Case Name:

Able Translations Ltd. v. Express International Translations Inc.

RE: Able Translations Ltd., Plaintiff/Responding Party, and Express International Translations Inc. and Philippe Vitu, Defendants

[2016] O.J. No. 5740

2016 ONSC 6785

Court File No.: CV-15-536821

Ontario Superior Court of Justice

S.F. Dunphy J.

Heard: October 21, 2016.
Judgment: November 8, 2016.

(114 paras.)

Counsel:

*David McGhee.*for the Defendants/Moving Parties.

Jeffrey Radnoff and Charles Haworth, for the Plaintiff/Responding Party.

ENDORSEMENT

1 S.F. DUNPHY J.:-- This motion is one of the first opportunities this court has had to consider s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 137.1 of the *CJA* was the main element of the reforms to the law of defamation recently introduced by the *Protection of Public Participation Act, 2015*, 2015 S.O. c. 23 following a long process of public consultation. I am called upon to consider the proper scope and application of this new and largely untested statute.

2 The defendant moving parties Express International Translations Inc. and its principal Mr. Philippe Vitu are moving to strike the plaintiff's defamation suit against them with costs pursuant to s. 137.1 of the *CJA*. In so doing, they bear the burden of establishing that the suit arises "from an expression made [by the defendants] that relates to a matter of public interest". If they are successful in establishing this, the onus shifts to the plaintiff to satisfy me: (a) that there are grounds to believe both that the proceeding has "substantial merit" and that the defendants have "no valid defence"; and (b) that the harm suffered or likely to be suffered by the plaintiff is "sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression".

3 The claim arises from a blog posting made by Mr. Vitu on August 31, 2015 during the course of the 2015 Federal election. In the blog posting, Mr. Vitu drew attention to the association between a candidate for office and the plaintiff corporation in terms that suggested that affiliation with the plaintiff reflected badly upon the candidate's fitness for office. The blog sought to attract support from like-minded individuals to call a press conference to highlight this connection to the broader public. The plaintiff reacted swiftly with a lawyer's letter demanding immediate retraction and threatening a law suit. Ultimately the press conference was never held and the blog was deleted from the site where it had been posted within a few days.

4 For the more detailed reasons that follow, I am granting the defendant's motion. The action must therefore be dismissed with the costs consequences provided for in s. 137.1(7) of the *CJA* that I have found no grounds to depart from.

5 There was never any basis to have brought the suit against the corporate defendant whose name was in no way associated with the expression in question. The action against the corporate defendant was and is entirely baseless and must be dismissed under the test prescribed by s. 137.1 of the *CJA*. As regards, the individual defendant, the blog posting expressed the opinion of its disclosed author (Mr. Vitu) concerning the fitness for office of a candidate in a general election. I find that this was an expression regarding a matter of public interest. The plaintiff has failed to satisfy me that there are grounds to believe that the proceeding has "substantial merit". The defamatory "sting" of the blog posting itself was oblique and slight except to those already familiar with the numerous public allegations made by others concerning the plaintiff that were not republished by the plaintiff. I cannot find that the claim as pleaded has "*substantial*" merit. I also cannot find that the plaintiff has given me reason to believe that the defences raised of truth, fair comment and qualified privilege are not valid. Having conducted an objective examination of the evidence presented, I cannot conclude that there is a reasonable probability that none of these defences would succeed if examined in depth following a full trial. Finally, I cannot find that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression. The evidence of the harm allegedly attributable to the blog posting is entirely implausible. The blog was but a pale echo of substantial charges publicly made by others and there is no evidence that the blog itself was even seen by more than a handful of people before the plaintiff's efforts saw it removed from the internet site. On the other hand, there is compelling evidence of the direct chilling impact the threat of this suit had upon the activities of the defendant in expressing honestly held opinions in the course of an election campaign. The moving parties have satisfied their burden of proof under s. 137.1 of the *CJA* while the responding party plaintiff has failed to discharge its burden of proof.

Overview of Facts

(i) The parties

6 The moving party defendant Mr. Philippe Vitu lives in Mississauga. He is an officer and director of the corporate defendant Express International. Mr. Vitu and his wife Dora are the sole shareholders and employees of Express International, a small business they operate out of their Mississauga home. Express International is in the business of providing interpreting and translation services.

7 The plaintiff Able is also in the interpretation and translation business on a much larger scale. It provides services in numerous languages and has a number of large, institutional clients. By contrast, the clientele of Express International contains very few institutional clients of that sort. While they are in the same business, by reason of the difference in scale and clientele, Mr. Vitu claims that Express International is not actually a competitor of Able.

8 Nothing turns on the precise degree to which the two businesses compete. I accept that they are in the same business but I also accept that their clientele has relatively little overlap in fact. However, they are certainly competitors to some degree.

9 Mr. Peter Fonseca is not a party to this proceeding. He was however an officer of the plaintiff Able with the title of Executive Vice-President, Strategy and Business Development from 2011 to 2014. He had been an MPP from 2003 to 2011, having been defeated as a candidate in the Federal election that year. In 2015 he was the nominated candidate for the Liberal Party of Canada in the riding of Mississauga East-Cooksville in the Federal election scheduled to be held in October 2015.

(ii) The August 31, 2015 blog posting

10 On August 31, 2015, Mr. Vitu made a posting to a web site known as "N49.com". No party has put any evidence before me as to the nature of this web site or what sort of traffic it generates. From the material before me, it appears that it is possible to post comments on the web site in response to entries made by others. It also appears that the site is monitored by Able who posts replies to various posts made about it on that site.

11 Mr. Vitu's posting has been referred to as a "blog". Whether it was a blog in the sense of a page of his own writings, supplemented and updated from time to time or simply a comment posted on a site permitting such postings is not clear although the latter appears to be the case. I refer to it as a "blog" for convenience only -- nothing turns on the distinction.

12 The blog posting was as follows:

> "**Press Conference to Denounce ABLE...**
>
> PETER FONSECA is the liberal candidate for Mississauga-East Cooksville (sic). He has good chances of being elected in October. His red signs are popping up almost everywhere on our larger streets; furthermore, this riding has always been liberal-leaning and lastly, he will benefit from the aura of his wife, Chris Fonseca, who is a municipal counsellor here and does excellent for our community.
>
> It so happens that PETER FONSECA (https:// peterfonseca.liberal.ca/) is intimately connected with ABLE (http://www.thisonlline.com/cgi/page.cgi/_memb er-ship.html/1004-Able-Translations-Ltd-Able-Transport-Ltd) as "VP Strategy".
>
> Some interpreters met him here as recently as a year ago.
>
> He must know about ALBE's business and image and is part of it. Therefore, his claims as a candidate here have no credibility.
>
> I suggest that we organize and hold a press conference in Mississauga about 10 days to 2 weeks before the election (end of Sept., first days of October) to denounce FONSECA. We would invite a report from the Toronto Star, the Toronto Sun and Mississauga News. I would need as many of you as possible to enlighten the press about your experience with ABLE because people have to know.
>
> I would be p***ed that a guy that is part of the ALBE clique be elected to Ottawa.
>
> If you are interested, please email me at [reference deleted].
>
> Thank you.
>
> Philippe Vitu"

13 Mr. Vitu's posting generated at least one response (not produced in evidence) from a Mr. Faysal Mohammed who appears to have been an interpreter with some experience with Able. In response to Mr. Mohammed's comment, Mr. Vitu made a further posting on the N49.com web site, allegedly on the same day (August 31, 2016), as follows:

> "Hello Faysal:[1]
>
> I sympathize with your well-written account of your business with ABLE's attitude with interpreters is absolutely deplorable, the action of interpreters is timid. Very little beyond complaining on sites such as this one, nothing that change the situation.
>
> TAKEACTION posted here on Aug. 31 that we (sic) went to ABLE's client to complain and that ABLE immediately issued a cheques with an apology (the client must have called ABLE).
>
> Did you do any such thing?

> In a post on the same day, I suggested organizing a press conference to denounce ABLE. Two interpreters (only) got back to me, but then balked (sic) out.
>
> I wish you guys would be more dynamic in taking action instead of just complaining on this site. Remember: UNITED WE STAND."

14 The plaintiff reacted to Mr. Vitu's posting swiftly. A demand letter of September 8, 2015 was sent by Mr. Radnoff (attaching and referencing only the first post of August 31, 2015). A further formal notice, doubtless intended to comply with the notice requirements of s. 5 of the *Libel and Slander Act*, R.S.O. 1990, c. L.12 was also sent. This notice also referred expressly only to the first of the two postings alleged to have been made by Mr. Vitu on August 31, 2015. The Statement of Claim, issued on September 21, 2015 similarly quoted only the initial August 31 post and made no explicit reference to the further public correspondence with Mr. Mohammed.

15 Mr. Vitu's evidence is that his original blog posting was removed shortly after it was posted. The plaintiff has not disputed this allegation. I infer that the removal was likely at or about the time of the initial lawyer's letter sent to Mr. Vitu on September 8, 2015.

(iii) Context of the publication

16 Mr. Vitu's affidavit and Ms. Teixeira's responding affidavit engage in considerable debate about whether in point of fact Able has a practice of paying its freelance interpreters and translators slowly. Able submits that it has nothing to answer in this regard. Complaints are promptly investigated and dealt with when they arise according to Ms. Teixeira. Mr. Vitu submits that there is a systematic refusal to pay Able's freelance interpreters and translators on time or without compulsion.

17 Whatever the truth of the matter, one thing is perfectly clear. There was a considerable body of material circulating on the internet in that time frame alleging that Able is systematically slow (or worse) in paying its freelance interpreters and translators. Mr. Vitu assembled approximately 100 pages of various signed and unsigned postings made on the internet by parties claiming to be translators or interpreters working for Able. The frustration level and indeed bitterness of some of the parties posting complaints is palpable and their language is often extreme and inflammatory. Not all were unfavourable of course. Some posts defended Able.

18 The largest number of complaints compiled by the moving party were posted on the N49.com web site. Many of them appear to have been the object of specific responses by Able who clearly monitored and responded to adverse comments on this web site. While it is true that some of the complaints produced date from a time after Mr. Vitu's post, many others clearly date from before.

19 There is nothing in the evidence to support the inference that these numerous complaints were in any way orchestrated by or even connected to Mr. Vitu or the post that he made. Ms. Teixera's suspicions expressed in her affidavit are accompanied by no concrete facts and are worthy of no weight. Mere suspicion of a state of affairs is not evidence.

20 Mr. Vitu's public posting did not repeat the allegations contained in the numerous complaints - both attributed and anonymous - that his subsequent affidavit filed on this motion compiled. His blog would have brought them to mind for anyone familiar with them; it would have been a cipher to those who were not.

(iv) Damages alleged by Plaintiff

21 The plaintiff's responding affidavit of Ms. Teixeira contains two paragraphs (paragraphs 21 and 22) outlining damages allegedly attributable to Mr. Vitu's posts of August 31, 2015. Paragraph 21 simply recites the names of four institutional clients allegedly lost "due to the Defamatory Blogs" while paragraph 22 claims that "[u]ltimately ABLE has lost 30% of its revenue following the Defamatory Blogs" without making an explicit claim to a causation link. No documentary evidence to substantiate or detail these claims was provided. There is also no concrete evidence as to how or why these claims might be attributed to Mr. Vitu's short-lived post on the N49.com web site is provided.

Issues

22 The following issues are raised by this application:

a. Was the expression in respect of a matter of public interest?

b. What is the standard of proof required under s. 137.1(4)(a) of the *CJA*?

c. Has the plaintiff discharged its onus of proving there are "grounds to believe that... the proceeding has substantial merit"?

d. Has the plaintiff discharged its onus of proving that there are "grounds to believe that...the moving party has no valid defence in the proceeding"?

e. Is the harm suffered or likely to be suffered by the plaintiff sufficiently serious that the public interest in allowing the proceeding to continue outweighs the public interest in the communication?

Analysis and Discussion

(i) Was the communication in respect of a matter of public interest?

23 The plaintiff's position is that the blog posting was purely a matter of private interest. The plaintiff submits that the communication was intended to advance the defendants' commercial interests as competitors of the plaintiff. The plaintiff claims that the blog posting was directed at it and did not involve Mr. Fonseca and further claims that there is no public interest in the various claims of unpaid freelance interpreters who had done work for Able in the past that were said to lie beneath the allegations made in the blog.

24 It is the subject-matter of the communication, determined objectively and reasonably, that is the object of the inquiry in s. 137.1(3) of the *CJA* and not the motives of the speaker or writer. The objects of s. 137.1 of the *CJA* are set forth in s. 137.1(1) and include to "encourage individuals to express themselves on matters of public interest", "to promote broad participation in debates on matters of public interest" among others.

25 Mr. Vitu is not disentitled from holding opinions or expressing them simply because they involve a competitor directly or indirectly. Competitors are not disentitled from having opinions on matters of public interest or from expressing them. If the subject matter of the communication is objectively and reasonably found to relate to a matter of public-interest in its pith and substance, the defendants have met their evidentiary burden. In such cases, the issue of motive arises in relation to the second phase of the inquiry under s. 137.1(4) of the *CJA* and in particular s. 137.1(4)(b). There is no reason to fear that wolves in sheep's clothing will pass by undetected. The determination of the true subject matter of the expression is to be made objectively and reasonably. Where the pith and substance of the matter is a defamatory personal attack thinly veiled as a discussion of matters of public interest, the court has all the tools it requires to determine the true nature of the expression and rule accordingly.

26 The Supreme Court of Canada recently considered the issue of defining "public interest" in the defamation context in *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII). The guiding principles regarding the definition of "public interest" that I would draw from a review of *Grant* include:

a. "...the judge must consider the subject matter of the publication as a whole. The defamatory statement is not to be scrutinized in isolation" (*Grant* at para. 101);

b. "The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest" (*Grant* at para. 103);

c. "...the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject." (*Grant* at para. 102); and

d. "Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic inter-

> est in such wide-ranging public debate must be reflected in the jurisprudence." (*Grant* at para. 106).

27 The first part of the analysis is thus to determine objectively what the subject matter of the communication as a whole is and then to consider whether that subject matter can fairly be described as a matter of public interest.

28 Viewing the blog posting as a whole, it is clear that the subject matter of the post was the merits of the candidacy of Mr. Fonseca in Mississauga East-Cooksville in light of his past business connections. While the title to the blog refers to a "press conference to denounce Able", the text underneath makes it quite clear that the press conference being suggested was to denounce *Mr. Fonseca* by reason of his *connection* to Able. Indeed, the "Able" discussed is not even identified exclusively with the plaintiff to any reader not already armed with that information.

29 It is not my role under s. 137.1 of the *CJA* to assess how interested the public might be in considering particular past business affiliations of a candidate for public office. It is sufficient that I should be able to determine, as I have, that the subject matter of discussion relates to a matter of public interest. The assessment of how central or peripheral to the public interest the discussion may be is more properly done under s. 137.1(4)(b) of the *CJA* when weighing the public interest in permitting the litigation to proceed against the public interest in protecting the expression in question.

30 The plaintiff has suggested that the reference to Mr. Fonseca should be construed as mere cover for what was in fact a direct attack on Able as a competitor of Mr. Vitu or his company. I can find nothing in the evidence that lends support to that construction. Mr. Fonseca was a candidate in the election that was then in full swing. Reading the publication as a whole, I can find no basis to suppose that the reference to Mr. Fonseca was nothing but a thinly-disguised pretext as suggested.

31 I find that the subject matter of the blog posting was an expression relating to a matter of public interest within the meaning of s. 137.1(3) of the *CJA*. Accordingly, subject to s. 137.1(4) of the *CJA*, I am *required* to dismiss this claim.

(ii) What is the standard of proof required under s. 137.1(4)(a) of the CJA?

32 The *PPPA* was enacted by the Legislature in 2015 following a process of study and review spanning several years. It amended three statutes: the *CJA*, the *Libel and Slander Act*, R.S.O 1990, c. L.12 and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

33 The procedure mandated is a "fast-track" procedure. This is because s. 137.2 provides that the motion to dismiss can be made at *any* time after the proceeding has commenced (s. 137.2(1) *CJA*), a motion brought pursuant to s. 137.1 must be heard within 60 days (s. 137.2(2) *CJA*) and there are limits set upon the amount of cross-examination permitted (s. 137.2(4) *CJA*). Even appeals are directed to be heard "as soon as practicable" (s. 137.3 *CJA*). As a result, a defendant may choose to strike a proceeding utilizing this proceedure before even filing a statement of defence.

34 In addition to creating a fast-track process for summary dismissal of defamation claims arising from expressions of public interest, the reforms apply significant costs sanctions to the plaintiff who is unsuccessful in preventing the claim from being dismissed (s. 137.1(6) *CJA*).

35 The purposes of the reforms intended by the *PPPA* are quite clearly stated in s. 137.1(1) of the *CJA* as follows:

> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters fo public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

36 A fast-track to summary disposition coupled with costs sanctions is the remedy the Legislature has chosen to counteract the problem of "libel chill" where debates on matters of public interest are concerned.

37 There is ample evidence in the present case of the libel chill effect of this law suit upon the defendant. The offending post was swiftly removed by the web site to which it was posted and Mr. Vitu's efforts to organize a press conference to illustrate what he saw as a material fact relating to Mr. Fonseca's candidacy fizzled before it got going.

38 By intentionally creating a fast-track and relatively summary procedure, the Legislature has implicitly accepted that *some* potentially meritorious defamation claims may nevertheless be dismissed without a full hearing on the merits. To this degree, it might be said that the *PPPA* combats "libel chill" with its own form of "litigation chill". However, the *PPPA* does not create a "safe space" for defamation without limit simply because the subject matter is one of public interest. Claims that are able to pass the review mandated by s. 137.1(4) are entitled to proceed. The question is how high was that threshold intended to be placed?

39 The words the Legislature has used must be the starting point. Section 137.1(4) of the *CJA* provides that the judge "shall not dismiss a proceeding" if the responding party "satisfies the judge that, (a) there are grounds to believe that, (i) the proceeding has substantial merit, and (ii) the moving party has no valid defence in the proceeding". The same "grounds to believe" standard is applied both to the question of "substantial merit" and that of "no valid defence".

40 This reference to both the merits of the claim and of the defences must be understood in the context of the law of defamation to which it relates. The plaintiff advancing a defamation claim bears the burden of establishing only that the words were published, that they refer to him or her and that they would have the effect of lowering his or her reputation in the eyes of a reasonable person. The plaintiff need not prove the words were untrue. It is defendant who has the burden of establishing any affirmative defences pleaded, including truth or justification. Section 137.1(4) of the *CJA* thus puts the plaintiff to the burden of addressing both the likelihood that it would be able to meet its own burden at trial *and* to address the likelihood that the defendant will not.

41 The plaintiff suggests that it bears the onus of establishing that the claim is neither "frivolous nor fleeting". In support of this the plaintiff cites the case of *1704604 Ontario Ltd. v Pointes Protection Association et al.*, 2016 ONSC 2884 (CanLII), being the only reported case on s. 137.1 of the *CJA* that the parties were able to locate and cite to me. In *170*, Gareau J. found that the claim before him "involves the sanctity of agreements made between parties" and was "not a claim that is frivolous or fleeting...In other words, it is a claim of substance" (at para. 47).

42 The problem for the plaintiff in proposing that I adopt such a low standard to the assessment of the merits of its claim is that same standard must also be applied to the assess the strength of the affirmative defences raised by the moving party. If a claim that is neither "frivolous nor fleeting" is sufficient to create "grounds to believe that...the proceeding has substantial merit", then an affirmative defence that is neither "frivolous nor fleeting" will not provide grounds to believe that such a defence is not valid. If anything, the plaintiff's case to meet its own burden must be stronger (by requiring "substantial" merit") than that applied to the defendant's affirmative defences (there is no qualifier similar to "substantial" attached to "no valid defence").

43 The "not frivolous or fleeting" and "low threshold" approaches to the burden of proof under s. 137.1(4)(a) of the *CJA* suggested by the plaintiff would in my view eviscerate s. 137.1 of the *CJA* of any concrete meaning, rendering it little more than a restatement of Rule 25.11 or Rule 21.01(3)(d) of the *Rules of Civil Procedure*. I reject this approach.

44 Section 137.1 of the *CJA* is a new enactment that alters the pre-existing framework of defamation law as evolved over time by both common law and statute. Section 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, requires me to interpret s. 137.1 of the *CJA "*as being remedial and [it] shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects". My role as judge is not to fight a rear-guard action against legislation validly enacted to amend the common law when the intent and purpose of the legislation is clearly expressed.

45 In my view, when the legislator required the responding party to satisfy *the judge* that there are "grounds to believe" (both that the claim has "substantial" merit and that the defences raised have none), the standard implied thereby is that of "*reasonable* grounds to believe".

46 The Supreme Court of Canada interpreted the phrase "reasonable grounds to believe" in the context of s. 19(1)(j) of the *Immigration Act*, R.S.C. 1985, c. I--2, to require "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities": *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 (CanLII) at para. 114. The determination requires that "there is an objective basis for the belief *which is based on compelling and credible information*": *Muguesera* at para. 114 (emphasis added).

47 I find the approach in Mugesera to be a compelling one. The standard was adopted (albeit in quite different contexts) in two further cases cited to me by the plaintiff: *Lyras v. Heaps*, 2008 ONCJ 524 (CanLII) and *Ontario (Registrar of Alcohol and Gaming Commission) v. 751809 Ontario Inc.*, 2013 ONCA 157 (CanLII).

48 There is a spectrum to which the merits of claims or affirmative defences may be subjected that extends from the very low threshold of not being frivolous or vexatious to the relatively high threshold of proof on the balance of probabilities. It is enough for present purposes that I conclude that the required standard under s. 137.1(4)(a) of the *CJA* is somewhat higher than the one and somewhat lower than the other. The *Muguesera* test of requiring the judge to look for "credible and compelling evidence" both of the substantial merits of the claim and the validity of the affirmative defences proposed commends itself to me as striking the appropriate balance. The Legislature clearly intended the *PPPA* to tilt the balance somewhat further towards protecting freedom of expression than the common law has accomplished with its gradual evolution but it is equally clear that the Legislature did not intend to provide a shield for unrestrained defamation in the public interest sphere. The "frivolous and vexatious" test filters few if any claims; the proof on the balance of probabilities standard would filter a large number and run the risk of turning s. 137.1 *CJA* motions into compressed (and expensive) summary judgment dry-runs. I am satisfied that the Legislature intended the courts to develop a standard that lies between the two extremes so as to give effect to the goals expressed in s. 137.1(1) of the *CJA*.

(iii) Has the plaintiff established "grounds to believe that the proceeding has substantial merit"?

49 It is in my view notable that the Legislature has added the qualifier "substantial" to modify "merit". The qualifier "substantial" means that something more than "some" merit needs to be demonstrated. This qualifier provides a further indication that a level of scrutiny higher than the low threshold of not being frivolous and vexatious is intended. Satisfying a judge that there are grounds to believe the claim has "substantial merit" requires that the judge be satisfied that there is credible and compelling evidence supporting the claim as being a serious one with a reasonable likelihood of success. A claim that appears to be marginal or dubious, for example, would not satisfy the standard even if it would be immune to being struck as frivolous or vexatious.

50 This assessment must be undertaken while remaining vigilant of the risk of applying the higher civil standard of proof. Apart from the unfairness of applying such a standard, the outcome of applying too high a standard on what is intended to be a summary fast-track procedure would potentially be to front-end load significant expense as plaintiffs feel compelled to attempt a full summary judgment hearing. Instead of sparing defendants the costs of litigation, the risk would be a magnification of those costs.

51 The plaintiff in a libel action bears the burden of proving that (a) the words complained of were defamatory in the sense of tending to lower the plaintiff's reputation in the eyes of a reasonable person; (b) the words complained of refer in fact to the plaintiff; and that (c) the words were published by being communicated to at least one other person: *Torstar* at para. 28.

52 There is simply no basis in the evidence to attribute either of the blog postings to the corporate defendant. Mr. Vitu personally signed both posts and neither make any reference to the company of which he is principal.

53 There are no grounds to believe that the claim as against the corporate defendant has substantial merit. The plaintiff has not discharged its burden as regards the corporate defendant and, as regards such defendant, the claim must accordingly be dismissed.

54 There is however no dispute regarding the publication of the blog by Mr. Vitu. The comments that the post attracted establish that at least somebody saw the post.

55 Were the words written "of the plaintiff"? There can be little doubt that in fact this was the case even if it is not at all evident from the face of the blog posting (Able's full legal name not being mentioned, it could be said to refer to any number of "Able" entities). Mr. Vitu's affidavit and indeed paragraph 10 of the Statement of Defence admit of no other conclusion but that the "ABLE" referenced in the blog was intended to refer to the plaintiff. Mr. Fonseca, the alleged "main" target of the blog, was an officer of the plaintiff from 2011-2014.

56 I conclude that there are grounds to believe that the plaintiff will be able to establish that the words were published and were said of the plaintiff.

57 The main issue as regards Mr. Vitu is whether the words were defamatory in their usual and ordinary meaning. As proof of the defamatory nature of the publication, the plaintiff has gone to great lengths in its evidence to attempt to

refute the allegation made by Mr. Vitu in his affidavit that the plaintiff is notorious for not paying its freelance interpreters and translators in a timely way.

58 However, that is not the defamation that is actually pleaded in the Statement of Claim. The plaintiff is not permitted to amend its pleadings in response to a motion under s. 137.1 of the *CJA* in any event: s. 137.1(6) *CJA*. The only defamation to which I may have reference is that pleaded.

59 What precisely was said of Able in the August 31, 2015 blog postings?

60 Firstly it is said that Mr. Fonseca "must know about ABLE's practices and image and is a part of it. Therefore his claims as a candidate have no credibility".

61 Secondly it is said "I would be p****d that a guy that is part of the ABLE clique be elected to Ottawa".

62 Thirdly, in response to a third-party response to his post, Mr. Vitu responded "ABLE's attitude with interpreters is absolutely deplorable" -- this last, separate post not having been specifically referenced in the Statement of Claim or the Notice of Libel.

63 In the Statement of Claim (para. 10) it is pleaded that the "express and implied meanings in their full context are meant to mean that Able was disreputable in its business dealings and insolvent".

64 There is simply no evidence to substantiate the claim that *blog postings* could in any way suggest that Able was insolvent. Plaintiff's counsel was unable to explain the allegation and I have not considered it further. The hundred or so complaints of interpreters and translators published on the internet -- none of which were repeated by Mr. Vitu -- might suggest such a view but they are not the object of the claim before me.

65 Can it be said that the two posts attributed to Mr. Vitu suggest that the plaintiff is disreputable in its business dealings?

66 The two blog postings would leave an uninformed spectator wondering what they were about. Taken at their highest, the two postings collectively suggest that Able *already* has a questionable reputation that reflects badly upon Mr. Fonseca and suggest that the author, Mr. Vitu, shares that view. They do not make any concrete suggestions as to what the source of that unfavourable reputation might be nor do they provide any basis beyond Mr. Vitu's implicit endorsement to suggest that the reader ought to share in it.

67 Does the mere public suggestion that a business already has a bad reputation among a particular category of people amount to defamation? Would such a suggestion tend to lower Able's reputation in the eyes of a reasonable person?

68 A reasonable person would know that the suggestion is made on the internet and that the internet is replete with claims -- both true and false, both attributed and anonymous. I have no evidence before me from which I could conclude that a reasonable person visiting the N49.com web site would form any view at all about the reputation of the plaintiff based only on the evanescent posting of Mr. Vitu. No particulars of the nature of Able's alleged reputation being provided, a reasonable person would have no basis on which to form any view at all beyond learning that the author has formed a negative view and appears to be looking to contact others with similar negative views to seek greater publicity of the grounds for those views.

69 The "sting" of the words used is slight to non-existent for those unfamiliar with the allegations of the translators and interpreters assembled by Mr. Vitu in his affidavit; for those familiar with them, Mr. Vitu's words provided no basis for a reasonable person's opinion of Able's reputation to be raised or lowered.

70 A claim premised on such a weak "sting" does not meet the required standard of possessing "substantial merit". It is to the contrary marginal and dubious.

71 Failing to satisfy me as to the merits of this essential and material element of its claim, I must therefore find that the plaintiff has failed to discharge its onus under s. 137.1(4)(a)(i) of the *CJA*. The plaintiff has not satisfied me that there are grounds to believe its claim has substantial merit.

> *(iv) Has the plaintiff established that there are "grounds to believe that...the moving party has no valid defence in the proceeding"?*

72 The plaintiff suggests that it has discharged its onus if it can establish that there is a "reasonable probability that there is no valid defence". Without rejecting that language per se, I am not sure that the formulation and reformulation of the words used by the Legislature is helpful in bringing us closer to the desired mark.

73 The *Mugesera* test that I have found helpful suggests that I must look for objective and credible evidence that goes beyond the level of mere suspicion but need not rise to the civil standard of proof to ground my belief.

74 I must also bear in mind that the *same* standard is applied both to measuring whether the plaintiff's claim has "substantial merit" and whether the affirmative defences offered are *not* valid. It is not sufficient that there is some chance the affirmative defence may not succeed. Such a standard would effectively apply a civil standard of proof to the assessment of the defendant's affirmative defences while applying a lesser standard to the plaintiff's own claim. That would turn the statute on its ear and make nonsense of the common "grounds to believe" standard of s. 137.1(4)(a) of the *CJA* to say nothing of the requirement that the claim have "substantial" merit (no similar qualifier being applied to the validity of the affirmative defences).

75 The Statement of Defence pleads truth, fair comment and qualified privilege as affirmative defences. The plaintiff must show than there are grounds to believe that *each* of these affirmative defences is not valid.

76 The principal defence relied upon by the moving party on this motion was that of fair comment. The leading case on this defence is *Simpson v. Mair*, 2008 SCC 40 (CanLII) which summarizes the elements of the defence as requiring that (a) the comment be on a matter of public interest; (b) the comment must be based on fact; (c) the comment must be recognizable as comment; (d) the comment must satisfy the objective test -- that a person could honestly express the opinion based on the proved facts; and (e) the defence may be rebutted by proof of subjective malice: *Simpson* at para. 28.

77 The public interest criterion has already been discussed. In *Simpson*, Binnie J. suggested that the onus of demonstrating public interest is "relatively easy to discharge" (at para. 30).

78 The question of whether the defendant can establish that the comment is based on fact is complicated by the vague and general nature of the defamation alleged in the first place. The comments made reference to Mr. Fonseca's association with the "practice and image" of Able without saying what they are. However, there is a very large body of evidence before me to suggest that there are facts that were well-known to the audience to whom the blog was directed (other freelance translators and interpreters) that would suggest that the "practice and image" of Able was not positive in the eyes of many in that group due to the large number of cases where payment was slow or made only after complaints. The plaintiff's response that most complaints are ultimately resolved does not directly contradict this body of evidence. There is no credible reason to suggest that Mr. Vitu did not honestly and reasonably believe that the body of negative reviews and comments from the community of interpreters and translators was largely true. There are grounds to believe that the comments made by Mr. Vitu could be reasonably expressed having regard to the facts.

79 The plaintiff suggests that it can prove malice. I have seen no evidence that would lead me to expect that the plaintiff can reasonably expect to be able to demonstrate that Mr. Vitu was motivated by malice in making the comments he made. The target of his comment was clearly Mr. Fonseca and not Able. The mere fact that Able and Mr. Vitu's company Express International are competitors does not lead to an inference of malice in this case. The plaintiff has offered no evidence apart from this single fact to demonstrate the existence of malice.

80 The plaintiff has failed to satisfy me there are grounds to believe that the defence of fair comment is not valid. The defence pleaded is a serious one that raises issues on which the credible and cogent evidence before me suggests that the defendant has a reasonable chance of success. I am not required to be satisfied that the affirmative defence *will* succeed on the balance of probabilities any more than I am required to be satisfied that the plaintiff's claim will succeed on the balance of probabilities.

81 In light of my conclusions on the fair comment defence, I do not find it necessary to examine the other defences pleaded, particularly since these received only slight attention from the parties in their written and oral argument.

> *(v) Is the harm suffered or likely to be suffered by the plaintiff sufficiently serious that the public interest in allowing the proceeding to continue outweighs the public interest in the communication?*

82 The burden of satisfying s. 137.1(4)(b) of the *CJA* rests squarely with the responding party plaintiff. In the first stage of the analysis, I am required to consider the harm suffered by the plaintiff or likely to be suffered that can rea-

sonably be attributed to the expression in question. In the second stage, I must consider the severity of that harm when weighing the public interest in affording redress for the harm against the public interest in protecting the communication that caused it.

83 While s. 137.1(4)(b) of the *CJA* does not carry forward the "grounds to believe" language of s. 137.1(4)(a), the summary nature of the proceeding is such that it cannot be presumed that the legislator intended that the plaintiff should be held responsible to prove damages to the full civil standard of proof. However, a "low threshold" is clearly not the appropriate test either. In my view, the evidence of damages suffered or likely to be suffered in consequence of the impugned statements must be such that there is credible and compelling evidence of harm that appears reasonably likely to be proved at trial. In assessing that evidence, I must have regard both to the fact that this is the plaintiff's burden of proof but also duly appreciate the practical limitations on the plaintiff in a constrained, fast-track summary proceeding.

84 When weighing the public interest in affording private redress of that harm against the public interest in protecting the expression giving rise to it, I consider that my task is to conduct that weighing exercise in light of the stated objectives of the legislation as set forth in s. 137.1(1) of the *CJA*. In my view, that does not call for a subjective micro-analysis of the public interest in the actual content of the expression. The public interest is not a numbers game. Some members of the public may attribute more importance to an issue than others. I must be primarily focused on the subject matter of the communication and the degree to which the expression cleaves to that public interest (or strays from it as the case may be). I view the intention of the *PPPA* as being to create a safer space, not necessarily a bullet-proof enclosure, for debate and expression of views. Hateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest were never intended to be sheltered.

85 I therefore turn to consider the question of the harm suffered or likely to be suffered by the plaintiff as a result of the communication. In the present case, the evidence of damages is vanishingly slight and frankly entirely implausible.

86 Common sense suggests that little to no harm can reasonably be expected to be attributable to the statements of Mr. Vitu. There is no evidence that more than a handful of people saw them. They were taken down from the N49.com web site swiftly. The references to Able and its reputation are oblique and would have been largely meaningless to anyone not already familiar with the profusion of negative views of Able expressed on-line by other members of the freelance translator and interpreter community (both attributed and anonymous).

87 The potential negative impact comments of Mr. Vitu on Able's reputation frankly pales in comparison to the very public comments of others that would appear to be far more damaging and thus far more likely sources of any actual reputational harm (both by their tenor and their sheer number). A sampling of a few of such comments immediately preceding Mr. Vitu's comments of August 31, 2015 would include:

a. "Birdslover" on August 27, 2015 wrote: "I strongly believe that legal actions should be done to support the unpaid interpreters like myself. More important is that Anablea Teashee should be in jail"...and "I also request WCB, CHILDEREN HOSPITAL, DOCTORS, LAWYERS and/or any company organization please STOP using Able";

b. "non-member90664" wrote on August 14, 2015: "They are probably so used to complaints at this point that they really couldn't care less. Very sad that company like this stays in business";

c. "non-member89742" wrote on July 8, 2015: "Unreliable company. They never pay the interpreters";

d. "non-member89716" wrote on July 6, 2015 under the bold headline "CHEATERS" that "the booking coordinator will lie to you", "you get trapped and agree to work despite not being paid" and "it will serve them better if Able is sued for criminal criminal offence for holding money of the interpreters"

88 It appears to me implausible in the extreme that material damages could be attributed to the briefly-available and oblique comments of Mr. Vitu to the exclusion of the far more numerous comments similar to those quoted above in the midst of which Mr. Vitu's comments would have had but slight visibility before being removed entirely. I have highlighted only a few of those that preceded Mr. Vitu's comments. The catalogue of comments from October 2015 and later are to the same effect or more extreme.

89 The plaintiff has produced no credible *evidence* (not including mere suspicion) that any of these comments were inspired by or organized by Mr. Vitu. The comments of others (including those coming later than August 31, 2015) would logically appear to be a far more likely vector for any actual reputational damage that Able may have suffered in the latter part of 2015 than the deleted comments of Mr. Vitu on August 31, 2015.

90 If the plaintiff is to demonstrate actual accrued or likely future damages attributable to Mr. Vitu's comments, compelling, credible and cogent evidence would be required to establish both the existence of actual damages (or the basis of estimating future damages) *and* the basis for attributing those damages to Mr. Vitu's comment.

91 Bare statements of the names of allegedly lost clients have been provided in the plaintiff's affidavit without evidence of the volume of business done with those clients in prior periods nor any explanation as to why, assuming any actual loss of business, the loss of such clients can be attributable to the statements made by the defendant as opposed to some other cause. The causal link to Mr. Vitu's comments is not at all self-evident and a bare statement of opinion from the plaintiff that it is so without any reasoned factual foundation to justify the opinion can be given no weight. The same criticism applies to the bare allegation of a 30% loss of revenue without any documentary back-up and without any basis of attribution to the alleged loss to comments of Mr. Vitu.

92 I find that the plaintiff has utterly failed to discharge its burden of establishing that it is likely to be able to prove any damages at all still less that such damages can reasonably be said to arise from Mr. Vitu's comments.

93 I consider the following facts relevant to attributing only a slight public interest in the continuation of the proceeding:

a. The plaintiff has failed to establish that it is likely that it has suffered or will suffer any damages as a result of Mr. Vitu's expression;

b. The plaintiff has made an entirely untenable claim as against the corporate defendant who also happens to be a competitor;

c. The plaintiff has pursued a competitor about comments referring to it only indirectly and that were almost immediately suppressed while providing no evidence that it has taken any similar action against the torrent of far more inflammatory comments made by others, the bulk of which were on the same web site.

94 This last factor -- that the plaintiff has provided no evidence of having reacted with similar vigour to the far more inflammatory statements of others -- leads me to draw the influence that the plaintiff's motives in this litigation are influenced if not driven by a consideration of who made the comments rather than their effect or their content. In short, the plaintiff's claim appears to me to be an instance of having seized an opportunistic pretext to inflict harm on a smaller competitor rather than a *bona fide* gesture to preserve reputation.

95 I find that the public interest in permitting this proceeding to continue is slight.

96 I turn now to consider the public interest in protecting the expression.

97 There is a very high level of public importance that attaches to protecting the ability of members of the public to demonstrate or to call public attention to aspects of the candidacy of an individual running for public office. The community of freelance translators and interpreters that is highly dissatisfied with Able may be a small one. Knowing that Mr. Fonseca was intimately associated with Able at a high level however would potentially be of significant interest to them. Other members of the community may sympathize with their situation and be interested to consider the degree to which Mr. Fonseca's association with Able is relevant to them.

98 The degree of public interest in protecting a particular communication turns not on a tally of how influential the communication might be or how many may find it important. The degree of public interest in protecting an expression can fairly be measured to some degree at least by a consideration of the quality of the expression. By the term "quality" I refer to where a particular expression can be placed on a spectrum that stretches from considered, reasoned debate to unreasoned hatred even where the subject matter is one of public interest. Factors such as hatred, proven malice or gratuitous insults of a serious nature would tilt the balance away from public interest even if the apparent subject matter itself -- the fitness of candidate "X" for office -- is itself clearly in relation to a matter of public interest.

99 In considering the degree of the public interest in protecting this expression, I view the following as relevant factors:

a. Mr. Vitu's communication did not republish the inflammatory comments of others even if it presumed a level of familiarity with them;

b. Mr. Vitu's communication was directed primarily at disclosing Mr. Fonseca's association with Able in terms that would have been largely opaque to anyone not familiar with the public controversy surrounding Able among members of the freelance interpreter and translator community;

c. The suit and threat of suit by the plaintiff clearly asserted a degree of libel chill upon Mr. Vitu and resulted in the suppression of his expression; and

d. Mr. Vitu's status as an (indirect) competitor of Able -- even if smaller in stature - is also clearly relevant.

100 If not completely to the "virtuous" side of the quality of speech spectrum, the above considerations would not place this particular expression very far to the bad side either. Mr. Vitu's status as an indirect competitor unquestionably casts a shadow over his motives, but it does not by itself tilt the balance against protecting this speech.

101 Mr. Vitu did not "light the fire" of controversy surrounding Able's reputation in that small community of free-lance workers. Mr. Vitu's oblique reference to the controversy added no fuel to the controversy that already burned but primarily served to highlight Mr. Fonseca's association with Able. Able may well claim that it was unjustly vilified. If so, it was the product of the combined efforts of others to which Mr. Vitu made no material contribution.

102 The public interest in protecting this expression is a reasonably strong one. Mr. Vitu's communication was moderate in tone, particularly in comparison to those assembled in evidence. While few voters may have found it useful to know of Mr. Fonseca's association with Able, there clearly was a community of freelance workers who may have found it useful information. Mr. Vitu's efforts were effectively muzzled by the plaintiff's efforts. It is not for me to say how many votes may have been influenced by the press conference that was never held or by the contribution to the comments on the N49.com web site that Mr. Vitu was dissuaded from posting by reason of the litigation threats made to him. It is clear that the plaintiff's efforts exerted a material libel chill in this case.

103 I therefore find that the plaintiff has failed to discharge its burden under s. 137.1(4)(b) of the *CJA*. The public interest in protecting the expression outweighs the interest in permitting this proceeding to continue.

Disposition

104 In the result, I have concluded that the defendants have satisfied their onus under s. 137.1(3) of the *CJA* while the plaintiff has failed to satisfy its onus under s. 137.1(4) of the *CJA*. Accordingly, this action must be dismissed.

105 Pursuant to section 137.1(7) of the *CJA*, the defendants are entitled to substantial indemnity costs both for the (successful) motion and for the proceeding itself unless I order otherwise.

106 The plaintiff suggests that such costs ought not to be awarded in this case because its action was commenced before the date the PPPA received Royal Assent (although the PPPA by its terms applied to all actions commenced after the date it received first reading in December 2014) and because the motion raised novel questions of law affecting matters of public interest. Finally, the plaintiff submits that it has been defamed and costs ought not be awarded to a defendant whose conduct, in effect, brought on the litigation.

107 I can attach no weight to the last argument advanced by the plaintiff. I have found no credible evidence that the plaintiff has suffered or will suffer any material damage attributable to the comments of Mr. Vitu. The blaze of controversy was well lit and Mr. Vitu contributed little to nothing to it. The defendants can in no way be said to have "brought on" this action.

108 While I have some sympathy for the plaintiff's position as being the first -- or at least among the first -- to be subjected to the new regime mandated by the *PPPA*, that consideration must be mitigated by a consideration of the fact that the effective date of the new legislation was known and the legislation itself received broad public input (including from the bar). I must also consider that the plaintiff's aggressive actions in this case have generated the very sort of libel

chill that the *PPPA* was designed to combat. The fact that the plaintiff appears to have singled out a small competitor's comments for litigation while taking no steps (at least none disclosed in evidence) to deal with the far more numerous and extreme expressions of opinion by others has led me to draw an adverse inference regarding the purity of the plaintiff's motives in this case. That adverse inference is strengthened by a consideration of the patently flimsy grounds invoked for having added its direct competitor Express International as a party defendant despite the plaintiff's entire lack of evidence that Express International played any role in the affair at all.

109 I therefore decline to exercise my discretion to excuse this plaintiff from the operation of s. 131.1(7) of the *CJA*. The moving party defendants are entitled to their costs of the action and motion assessed on a full indemnity basis.

110 The parties exchanged Outlines of Costs at the conclusion of the hearing and I received their written submissions.

111 The plaintiff's Outline detailed fees and disbursements for the motion of $5,450 on a partial indemnity basis. On a full indemnity basis, Mr. Radnoff's Outline provides incomplete data from which an estimate of $8,450 would be reasonable. He did not provide an Outline applicable to the entire proceeding.

112 The moving party defendants provided an Outline totaling $35,086.98 for the entire proceeding. Mr. McGhee's claimed rate of $450/hr on a full indemnity basis is only slightly higher than the $425/hr claimed by Mr. Radnoff. Both rates are well within the range of reasonable having regard to the Costs Subcommittee of the Civil Rules Committee from 2005.

113 The plaintiff suggests that the moving party defendants' claimed hours were excessive and points to the significantly higher number of hours expended by Mr. McGhee as compared to those expended by Mr. Radnoff for the relevant steps in the proceeding where their respective Outlines permit comparison. While I am not inclined to dive into an hour-by-hour comparison of the efforts expended by each given the entitlement of the defendants to full indemnity costs, I am persuaded by Mr. Radnoff's written submissions that Mr. McGhee's claimed hours appear somewhat unreasonable in all of the circumstances and warrant some modest but downward adjustment.

114 I am therefore ordering that the plaintiff shall pay the full indemnity costs of the defendant for the proceeding and motion that I fix at $30,000 all inclusive.

S.F. DUNPHY J.

1 The plaintiff claims the response to the comment of Mr. Mohammed was posted on the same day (August 31, 2015). A review of the contents of Mr. Vitu's response that refers to August 31 in the past tense suggests the dating may be somewhat off. However nothing turns on the chronology to that level of detail -- it was either the same day or some number of days afterwards.