satisfy the court that there are "grounds to believe" that: (i) the proceeding has substantial merit, and (ii) the applicant has no valid defence in the proceeding.

"Grounds to believe"

[37] The words "grounds to believe" refer to the existence of a basis in the record and the law—taking into account the stage of the litigation—for reaching the belief or conclusion that the legislated criteria have been met: *Pointes* at paras. 36, 39. "A basis" will exist if there is any basis in the record and the law—provided it is legally tenable and reasonably capable of belief—to support a finding of substantial

merit and the absence of a valid defence: *Bent* at para. 88. The "grounds to believe" standard has been found to require "something more than mere suspicion, but less than…proof on the balance of probabilities": *Pointes* at para. 40, quoting *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para. 114. The limited record at this stage of the proceeding does not permit the ultimate adjudication of the issues. However, the language of s. 4(2) necessarily entails "an inquiry that goes beyond the parties' pleadings to consider the contents of the record": *Pointes* at para. 38.

[38] The assessment under s. 4(2) of the *PPPA* is a subjective one, requiring the court hearing the motion to determine whether there are grounds to believe there is substantial merit to the proceeding and no valid defence. This language does not connote a theoretical assessment by a "reasonable trier": *Pointes* at para. 41.

Section 4(2)(a)(i) — "Substantial merit"

[39] In *Pointes*, the Supreme Court of Canada defined the "substantial merit" requirement as follows:

> [49] …[F]or an underlying proceeding to have "substantial merit", it must have 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. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law — taking into account the stage of the proceeding — for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

[40] This standard is more demanding than that applicable on a motion to strike, which merely requires <u>some</u> chance of success under the "plain and obvious" test. A claim with merely some chance of success, or a mere possibility of success, will not meet the substantial merit test. A "real prospect of success" requires more than an arguable case: *Pointes* at para. 50.

Section 4(2)(a)(ii) — "No valid defence"

[41] The applicant (defendant) must "put into play" the defences they intend to present. Once this is done, the burden is on the responding party to demonstrate

there are grounds to believe there is “no valid defence” to the proceeding. The word “no” is absolute, and the corollary is that if there is any valid defence to the proceeding then the proceeding should be dismissed: *Pointes* at para 58. This mirrors the inquiry on substantial merit. Both criteria entail an assessment by the application judge of the strength of the claim or any defences as part of an overall assessment of the prospect of success of the underlying claim: *Pointes* at para. 59.

[42] Accordingly, 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.

Section 4(2)(b) — The public interest hurdle

[43] As a final hurdle, s. 4(2)(b) of the *PPPA* requires the responding party to satisfy the judge that the likely harm they have suffered, or will suffer, due to the defendant’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. This provision serves as a “robust backstop” for the judge to dismiss even technically meritorious claims if the public interest in protecting the expression outweighs the public interest in allowing the proceeding to continue: *Pointes* at paras. 53, 62. In *Pointes*, the Court described the weighing exercise as the “crux” or “core” of the analysis because it engages directly with the overarching concerns that anti-SLAPP legislation seeks to address by assessing the public interest and public participation implications: *Pointes* at paras. 61–62; *Hansman* at para. 58.

[44] As a prerequisite to the weighing exercise contemplated by s. 4(2)(b), the responding party must show two things: (i) the existence of harm, and (ii) the fact that the harm was suffered as a result of the applicant’s expression: *Pointes* at para. 68; *Hansman* at paras. 67–68. Either monetary or non-monetary harm may be

relevant to the existence of harm under the first criterion. There is no threshold requirement for the harm to be sufficiently worthy of consideration: *Pointes* at paras. 69–70.

[45] However, the magnitude of the harm becomes relevant at the weighing stage of the analysis, when the judge must determine whether the harm is sufficiently serious that the public interest in allowing the underlying proceeding to continue outweighs the public interest in protecting the speech: *Pointes* at para. 70. Accordingly, while the presumption of damages in defamation law can establish the existence of harm, it cannot establish that the harm is "serious": *Hansman* at para. 67. As explained in *Hansman*:

> [67] …To hold otherwise would be to presumptively tip the scales in favour of the plaintiff in defamation cases and effectively gut the weighing exercise. 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.
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> [Emphasis added.]

[46] Even where the actual harm suffered by the responding party is serious, s. 4(2)(b) of the *PPPA* 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; *Hansman* at para. 68. Evidence of a causal link between the expression and the harm will be especially important where the harm may have been caused by sources other than the defendant's expression: *Pointes* at para. 72. It should be borne in mind that at this stage, the plaintiff cannot be expected to provide a fully developed damages brief, and the application judge is not required to make definite findings of causation: *Pointes* at para. 115; *Hansman* at para. 65.

[47] The evaluation of the public interest in protecting the defendant's expression is informed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, which "grounds the level of protection afforded to expression in the nature of the expression": *Pointes* at para. 77. The closer the defendant's expression is to the

core values underlying freedom of expression, the greater the public interest in protecting it: *Pointes* at para. 77. The public interest weighing exercise is not simply an inquiry into whether the proceeding has the hallmarks of a SLAPP: *Pointes* at para. 79.

The chambers judgment

[48] In the first half of his reasons for judgment, the judge reviewed the factual background to the proceeding, s. 4 of the *PPPA*, and the framework of analysis established by the Supreme Court of Canada. Neither party takes issue on appeal with the accuracy of the judge's factual summary, or his statement of the overarching legal framework.

[49] The judge then turned to the application of the law to the record before him.

Substantial merit

[50] The judge separately addressed the question of substantial merit in relation to the alleged defamatory statements published in *Assassination of a Saint*, and those published during the respondent's 2018 speech at Duke University.

[51] In relation to the speech, the judge found that the appellant had failed to establish grounds to believe that the defamation action had substantial merit. He concluded that a viewer would not infer from the words used by the respondent in the speech, combined with the image of the Loose Sheets that was projected during the speech, that the appellant was an oligarch who conspired with other oligarchs to assassinate Archbishop Romero. No issue is taken on appeal with this conclusion.

[52] In relation to the book, the judge found that the appellant did not establish grounds to believe that the words set out on page 63, viewed in isolation, had the inferential defamatory meaning that he alleged. The judge noted that the impugned passages contained qualifying words ("if true"), and that the respondent conveyed the uncertainty around the meaning of the Loose Sheets. The judge stated:

> [75] The words "[i]f true" on page 63 significantly qualify any impression left on a reasonable reader: namely, that no assertion is made that

> allegations based on the diary are true. There are other cautionary words used; a reasonable reader would understand page 63 to be relaying that there is a mystery about the meaning of the Loose Sheets. The references on page 63 are akin to a statement that there is an investigation of the role of persons whose names appear on the Loose Sheets, including the plaintiff, as to whether there has been misconduct, but is not a statement by the defendant that the plaintiff has in fact engaged in misconduct. The former meaning is not capable, as a matter of law, of lowering the reputation of the plaintiff in the eyes of an ordinary person: *Catalyst* at para. 138.

[53] However, the judge concluded that endnote 10 had a "different complexion": at para. 77. The judge noted that endnote 10 did not include cautionary words, or state that no findings were made against the appellant by the Truth Commission. The judge found that, read in the context of the publication as a whole, there are grounds to believe that the "defamatory sting" in endnote 10 has substantial merit: at para. 84. The judge reasoned:

> [86] Insinuating that a person financed death squads, or assisted in the assassination of another person, would be a very serious allegation. I find that there are grounds to believe that there is substantial merit to the allegation that the statement in endnote 10 would "[tend] to injure the reputation" of the plaintiff in the estimation of a right-thinking member of society generally, and cause the plaintiff to be regarded with feelings of dislike or disesteem: *Taseko* at para. 45, citing *Color Your World* at para. 14.
>
> [87] Endnote 10 is placed in the context of a chapter and in a book relating to the assassination of Archbishop Romero. I find that there are grounds to believe that there is substantial merit to the allegation that the Book Statements (considering endnote 10) bear the inferential meaning that the plaintiff financed death squads and that the plaintiff conspired to assassinate Archbishop Romero or a substantially similar meaning.

[54] The judge acknowledged the respondent's evidence that he had not asserted any findings of guilt against the appellant, but, rather, simply indicated that a witness had spoken of the appellant to the Truth Commission. However, the judge found that the intention of the author and publisher of an allegedly defamatory statement is "not relevant on the issue of meaning": at para. 89.

[55] The judge also found on the record before him that there were substantial grounds to believe that the book, including endnote 10, has been published and read in Canada, including in British Columbia.

No valid defence

[56] The judge focussed his analysis on the pleaded defence of responsible communication. For this defence to apply, the publication must be on a matter of public interest, and the defendant must show that the publication was responsible, in the sense that the defendant exercised diligence having regard to the relevant circumstances. The judge noted that diligence is to be assessed by reference to the non-exhaustive list of factors set out by the Supreme Court of Canada in *Grant*. He found that some of the *Grant* factors militated in favour of the respondent, while others militated in favour of the appellant.

[57] In light of the issues raised on appeal, there are two aspects of the judge's reasoning that are of particular note.

[58] First, the judge rejected the appellant's submission that the standard of diligence for this defence should be higher for the respondent because he is a lawyer:

> [118] …I do not accept that persons trained as lawyers, who may be involved in open discourse in the public interest, should be deprived of a defence to a defamation action in circumstances where this defence would be available to a person not trained in the law in the same circumstances.

[59] Second, the judge addressed the respondent's argument that the repetition rule—which holds that repeating a libel has the same legal consequences as originating it—does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than their truth or falsity. This is an exception known as "reportage", which is one of the factors listed in *Grant*. The judge stated:

> [128] Here, on my preliminary review, three of the criteria would tend to lead to the conclusion the impugned statements were reportage: (1) endnote 10 did attribute the statement to a source, although FC2 was not identified; (2) endnote 10 does not indicate, expressly or implicitly, that the evidence of FC2 was verified to be true or found to be true by the Truth Commission; and; (4) the report does provide the context in which the statement was made. However, on the other hand, (3) the report did not set out both sides of the dispute.
>
> [Emphasis added.]

[60] The judge did not address, at least not explicitly, the question of whether, or why, there was a public interest in reporting FC2's evidence to the Truth Commission regardless of its truth or falsity.

[61] The judge concluded, taking all of the *Grant* factors into consideration, that the respondent did act with "some diligence and responsibility in trying to verify the allegation" prior to the publication of the book, including meeting with FC2 to confirm the accuracy of the account of FC2's evidence in the Informe Document: at para. 129 (emphasis added). The judge held, for the purpose of the application, that the respondent "did not act with a reckless disregard for, or indifference to, the truth": at para. 131.

[62] Thus, the judge held that the appellant failed to meet his burden under s. 4(2)(a)(ii) of the *PPPA* to show that the respondent has no valid defence in the proceeding. That is, the appellant had not demonstrated that there is a basis in the record and law, taking into account the stage of the proceeding, to support a finding that the responsible communication defence does not tend to weigh more in the respondent's favour: at para. 132.

[63] In light of this conclusion, the judge found it unnecessary to address the respondent's further defences of justification, fair reporting qualified privilege, and fair comment. He also found it unnecessary to engage in the public interest hurdle stage of the analysis under s. 4(2)(b) of the *PPPA*. As the judge was not satisfied that the appellant had discharged his statutory burden under s. 4(2)(a), he allowed the application and dismissed the action.

Issues on appeal

[64] The appellant's only ground of appeal is that the judge erred in finding that he did not satisfy the onus on him to establish that there were grounds to believe the respondent had no valid defence to the action under s. 4(2)(a)(ii) of the *PPPA*. The appellant does not challenge the judge's finding that the respondent met his threshold burden under s. 4(1) to show that the proceeding arises from expression on a matter of public interest. Nor does he challenge the judge's finding that he did

not meet his burden under s. 4(2)(a)(i) of the *PPPA* in relation to the respondent's 2018 speech. It is, therefore, unnecessary to revisit these aspects of the chambers judgment on appeal.

[65] The respondent says that the judge did not make the error alleged by the appellant, and that the appeal may be dismissed on that basis. As an alternative basis to uphold the judge's order, the respondent argues that the judge erred in finding that the appellant discharged his burden to demonstrate substantial merit. The respondent says the impugned passages in the book, including endnote 10, are not capable of bearing the defamatory meaning alleged by the appellant. The respondent does not argue that any of the remaining defences—that is, any of the defences that were in play apart from the defence of responsible communication—provide an alternative basis for upholding the judge's order. It is, therefore, unnecessary to consider the remaining defences, regardless of the conclusion this Court reaches on the ground of appeal raised by the appellant.

[66] In the event that this Court concludes that the judge made the error alleged by the appellant in assessing the strength of the defence of responsible communication, then both parties invite the Court to proceed to the public interest weighing stage of the analysis under s. 4(2)(b) of the *PPPA*. Neither party suggests that this is an issue that ought to be remitted to the judge.

[67] In light of the parties' positions, I find that this appeal raises three issues. It is convenient to address them in the following sequence:

a) Did the judge err in finding that the appellant met his burden of showing there were grounds to believe that the words in endnote 10 were reasonably capable of bearing the inferential meanings pleaded by the appellant?

b) If not, did the judge err in finding that the appellant did not meet his burden of showing there were grounds to believe that the respondent has no valid defence?

c) If so, did the appellant show that he had suffered harm, or was likely to suffer harm, that is of a sufficiently serious nature that the public interest in continuing the proceeding outweighed the public interest in protecting the respondent's expression?

Standard of review

[68] The question of the applicable standard of review is greatly simplified by the recent judgment of this Court in *Rooney v. Galloway*, 2024 BCCA 8, which (at paras. 25–33) comprehensively addresses the standard of review on appeal of a judge's decision on an application under s. 4 of the *PPPA*. The relevant principles set out in *Rooney* may be summarized as follows:

a) Once a chambers judge has correctly interpreted s. 4 of the *PPPA*, the merits-based hurdle under s. 4(2)(a) must be analyzed from the perspective of the judge hearing the application. Accordingly, a highly deferential standard of review applies to the judge's application of the law to the facts: *Rooney* at para. 27.

b) A judge's finding on whether there are grounds to believe that the applicant has no valid defence in the proceeding is owed particular deference given the highly deferential nature of the s. 4 scheme. A discretionary decision is reversible on appeal only where the lower court misdirected itself, or came to a decision that is so clearly wrong that it amounts to an injustice: *Rooney* at para. 29.

c) The standard of review for a judge's finding of defamation differs depending on the nature of the alleged error. The first question of whether the words are reasonably capable of bearing a defamatory meaning is a question of law and subject to a standard of review of correctness. The second question of whether the words are, in fact, defamatory is a question of fact and the "palpable and overriding error" standard applies. Where a judge has merged the two lines of inquiry and concluded that the words are in fact defamatory, this Court will still

review on a correctness standard the question of whether the words were capable of being defamatory if that is the alleged error: *Rooney* at para. 28.

Analysis

The first issue on appeal: Did the judge err in finding there were grounds to believe that the defamation action has substantial merit?

[69] There is no question that the judge correctly stated the relevant legal principles to apply in assessing whether there was substantial merit to the allegation that the impugned statements in *Assassination of a Saint* were capable of bearing the inferential meanings asserted by the appellant. The judge explained that an inferential meaning is "the impression an ordinary, reasonable person would infer from the allegedly defamatory material": at para. 58, quoting *Taseko Mines Limited v. Western Canada Wilderness Committee*, 2017 BCCA 431 at para. 43. The words are to be examined from the perspective of a reasonable reader who is "reasonably thoughtful and informed, rather than someone with an overly fragile sensibility" and with "a degree of common sense" attributed to viewers: at para. 61, quoting *Taseko* at para. 45. The judge noted that the test to apply in determining whether an inferential meaning is defamatory "is based on the natural and ordinary meaning that a reasonable person would infer from the entirety of the publication": at para. 62, quoting *Taseko* at para. 47.

[70] The respondent says the judge nevertheless erred in concluding that the impugned statements in *Assassination of a Saint*, including endnote 10, are "'reasonably capable of bearing' the inferential meaning alleged by the plaintiff": at para. 85. The question of whether the words are reasonably capable of bearing a defamatory meaning is a "threshold question" in a defamation action: *Lawson v. Baines*, 2012 BCCA 117 at para. 26. It is a question of law, and subject to a standard of review of correctness on appeal: *Rooney* at para. 28.

[71] The respondent's argument on appeal focusses on a passage from the reasons for judgment in which the judge stated his conclusion that: "there are

grounds to believe on this application that the allegation that endnote 10 is *prima facie* defamatory has substantial merit": at para. 80, (emphasis added). The respondent says the judge's use of the term "*prima facie*" in this passage suggests that the judge may have, wrongly, determined that the words in endnote 10 were capable of bearing the pleaded meanings without considering their context. The respondent emphasizes that there are several qualifiers and cautions in the body of *Assassination of a Saint*, and this provides necessary context in considering whether endnote 10 was reasonably capable of bearing the pleaded meanings. The respondent argues that endnote 10 was "no different than a report of what a witness said at a trial or inquiry": Respondent's Factum at para. 72.

[72] I do not agree that the judge erred in failing to consider context in assessing whether the statements in endnote 10 were capable of bearing the pleaded inferential meanings. Paragraph 80 of the reasons for judgment reflects the judge's overall conclusion that there were grounds to believe the appellant had made a *prima facie* showing of defamation. This is what the "substantial merit" test captures. Once the plaintiff makes a *prima facie* case, the burden shifts to the defendant to advance a defence to escape liability. This is what the "no valid defence" captures: *Bent* at para. 102. It is in this sense that the judge used the phrase "*prima facie* defamatory" in paragraph 80 of his reasons.

[73] The judge plainly considered context in assessing whether the words used in endnote 10 were reasonably capable of bearing the inferential meanings asserted by the appellant. The judge noted that the cautionary words on page 63 of *Assassination of a Saint* cast uncertainty over the implications of the Saravia diary and the Loose Sheets, whereas endnote 10 concerned the Informe Document and a confidential witness: at para. 82. He further observed that endnote 10 was contained in a book about the assassination of Archbishop Romero: at para. 87. By this, I infer the judge found that this context created the link between the statement attributed to FC2 that the appellant had financed death squads, and his possible involvement in the assassination of Archbishop Romero. The judge acknowledged the respondent's evidence that he did not intend, in endnote 10, to assert that the

appellant was, in fact, guilty of financing death squads. However, the judge cited case law for the proposition that the intention of the author of an allegedly defamatory statement is not relevant on the issue of meaning: at para. 89.

[74] In my view, the judge was correct in finding that the words in endnote 10 were reasonably capable of bearing the pleaded inferential defamatory meanings. In the absence of any qualifying language in endnote 10, and in the context of the book as a whole, there was substantial merit to the allegation that the reasonable reader would infer that FC2's evidence to the Truth Commission tended to support the allegations that the appellant financed death squads and conspired to assassinate Archbishop Romero. There is no question that these inferential meanings are defamatory. I see no basis to depart from the reasoning of the judge on this issue.

[75] Before turning to the next issue on appeal, I will briefly address the respondent's suggestion that endnote 10 was "no different than a report of what a witness said at a trial or an inquiry". This submission runs into the repetition rule, which is a focus of the appellant's argument on appeal. The appellant's reliance on the repetition rule raises the issue of whether the respondent could defend the defamation action on the basis that there was a public interest in reporting what FC2 said to the Truth Commission, apart from its truth or falsity. This is an issue that went to the question of whether the appellant met his burden of showing the respondent has "no valid defence", and not to the question of whether endnote 10 was reasonably capable of bearing the pleaded defamatory meanings. I will return to the issue later in these reasons.

The second issue on appeal: Did the judge err in holding that there were grounds to believe the defendant had a valid defence?

[76] It is common ground that the judge's finding that the appellant did not meet his burden of showing that the defence of responsible communication had no real prospect of success is entitled to a high level of deference on appeal. However, the appellant says the judge's analysis was impacted by two extricable legal errors that justify appellate intervention: (i) he failed to recognize that a heightened degree of

diligence is required where the defendant is a lawyer, and (ii) he assessed the respondent's conduct by reference to a standard of "some diligence" (at para. 129) as opposed to reasonable diligence, and wrongly ignored the repetition rule.

The defence of responsible communication

[77] The defence of responsible communication was first recognized in Canada in the 2009 decision of the Supreme Court of Canada in *Grant*. Prior to *Grant*, the law provided limited protection from liability in defamation to media organizations in relation to the publication of statements of fact. If the defence of justification (i.e., that the statement was substantially true) failed, the only way of escaping liability was for the publisher to show that the statement was made on an occasion of qualified privilege. For the reasons set out in *Grant*, the defence of qualified privilege proved to be of limited assistance in this context: at para. 34.

[78] In *Grant*, the Court pointed to two broad arguments in favour of changing the law to broaden the defences available to public communicators. The first, an argument grounded in principle, relied on the freedom of speech guarantee in s. 2(b) of the *Charter*. The Court reasoned that media reporting on matters of public interest engages two of the same rationales as the s. 2(b) *Charter* guarantee: free expression is essential to the proper functioning of democratic governance, and the free exchange of ideas is a precondition to the search for truth: at paras. 47–57. While the law must take due account of the damage to a plaintiff's reputation, this does not preclude consideration of whether the defendant acted responsibly, nor of the social value of debate on matters of public interest: at para. 61.

[79] The second argument in favour of a change in the law was one grounded in jurisprudence. As reviewed in *Grant*, many foreign common law jurisdictions have modified the law of defamation to give greater protection to the media, recognizing that "the traditional rules inappropriately chill free speech": at para. 40. The Court's review of the law in other jurisdictions included the change of law effected by the decision of the House of Lords in *Reynolds v. Times Newspapers Ltd.*, [1999] UKHL 45, [2001] A.C. 127. *Reynolds* modified the common law in England to provide

greater protection to publications on matters of public interest by introducing the standard of responsible journalism. In his judgment in *Reynolds*, Lord Nicholls provided a list of considerations (which have come to be known as the "*Reynolds* factors") to be used for determining whether a communication falls within the scope of responsible journalism. Subsequent decisions have clarified that the standard of responsible journalism is to be applied in a "practical and flexible manner", and that the *Reynolds* factors are not "a series of hurdles to be negotiated by a publisher" in order to successfully establish the defence: *Bonnick v. Morris*, [2002] UKPC 31, [2003] 1 AC 300 at para. 24; *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44, [2007] 1 AC 359 at para. 33.

[80] In *Grant*, the Supreme Court of Canada concluded that Canadian law should also be modified to create a new defence of responsible communication on matters of public interest. The defence is available to "anyone who publishes material of public interest in any medium": at para. 96. The new defence has two essential elements: (i) the publication must be on a matter of public interest, and (ii) the defendant must show that publication was responsible, in that the defendant was diligent in trying to verify the allegations having regard to all the circumstances: at para. 98. At paras. 110–125 of *Grant*, the Court set out a list of relevant factors that may aid in determining whether a defamatory communication on a matter of public interest was made responsibly:

i. the seriousness of the allegation;

ii. the public importance of the matter;

iii. the urgency of the matter;

iv. the status and reliability of the source;

v. whether the plaintiff's side of the story was sought and accurately reported;

vi. whether inclusion of the defamatory statement was justifiable;

vii. whether the defamatory statement's public interest lay in the fact that it was made, rather than in its truth ("reportage"); and

viii. any other relevant consideration.

[81] These factors overlap to some extent with the *Reynolds* factors, but there are important differences. Of significance to the present appeal is the inclusion of "reportage" (item vii) within the list of factors identified in *Grant* as relevant to the issue of the defendant's diligence. As I will explain, the concept of reportage is relevant to the second error alleged by the appellant in the judge's analysis of the "no valid defence" criterion under s. 4(2)(a)(ii) of the *PPPA*.

[82] In its discussion of "other considerations" relevant to the defence of responsible communication, the Court in *Grant* noted that the trier of fact need not settle on a single meaning of the impugned statements, but rather should assess the responsibility of the communication "with a view to the range of meanings the words are reasonably capable of bearing": at para. 124. The Court explained:

> [124] If the defamatory statement is capable of conveying more than one meaning, the jury should take into account the defendant's intended meaning, if reasonable, in determining whether the defence of responsible communication has been established. This follows from the focus of the inquiry on the conduct of the defendant. The weight to be placed on the defendant's intended meaning is a matter of degree: "The more obvious the defamatory meaning, and the more serious the defamation, the less weight will a court attach to other possible meanings when considering the conduct to be expected of a responsible journalist in the circumstances" (*Bonnick v. Morris*, [2002] UKPC 31, [2003] 1 A.C. 300 (P.C.), at para. 25, *per* Lord Nicholls).

[83] In this passage, the Court cites *Bonnick* for the proposition that other possible meanings of the defamatory statement may be considered in assessing the defendant's diligence. The "single meaning rule"—which requires the court to attribute only one meaning to the impugned words in deciding whether they are defamatory—is not applicable to the assessment of whether the defendant has met the standard of responsible journalism. As explained in *Bonnick*:

> [22] …It is one matter to apply this principle when deciding whether an article should be regarded as defamatory. Then the question being

> considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly. Then the question being considered is one of conduct.

[84] Therefore, if the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, the court may take into account that other meaning in considering whether the communication falls within the defence of responsible journalism: *Bonnick* at para. 24. See also *Hansen v. Harder*, 2010 BCCA 482 at paras. 54–55.

[85] Finally, in *Quan v. Cusson*, 2009 SCC 62, the companion appeal to *Grant*, the Court indicated that in assessing the defence of responsible communication, the trier of fact "must consider the broad thrust of the publication as a whole rather than minutely parsing individual statements": at para. 30.

Did the judge err in his analysis of the defence of responsible communication?

[86] On appeal, the appellant does not challenge the judge's finding that endnote 10 relates to a matter of public interest, thereby establishing the first element of the defence of responsible communication: at para. 116. The errors alleged by the appellant both relate to the second element, and the judge's approach to analyzing the test of reasonable diligence.

Issue 1: Did the judge err in finding that lawyers do not owe a higher standard of diligence under the defence of responsible communication?

[87] The appellant contends that the judge erred in dismissing his argument that defamation law holds lawyers to a higher standard of care than other defendants, and that this should extend to the standard required of a lawyer under the responsible communication defence. The appellant relies on the following passages from the Supreme Court of Canada's judgment in *Bent*:

> [133] …[T]he law is manifestly clear that courts will strictly scrutinize a lawyer's conduct because lawyers are "duty-bound to take reasonable steps to investigate": *Botiuk*, at paras. 99 and 103; *Hill*, at para. 155…
>
> . . .

> [136] …"The more serious the allegation in issue, the more weight a court will give to a failure by the defendant to verify it prior to publication as evidence of malice, in the sense of indifference to the truth":…[citation omitted]. This is particularly true of lawyers, who are "more closely scrutinized" than a lay person: *Botiuk*, at para. 98. Lawyers are "duty-bound" to "undertake a reasonable investigation as to the correctness" of a defamatory statement, and "actions which might be characterized as careless behaviour in a lay person could well become reckless behaviour in a lawyer": paras. 98–99 and 103.

[88] The appellant points out that the respondent is described in *Assassination of a Saint* as "a lawyer who was part of the investigative team", and as a "human-rights attorney" and "an expert in the field of U.S. human-rights litigation". Given the respondent's status, the appellant contends that the judge was wrong to reject the argument that his conduct should have been "more closely scrutinized". The appellant says that such heightened scrutiny is required by *Bent*, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59, and *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, 1995 CanLII 60.

[89] The passages relied on by the appellant from *Bent*, *Hill*, and *Botiuk*, are all concerned with whether statements made by the lawyer/defendant on an occasion of qualified privilege were actionable because the privilege was defeated, either because the defendant acted with malice or because the scope of the privilege was exceeded. It is in this context that the Supreme Court of Canada commented that the conduct of a lawyer is "more closely scrutinized" than that of a lay person. These cases are unrelated to the defence of responsible communication, which requires all defendants to meet a standard of reasonable diligence in communicating on matters of public interest.

[90] I see no basis in the jurisprudence, or in principle, for transferring the commentary from *Bent*, *Hill*, and *Botiuk* regarding the standard of conduct expected of a lawyer in the very different context of those cases to the assessment of the standard of diligence required under the defence of responsible communication. As the Supreme Court of Canada explained in considerable detail in *Grant*, the rationale for the new defence lies, to a significant extent, in our societal interest in protecting communication that advances democratic discourse and truth-finding. There is no

rationale that I can discern for restricting the attainment of that societal interest simply because the author of the communication happens to be a lawyer rather than, for example, a professional journalist. The defence of responsible communication is available to "anyone who publishes material of public interest": *Grant* at para. 96. Furthermore, any defendant who invokes the defence must meet a standard of diligence that is flexible and case-specific. The appellant's suggestion that there exists an inflexible rule that a higher standard of diligence invariably applies where the defendant is a lawyer appears, in my view, entirely inconsistent with the framework of analysis set out in *Grant*.

[91] For these reasons, I do not accede to the appellant's argument that the judge erred in law in failing to apply a higher standard of care to the respondent's conduct in analyzing the element of reasonable diligence.

Issue 2: Did the judge err in applying a standard of "some diligence" rather than reasonable diligence, and in ignoring the repetition rule?

[92] The second error alleged by the appellant exposes a difference of opinion between the parties regarding the correct perspective for analyzing the respondent's conduct. In basic terms, the dispute concerns whether the defence of responsible communication requires the respondent to have exercised diligence in confirming that endnote 10 was accurate in conveying what FC2 told the Truth Commission, or in confirming the truth of the substance of the inferential allegations that the appellant financed death squads and conspired to assassinate Archbishop Romero. Relying on the repetition rule, the appellant says the respondent was obliged to exercise reasonable diligence in confirming the truth of the allegations. In his factum, the appellant puts the point this way:

> 68. In this context, the Respondent was obligated to exercise reasonable diligence by verifying the defamatory meaning conveyed by the expression complained of, namely, whether the Appellant was in fact a death squad financier or had in fact any involvement in the Assassination of Archbishop Óscar Romero or the killing or assassination of anyone else…

[93] Relying on the concept of "reportage", the respondent says that his duty of reasonable diligence was limited to confirming that FC2's testimony was accurately reported. In his factum, the respondent responds as follows:

> 63. The appellant's reliance on the "repetition rule" as an answer to the responsible communication defence (factum para. 67) is misplaced. That rule provides that it is not a defence to simply say that the defendant was attributing a statement to another. However, some defences directly protect an accurate account of what a person said. In the context of responsible communication, such reportage is one of the recognized factors to establish the defence, as the judge below recognized (RFJ paras. 126–128). The insistence by the appellant that the respondent prove the appellant was in fact a death squad financier (factum para. 68) illustrates the disconnect between the required standard and the one the appellant asserts.

[94] This division between the parties over the repetition rule, and the relevance of reportage on the facts of this case, impacts the analysis of the alleged error of the judge in his approach to assessing reasonable diligence. To address this division, it is necessary to begin with a review of reportage, as that concept has developed in English and Canadian law.

Reportage in English law

[95] The repetition rule holds that if the defendant repeats an allegation about the plaintiff made by a third party, they cannot defend themselves in a defamation action by showing that the third party, in fact, made the allegation. Rather, they must prove that the allegation is true, or bring themselves within a common law or statutory defence. Prior to *Reynolds*, the law provided defences in a narrow range of defined circumstances, such as the fair and accurate reports of public court proceedings. The question that arose after *Reynolds* was whether the law should extend a more general defence, outside of these pre-defined situations, where the publication of an allegation, regardless of its truth or falsity, is in the public interest: Alastair Mullis & Richard Parkes, eds., *Gatley on Libel and Slander*, 12th ed. (London, UK: Sweet & Maxwell, 2013) at para. 15.15.

[96] The doctrine of "reportage" was first recognized in England in the post-*Reynolds* decision of the English Court of Appeal in *Al-Fagih v. HH Saudi Research & Marketing (UK) Ltd.*, [2001] EWCA Civ 1634. In this case, the defendant's

newspaper reported, over a period of two weeks, on an unfolding split between two prominent members of a Saudi Arabian dissident political organization. A majority of the Court of Appeal held that, in this context, the newspaper was entitled to publish an allegation advanced by a party to the dispute without taking steps to verify its truth. Lord Justice Simon Brown stated that there will be circumstances, as here, where:

> [52] …both sides to a political dispute are being fully, fairly and disinterestedly reported in their respective allegations and responses. In this situation it seems to me that the public is entitled to be informed of such a dispute without having to wait for the publisher, following an attempt at verification, to commit himself to one side or the other.
>
> [Emphasis added.]

[97] Lord Justice Latham, in concurring reasons, stated that it is "the fact that the allegation of a particular nature has been made which is in this context important, and not necessarily its truth or falsity": at para. 65. In determining that the newspaper was entitled to publish the allegation without verification, the majority highlighted the fact that the public was entitled to be informed of the dispute, the paper did not "in any way" suggest it was adopting the allegation, and it reported the allegation "entirely neutrally": at paras. 49, 54, 67. "Reportage" was described by Simon Brown L.J., as "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper": at para. 6.

[98] The issue of the relationship between the doctrine of reportage and the *Reynolds* defence of responsible journalism was addressed in the later decisions of the English Court of Appeal in *Roberts v. Gable*, [2007] EWCA Civ 721, and *Charman v. Orion Group Publishing Group Ltd.*, [2007] EWCA Civ 972.

[99] In *Roberts*, the defendants had republished allegations and counter-allegations from either side of a political feud within the British National Party. This prompted a defamation action by one of the parties to the feud. To answer the question of whether the publication fell within the concept of reportage, Lord Justice Ward, with the other members of the Court concurring, undertook a comprehensive

review of the relevant jurisprudence to date. He summarized the state of law in this way:

> [53] What can be learnt so far from this review of the authorities is that the journalist has a good defence to a claim for libel if what he publishes, even without an attempt to verify its truth, amounts to *reportage*, the best description of which gleaned from these cases is that it is the neutral reporting without adoption or embellishment or subscribing to any belief in its truth of attributed allegations of both sides of a political and possibly some other kind of dispute.
>
> [Emphasis added.]

[100] Lord Justice Ward dismissed the suggestion that reportage could be conceived of as a "defence *sui generis*", because he found that this would be inconsistent with *Reynolds*. Instead, Ward L.J. described reportage as a "form of, or a special example of" *Reynolds* privilege, and "a special kind of responsible journalism but with distinctive features of its own": at para. 60. The *Reynolds* factors will be "adjusted as may be necessary" where a publication is found to be reportage: at para. 61(6). Where a publication does not have the protection of reportage, the defendant may still attempt to demonstrate that "it was a piece of responsible journalism", by reference to the traditional *Reynolds* factors, even though the defendant did not check the accuracy of the report: at para. 61(5).

[101] In respect of the publication in issue in *Roberts*, Ward L.J. concluded that the defendants had not adopted the allegation of wrongdoing as their own, but rather engaged in "attributed neutral reporting of a story in the public interest": at para. 68. The publication was, therefore, "proper reportage", and consequently the standard of responsible journalism did not require verification of the truth of the reported allegation: at para. 68.

[102] The decision in *Charman* provides a useful counter example of a case where a claim of reportage failed. The plaintiff was a police officer and the defendant an author of a book ("*Bent Coppers*") that purported to provide the "inside story" of efforts to root out corruption in the Metropolitan Police force. The book contained several references to the plaintiff. The trial judge found, and the Court of Appeal agreed, that the ordinary reasonable reader of the book would understand these

references to mean that there were “cogent grounds to suspect” that the plaintiff abused his position as a police officer, and colluded with others to obtain corrupt payments.

[103] The Court of Appeal in *Charman* upheld the finding at trial that this was not a case of reportage. Indeed, Ward L.J. described the facts as “miles removed from the confines of reportage properly understood”: at para. 49. The book, read as a whole, was a “far cry” from simply reporting an account of corruption. Rather, it was a piece of investigative journalism where the author “was acting as a bloodhound sniffing out bits of the story”: at para. 49. Importantly, the Court rejected the submission that the concept of reportage applied simply because the book was on a matter of public interest. Lord Justice Ward stated that “[n]o matter how overwhelming the public interest, it is not reportage simply to report with perfect accuracy and in the most neutral way the defamatory allegations A has uttered of B”: at para. 50.

[104] After determining that this was not a case of reportage, Ward L.J. turned to the question of whether the book could be considered responsible journalism, which he described as “a different question altogether”: at para. 50. After reviewing the *Reynolds* factors, Ward L.J. addressed the overarching question of whether the book struck a fair balance between freedom of expression and the reputation of individuals, “bearing in mind that the court should suffer no greater limitation of press freedom than is necessary to hold that balance”: at para. 84. In finding that the defence of responsible journalism was made out, Ward L.J. characterized the book as “the sort of neutral, investigative journalism which *Reynolds* privilege exists to protect”: at para. 85, quoting *Jameel* at para. 35.

[105] Of final note in relation to the law of England, reportage is now an aspect of the statutory defence in s. 4 of the *Defamation Act*, *2013* (U.K., c. 26), that covers the publication of statements on matters of public interest. Section 4(3) provides:

> **4 (3)** If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe

> that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

[106] While the protection of s. 4(3) is limited to an "accurate and impartial account of a dispute to which the claimant was a party", there is some suggestion in the case law that the common law defence may not be limited to neutral reporting on a dispute: *Charman* at para. 91, per Sedley L.J. In any case, the "critical question" is whether the public has an interest in knowing of the allegation regardless of its truth or falsity: *Roberts* at para. 61 (7).

Reportage in Canadian law

[107] The doctrine of reportage has received more limited attention in Canadian law. *Grant* is the leading authority on the subject. Under the framework set out in *Grant*, reportage is a relevant factor in determining whether a defamatory communication on a matter of public interest was responsibly made. In that way, Canadian law represents a departure from English law, at least in form. At the same time, *Grant* establishes a distinct analytical framework for assessment of a claim of reportage, as set out in these passages:

> [120] …[T]he repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity. This exception to the repetition rule is known as reportage. If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made. See *Al-Fagih v. H.H. Saudi Research & Marketing (U.K.) Ltd.*, [2001] EWCA Civ 1634 (BAILII), at para. 52; *Charman*; *Prince Radu of Hohenzollern v. Houston*, [2007] EWHC 2735 (QB) (BAILII); *Roberts v. Gable*, [2007] EWCA Civ 721, [2008] 2 W.L.R. 129.
>
> [121] Where the defendant claims that the impugned publication (in whole or in part) constitutes reportage, i.e. that the dominant public interest lies in reporting what was said in the context of a dispute, the judge should instruct the jury on the repetition rule and the reportage exception to the rule. If the jury is satisfied that the statements in question are reportage, it may conclude that publication was responsible, having regard to the four criteria set out

> above. As always, the ultimate question is whether publication was responsible in the circumstances.
>
> [Emphasis added.]

[108] In accordance with this framework, where reportage is claimed, the trier of fact must address the distinct questions of: (1) whether the statements are reportage, and (2) if so, whether publication is responsible, having regard to the four criteria set out in para. 120 of *Grant*. Whether or not the statements constitute reportage, the ultimate question remains whether the publication as a whole was responsible in the circumstances.

Discussion

[109] While it is now firmly established, both in Canada and England, that reportage falls within the umbrella of the defence of responsible journalism (or responsible communication), some analytical difficulty remains. The difficulty stems from the fact that many of the factors identified in *Grant* and *Reynolds* as relevant to the defence go to the defendant's diligence in verifying the accuracy of the published statements. Reportage, by contrast, relieves the defendant of the obligation to verify accuracy, other than, perhaps, to demonstrate that the reported statements were in fact made by a third party. There is an obvious incongruity between a defence of "I exercised reasonable diligence to verify the statements" and a defence of "I was not required to verify the statements". This incongruity is evident in the parties' submissions on this appeal. The appellant says that the respondent did not exercise diligence in verifying the truth of the allegations that he financed death squads and conspired to assassinate Archbishop Romero, while the respondent says he was under no such obligation because endnote 10 constituted reportage.

[110] It appears to me that the law of defamation in England and Canada is substantially aligned in how this apparent incongruity is to be resolved. In both jurisdictions, reportage forms part of the defence of responsible journalism or responsible communication. It is not a separate defence. However, where the defendant claims that the impugned publication constitutes reportage, that issue must be determined independently because the answer to that question will

influence the standard of diligence. In England, the *Reynolds* factors are "adjusted as may be necessary" where the publication is found to be reportage: *Roberts* at para. 61. In Canada, where the trier of fact is satisfied that the impugned statements are reportage, the question of whether the publication is responsible is to be considered by reference to the factors set out in para. 120 of *Grant*. Finally, in both England and Canada, a publication that is found not to constitute reportage may nevertheless meet the standard of responsible journalism or responsible communication through an analysis of the usual *Reynolds* or *Grant* factors (depending on the jurisdiction).

[111] In considering the guidance from *Grant*, it is also deserving of emphasis that the four criteria listed in para. 120 of *Grant* are used to assess whether the defendant has acted responsibly in publishing a statement that is found to be reportage: *Grant* at para. 121. The presence of the four criteria do not establish that a statement is reportage. The threshold requirement for reportage is that the public must have an interest in the fact that the defamatory allegation was made, regardless of its truth or falsity. Furthermore, the facts that the subject matter of the publication is a matter of public interest and that allegation was neutrally reported, do not, by themselves, meet this threshold: *Charman* at para. 50.

[112] The question of what type of communications might meet the public interest requirement of reportage has not received extensive judicial consideration. One established category is neutral reporting on a dispute between public figures, where the existence of the dispute is a matter of public interest regardless of the truth of the competing allegations. *Roberts* and *Al-Fagih* are both examples of this category of case. In *Grant*, the Court alludes to this type of scenario in stating that "[i]f a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability" even if the allegations are untrue: *Grant* at para. 120 (emphasis added). Even if *Grant* cannot be taken to have entirely restricted reportage to communication regarding a dispute that is a matter of public interest, it has at least signalled that the public must have an interest in the fact that

an allegation has been made, regardless of its truth, in order for the publication of the allegation to be reportage.

The judge's treatment of reportage

[113] Returning to the case at bar, I am persuaded that the judge erred in law in his treatment of reportage, and that this error impacted his analysis of the respondent's diligence.

[114] While there is some ambiguity in the reasons for judgment, I agree with the respondent that the judge appears to have concluded there are grounds to believe that endnote 10 constitutes reportage, thus relieving the respondent of any obligation to verify the truth of the defamatory allegations. However, in reaching this conclusion the judge followed a path of reasoning that, in my view, was analytically flawed. The judge apparently viewed the four factors listed at para. 120 of *Grant* as criteria that determine whether the impugned statements are reportage: at para. 128. This is incorrect as a matter of law. The four factors listed in *Grant* are to be considered by the trier of fact in assessing the defendant's diligence (i.e., whether the communication is responsible) only after it has been determined that the statements constitute reportage. I repeat the critical sentence from para. 121 of *Grant*:

> If the jury is satisfied that the statements in question are reportage, it may conclude that the publication was responsible, having regard to the four criteria set out about.
>
> [Emphasis added.]

In determining whether a statement is reportage, the central question is whether there is a public interest in the fact that the allegations have been made, regardless of their truth or falsity. This question was not addressed by the judge.

[115] As noted, it is not the case that any communication that is in the public interest constitutes reportage, so as to leave the defendant free to advance allegations indiscriminately without verification. The scenario that is most firmly established within the scope of reportage is neutral reporting on a dispute between

public figures. In that case, the existence of the dispute is, in itself, a matter of public interest, regardless of the truth of the competing allegations. If the defendant neutrally reported on such a dispute, without endorsing or adopting the allegations, this may constitute reportage.

[116] Assuming, without deciding, that reportage may extend to other situations beyond neutral reporting on disputes between public figures, I fail to see any grounds to believe that the respondent has a real prospect of success in establishing that endnote 10 is reportage. There is no apparent public interest in knowing FC2's allegation about the appellant to the Truth Commission if it is false. In the context of *Assassination of a Saint*, the significance of FC2's evidence is the possibility that it may be true. The book is, after all, a work of investigative reporting that was, as the respondent notes in the Introduction (p. xvii), primarily motivated by his desire to "share and analyze the available evidence" as to who may have been involved in the assassination and their motivations. The respondent's laudable objective of seeking justice for Archbishop Romero, and bringing attention to the circumstances of his death, is undeniably in the public interest. However, the public interest does not extend to hearing allegations about the involvement of individuals in the assassination if those allegations are false.

[117] Before concluding on this point, I will address the respondent's argument that endnote 10 is no different than "the kind of account of witness testimony one sees frequently in media reports of proceedings": Respondent's Factum at para. 47. This was a persistent theme of his arguments on appeal. I note that the respondent has not directly raised on appeal the defence of qualified privilege in relation to reports of court proceedings, although that defence was put in play on the application in the court below. For the purpose of this appeal, I understand the respondent to argue that an analogy can be drawn to the defence for the purpose of bringing endnote 10 within the definition of reportage.

[118] I do not agree that such an analogy can be drawn. There is a statutory privilege that covers the reports of court proceedings in British Columbia in s. 3 of

the *Libel and Slander Act*, R.S.B.C. 1996, c. 263. The statutory privilege extends to a "fair and accurate report in a public newspaper or other periodical publication or in a broadcast of proceedings publicly heard before a court exercising judicial authority if published contemporaneously with the proceedings". There is also a common law privilege that covers a fair and accurate report in a newspaper or otherwise of a judicial proceeding in open court. The rationale for the privilege is that the public has a right to be informed about all aspects of proceeding to which it has a right of access: *Hill* at paras. 150–151; Peter A. Downard, *The Law of Libel in Canada*, 5th ed. (Toronto: LexisNexis, 2022) at §8.04. I can see no analogy between the common law and statutory privilege for fair reporting of open court proceedings, and the selective reporting of a single piece of evidence said to have been provided by a confidential witness to the Truth Commission 23 years prior to the publication of *Assassination of a Saint*. Quite apart from the fact that there is no indication that the proceeding before the Truth Commission was public, *Assassination of a Saint* does not, and was not intended to, present a fair and accurate report of that proceeding. Rather, it was intended to present a targeted review of evidence gathered to date that may tend to identify those involved in Archbishop Romero's assassination.

[119] Bearing in mind that there is some ambiguity in the judge's reasons, I am persuaded that his legal error in assessing the strength of reportage impacted his overall analysis of the defence of responsible communication. Following his discussion of reportage, the judge appears to have assumed, without further explanation, that the respondent's diligence was to be assessed only by reference to the steps he took to verify that endnote 10 accurately reported FC2's evidence to the Truth Commission, rather than to verify the substance of the defamatory allegations themselves: at paras. 126–131. It is this analysis that has led to the crux of the dispute between the parties on appeal over the relevance of the repetition rule, and the standard by which the respondent's diligence is to be measured.

[120] However, the conclusion that the judge erred in law in his analysis of the *Grant* factors, specifically in relation to reportage, does not end the inquiry. Excluding reportage as a consideration, there still remains the question of the

strength of the defence of responsible communication on the remaining *Grant* factors. I now turn to that question.

Did the appellant discharge his statutory burden to establish that the defence of responsible communication has no real prospect of success?

[121] In assessing the strength of the defence of responsible communication, I take as my starting point that it is the "broad thrust of the publication as a whole" that must be considered, and not the isolated defamatory language: *Quan* at para. 30; see also *Wilson v. Canwest Publishing Inc./Publications Canwest Inc*., 2018 BCCA 441 at paras. 25–27. This perspective is consistent with the rationales for the defence, which include the encouragement of public debate and discourse on matters of public importance, and protecting the "cut and thrust of discussion necessary to discovery of the truth": *Grant* at para. 57. The fair balance between freedom of expression and the reputations of individuals must account for the public interest in receiving the communication as a whole, and not simply the defamatory words in isolation.

[122] The evidence that the respondent cites to demonstrate his diligence primarily concerns the steps he took to confirm that endnote 10 accurately reflected FC2's evidence to the Truth Commission: his reliance on the Informe Document which summarized FC2's evidence; his personal meeting with FC2 to confirm the accuracy of the summary contained in the Informe Document; and FC2's signed declaration attesting to the accuracy. There is no issue that the respondent did not take further steps to verify the truth of FC2's evidence. He did not, for example, attempt to contact the appellant prior to publication. The question is whether there are grounds to believe that the respondent has a valid defence of responsible communication despite his failure to take steps to verify the truth of the defamatory allegations.

[123] I will review the *Grant* factors that appear to me to be most pertinent to a preliminary assessment of the strength of the defence of responsible communication in these circumstances.

[124] The first two *Grant* factors are the seriousness of the allegation and the public importance of the matter. There is no question that the inferential allegations in endnote 10 are serious ones, and, as such, may demand more thorough efforts at verification than "suggestions of lesser mischief": *Grant* at para. 111. However, it is also "[i]nherent in the logic of proportionality" that the degree of the public importance of the communication must be considered: *Grant* at para. 112. It is unassailable that *Assassination of a Saint* is a publication on a subject of high public importance. No person has ever faced criminal sanction, or even criminal prosecution, for the murder of Archbishop Romero. The barriers to a meaningful investigation into the circumstances surrounding his death are fully canvassed in the book. They include "ongoing obfuscation and disinformation" by those with motives to prevent the truth from emerging and the dangers that still face potential witnesses in El Salvador: *Assassination of a Saint* at xvii. There is an obvious public interest in the publication of an account of one of the most significant efforts to date to gather evidence of the circumstances of the assassination; that being the civil action in *Doe v. Saravia*.

[125] There is a basis in the record to support the respondent's view that FC2 was a reliable source of information. The Informe Document not only summarizes FC2's evidence to the Truth Commission, but also details FC2's close involvement in D'Aubuisson's organization. The Informe Document also summarizes the evidence of another witness, FC3, who is reported to have testified about the appellant's link to death squads. As noted, the respondent personally met with FC2 to confirm the accuracy of the summary of FC2's evidence to the Truth Commission, as set out in the Informe Document.

[126] While the respondent did not take steps to verify the substance of FC2's evidence, or to communicate with the appellant prior to publication, his evidence is that he did not intend to infer that the appellant was guilty of financing death squads and conspiring to assassinate Archbishop Romero. Rather, he intended to assert that "a witness had spoken of him to the Truth Commission and that a well known document contained his name". The fact that the words have a defamatory meaning

does not prevent the court from considering the respondent's evidence that he did not intend the defamatory meaning: *Grant* at para. 124; *Bonnick* at paras. 21–22. Given the cautionary language used by the respondent in other portions of the book about the limits of the evidentiary record, including in the passage to which endnote 10 relates, the respondent's intended meaning of endnote 10 appears to me to fall within a range of reasonable meanings that the words can bear. The respondent's intended meaning provides some context for his failure to verify the substance of the allegations, or to contact the appellant before publication. As the respondent notes, the appellant had no knowledge of what any witness told the Truth Commission, and, therefore, could not have confirmed or denied the accuracy with which FC2's testimony was reported in endnote 10.

[127] I return to the starting point of the analysis of responsible communication, which requires that the "broad thrust of the publication as a whole" be considered. Here, the defamatory words are contained in a single sentence in one of over 450 endnotes to a book that runs almost 200 pages. The appellant is not a focus of the book; his name is only mentioned twice. Other than endnote 10, there is no suggestion on appeal that the remainder of the book is anything other than the product of accurate reporting and careful attention to the factual limits of the existing evidentiary record. While one may question the justification for including endnote 10 in the book, it must be recognized that the decision to include a particular statement in a publication engages matters of editorial choice, which is to be given generous scope: *Grant* at para. 118.

[128] At the end of the day, the standard of conduct must be applied to the respondent in a "practical and flexible" manner: *Bonnick* at para. 24. Adopting such an approach, I cannot see how the respondent could lose the defence of responsible communication in relation to a publication on a subject of high public importance on the basis of a single sentence in an endnote that bears a defamatory meaning the respondent did not intend. The most that can be said, with the benefit of hindsight, is that the respondent may have been ill-advised to include endnote 10 in

Assassination of a Saint. But, once again, that is not the appropriate lens through which to view the defence of responsible communication.

[129] As such, I reach the same conclusion as the judge, albeit for different reasons, that the appellant has not met his onus under s. 4(2)(a)(ii) of the *PPPA* to show there are grounds to believe that the defence of responsible communication has no prospect of success. That is, I conclude that the appellant has not demonstrated there is a basis in the record and the law—taking into account the stage of the proceeding—to support a finding that the responsible communication defence does not tend to weigh more in the respondent's favour.

The third issue on appeal: The public interest hurdle under s. 4(2)(b) of the *PPPA*.

[130] In light of my conclusion on the second issue on appeal, it is not strictly necessary to address the third issue, which concerns the public interest hurdle in s. 4(2)(b) of the *PPPA*. The action may be dismissed on the basis of the appellant's failure to establish that there are no grounds to believe that the respondent does not have a valid defence to the action. However, given that the public interest hurdle was fully argued, I will briefly state my reasons for concluding, in any event, that s. 4(2)(b) provides an alternative basis for dismissing the action.

[131] The appellant has provided general evidence about the anger, shock, and distress he experienced when his godson first brought *Assassination of a Saint* to his attention in December 2018. He describes his continuing anxiety over knowing that many people in the world have read the statements about him in the book. The appellant also deposes that he recently instructed his staff to conduct a search of Twitter (now "X"), and discovered a "storm of social media posts" about him, beginning in 2017. He states that these posts implicate him in financing death squads and being involved in the assassination of Archbishop Romero. He believes that these posts are due to the publication of *Assassination of a Saint*. However, as the respondent emphasizes, none of the posts in evidence mentions the book or the respondent.

[132] I accept that the appellant has met the prerequisites for engaging in the weighing exercise under s. 4(2)(b) of the *PPPA*, in that he has shown the existence of harm and its causal relationship to the expression. However, he has established these prerequisites through the presumption of damages in defamation law, rather than through evidence of specific harm. As highlighted in *Hansman* at para. 67, the presumption of damages cannot establish that harm is "serious" at the weighing stage of the analysis. What is missing from the record in this case is evidence that enables the Court to draw an inference of the likelihood of harm of a magnitude sufficient to outweigh the public interest in protecting the respondent's expression. The appellant deposes that he was not even aware of *Assassination of a Saint* until December 2018, almost two years after its publication. There is no evidence that anyone other than the appellant, and possibly his godson, had even read endnote 10 before he commenced the defamation action.

[133] There is no question that the inferential defamatory statements in endnote 10 are serious. However, the seriousness of the allegations does not, in itself, establish harm that is sufficiently serious to outweigh the public interest in free expression. To hold otherwise would presumptively tip the balance in the appellant's favour: *Hansman* at para. 67. Furthermore, the public interest in free expression is very strong in this case. *Assassination of a Saint* is a publication that concerns a pivotal event in history, which has had long-lasting political and social impacts. The respondent's efforts through the book to shed light on the circumstances of Archbishop Romero's assassination, and to identify those accountable for his death, is speech that falls at the core of the s. 2(b) *Charter* protection. It serves a truth-seeking function and encourages democratic discourse on an issue of significant public importance.

[134] For these reasons, even if I had reached a contrary conclusion on the second issue on appeal, I would nevertheless have upheld the dismissal of the action on the public interest hurdle. That is, the appellant did not meet his burden of showing harm that is sufficiently serious in nature that the public interest in continuing the proceeding outweighs the public interest in protecting the respondent's expression.

Disposition

[135] I would dismiss the appeal.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Justice Winteringham"