

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Level One Construction Ltd. v. Burnham*,  
2018 BCSC 1354

Date: 20180814  
Docket: S147988  
Registry: Vancouver

Between:

**Level One Construction Ltd. and Randy Kautzman**

Plaintiffs

And

**Marla Burnham, Canadian Broadcasting Corporation, Eric Rankin,  
Jenni Sheppard, Wayne Williams, Chris Foe, Chris Poe, Kim Yoe,  
Chris Sloe, Kim Loe, John Doe and Richard Roe**

Defendants

Corrected Judgment: The first page of this judgment was corrected  
on August 16, 2018

Before: The Honourable Madam Justice Sharma

## Reasons for Judgment

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Place and Date of Trial:

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Place and Date of Judgment:

Vancouver, B.C.  
August 14, 2018

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## **I. OVERVIEW**

[1] This is an action for defamation. The plaintiff, Randy Kautzman, is the president of the other plaintiff, Level One Construction Ltd. (Level One), which is in the home construction and renovation business.

[2] In October 2013, Level One entered into a contract with the defendant, Marla Burnham, to complete renovations at her home. A dispute arose between them about part of that work and Ms. Burnham wanted to cancel the contract. Level One claimed if she cancelled the contract, it was entitled to retain a portion of the deposit that she had paid. Ms. Burnham found that stance unfair and started a small claims action against Level One in B.C. Provincial Court. Her notice of claim was filed in January, 2014. Level One filed a response in February, 2014.

[3] Ms. Burnham also contacted the defendant, the Canadian Broadcasting Corporation (CBC), about her experience via a website soliciting input for a feature called "CBC Investigates". The defendant Eric Rankin was the reporter assigned to the story. He conducted an interview of Ms. Burnham on February 12, 2014 (CBC Interview), parts of which were included in a broadcast televised on February 14 (Television Broadcast). That broadcast was summarized on the CBC's website the same day that the broadcast aired (Online Story). In addition, Ms. Burnham posted a review recounting her experience with Level One on Yelp, an internet business directory that permits people to submit comments about the businesses (Yelp Posting).

[4] The plaintiffs allege that during her interview, and in the Yelp posting, Ms. Burnham defamed them. The plaintiffs further allege that her defamation was republished by the CBC Defendants, including Mr. Rankin, Jenni Sheppard, Wayne Williams and series of John Does (collectively the CBC Defendants) in the Television Broadcast, the Online Story and by third parties on the internet. The plaintiffs also claim the Television Broadcast and the Online Story defamed them.

[5] In defence to the action, the defendants deny that the words spoken and published have a defamatory meaning. But in the alternative, Ms. Burnham pleads

justification, fair comment and qualified privilege. The CBC Defendants alternatively plead responsible communication, fair comment and qualified privilege.

[6] For the reasons explained in this judgment, I conclude the plaintiffs' claims are dismissed because no defamatory meanings were conveyed by the defendants. In the alternative, I find Ms. Burnham can rely on the defence of justification to the extent described in para. 176, and fair comment; the CBC Defendants have established the defence of responsible communication and fair comment.

## **II. FACTS**

[7] Unless specifically identified as being in dispute, the following narrative constitutes my findings of fact, which are gleaned primarily from the testimony of the non-expert witnesses called by the parties.

[8] The plaintiffs called seven non-expert witnesses. In addition to Randy Kautzman, Maurice Blair and Hans Helder testified, both of whom worked for Level One on Ms. Burnham's project at the relevant time. The plaintiff also called Alex Dumitru (a Level One employee who dealt with marketing), Audrey Le (Level One employee responsible for accounting) and Della Glendenning (a one-time potential customer of Level One who saw the Television Broadcast).

[9] The CBC called three witnesses: Mr. Rankin, the reporter who investigated, researched and performed the interviews that provided the material for both the Television Broadcast and the Online Story; Ms. Sheppard, who wrote the Online Story, and Wayne Williams, senior news director. Ms. Burnham testified on her own behalf and did not call any additional witnesses.

### **A. The Final Estimate and the Contract**

[10] In 2013, Ms. Burnham inherited some money from her father and decided to renovate her home. In particular, she wanted to finish the basement, replace the roof on a shed and have a shed built that could later be turned into a sauna (whether her intention relating to the last item remained the same throughout her dealings with Level One is a matter of controversy).

[11] She conducted research on the internet and decided to put in a request on HomeStars, which is a website for home construction and renovation companies. People submit a request describing the nature of the work they want done, and HomeStars forwards the request to the relevant companies. It is then up to those companies to contact the potential client directly.

[12] In early September, 2013, two companies replied to Ms. Burnham's request on HomeStars, including Level One. The other company was Vancouver General Contractors, one of Level One's competitors. Ms. Burnham decided to go forward with Level One having been impressed by the professional appearance of their website, the reviews and the positive interaction she had with the person Level One sent to provide an estimate for the cost of the job (Maurice Blair).

[13] Mr. Blair came to Ms. Burnham's home on September 13, 2013 and walked around her property in order to understand the work that she wanted done. He stated he would provide an estimate, which he did on October 1, 2013. Ms. Burnham identified errors on that estimate, including items that were not part of her renovation project. She speculated those items were "cut and pasted" from a different estimate.

[14] Mr. Blair addressed the errors and prepared a revised estimate on October 15, 2013. Some more minor changes were required to that, and he provided a third estimate on October 15, 2013, which was for \$18,908.51 (the "Final Estimate"). Ms. Burnham was satisfied with the Final Estimate and agreed to sign a contract on that basis.

[15] The work described on the Final Estimate for the disputed sauna shed was:

Sauna

Build a Sauna (5'x6') Cedar with Cedar Shingles

[16] Mr. Blair testified that despite that wording, the contract price did not include building a complete sauna, but only a shed that could be converted into a sauna priced for \$1,500. Ms. Burnham confirmed under cross-examination that she understood the \$1,500 price to be only for a shed, not a fully-functional sauna.

[17] She attended Level One's office on October 21, 2013 and met with Mr. Blair. She signed the contract and it was witnessed by Hans Helder, who ultimately became the project manager. The total price of the contract was \$18,908.51, as stated in the Final Estimate.

[18] Mr. Blair testified that at the contract signing, he introduced Mr. Helder to Ms. Burnham by name and told her he was one of the company's project managers. However his evidence was inconsistent with both Mr. Helder's and Ms. Burnham's recollection. I find that Mr. Helder was not introduced to Ms. Burnham as the project manager at that point. He was simply asked to witness the signatures on the contract as he happened to be walking by the office at the relevant time.

[19] Ms. Burnham paid a \$5,000 deposit. She was told by Mr. Blair that the next step was that a project manager would come to her home to review the work with her. Mr. Helder did that on October 28, 2013. He confirmed he had a copy of the Final Estimate with him when he went to Ms. Burnham's home.

### **B. The Project Forecast Proposal**

[20] The parties dispute what was discussed during the October 28 site visit, particularly about the sauna shed. Ms. Burnham testified at no time did she indicate that she wanted Level One to build a fully-functional sauna. She maintained that she wanted a shed built that could later be converted into a sauna. She claimed that her instructions to Level One never changed with regard to that part of the project.

[21] However, Mr. Helder testified that Ms. Burnham expressly told him that she wanted a sauna built. He told her that a sauna could not be built for \$1,500 and that he would research the issue and get back to her. Mr. Helder says that Ms. Burnham informed him that she had done research on saunas and would send that research to him.

[22] The parties agree that later that day, Ms. Burnham sent Mr. Helder an email with a hyperlink to a website about "sauna kits". As I understand it, those are prefabricated sauna buildings intended for residential use that require some

assembly by the home owner. Those websites also listed all the components of a sauna, which could be purchased individually, and their prices. Mr. Helder testified Ms. Burnham never mentioned that the website was meant as a reference only. He also testified that Ms. Burnham gave him a drawing she made and told him this is what the sauna should look like (where the power was to go, the location of the heater, etc.).

[23] The plaintiffs' position is that during this site visit, Ms. Burnham was either unclear about what she wanted, or decided she wanted Level One to build a sauna for her. I discuss that factual discrepancy later in this judgment (see below at paras. 65-75).

[24] Mr. Helder sent by email to Ms. Burnham an updated cost proposal for the project on November 12, 2013, including the price to assemble a sauna kit or build a sauna; Level One labelled this document "Project Forecast Proposal" (the "Final Forecast"). The plaintiffs' position is that the Final Forecast is entirely different than an estimate. The price on the Final Forecast was \$35,536.31. With respect to the sauna shed, the Final Forecast lists the prior "estimated" cost as \$1,500 and the new "forecasted" cost as \$12,750. The work described on the Final Forecast for the "sauna" was:

Sauna

To build a 5'x7' Cedar Sauna with Duriod Shingles. Two options available first is with a Complete Kit supplied by Home Sauna Kits (see attachment 1) includes everything except the floor base & the duriod shingles (cheapest option) Second option is to build a shed from scratch then buy the interior also supplied by Home Sauna Kits (attachment 2) which costs \$750 more.

[25] Ms. Burnham was frustrated and confused to receive the Final Forecast because the cost had almost doubled. She felt misled. In her mind, she had not changed the scope of the project in any way, so she did not understand how or why the price would increase so dramatically. Ms. Burnham acknowledged during cross-examination that when she saw the revised price in the Final Forecast, she understood that the new pricing included a fully-functional sauna, not a shed.

### C. Refund and Request for Non-Disclosure Agreement

[26] In his November 12, 2013 email to Ms. Burnham (which attached the Final Forecast), Mr. Helders wrote:

...While you were gone & over the past week I have had a chance to put together what we call a Project Forecast derived from your Estimate / my onsite visit as well the sub-trades that will be needed to work on your project. The thing that stands out the most to me and sends out a big red flag on your estimate is the cost of building that Sauna for you. I have attached for you above a couple of options regarding building of Saunas which will show you that the estimated cost of \$1,500 is completely unrealistic??? I have no idea how Maurice came up with this number unless it was a misprint or he forgot to add a zero or something. ...

I understand that all these extras have substantially increased the cost of your project and that due to this increase you may not wish to continue with it. If you so desire you do have the option of changing your mind and requesting your moneys [sic] back. ...

[27] There was a discrepancy in the evidence about whether Mr. Helders had the authority to offer a refund to Ms. Burnham. At his examination for discovery, Mr. Helders said that he had that authority, but he testified at trial that he did not. Mr. Kautzman testified that Mr. Helders would not have had authority to decide whether to refund the deposit.

[28] I find that when Mr. Helders sent the above email to Ms. Burnham, he believed that he had authority to return her deposit, and he conveyed that belief to Ms. Burnham. I base that on the wording of his email and his examination for discovery evidence. In terms of the issues in this case, it does not matter if Mr. Helders' belief was correct because I am satisfied that he conveyed to Ms. Burnham that he had that authority, and she relied on his statement.

[29] Ms. Burnham cancelled her contract with Level One because she was frustrated with the entire experience. In addition to the shock of the price of the Final Forecast, she felt that there had been delays in providing the estimates, there were errors in the second estimate and the work was not scheduled to start when she expected. In particular, she did not get the first estimate for about two weeks, even though it was promised to arrive within a few days. After informing Mr. Blair of the

mistakes in that first estimate, she again had to wait about two weeks before receiving the Final Estimate. It was mid-November when the Final Forecast arrived.

[30] Ms. Burnham responded to Mr. Helder's November 12<sup>th</sup> email, which attached the Final Forecast, later that same day:

Needless to say I am disappointed with the new estimate. I am well aware of the cost of kit saunas, and had already priced them out before Level One's original quote. I think I had you guys come out at the beginning of September and [nothing has] happened, now [it's] mid November the price is 25% higher....I'm guessing that your company is not too keen on the job, judging by the pace and variety of quotes and estimates. I don't have a lot of confidence in this process anymore and I would like to get my money back. I am a little astounded by the differences in the project estimates and truthfully feel frustrated by the whole process.

I hope I will be able to get my money back in full ASAP...

Please let me know how to get my refund underway.

[31] Mr. Helder forwarded Ms. Burnham's email to Mr. Kautzman who replied, "If she priced out the sauna and knew the costs and [ours] was 1500 why didn't she speak up sooner?" Mr. Kautzman then forwarded the email exchange between Mr. Helder and Ms. Burnham to his partner at the time, Eduardo Silva. The following day, on November 13, Mr. Silva wrote in a reply email:

...Well lets get some info first:

-When did she sign the contract with us?

-What was the starting date and completion date that was put in the contract?

-Did she sign the estimate together with the contract and ALSO did she sign the top of the estimate where it shows that all items are allowances?

-Who signed the contract with her? Did we promise anything to her? i.e. start date? Or cost to be super close to estimates etc.?

-How much is the entire project? And how much is LABOUR only? (I just want to see how much her penalty would be)

If we need to reply to her ASAP just tell her that we will look into it.

Give me all the answers as this will make it easier to judge I guess...

Let's learn from this situation as I sort of forecasted this situation. This is a HUGE risk for us to take as this [sic] people can post a bad review for shit like that! ....

[32] Later that day, Mr. Kautzman sent the following reply to Mr. Silva, copied to Mr. Blair and Mr. Helder:

...I think it is fair she pays for their time of over 8 hrs of research. If she knew the cost of the saunas beforehand why didn't she put up her hand and say something...I am going to forward this to Maurice to fill out the information and return it to you. Give me your input and yes it's a way for this woman to give us a bad review but I do know she is working without permits so let's see what happens first. Maurice wants to call her first. She initially did not want a sauna rather a shed is my understanding and did not provide any drawings or anything until the day she came in to provide a hand sketch. Let Maurice call her and feel her out and see what we can do to appease her. If Maurice explains that the estimate was based on a hollow shed we may be able to work with her. Maurice please call her and please fill out the information for Eduardo and send it back to him...

[33] Mr. Kautzman told Mr. Blair to call Ms. Burnham and tell her that the price for the project had increased because she had changed the scope of work, and that she would be charged an administrative fee of an undetermined amount to terminate the contract.

[34] Mr. Blair had a telephone conversation with Ms. Burnham on or about November 13<sup>th</sup> in which he conveyed what Mr. Kautzman instructed him to tell her. Ms. Burnham confirmed she was told Level One would charge her an administrative fee because she had changed the scope of the work.

[35] Ms. Burnham was taken back. She had a vivid recollection of the conversation not only because of its content, and her response, but she remembered she had been cycling on her way to work (something that Mr. Blair recalled about that conversation also). She informed Mr. Blair that she would tell everyone she knew about her experience. The evidence was clear that Ms. Burnham did not mention a negative review of the company until after learning about the administrative fee.

[36] In an email dated November 14, Mr. Kautzman sent the following to Ms. Burnham:

Good Morning Marla,

I have spoken to both Hans and Maurice, and have also received your email... It's disappointing that you have decided to go with another contractor and want to release Level One. Considering your contract signing was held on October 21<sup>st</sup>, it has only taken us around 2 weeks to get quotes back for materials. Unfortunately, the process does take time. We don't believe that billing you for this time is not out of line for any estimate [sic], especially to get through the project estimate phase. This has taken us a lot of time and cost to our company.

We have no issue refunding your deposit pursuant to our signed contract. We are well within our rights to implement the penalty portion of the contract to cover the 8 hrs Hans worked on your project forecast and tracked down multiple suppliers as well as just a standard cancelation penalty. One thing we are unsure of is why you didn't call or email when you saw the allowance for the sauna was priced at \$1500.00, if you knew, in advance, the costs of sauna packages you had researched. There was also discussion about you wanting just a simple shed which could be converted into sauna later. That should have been cause for you to email or call your project manager or the estimator. Because estimating is such a difficult process without drawings and permits, it makes it incredibly challenging to envision what the client wants/sees in comparison to what the estimator wants/sees.

The penalty for cancelled items is 15% of the contract total labor (clause 5.11) \$1399.22 penalty for cancelled labor; however, I am only interested in the costs of covering the wage of those who worked on your project after you signed your contract, and believe that will be less than the 15% cancellation clause. We have blocked off time for your project and now we need to mitigate our damages.

I was informed that you are interested in spreading your negative opinions about Level One during a telephone conversation you had with Maurice. I find this suggestion unprofessional and a borderline threat. Considering we have not done anything other than try to complete your project at your request. I find these comments unfair and see no need for you to have made those threats. Stating to our Estimator that you will deliberately and intentionally malign or defame my company is nothing less than an effort to extort your deposit back and this would certainly be met with immediate legal action if it were to occur. All conversations going in and out of our office both by phone and computer are monitored and recorded.

I would like to propose the following:

Level One will deduct the costs of the project management fee, from your deposit, for the time we have invested on sourcing out your project items. We will refund the balance, and will forego the 15% penalty of the whole signed contract, in lieu of covering the project manager costs, as well as a standard non disclosure, non complaint and non posting agreement that we would require you to sign when preparing your refund. I can have your cheque and the non-disclosure agreement printed up for you to sign within the next few days. You will be contacted to arrange a time for a signature meeting.

I would also like to warn you of the repercussions for not using permits when building. You can almost always assume someone will call into the city and make a report of illegal renovations that have taken place or will take place. Please read more about the importance of permits here [hyperlink omitted].

[37] Mr. Burnham responded by email to Mr. Kautzman on November 19, 2013 stating:

I would like to acknowledge receipt of your email dated November 14, 2013. I wish to inform you that I have been seeking professional advice regarding this matter and have found that your company owes me a complete refund for the following reasons:

- 1) Your Company's estimate is one of several I received. I signed a contract in good faith and paid a deposit based on the estimate provided by your company. When work was due to begin I received a second estimate nearly doubling the original, effectively breaking the signed contract.
- 2) The point of getting an estimate is to seek out the estimated cost of a project. It is not the client's responsibility to [sic] how much various items cost and any time spent on researching materials and their cost should be completed prior to providing an estimate.
- 3) If your company made errors on the original estimate, then that is your responsibility, not mine. You cannot change the terms of the contract without my consent. Nor is it acceptable for you to extract monies from the deposit for work that should have been completed prior to the original estimate.
- 4) Your email seeks to intimidate me and try to force me to pay for errors that your company made. This is both dishonest and unethical.

[38] Later that same day, Mr. Kautzman sent the following email to Ms. Burnham:

Actually, the intimidation started with you wanting to "bad mouth" my company to get a full refund. I am well aware of contract law and have had one or two issues similar to yours in the past 12 yrs, and that is why our contract is structured the way it is.

When signing you are signing the contract as "allowances" and a place holder for us to book in your project and securing an allotted time. Your indecisiveness with the shed and or sauna issue was explained to you both by Maurice and Hans. Without knowing exactly what you wanted it is impossible to give you an accurate estimate that is why we use allowance. We provided you a free estimate and not a quote. The next phase after the estimate and contract signing is to provide you a "project forecast". You were aware of all costs at the time and "Allowances" as you initialled each and every section. Your issue seems to be specifically the sauna. The sauna specifications could be changed to many different saunas and many different costs.

These are the same documented procedures we use for each and every client and never has one reneged on a contract knowing full well each and every item was an allowance and you were free to cancel any portion of the signed contract with a penalty. We have not breached or changed the conditions or terms of our contract as you have stated, the terms and conditions are in your contract. If it was a fixed price quote or contract you have every legal right not to allow changes. You would be correct in your assumption that a contract cannot be changed without the approval of all parties.

That being said you have your options and we will certainly exercise ours as the terms of our contract and contract law stipulates if you leave a deposit you can lose your deposit 100%. Please refer to item 5.13. You were in no way forced to sign any agreement with our company and Hans and Maurice have been in constant contact with you and each and every meticulous detail was explained to you at your contract signing.

I am certainly willing to provide you with a refund minus the costs we spoke of or I can exercise my right to hold the full deposit and mitigate my damages for the time and profit our company lost, as well as the damages done to our company for lost revenue for the time slot you have now left void. I believe your counsel may be giving you misinformation considering the terms and conditions are clearly itemized in our contract (again which you initialed as well as them being explained to you before the contract signing), and in accordance with contract law in BC.

I do have a release for you to sign anytime at our office. You are more than welcome to call the office and book a time to come in and pick up a cheque and sign the release.

[39] Ms. Burnham testified that she found these emails unpleasant and intimidating. The plaintiffs challenged that characterization. Mr. Kautzman testified that in those emails he was trying to persuade Ms. Burnham to continue with the contract by simply removing the sauna work. He stated that from his perspective the working relationship with Ms. Burnham was “not dead in the water”.

[40] I do not accept Mr. Kautzman’s interpretation given the tone and content of the emails, especially in light of other evidence. The correspondence is not consistent with an invitation to Ms. Burnham to continue in the business relationship.

[41] In the November 14 email, he stated that he has “no issue refunding your deposit” but that they are “well within our rights to implement the penalty portion”. In his conversation with Ms. Burnham, Mr. Helder confirmed he did not mention any

penalty, just an “administrative fee”. In that context the tone of Mr. Kautzman’s email could be interpreted as antagonistic.

[42] Mr. Kautzman also used strong language when stating that she was going to “deliberately and intentionally malign or defame” Level One, which Mr. Kautzman labelled “nothing less than an effort to extort your deposit back and this would certainly be met with immediate legal action if it were to occur”. It is simply unbelievable that a company that threatens to sue a customer is trying to keep the business relationship alive.

[43] I also find the following extract to be a direct threat:

I would also like to warn you with the repercussions for not using permits when building. You can almost always assume someone will call into the City and make a complaint of illegal renovations that have taken place or will take place.

[44] Mr. Kautzman testified this was not a threat; he claimed he was obliged to raise the concern because of health and safety issues. I do not find his claim to be credible. Before the contract was signed, there was a brief consideration of getting permits, and Ms. Burnham admitted she preferred not to. That is because, in her words, a renovation done years ago at her home had some “unconventional qualities”. Although that work had been supervised by a structural engineer, no permits were obtained. Email correspondence confirms that Mr. Kautzman approved moving forward with her project without getting the required permits.

[45] Moreover, Mr. Kautzman eventually did report Ms. Burnham to the City about three weeks after the Television Broadcast. Ms. Burnham testified that a City inspector did, in fact, visit her property and found several elements of her home were not compliant.

[46] Any attempt to paint that report to City Hall and that portion of his email as anything other than retaliation is simply not believable. I find that Mr. Kautzman’s email was a threat and reasonably perceived as such by Ms. Burnham. I find it was a bullying tactic to discourage her from seeking redress from Level One.

#### **D. Media Contact**

[47] Ms. Burnham drafted a document outlining her experience with Level One and attached it to an email dated January 20, 2014 that she sent to various media agencies, including the CBC. That document was titled by Ms. Burnham as "Potential Scam". The CBC decided to investigate further for the possibility of a story. The story eventually ended up with Mr. Rankin to pursue.

[48] Mr. Rankin is a very experienced and highly regarded journalist with over 40 years of experience. Wayne Williams and Jenni Sheppard both testified about their confidence in his abilities and sound judgment. Mr. Williams' role was to oversee CBC's news operations in B.C. Among his other duties, he managed the budget, dealt with hiring staff, gave advice on policy and standards and responded to complaints. At the time of the publications, the CBC Investigates team was comprised of Mr. Rankin, Paisley Woodward, an experienced producer, and Allison Broddle, the executive producer. Jenni Sheppard was an online writer and editor for the CBC who conducted research, wrote topical analyses and copy-edited.

[49] Ms. Woodward forwarded Ms. Burnham's email to Mr. Rankin on February 11, 2014 as a potential story. He did some initial investigation, including contacting the Better Business Bureau (BBB) to inquire about Level One's status with that organization. He also asked about the process for getting a refund for a home renovation contract, in general. He obtained a copy of Ms. Burnham's notice of claim in small claims court, and reviewed the contract that was attached to Ms. Burnham's email. Ms. Woodward conducted background checks of both Mr. Kautzman and Ms. Burnham. Mr. Rankin attempted to contact previous customers of Level One.

[50] Only after those initial investigations, did Mr. Rankin call Ms. Burnham on February 12, 2014 to conduct what he called a "pre-interview". One of the purposes of that phone call was to introduce himself, but also to gauge whether Ms. Burnham's version of events was consistent with the documents she sent, and he reviewed. He also wanted to get a sense of how well she could express herself,

which was an important factor in deciding whether a news story was appropriate for a television broadcast.

[51] Later that day, Mr. Rankin attended at Ms. Burnham's property with a camera operator and conducted an interview. In addition to recording Mr. Rankin's interview with Ms. Burnham, the CBC recorded some video footage of Mr. Rankin and Ms. Burnham walking around her property. After he returned to the office, Ms. Burnham sent Mr. Rankin some further emails and documents about her interactions with Level One.

[52] Mr. Rankin contacted Mr. Kautzman the next day by telephone to get his side of the story. Mr. Rankin testified that at the end of his conversation, Mr. Kautzman said he had "no problem providing Ms. Burnham a full refund", but that he needed to consult his lawyer. Mr. Kautzman did not recall saying this, but he could not deny that he might have said this.

[53] On a balance of probabilities, I find that Mr. Rankin's recollection is accurate. As Mr. Rankin explained, the comment was memorable to him because it meant Ms. Burnham's problem had been resolved. That resolution would have made for a better story that would be attractive to any news outlet because the investigative team could portray itself as being responsible in some part for Ms. Burnham's getting a refund.

[54] Mr. Kautzman's comment also surprised Mr. Rankin given the documents he had seen, and what Ms. Burnham had told him. During his telephone conversation, he asked Mr. Kautzman to give an on-camera interview to respond to the complaint and offer Ms. Burnham a full refund. As Mr. Rankin testified, that would have made for "great television".

[55] About two hours after their initial conversation, Mr. Rankin called Mr. Kautzman to follow up. At that point, Mr. Kautzman stated that after talking to his lawyer, he would not offer Ms. Burnham a full refund. Mr. Kautzman said he would think about appearing on camera.

[56] Later that day, Mr. Rankin attended Level One's office with a camera operator in order to obtain video footage of the business for the Television Broadcast. Mr. Rankin spoke briefly to Mr. Kautzman. There was a dispute as to what was said at that time, but the content of their conversation is not material. It is clear, however, that Mr. Kautzman did not give an on-camera interview. It was also clear that Mr. Kautzman was upset that the CBC was filming his business.

[57] At about 2:00 p.m. on February 13, Mr. Kautzman emailed Mr. Rankin asking the CBC to provide him with the questions in advance of an on-camera interview. Mr. Rankin and Mr. Williams testified that they spoke after receiving Mr. Kautzman's request. They confirmed it was inappropriate to provide Mr. Kautzman with the interview questions ahead of the interview as it was contrary to the CBC policy. At 3:00 p.m. Mr. Rankin informed Mr. Kautzman by email that he would not provide questions in advance of the interview. He made it clear that the CBC had a deadline of noon on February 14, 2014, and that if Mr. Kautzman wanted to respond to the story it had to be done before that time. In the same email, Mr. Rankin also described the topic of the story as, "Marla Burnham's 5 thousand dollar deposit, the revised (nearly doubled) estimate by Level One Construction & Renovation and her position she is due a full refund of her deposit".

[58] Mr. Kautzman replied to that email at 5:42 p.m. that day:

Hello Eric:

I respectfully wish to decline an on camera interview, however, the following is our statement with regard to Ms. Marla Burnham.

Level One Construction entered into a signed contract which included a provision for costs associated with a cancellation. She is being charged the cancellation fee. When we enter into our contracts we have to go through the process of putting together the bids and confirm estimates, commit our workers to schedules which precludes us from other jobs. Ms. Burnham cancelled the job and then was subject to the cancellation fee.

[59] Mr. Kautzman confirmed during his testimony that he would not have agreed, under any circumstances, to do an on-camera interview. Level One's email statement was reproduced in its entirety in the Online Story, but not in the Television

Broadcast. The CBC submits that the substantive content of Mr. Kautzman's email was contained in the Television Broadcast wherein Mr. Rankin stated:

Randy Kautzman stepping in, pointing out the contract contained a 15% cancellation penalty. If she promised not to post a negative review online, he'd settle for a little less – labour expenses and only pocket \$1000 of her deposit

## **E. The Allegedly Defamatory Expressions**

### **1. Ms. Burnham's CBC Interview**

[60] On February 12, 2014 Ms. Burnham gave audio and audiovisual interviews to the CBC. The plaintiffs say in those interviews Ms. Burnham defamed them. Although I have reviewed and considered the complete interview, for convenience I will reproduce here only what the plaintiffs have particularized in their December 1, 2016 amended notice of civil claim as the defamatory words:

**Question by Mr. Rankin:** Now it didn't turn out that way. Tell me what it turned into for you?

**Response by Ms. Burnham:** Well it turned into a kind of long unpleasant experience where I felt really, you know, had. I felt kind of as though I had been scammed. You know, they gave me one price got to me sign a contract and then the price doubled before any work had begun. And I just felt that it, there was something really dishonest going on...so I signed for a contract based on about \$18,000 for the work. For the three areas. And that seemed like a reasonable price to me and that's kind of what I wanted to spend. I didn't want to spend a lot more. And so it seemed, and you know that there might be things come up on the job, you know you have a little contingency, but you know, I wanted to keep it reasonable. It's not a palace. You know, it is just a basement.

**Question by Mr. Rankin:** And you come back from vacation and something completely different is presented to you?

**Response by Ms. Burnham:** That's right.

**Question by Mr. Rankin:** What went through your mind when you saw that?

**Response by Ms. Burnham:** Well I was shocked. I was really, really shocked because I thought I was going to come back and there would be workmen in my house starting that very week. And that is what I was led to believe. And instead I just received an email with another estimate for the same work for twice as much money, for \$35,000.

**Question by Mr. Rankin:** And what did you think when you saw that almost doubling of the estimate?

**Response by Ms. Burnham:** I was just totally shocked. I was really, I just couldn't believe it. I couldn't believe it. And I, and I just thought "they can't do

this.”...I totally lost all faith in the company when I received a second estimate for twice as much money. ...

**Question by Mr. Rankin:** But I guess the point is it is not your error, it is their error? You tell me that?

**Response by Ms. Burnham:** No. I think it’s definitely not my error. ... My error was having faith in that company and thinking they were straightforward and upfront. ... And I can’t be held responsible for the mistakes they make in their estimates. ...

**Question by Mr. Rankin:** But there is a key thing here and that is you signed a contract with their estimate being \$18,000. And then they changed kind of the rules of the game. I mean explain that to me. Tell me a little about that; how you feel about that difference?

**Response by Ms. Burnham:** Well I just find it kind of totally bad business, right, to change the price. I mean it would be one thing if they had gone on the job and found there was a pipe going through the property that had to be removed or something, but no one so much as lifted a hammer in this situation. They just gave me one estimate, and then when the work was supposed to begin gave me another estimate which was twice as much money. So they got me to sign based on one price and then changed it which just seems super dishonest to me.

**Question by Mr. Rankin:** ... You’ve signed a contract that said \$18,000. They change it to \$35,000 and somehow expect you to still abide by that contract?

**Response by Ms. Burnham:** ...But, you know, according to the emails that I have had from him, you know, he is prepared for this sort of thing and that, you know, he has clearly done this before. ...

**Question by Mr. Rankin:** Let’s talk about that extortion aspect, too; the fact that they were trying to get that non-disclosure, and how you feel about it? ... So tell me about the other thing that disturbs you or bothers you?

**Response by Ms. Burnham:** Well, they would only give me whatever mystery portion of money that, I don’t know what it was going to be, back if I signed a non-complaint, non-post, non-disclose form, right? So I found that kind of like extortion because, ... if they stand by what they have done then why would they have any issue with me posting or complaining? If they feel like what they did was okay then why can’t I go on to Yelp or HomeStars and say “I had a really bad experience with this company. This is what they did”? But for me, the only time they ever talked about giving me back my money was with that form being signed. And he went on to email me days, day after day ... saying “when are you coming in to sign this form?” ...

**Question by Mr. Rankin:** You feel let down out by those online searches?

**Response by Ms. Burnham:** I do, absolutely. And I feel that ... a really interesting aspect of this is that ... you’re not seeing a true reflection of the business because they are not - anyone who is having a bad experience is having to sign the non-post, non-complaint, non-disclosure form to get their money back. And you know, truthfully, I’m fortunate enough to not be under pressure and need that money immediately. But a lot of other people I think

would be really intimidated by the tactic and just take what they can get. .. honestly I kind of half expected a brick through the window. That's the kind of vibe I get from the guy...I got this thing on LinkedIn that he has looked at my profile a couple of times, right? ... And that's kind of creepy, right? ... I don't think they left me any choice but to cancel. ... I didn't have the money for twice as much. ... What choice do you have but to cancel under those circumstances? If it was five grand or seven grand more. ... it is something you are kind of prepared for ... when you do something like this, but twice as much. ... The difference was so huge and they both work for the same company.

## **2. The Yelp Posting**

[61] On or about June 6, 2014, Ms. Burnham posted a review of her dealings with the plaintiffs on Yelp (the Yelp Posting) which read:

*I had several contactors through [sic] a relatively small construction project/ series of projects at my home and chose Level One because the Project manager seemed straightforward and honest. After signing a contract with the company a different project manager came by as he would be the one managing the job. I went away with the promise that a schedule of work would be drawn up and work would begin upon my return. Instead I returned to find a new estimate for the same job, but double the price. In his email the project manager told me that he understood that it was a great deal more money and that I could ask for a refund of my deposit. When I did make that request the first project manager told me that they would be holding some money back for administrative costs. I said I wanted a complete refund because they doubled the price for the same job and I wanted a full refund. I was then contacted by the owner of Level One who told me that I could get a portion of my deposit back so long as I signed a non complaint, non disclosure, non post form. After beginning a small claims actions [sic] I contacted a consumer interest reporter at the CBC because the process seemed pretty questionable.*

[62] At the end of the Yelp Posting Ms. Burnham included a hyperlink to the Online Story which contained the Television Broadcast.

## **3. The CBC Television Broadcast**

[63] On February 14, 2014 the CBC Defendants aired the Television Broadcast. The Television Broadcast aired for approximately two minutes and forty-one seconds. The plaintiffs say the Television Broadcast defamed them. In their December 1, 2016 amended notice of civil claim, they provide the particulars as follows:

TIME	VISUAL	AUDIO
00:00	<p>Anchorperson Gloria Macarenko speaking to the camera</p> <p>Graphic: “CBC News INVESTIGATES” appears on television monitors in the background.</p>	<p>Gloria Macarenko:</p> <p><i>Most of us can remember a time when the estimate of a job came in way less than the actual cost.</i></p> <p><i>But what happens when a renovation contract doubles before construction begins?</i></p> <p><i>Well, one local woman tried to cancel, but she says the contractor refused to refund her full deposit.</i></p> <p><i>So she brought her case to our investigative team and Eric Rankin picks up the story there.</i></p>
00:24	<p>Ms. Burnham and Mr. Rankin walking towards camera in a back-yard concrete patio area.</p> <p>Graphics: “RENOVATION RULES”, “INVESTIGATES”, and CBC logo with the caption “CBC news”</p>	<p>Ms. Burnham:</p> <p><i>Well I thought it was going to be really simple...</i></p>
00:27	<p>Ms. Burnham grabs and lifts the edge of a shed roof while Mr. Rankin watches.</p> <p>Ms. Burnham and Mr. Rankin walk down the side of a house towards the back yard.</p> <p>Image of tiles laid out on a concrete patio.</p>	<p>Mr. Rankin [voice-over]:</p> <p><i>Marla Burnham came into some inheritance money so she decided to invest in some home renos. Have her shed roof fixed, her basement finished a sauna built. ...</i></p>
00:38	<p>Ms. Burnham and Mr. Rankin walk around outside in a backyard area.</p>	<p>Mr. Rankin [voice-over]:</p> <p><i>Burnham checked out online reviews, got two estimates, and went with Level One Construction.</i></p>
00:43	<p>Shot of left-profile image of Mr. Rankin from the waist-up facing in the direction of Mr. Rankin.</p>	<p>Mr. Rankin:</p> <p><i>So you thought you had dotted all the i's, crossed all the t's on this?</i></p>
00:46	<p>Camera pans to right-profile image of Ms. Burnham from the waist-up facing in the direction of Mr. Rankin.</p>	<p>Ms. Burnham:</p> <p><i>I did, yeah. I did think I...I thought I had, yes.</i></p>

00:50	<p>Close-up of top left corner of document. The words “Level One Construction + Renovations” appear.</p> <p>The camera zooms in on text in a documents, focusing in on the text “sum of 18,908.51 Dollars (\$)”</p>	<p>Mr. Rankin [voice-over]:</p> <p><i>A project manager with Level One gave Burnham an \$18,000 estimate.</i></p> <p><i>So she signed a contract and handed over a \$5,000 deposit.</i></p>
00:59	<p>Image of the back of a house.</p> <p>Mr. Rankin walks toward camera from screen-right, talking.</p> <p>Graphic: ERIC.RANKIN@CBC.CA</p> <p>Twitter: @EricRankinCBC</p> <p>Close-up image of the text of a document. The text “35,536.21” is prominent in the shot.</p> <p>The camera zooms in on the text “35,536.21”</p>	<p>Mr. Rankin:</p> <p><i>But a short time later a different project manager from Level One came out to draw up a work schedule.</i></p> <p><i>Burnham went on vacation for a week only to return to a new costing: \$35,000 dollars.</i></p> <p><i>Almost double the original \$18,000 estimate.</i></p>
01:14	<p>Image of Ms. Burnham seated inside from the waist-up facing the camera. A lap-top computer is open in front of her.</p> <p>Graphic: “MARLA BURNHAM homeowner”</p>	<p>Ms. Burnham:</p> <p><i>So they got me to sign based on one price and then changed it.</i></p> <p><i>Which just seems super dishonest to me.</i></p>
01:20	<p>A blue-filtered image of a building with the word “LEVELONE.CA” spelled on a sign appearing in the windows.</p> <p>Graphic: “Level One Construction 2<sup>nd</sup> PROJECT MANAGER:”</p> <p>The image of an email fades over the image of the building.</p> <p>The words “I have no idea how (the first manager) came up with (his) number...” appear on the screen.</p> <p>The words “...you do have the option of...requesting your moneys (sic) back.” appear on the screen.</p>	<p>Mr. Rankin [voice-over]:</p> <p><i>At first the second project manager seemed apologetic writing “I have no idea how the first manager came up with his number. You do have the option of requesting your monies back.”</i></p>

- 01:32 A blue-filtered still image of Randy Kautzman facing the camera fills the left-third of the screen with the graphic “Level One Construction RANDY KAUTZMAN”
- But then Level One President Randy Kautzman stepped in, pointing out the contract contained a 15% cancellation penalty.*
- A blue filtered still image of the text “604-ONE-RENO Level One construction + renovations www.levelone.ca 604.ONE.RENO” fills the right two-thirds of the screen.
- If she promised not to post a negative review on the internet he would settle for a little less: labour expenses, and only pocket \$1,000 of her deposit.*
- The graphic: “15% Cancellation Fee” fades over the right two-thirds of the screen.
- The graphic “PROMISE No negative review” fades over the right two-thirds of the screen.
- The graphic: “\$1,000” screens over the right two-thirds of the page.
- The image of Randy Kautzman is magnified.
- 01:48 Image of Ms. Burnham seated inside from the chest-up facing the camera.
- Ms. Burnham:
- It is definitely not my error.*
- You know, I just...my error was just having faith in that company.*
- 02:24 Image of Ms. Burnham seated inside from the waist-up facing the camera.
- Ms. Burnham:
- A lap-top computer is open in front of her.
- It would be one thing if they had gone on the job and found there was a pipe going through the property that had to be, you know, removed or something.*
- But no one so much as lifted a hammer in this situation.*
- 02:34 Image of Ms. Burnham walking outside a house on a concrete patio towards Mr. Rankin, who is standing around the corner from her at the side of the house.
- Mr. Rankin [voice-over]:
- A new definition of reno hell without the renos.*
- Image of Ms. Burnham standing outside the house facing and speaking with Mr.

Rankin.

#### 4. The Online Story

[64] On or about February 14, 2014, the CBC Defendants published the Online Story, which included a link to the Television Broadcast. The plaintiffs say the Online Story defamed them. The full Online Story is produced below (with the impugned portions pled in the December 1, 2016 amended notice of civil claim in italics):

*'No negative online review,' demanded for reno refund*

*Marla Burnham wants full \$5,000 deposit refunded after Level One Construction doubled estimate for work*

By Jenni Sheppard, CBC News Posted: Feb 14, 2014 3:28 PM PT Last Updated: Feb 16, 2014 11:48 AM PT

*A Vancouver woman says she is being held to ransom, after a renovations firm initially refused to even partly refund her deposit – unless she agreed not to write a negative online review of the company.*

*Marla Burnham demanded a full refund of her \$5,000 deposit after Level One Construction doubled their initial \$18,000 estimate for work on home renovations, her shed roof and a new sauna.*

*The firm said the contract she signed with them contained a cancellation policy, but later said it would offer her a partial refund for her original deposit – if she promised not to post a negative review on the internet.*

Burnham says she's particularly shocked because she chose the company in the first place using the home renovation review website Homestars.com, where the firm has received almost entirely positive reviews, and the Better Business Bureau.

"I did some research, looked for companies that had a good reputation – good online reviews – through some websites that I thought were there for that purpose," she said.

In future [sic], Burnham says, she won't be relying on websites and online rating systems anymore.

"I think that they are quite meaningless now. Because if you don't see any [bad reviews], it might be because everyone who has had a bad experience has signed off and said, "You know, I want my money back, so I'm not going to say anything bad about this company."

*\$18K estimate almost doubled*

*Burnham got estimates for the work from two companies, and decided on Level One Construction, after a project manager with the firm quoted her \$18,000.*

*She duly signed a contract for the work and handed over a \$5,000 deposit. A short time later, a different project manager from the company came out to see the job.*

*Burnham went on vacation for a week, thinking it was a straightforward job that would be done quickly, but returned to find a new costing of \$35,536.31 – almost double the original estimate.*

*“So they got me to sign based on one price and changed it, which just seems super-dishonest to me,” said Burnham.*

*At first, the second project manager seemed apologetic, writing in an email to Burnham.*

*“I have no idea how [the first manager] came up with [his] number,” and “You do have the option of...requesting your monies back,” said the manager in the email.*

*But then Level One president Randy Kautzman stepped in, pointing out the contract contained a 15 per cent cancellation penalty, so she should not be receiving any money back.*

*However, he said, if she promised not to post a negative review on the internet, he’d settle for a less [sic] and only keep \$1,000 of her deposit.*

*“It’s definitely not my error...My error was having faith in that company,” said Burnham. “Thinking that they were straightforward and up front. And I can’t be held responsible for the mistakes they make in their estimates.”*

Breach of contract questioned

Litigation lawyer Mathew Good says someone in Burnham’s position would be due a full refund, because if a contractor dramatically changes the price, he’s breached the contract.

“Look you’ve got a problem here. You’ve agreed to do it, you’ve promised to do it for a certain price, so legally you could be held to that,” said Good.

When first contacted by CBC News, Kautzman said he’d reconsidered and would give Burnham a full refund. But after talking to his lawyer, he’d changed his mind.

Burnham will be fighting him and has filed a statement of claim in small claims court.

*“It would be one thing if they had gone on the job and found there was pipe going through the property that had to be removed or something, but no one so much as lifted a hammer in this situation.”*

Two days ago, Kautzman filed his own statement of defence in response, agreeing to refund \$2750 of the deposit, but claims that Burnham changed the scope of work before cancelling, and therefore the company is entitled to keep the rest.

On Thursday Kautzman sent a statement to CBC News saying:

“Level One Construction entered into a signed contract which included a provision for costs associated with cancellation. She is being charged the cancellation fee.

“When we enter into our contracts we have to go through the process of putting together the bids and confirm estimates, commit our workers to schedules which precludes us from other jobs.

“Ms. Burnham cancelled the job and then was subject to the cancellation fee.”

None of the allegations have been proven in court.

Read below:

- Contract signed between Marla Burnham and Level One Construction
- Marla Burnham’s statement of claim with the small claims court
- Randy Kautzman’s statement of defence

### **F. Did the Price Double for the Same Work?**

[65] At the heart of the plaintiffs’ complaint is their position that a person would walk away after hearing and/or reading the publications believing that Level One, by issuing the Final Forecast, had doubled the price it would charge for performing the exact same tasks as identified in the Final Estimate. This is based on statements that the price doubled for the “same job” or “same work”. The plaintiffs submit an ordinary person would infer from those phrases that there was no change to the scope of work.

[66] If it is true that Level One increased the price for the project to nearly double for doing the exact same tasks as it identified in the Final Estimate, then the defendants may be absolved of liability for any defamatory meaning alleged to arise from that statement based on the defence of justification.

[67] The plaintiffs maintain the difference between the Final Estimate and the Final Forecast accurately reflects the change in scope of work that Ms. Burnham wanted; they allege that she was attempting to get away with having a “full” sauna built, as itemized in the Final Forecast, for the cost identified to build a “sauna shed” in the Final Estimate. They intimate that Ms. Burnham decided to take advantage of the situation when she realized Mr. Helder misinterpreted the Final Estimate as providing a quote for building a fully-functional sauna.

[68] Alternatively, the plaintiffs allege that Ms. Burnham was unsure about what she wanted in speaking with Mr. Blair, but decided she would insist on a fully-

functional sauna upon seeing the Final Estimate and learning from Mr. Helder that the Final Estimate's price was too low for a complete sauna. In both scenarios, the plaintiffs allege that Ms. Burnham was being disingenuous with Level One.

[69] The plaintiffs submit their position is supported by Ms. Burnham's forwarding to Mr. Helder a couple of website addresses for "sauna kits". The plaintiffs argued there was no reason for Ms. Burnham to forward that information unless she wanted Level One to build a sauna for her.

[70] Ms. Burnham stated that she offered to send Mr. Helder the information about sauna kits so that he would have an idea of what a finished sauna would look like, which would help him to understand what she wanted in that shed. She also sent him a drawing she had done, which showed details inside the sauna including the benches and heater. She did so because Mr. Helder admitted to her that he had not built a sauna before; Mr. Helder confirmed that.

[71] Although Mr. Helder told Ms. Burnham that the \$1,500 estimate was unrealistic, he admitted he said nothing about how much it might cost because he did not know. He agreed he did not say that the price could double. In response to a question during cross-examination whether Ms. Burnham specified that she wanted a sauna complete with electrical work and other things, Mr. Helder answered, "she wanted a sauna built and she wanted to enjoy it by Christmas". Throughout his testimony he maintained that she wanted a fully-functional sauna built.

[72] However, Mr. Blair's evidence was firm and consistent that he understood that Ms. Burnham only wanted a shed built. He testified the only reason he used the word sauna on the Final Estimate was to distinguish it from work being done on a pre-existing shed on her property.

[73] Thus, I do not find either scenario posited by the plaintiffs to be persuasive, and I do not find that Ms. Burnham was trying to take advantage of the situation. There was no mention in any document nor testimony that Ms. Burnham explicitly stated that she expected Level One to build a fully-functional sauna, rather than a

shed that could later be converted into a sauna. I find that Ms. Burnham reasonably assumed Mr. Helder would have been briefed by Mr. Blair and understood that the wording on the Final Estimate [“Build a sauna (5’ X6’) Cedar with Cedar Shingles”] was the estimate for a shed later to be converted into a sauna. It is entirely possible, and likely, that during their conversations at her property, neither realized they had a different understanding of what Mr. Blair wrote on the Final Estimate.

[74] I find that Mr. Helder believed that Ms. Burnham wanted Level One to build a fully-functional sauna, but that belief was mistaken. Ms. Burnham’s testimony that she wanted a shed built that could later be converted into a sauna was clear and consistent throughout; it was not weakened during cross-examination.

[75] I find the scope of the work on the Final Forecast did change from what was described on the Final Estimate, but that was based on Mr. Helder’s misunderstanding of the project and not on anything said or done by Ms. Burnham. I also find that Ms. Burnham was unaware of Mr. Helder’s misunderstanding until she received the Final Forecast.

### III. LEGAL PRINCIPLES

[76] The parties do not dispute the legal principles guiding this case.

#### A. Proving Defamation

[77] The plaintiff has the burden in a defamation action to establish the following: (i) the impugned words were defamatory in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person; (ii) they refer to the plaintiff, and; (iii) they were published, meaning that they were communicated to at least one person: *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28.

[78] If the plaintiff can establish those elements, falsity and damage are presumed and the onus shifts to the defendant to advance a defence. Defamation is a tort of strict liability so it is unnecessary for the plaintiff to prove that the defendant was careless or intended to cause harm: *Grant* at paras. 28-29.

[79] Not every criticism of a person or disparaging comment is defamatory. A defamatory statement is one that has a tendency to lower the reputation of the person to whom it refers in the estimation of right-thinking members of society generally and, in particular, to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem. The test is an objective one: *Colour Your World Corp. v. Canadian Broadcasting Corporation* (1998), 38 O.R. (3d) 97 (C.A.); *Lougheed Estate v. Wilson*, 2017 BCSC 1366 at paras. 156-157.

[80] The Court of Appeal in *Lawson v. Baines*, 2012 BCCA 117 set out a two-step process for determining whether words are defamatory at para. 26:

The first task of a judge in a defamation case is to answer the "threshold question" of "whether the words cited are reasonably capable of a defamatory meaning": *Laufer v. Bucklaschuk* (1999), [2000] 2 W.W.R. 462 at 470-471 (Man. C.A.). The judge, if sitting alone, then plays a second role; as a finder of fact, in determining whether the words do, in fact, bear that defamatory meaning.

[81] Guidance on how to determine the ordinary, natural meaning of words is provided in *Mainstream Canada v. Staniford*, 2012 BCSC 1433 at para. 110, var'd on appeal on other grounds (2013 BCCA 341), which cited *Lewis v. Daily Telegraph Ltd.* (1963), [1964] A.C. 234 (U.K.H.L.) (*Lewis*) where Lord Reid said the following:

What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is regarded as part of the natural and ordinary meaning.

[82] With regard to proving that the words are defamatory, three alternative means are available: (i) if the literal meaning of the words complained of are defamatory; (ii) if the words complained of are not defamatory in their natural and ordinary meaning, but their meaning is based upon extrinsic circumstances unique to certain readers, the "legal" or "true" innuendo meaning is defamatory, or; (iii) if their inferential meaning or impression left by the words complained of is defamatory (the "false" or

“popular” innuendo meaning): *Lawson v. Baines* at para. 13; *Weaver v. Corcoran*, 2017 BCCA 160 at para. 71.

[83] If the literal meaning of the words is at issue, it is unnecessary to go beyond the words themselves to prove they are defamatory, and evidence outside of the words themselves is inadmissible: *Weaver v. Corcoran* at para. 72.

[84] If the claim is based on the inferential meaning, the question is one of impression. The court must ask what the ordinary person would infer from the words in the context in which they were used. Both literal and inferential defamatory meanings must reside within the words as part of their ordinary natural meaning. This contrasts to legal innuendo where the impugned words may take on a defamatory meaning from circumstances beyond general knowledge, but known only to the recipient: *Lawson v. Baines* at paras. 23 and 35; *Weaver v. Corcoran* at para. 72.

[85] Where more than one statement is alleged to be defamatory, it is permissible to look at the statements on the related subject together. For example, a story or caption on the front page of a newspaper should be read in combination with the article to which it refers, even if the article is found elsewhere. Also, if provisions of one document are cited in another, depending on the circumstances and issues, it may be appropriate to read the two together: *Brown on Defamation*, 2nd ed. (Toronto: Carswell, 1999) (loose-leaf updated 2014, release 5) vol. 1.

[86] The audio-visual dimension of a television broadcast can transform the impression one might otherwise get from a statement because things like voice intonation, visual background, and gestures may accompany the articulated facts to dramatic effect. Because of these distinguishing factors in a broadcast, the overall impression, in addition to the accuracy of the statements is relevant: *Color Your World Corp.* at para. 17.

[87] Once defamatory meaning is established, the plaintiff must prove that the impugned words are “of or concerning” him or her. This is a factual question: *Booth*

*v. British Columbia Television Broadcasting System Ltd.* (1982), 139 D.L.R. (3d) 88 (B.C.C.A) at para. 92.

[88] To prove the publication element, the plaintiff must prove that the defendant has, by any act, conveyed the defamatory meaning concerning the plaintiff to a third party, who has received it: *Crookes v. Newton*, 2011 SCC 47 at para. 16.

[89] All persons who aid or participate in the publication of defamatory expressions, in furtherance of a common design, may be held liable in damages to the plaintiff, whether at the time they realized they were committing the tort of defamation: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 73-77.

[90] The general rule is that a person is responsible only for his or her own defamatory publication, and not for the republication by others. There are three exceptions to this general rule: (i) where he or she is authorized, or intended that the person to whom he or she published the words would repeat or republish them to some third person; (ii) where the repetition or republication of the words to a third person was the natural and probable result of the original publication, and; (iii) where the person to whom the original publication was made was under a moral duty to repeat or republish the words to a third person: *Smith v. Matsqui (District)* (1986), 4 B.C.L.R. (2d) 342 (S.C.) at para. 26.

[91] A person who communicates a defamatory remark to a reporter will be deemed to have authorized that reporter to publish that remark and will be held responsible for the publication as though he or she published it themselves: *Pressler v. Lethbridge*, 2000 BCCA 639 at paras. 53 and 55.

## **B. Defences**

[92] Different defences in defamation law are available depending whether the impugned statement is fact or opinion. Statements of fact can be defended as truth or responsible communication, while opinion is generally defended as fair comment. Therefore, to determine the defence available to the defendant, it is important to

consider whether the defamatory statement is fact or opinion: *Lougheed Estate* at para. 159. The Supreme Court discussed what constitutes "comment" in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 26:

... "comment" includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Brown's *The Law of Defamation in Canada* (2nd ed. (loose-leaf)) cites ample authority for the proposition that words that may appear to be Statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, vol. 4, at p. 27-317) in the context of political debate, commentary, media campaigns and public discourse. ...

[93] Whether a statement is fact or comment must be determined from the perspective of a reasonable reader: *WIC Radio* at para. 27.

### **1. Fair Comment**

[94] There are five elements that must be proven to establish the defence of fair comment as articulated by the Supreme Court of Canada in *WIC Radio* at para. 28:

For ease of reference, I repeat and endorse the formulation of the test for the fair comment defence set out by Justice Dickson, dissenting, in *Cherneskey* as follows:

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

[Emphasis added; emphasis in original deleted; pp. 1099-1100.]

(citing *Duncan and Neill on Defamation* (1978), at p. 62)

[95] In order for the words to be commentary, the facts upon which they are based must be sufficiently stated, referenced or notorious to allow viewers and readers to make their own assessment on the merits of the comment. If the factual foundation is unstated, then the defence is not available. This is an objective test, but the

comments need not be fair, rational or warranted as long as a reasonable person could honestly express them based on the proven facts: *WIC Radio* at paras. 28 and 31.

[96] It is important to note that the defence of fair comment is not available if the defendant's statement is an assertion of fact and not a comment or, if it can be construed as a comment, but the underlying facts are not proven.

## **2. Justification**

[97] Justification is a complete defence to defamation. In order to establish justification, the defendant must prove that the meaning of the words or expression is true or substantially true: *Lougheed Estate* at para. 164.

[98] The defendant's honest belief in the truth of the statement is not sufficient and it must be proven on a balance of probabilities: *Nazerali v. Mitchell*, 2016 BCSC 810 at para. 132, var'd on appeal on other grounds, 2018 BCCA 104. It is sufficient, however, for the defendant to establish that a defamatory expression was substantially true and that the gist or sting of the defamation was true: *Smith v. Cross*, 2007 BCSC 1757 at para. 37, aff'd 2009 BCCA 529. Minor inaccuracies do not preclude the defence so long as the publication conveyed an accurate impression: *Lougheed Estate* at para. 164.

## **3. Responsible Communication**

[99] The defence of responsible communication was set out in *Grant* at para. 98. In that case the Supreme Court of Canada stated that there are two essential elements, the first of which is conceded in this case: was the publication on a matter public interest? The second inquiry is whether the publication of the defamatory communication was responsible, in that the publisher was diligent in trying to verify the statements having regard to all the relevant circumstances. To determine that, the court must look to a number of factors, none of which are determinative. The Court discussed the following factors at paragraphs 111-125, but confirmed at

paragraph 122 the list is not exhaustive and ultimately all matters relevant to whether the defendant communicated responsibly can be considered:

- (1) the seriousness of the allegation;
- (2) the public importance of the matter;
- (3) the urgency of the matter;
- (4) the status and reliability of the source;
- (5) whether the plaintiff's side of the story was sought and accurately reported;
- (6) whether inclusion of the defamatory statement was justifiable; and
- (7) whether the defamatory statements public interest lay in the fact that it was made rather than its truth.

#### **4. Qualified Privilege**

[100] The defence of qualified privilege arises when the defamatory words are published in a manner and at a time that is “reasonably appropriate in the context of the circumstances existing on the occasion when that information was given”: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 147. In that case, the Supreme Court of Canada summarized the defence of qualified privilege as follows at paras. 143-144:

[143] Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

...

[144] The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff.

[101] Therefore, when the occasion attracts a qualified privilege, the law will presume the defamatory words were made honestly and in good faith unless actual or express malice is proved. The courts have been willing to allow the defence of qualified privilege where the media can demonstrate it has a social and moral duty to publish the impugned article and there is a corresponding public interest in receiving the article in question: *Grant* at paras. 34-36.

### **5. Malice**

[102] A finding of malice will defeat the defences of fair comment and qualified privilege. The burden of proving malice is on the plaintiff: *WIC Radio* at para. 28.

[103] Malice is a dominant and improper motive on the part of the defendant comprising a desire to injure the claimant, personal spite or ill will, reckless disregard for the truth or any ulterior motive that conflicts with the interest or duty created by the occasion: *Church of Scientology* at para. 145; *Smith v. Cross* at para. 31.

[104] Madam Justice Kirkpatrick reviewed several leading authorities on malice in *Smith v. Cross*, 2009 BCCA 529, before stating that a defendant is actuated by malice if he or she publishes the statement:

- i) Knowing it was false; or
- ii) With reckless indifference whether it is true or false; or
- iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; or
- iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

### **C. The Importance of Pleadings**

[105] As recently noted by the Court of Appeal in *Weaver*, pleadings define and clarify the issues of fact and law the court must determine, and give the other side notice of the case to be met: para. 63. The particular importance of pleadings in defamation cases is due to the serious nature of defamation allegations, and the need to avoid unwarranted fishing expeditions: *Weaver* at para. 64.

[106] Recently this Court dealt with the issue of pleadings in a defamation action in *Northwest Organics, Limited Partnership v. Roest*, 2018 BCSC 866. As para. 124, Madam Justice Iyer commented on what must be included in the plaintiff's pleadings:

[124] ...pleadings play a critical role in defamation cases. Material facts must be pleaded with precision as they give the opposing parties fair notice of the case they have to meet and frame the issues for trial: *Weaver v. Corcoran*, at para. 63. If the plaintiff does not properly plead a claim or part of a claim against a defendant the court cannot decide it, even if a party has presented evidence that relates to it and made arguments about it. As discussed below, that has occurred in this case.

[107] In British Columbia there is relevant legislation: *Libel and Slander Act*, R.S.B.C. 1996, c. 263:

2. Defamatory words in a broadcast are deemed to be published and to constitute libel.

13 (1) In actions of libel and slander the plaintiff may allege that the words or matter complained of were used in a defamatory sense, specifying the defamatory sense without any prefatory allegation to show how the words or matter were used in that sense.

(2) The allegation is put in issue by the denial of the alleged libel or slander, and if the words or matter set out in the pleadings, with or without the alleged meaning, show a cause of action, the notice of civil claim is sufficient.

[108] In their December 1, 2016 amended notice of civil claim, the plaintiffs allege that the CBC Interview, the Yelp Posting, the Television Broadcast and Online Story defamed them. The plaintiffs submit the defamatory words are false and malicious.

[109] The plaintiffs allege that the individual CBC Defendants Rankin, Sheppard, Williams and others are all vicariously liable in defamation as the their acts and omissions occurred during the course and scope of their employment by the corporate defendant CBC.

[110] The plaintiffs allege that Ms. Burnham is liable for the republication of the defamatory words in the CBC Interview as those words were republished by the defendants CBC and by third parties on the internet. The plaintiffs further allege that

the CBC Defendants are liable for the republication of the Television Broadcast and the Online Story.

[111] The plaintiffs submit that both Ms. Burnham and the CBC Defendants were actuated by malice as they published the defamatory words with the knowledge that the meanings conveyed by those words were false, or in the alternative, with reckless indifference whether those words were true or with the predominant purpose of injuring the plaintiffs.

[112] The plaintiffs seek general, special, aggravated and punitive damages. They also seek an interlocutory and permanent injunction to restrain the defendants from any further publication of the defamatory words as well as an order requiring the CBC Defendants to permanently remove the defamatory articles from their websites.

[113] In her November 21, 2014 response, Ms. Burnham admits that she authored and published the words in the CBC Interview and Yelp Posting, but denies that those words are capable of being defamatory or are in fact defamatory in their literal or inferential meanings.

[114] In the alternative, Ms. Burnham submits that insofar as the allegations are allegations of fact, they are true in substance and fact, and insofar as the words consist of expressions of opinion, they are fair comment and made without malice. In the further alternative, Ms. Burnham says that if the words are found to be defamatory, they were made on occasion of qualified privilege.

[115] Finally, Ms. Burnham submits that if the court finds her liable in defamation, the plaintiffs have not suffered any loss. She also points to the fact that she took down the Yelp Posting on or about September 23, 2014.

[116] The CBC Defendants in their response, claim that the Television Broadcast and the Online Story were published and broadcast in good faith, and without malice. They claim a belief in the truth of the facts contained in the allegedly defamatory words and an honest belief in the comments expressed therein. They submit that neither the Television Broadcast nor the Online Story read or viewed in

their entirety are capable of bearing the defamatory meanings alleged by the plaintiffs.

[117] The CBC Defendants say they are protected by fair comment as the words concern matters of public interest, namely, *inter alia* business practices and consumer protection. They say that insofar as the allegedly defamatory words consist of statements of fact, they are true in substance and in fact, and insofar as they consist of expressions of opinion, they constitute comment.

[118] They also say because they had an interest in publishing and broadcasting the words complained of to those who had an interest in receiving them (members of the public who are potential clients of the plaintiffs), the Television Broadcast and the Online Story were published on occasions or in circumstances of qualified privilege.

[119] In the alternative, the CBC Defendants say they acted responsibly in publishing the Television Broadcast and Online Story in respect of a matter of the public interest in researching, writing and publishing the stories, and are thus protected by the defence of responsible communication.

#### **IV. HAVE THE PLAINTIFFS MADE OUT A *PRIMA FACIE* CASE OF DEFAMATION?**

[120] Ms. Burnham and the CBC admit that the words alleged to be defamatory in the publications were about the plaintiffs, and that they were published and read and accessed by some third party. Thus, the second two elements of the plaintiffs' case for defamation are met and the only issue is whether the words themselves convey defamatory meaning.

##### **A. The CBC Interview**

[121] The plaintiffs allege that in the context of the CBC Interview given by Ms. Burnham, the alleged defamatory words conveyed the following natural and ordinary inferential meanings concerning the plaintiffs:

- a) the plaintiffs cheated, scammed and defrauded Ms. Burnham, and obtained money from her using deceitful bait and switch tactics;

- b) the plaintiffs regularly cheat, scam and defraud the public, and obtain money from the public using deceitful bait and switch tactics;
- c) the plaintiffs attempted to censor Ms. Burnham's criticism of the plaintiffs by extortion, coercion and physical intimidation; and
- d) the plaintiffs regularly censor their clients' criticism of the plaintiffs by extortion, coercion and physical intimidation.

[122] The plaintiffs allege that each of the above meanings are false, malicious and defamatory. The plaintiffs allege that Ms. Burnham using the words in her pre-interview with Mr. Rankin amounted to slander, actionable *per se*.

[123] The plaintiffs submit that Ms. Burnham's words have the ordinary meaning that Level One was dishonest by having two dramatically different quotes for the exact same work. The key elements of the alleged defamatory statements are Ms. Burnham's saying that she had a "long unpleasant experience", where she felt "had" and as though she had been "scammed". She also stated, "You know, they gave me one price, got me to sign a contract and then the price doubled before any work had begun. And I just felt that it, there was something really dishonest going on".

[124] She also commented on what went through her mind when she came back from vacation and received the Final Forecast. She stated she was "really, really shocked" and that she came back to "an email with another estimate for the same work for twice as much money, for \$35,000". In response to a question by Mr. Rankin during her interview to explain the difference between the Final Estimate and the Final Forecast, she told him that it was "totally bad business" to change the price.

[125] Ms. Burnham's words do not make it clear that there was confusion about what the item "sauna" on the Final Estimate was supposed to represent. However, I found that Mr. Blair understood what she wanted done. Mr. Helder showed up at the worksite with the Final Estimate, which was prepared by Mr. Blair but provided an estimate that doubled the price. Even if she did not further clarify in her interview that each man thought they were pricing different things, reasonable people would

assume that she had relied, and was entitled to rely, on what she first told the company (Mr. Blair) she wanted.

[126] However, I am also satisfied that Ms. Burnham was aware when she got the Final Forecast that the difference in the price was because of Mr. Helder's mistake in thinking she wanted a fully-functional sauna built. The plaintiffs allege that she tried to take advantage of that awareness and their complaint about the publications focussed on that. As noted earlier (paras. 67-75), I do not find that supposition borne out by the evidence.

[127] The plaintiffs have failed to acknowledge that even if the price increase was fully justified based on a change in scope of work, Ms. Burnham had reason to cancel the contract because of the internal miscommunication that led to the doubling of price. That type of miscommunication could reasonably lead to a customer losing faith in Level One. Logic suggests that had her deposit been returned, that would have been the end of this saga.

[128] Instead, I find Mr. Kautzman made a decision to take a tough stand with Ms. Burnham, for reasons that are unclear to me. He attempted to justify withholding some portion of the deposit to compensate for the "work" done on the project. However, Mr. Helder's testimony was clear that the company did not pay him anything extra for the time he worked on the Final Forecast. He wrote in an email to Mr. Kautzman that the company was not "out of pocket" for the work he'd done; he said he spent a few hours on the Final Forecast, but came into the office during his day off to do so. Nor is there any indication in the contract or any other document that deposits may be forfeited if "research" is done and a project cancelled.

[129] I also do not accept Mr. Kautzman's estimate of either the amount of work done, or its value. His evidence about how he arrived at the appropriate figure to withhold from the deposit as either a fee or penalty was confused, vague and inconsistent. It was not matched by his small claims pleadings.

[130] Nevertheless, if statements Ms. Burnham made in the build-up to that story can be interpreted by an ordinary person to mean that Level One was trying to charge double for the performing the exact same tasks, that could possibly amount to defamation.

[131] As stated in *Lawson v. Baines*, the first step is to answer whether the words are reasonably capable of defamatory meaning. I find that the words used by Ms. Burnham in the CBC Interview were capable of imputing dishonest and deceitful conduct onto the plaintiffs in their dealings with Ms. Burnham.

[132] The second step is to determine whether the words do, in fact, bear that defamatory meaning. I find that they do not.

[133] In their pleadings, the plaintiffs allege Ms. Burnham's words imputed to them the following actions: cheating, fraud, scamming, extortion, physical intimidation and coercion, and that they regularly cheated, scammed and committed fraud.

[134] As noted in *Casses v. Canadian Broadcasting Corporation et al.*, 2015 BCSC 2150, the trier of fact decides the natural and ordinary meaning of the alleged defamatory words, including what innuendos can be inferred from them. In doing so, "I am not bound by either the plaintiffs' interpretations, or those of the defendants" (para. 326).

[135] I agree with Ms. Burnham that the sting alleged by the plaintiff is extreme and exaggerated. In *Mainstream Canada* at para. 111, the Court of Appeal quoted Lord Reid from *Lewis* at 259 as stating that ordinary men and women have different temperaments; "[s]ome are unusually suspicious and some are unusually naïve", and it is necessary to "envisage people between these two extremes" when assessing what "ordinary" people would think.

[136] Certainly there was no evidence whatsoever that anyone understood any words Ms. Burnham spoke to have implied there had been any physical intimidation in her dealings with Level One. I do not find her comment that "...honestly I kind of half expected a brick through the window. That's the kind of vibe I get from the

guy....” to reasonably convey that she truly believed she would be physically harmed.

[137] The plaintiffs focus on the portions of the interview where Ms. Burnham stated her belief that the price doubled for the project. The key phrases are the following: “I felt kind of as though I had been scammed”; “So they got me to sign based on one price and then changed it which just seems super dishonest to me”; and “Well I just find it kind of totally bad business, right, to change the price”. But in response to a question from Mr. Rankin (“But I guess the point is it is not your error, it is their error? You tell me that?”), she stated “No. I think it’s definitely not my error. ... I can’t be held responsible for the mistakes they make in their estimates”.

[138] In her response, Ms. Burnham was explaining that Level One made errors and mistakes in increasing the price when in her mind, she had not changed the scope of the work. Accusing someone of making an error or mistake is not the same as alleging that someone cheated, scammed or defrauded you, or was deceitful. She also mentioned being shocked and losing faith when she received the Final Forecast because of the increase in price. However, she did not link that shock or disappointment to an impression that the plaintiffs were deceitful or guilty of fraud.

[139] I bear in mind that the alleged defamatory publication must be read as a whole even if the plaintiff only complains about portions of it: *Charleston v. News Group Newspaper Ltd.*, [1995] 2 A.C. 65 (H.L.). Reading only the impugned portions of the CBC Interview, I find reasonable people would understand that Ms. Burnham’s primary complaint is that having made what she believed to be a mistake, Level One would not then refund her deposit when she wanted to cancel. It is also clear that Ms. Burnham is relating only her own experience with and impressions of Level One.

[140] With regard to the accusation that Level One regularly engaged in cheating, scamming and defrauding the public, the plaintiffs fasten upon the phrase “...you know, he is prepared for this sort of thing and that, you know, he has clearly done this before”. That statement is in response to a question that having doubled the price based on a mistake, Level One still expected her to “abide by that contract”.

However, Mr. Rankin immediately asks this after Ms. Burnham stated “he has clearly done this before”: “Let’s talk about that extortion aspect, too”.

[141] It is clear from reading the entire interview, and in particular her answer to that question, that the “extortion aspect” is the refusal to refund her deposit unless she signed a non-disclosure agreement. Thus, I find an ordinary person would understand that the “thing” that had been done before was not increasing the price for the same work, but not refunding a deposit without signing a waiver. Even if one accepts that an equally plausible meaning is that the “thing” done before was increasing the contract price in the absence of expanded instructions, I am obliged to choose the least harsh interpretation: *Weaver* at para. 69. In any event, understanding the words within the context of the whole interview, I find neither meaning equates to an allegation that Level One regularly defrauds, cheats and scams people.

[142] Ms. Burnham also submits that her statement (about the “thing”, whatever it is, being done before) was consistent with Mr. Kautzman’s own words, particularly his email where he stated: “I am well aware of contract law and have had one or two issues similar to yours in the past 12 [years], and that is why our contract is structured the way it is”.

[143] Lastly, towards the end of the interview Ms. Burnham specifically identifies the “interesting” aspect of her experience was whether the online reviews people see are a “true reflection of the business because they are not - anyone who is having a bad experience is having to sign the non-post, non-complaint, non-disclosure form to get their money back”. She raised the issue of the trustworthiness of online reviews, which the CBC submits was a matter of public interest that triggered public interest in the story. This bookends the beginning of the interview where she described how she chose Level One to do the work in the first place by going through HomeStars.

[144] Finally, even if ordinary people would get the impression that Level One doubled the price for the project without a change in scope of work (a finding I do not

make), in the context of the whole interview, I do not find that impression would subject Level One to contempt, ridicule, fear, dislike or disesteem. In my view, the plaintiffs exaggerate the intending meaning and influence of the alleged defamatory words.

[145] For those reasons, I do not agree that in the CBC Interview Ms. Burnham defamed the plaintiffs.

### **B. The Television Broadcast and the Online Story**

[146] With regard to the Television Broadcast and Online Story, the plaintiffs plead that the natural and ordinary inferential meaning of the words are:

- a) the plaintiffs fraudulently induced Ms. Burnham to hire Level One to carry out home renovations by grossly misrepresenting the final price the plaintiff's intended to charge her and deceitfully obtained a non-refundable \$5,000 deposit which she would forfeit if she cancelled the transaction when she learned its true cost; and
- b) the plaintiffs were dishonest in their dealings with Ms. Burnham.

[147] The plaintiffs rely on the same arguments they proffer with regard to the CBC Interview in arguing the Television Broadcast and Online Story are defamatory. They add however, that the CBC publications constitute libel that was published with Ms. Burnham's knowledge and consent.

[148] The plaintiffs' alleged defamatory meanings are somewhat more tempered than those attributed to the CBC Interview. Nevertheless, they do allege the CBC publications convey that the plaintiffs committed fraud by inducing Ms. Burnham to sign a contract that grossly under-estimated the final price they intended to charge and then deceitfully withholding her deposit if she cancelled. Thus the plaintiffs' key allegations are that an ordinary person seeing the Television Broadcast or reading the Online Story would discern the meaning of the publications to be that the plaintiffs were guilty of deceit and fraud.

[149] The CBC's position is that the intended meaning of the Television Broadcast was the contractual dispute between Ms. Burnham and Level One, and after a

doubling of the original estimate, Ms. Burnham wanted a full refund of her deposit. She was then told she would only get a partial refund on the condition that she not post a negative online review since it was Level One's view that the scope of work had been changed and she was charged a cancellation fee.

[150] With regard to the Online Story, the CBC's position is that the meaning conveyed was the contract dispute and that "Mr. Kautzman was saying to Ms. Burnham she could not have her refund less she agreed not to write a negative review, and Ms. Burnham was unhappy about this given the reliance placed on online reviews".

[151] The CBC Defendants submit the plaintiffs' primary position is that the publications are defamatory because readers or viewers were not given any explanation for why the price doubled for the "same work". I agree that is a fair characterization of the plaintiffs' position.

[152] From an initial point of view, I find it is clear that the intended meanings asserted by the CBC Defendants are accurate and fair. I do not find the publications had a defamatory meaning.

[153] I find the Television Broadcast and the Online Story are clear that the reason why the project doubled in price was a fact in dispute between Ms. Burnham and Level One. The publications do not state which version is true, specifically identifying that the matter was the going to Provincial Court and none of the allegations had yet been proven. Thus, the publications do not convey as a fact, an assumed fact or innuendo that the price doubled for the same work. They present that as Ms. Burnham's contention.

[154] Both publications present Ms. Burnham's version (largely in her own words) and Mr. Kautzman's explanation that Ms. Burnham changed the scope of work to be done. The publications also included the accurate fact that a Level One project manager wrote in an email that he had "no idea how [the first manager] came up

with [his] number”. Thus, the publications identified that internally, there may have been a dispute about the true cost of the project.

[155] I do not agree that an ordinary person viewing or reading the publication would come away understanding that the plaintiffs had committed fraud or been deceitful with regard to doubling the contract price or insisting on keeping a portion of the deposit Ms. Burnham paid.

[156] I agree with the CBC Defendants’ submission that it is important to understand Ms. Burnham’s comment about signing the contract at one price and then changing it was made in the context of the facts that “no work had been done and her deposit was being withheld unless she agreed to silence”. Thus, the sting and gist of the publications is not the doubling of the price, but Level One’s insistence on a non-disclosure agreement before it would refund any portion of the deposit once Ms. Burnham decided to cancel the contract. That does not convey a meaning that the plaintiffs were deceitful or fraudulent, or would be subjected to ridicule, contempt or fear.

[157] For those reasons, I do not find the plaintiffs have met their burden in establishing the Television Broadcast or the Online Story were defamatory.

### **C. Yelp Posting**

[158] In their amended notice of civil claim, the plaintiffs allege the natural and ordinary inferential meaning of Ms. Burnham’s words in the Yelp Posting are identical to those alleged against the Televisions Broadcast and Online Story. They also allege the Yelp Posting has the defamatory meaning that the Online Story contains reliable information about the plaintiffs which unmask them and blows the whistle on their discreditable conduct.

[159] The comments in the Yelp Posting that the plaintiffs claim are defamatory are the same as those contained in the CBC Interview: Ms. Burnham posted that she came back from vacation to “...a new estimate for the same job, but double the

price” and “I wanted a complete refund because they doubled the price for the same job...”.

[160] For the same reasons I found the Television Broadcast and Online Story are not defamatory, I do not find the Yelp Posting defamatory in relation to the identified meanings the three publications share. I adopt my preceding reasoning here.

[161] The additional meaning attributed to the Yelp Posting is that the Online Story contains “reliable information”. I understood the plaintiffs to say that arises from the closing sentence of the Yelp Posting which stated that Ms. Burnham contacted a consumer interest reporter at the CBC “because the process seemed pretty questionable”.

[162] I do not agree anything written by Ms. Burnham enhances any inherent reliability the Online Story already had. She makes no comment about the story. The Yelp Posting serves as an introduction, written from a personal perspective. I do not find ordinary people would be convinced Ms. Burnham’s story must be true simply because she started a law suit, or the CBC reported the dispute. She stated the process “seemed pretty questionable”, which ordinary people would not equate with deceitful or fraudulent conduct.

[163] Moreover, over half of what she wrote in the Yelp Posting addresses the failure to get a full refund unless she signed a non-disclosure clause. In my view, an ordinary person would understand that the “process” Ms. Burnham found “questionable” was being told she could not get any portion of her deposit back once she chose to cancel the contract because of a doubling of the price unless she agreed to sign a non-disclosure agreement. I do not think ordinary people would take from those statements that Level One committed fraud or was deceitful. Nor do I find reading the Yelp Posting and then viewing the Television Broadcast and reading the Online Story would result in coming away with that message.

[164] For those reasons, I do not find the Yelp Posting conveyed any defamatory meanings.

#### D. Conclusion on Defamatory Meaning

[165] I find that the plaintiffs have not established that any of the publications defamed them, and their claims are dismissed on that basis.

[166] In the event I am mistaken about that conclusion, however, I also find the defendants escape liability for any defamatory meanings based on the defences I discuss in the following paragraphs.

#### V. IF MS. BURNHAM DEFAMED THE PLAINTIFFS, IS SHE ENTITLED TO RELY ON ANY DEFENCE?

##### A. Justification

[167] The primary factual issue in dispute brought out in the CBC Interview and Yelp Posting is whether Ms. Burnham communicated that she only wanted a shed that could be converted into a sauna or, if she stated or was unclear that she wanted a fully-functional sauna built. At first glance this seems to be a question of fact.

[168] The plaintiffs point to the CBC Interview where she said, “My father passed away last year and with some inheritance money I decided to finish my basement. Fix a shed roof and **have a sauna built**” [emphasis added]. They say this clearly indicates that she wanted a sauna built and that she falsely represented the situation when she said later in the interview, “When I returned instead of a schedule of work I received a new estimate **for the same job** for \$35,000 approx.” [emphasis added]. The plaintiffs say Ms. Burnham clearly conveys to the reader that both prices were for the same scope of work.

[169] I have already found above at paras. 65-75 that at no time did Ms. Burnham explicitly ask or expect Level One to build a fully-functional sauna. I do not find her use of the word sauna above to detract from that finding. The sentence is vague in that it does not say she wanted Level One to immediately build the sauna.

[170] Ms. Burnham says the following evidence supports the truth of her statements, the gist of which is that the plaintiffs secured a contract based on one price, then increased the price after the contract had been entered into:

- a) She was provided with three separate estimates prior to entering the contract, the third of which (the Final Estimate) formed the basis for the contract. The Final Estimate was in the amount of \$18,908.51;
- b) She paid a deposit in the amount of \$5,000 and signed the contract for the renovations to begin;
- c) The contract did not include any additional terms nor was it initialed on every page, which she says runs contrary to the evidence of the plaintiffs' witnesses who stated each paragraph of the contract had been reviewed with her and that she had initialed each page;
- d) After signing the contract, she had further interactions with Mr. Helder over the course of approximately two weeks, during which time no mention was made of a pending change in price or scope of work; and
- e) Without forewarning and not in her request, she was presented with the Final Forecast nearly doubling the price of the project.

[171] I agree with Ms. Burnham that the evidence is largely uncontroverted as to the basic chronology and facts of her interactions with the plaintiffs. This is supported by the documentary evidence and by the testimony of the parties.

[172] There is no dispute that the price doubled from the Final Estimate to the Final Forecast; what the plaintiffs dispute is Ms. Burnham's statement that it was for the "same work" or "same job", which they say is only identifiable as a statement of fact, not comment. Comments include deductions, inferences and conclusions generally incapable of proof: *Ross v. New Brunswick Teachers' Assn.*, 2001 NBCA 62 at para. 56 as cited in *WIC Radio* at para. 26.

[173] It is clear from the evidence that Ms. Burnham subjectively believed that the price doubled for the "same work" because she knew she had not changed the scope of the work, a fact that I accept. I have also already found that there was a genuine misunderstanding between Mr. Helder and Ms. Burnham about the scope

of work. Mr. Helder believed Ms. Burnham had always asked for and wanted a fully-functional sauna built, even though she only wanted a shed built. In finding Ms. Burnham did not change the scope of work, I make no comment on whether Mr. Helder's misunderstanding was reasonable.

[174] Thus, I make no finding whether the plaintiffs doubled the price for the "same work". I accept that Ms. Burnham believed that they had done so, and her belief was reasonable. However, Ms. Burnham's honest belief in the truth of that statement is not sufficient and she must prove that the plaintiffs doubled the price for the same work on a balance of probabilities: *Nazerali* at para. 132. On the evidence before me, she is unable to do so and thus the defence of justification must fail in that regard.

[175] With respect to the statement made in the CBC Interview that the plaintiffs "is prepared for this sort of thing and...he has clearly done this before", I refer to my analysis earlier in the judgment (paras. 140-141) where I note there are two possible meanings attributed to the statement. I also find that Ms. Burnham's statement is based on the email she received from Mr. Kautzman on November 19, 2013 at 12:41 p.m. where he indicated that the plaintiffs had encountered similar issues to Ms. Burnham's in the past and that was why their contract was structured in the way it was. Therefore, based on the plaintiffs' own evidence, I do find there was a factual basis underlying that statement sufficient to make it substantially true.

[176] In the event I was mistaken that the statements by Ms. Burnham in the CBC Interview and the Yelp Posting that the plaintiffs were "prepared" and "done this before" are not defamatory, I find that they are substantially true and are therefore protected under the justification defence. However, I find that Ms. Burnham has not proved justification with respect to the statement that the plaintiffs doubled the price for the same work.

## B. Fair Comment

[177] In the event my previous conclusions that the impugned words do not convey defamatory meaning are wrong, I find Ms. Burnham is entitled to the defence of fair comment. The statements alleged to be defamatory are the following:

- “the process seemed pretty questionable” (Yelp Posting);
- “Instead I returned to find a new estimate for the same job, but double the price” (Yelp Posting);
- “I felt kind of as though I had been scammed” (CBC Interview);
- “... I just received an email with another estimate for the same work for twice as much money, for \$35,000” (CBC Interview);
- “So they got me to sign based on one price and then changed it which just seems super dishonest to me” (CBC Interview); and
- “So I found that kind of like extortion” (CBC Interview)

[178] I review the elements of the fair comment defence as set out in *WIC Radio*.

### **1. The comment must be on a matter of public interest.**

[179] There was no dispute that the publications were in the public interest. I accept that consumers communicating their experiences about businesses with which they had dealings invokes the public interest.

### **2. The comment must be based on fact.**

[180] In *WIC Radio*, Mr. Justice Binnie stated at para. 31, “[w]hat is important is that the facts be sufficiently stated or otherwise be known to the listeners that listeners are able to make up their own minds on the merits of [the] comment”.

[181] Whether Ms. Burnham’s comments on her dealings with the plaintiffs are protected as fair comment depends on whether they have a factual basis on which the viewer/reader can make up their own mind as to the merit of the comments. That does not mean I have to resolve whether the work doubled for the “same work”, but rather if Ms. Burnham got her basic facts correct.

[182] With respect to the Yelp Posting, Ms. Burnham explicitly identifies the underlying facts informing her comments, including:

- a) After considering another contractor for the renovations, Ms. Burnham chose the plaintiffs;
- b) After signing the contract, a different employee of Level One came to her property as he would be managing the job;
- c) She went away with the promise that a schedule of work be drawn up and work would begin after her return;
- d) When she returned, she received the doubling of costs in the Final Forecast;
- e) Mr. Helder told her that he understood the Final Forecast was a great deal more money and that she could ask for a refund for her deposit;
- f) When she made that request for the return of her deposit, Mr. Kautzman told her he would be holding some of the deposit back;
- g) She told Mr. Kautzman that she wanted a full refund; and
- h) She was contacted by Mr. Kautzman who told her they would waive the cancellation penalty if she signed a non-disclosure form.

[183] All of these facts are uncontroverted by the evidence.

[184] With respect to the CBC Interview, Ms. Burnham submits the underlying facts informing her comments include the following:

- a) She contacted the plaintiffs in September 2013;
- b) The Final Estimate was priced at \$18,908.51;
- c) On October 21, 2013 Ms. Burnham signed a contract with the plaintiffs and paid the deposit;

- d) On October 28, 2013 Mr. Helder's came to her property to discuss the project and to draw up a work schedule;
- e) On November 12, 2013 Mr. Burnham received the Final Forecast with costing at \$35,536.31;
- f) Mr. Helder's advised Ms. Burnham that she could request her deposit back;
- g) Ms. Burnham requested her deposit back;
- h) On November 14, 2013 Mr. Kautzman informed Ms. Burnham that he would return a portion of her deposit if she agreed to sign a non-disclosure release despite that he could legally withhold a 15% cancellation penalty;
- i) On November 19, 2013 Ms. Burnham repeated her request for a full return of her deposit; and
- j) On November 19, 2013 Mr. Kautzman informed her a portion of the deposit would be refunded (approximately \$1,000) if she agreed to the terms of the non-disclosure release.

[185] The Supreme Court of Canada has said in *WIC Radio* at para. 56 (quoting *London Artists Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.) that the “commentator must get his basic facts right” and the “basic facts are those who go to the pith and substance of the matter...”.

[186] I agree with Ms. Burnham that the basic facts she provides in the Yelp Posting and CBC Interview provide an underlying basis that could reasonably inform Ms. Burnham's comments that she felt as if she was being “scammed” and extorted for what she believed was a doubling of price for the “same work”, which she believed was “dishonest”, as well as a process that was “questionable”. I further find that the ordinary person would be able to make up his/her own mind whether the basic facts informing Ms. Burnham's words give merit to her comments.

**3. The comment, though it can include inferences of fact, must be recognizable as comment.**

[187] Unlike a statement of fact, a statement of comment is generally incapable of proof and this includes deductions, inferences, conclusions, criticisms, judgments, remarks, and observations generally incapable of proof: *Ross v. New Brunswick Teachers Assn'*, 2001 NBCA 62 at para. 56 as cited in *WIC Radio* at para. 26.

[188] I find Ms. Burnham's comment that the price was doubled for the "same work" or "same job" retain a subjective element that is recognizable as comment when the publications are viewed as a whole.

[189] I agree with Ms. Burnham that her use of the words "scammed", "super dishonest" and "extortion" in the CBC Interview should be construed and are clearly identifiable as comments, not statements of fact. She said, "I felt kind of as though I had been scammed", "seems super dishonest to me" and she "found that kind of like extortion" [emphasis added.].

[190] With respect to the word "scam" Ms. Burnham testified that she titled her document to the CBC as such because she felt that it reflected the entirety of her experience with the plaintiffs and that she thought the non-disclosure release was being used in a way to prevent her from sharing her experiences, which qualifies as comment not an assertion of fact.

[191] With respect to the comment "this process **seemed** pretty questionable" in the Yelp Posting, I am satisfied that Ms. Burnham's perspective that the dealings she had with the plaintiffs was "questionable" clearly contains a subjective element that is readily recognizable as comment.

**4. The comment must satisfy the objective test: could any person honestly express that opinion on the proved facts.**

[192] I find that all of the above comments could be reasonably expressed on the proved facts. Ms. Burnham returned from vacation thinking that her renovations were going to cost approximately \$19,000 and then she was sent the Final Forecast

which almost doubled that price for what she reasonably believed was the “same work” or “same job”. Any reasonable person would be shocked in that scenario.

[193] Afterwards, Mr. Helder told her that she could ask to get her deposit back acknowledging that the price had increased substantially. Acting on this representation, Ms. Burnham did request that deposit back and then was told by Mr. Kautzman that the plaintiffs would be willing to refund her a portion of her deposit as long as she signed the non-disclosure release. These facts are uncontroverted and could lead any reasonable person to believe they were being scammed or extorted.

[194] For those reasons, I find that Ms. Burnham has met the first four parts of the fair comment test. However, if the plaintiffs prove she was actuated by malice, the fair comment defence fails.

### **5. Malice**

[195] The plaintiffs say that Ms. Burnham acted in reckless disregard of the truth in her statements that the price doubled for the “same work”. I have already found above that that comment was reasonably expressed on the facts and I also find for the same reasons, it is not indicative of malice.

[196] The plaintiffs submit that evidence of malice exists when Ms. Burnham threatened Mr. Blair to tell everyone she knows about Level One and that she would write a negative review online. However, I agree with Ms. Burnham that this must be considered in context. This statement was made after she had been dealing with the plaintiffs for two months, received three different estimates, signed a contract, paid a deposit, received the Final Forecast for a price she reasonably considered to be double for the same work, received an offer to request her money back, and then had that offer revoked after she had accepted it. It is not unreasonable for her to express frustration with this process. A defendant can have a great deal of ill-will towards a plaintiff, but the defence of fair comment will not be defeated unless the court concludes the defendant’s dominant purpose in publishing the material is to injure the plaintiff out of spite or ill-will: *Casses* at para. 534. I find her dominant

purpose was to express her frustration at the attempt to hold her deposit hostage for her silence.

[197] I also point out that Mr. Kautzman’s conduct and attitude toward Ms. Burnham during his interactions with her bordered on being aggressive (see above at para. 46). In addition to the tone and content of his emails, Mr. Kautzman made false statements about video and telephone recording of client interactions. He also followed through on a threat to report Ms. Burnham to the City because of previous renovations on her home. Thus, to the extent that there was anything offensive about Ms. Burnham’s statement that she would “tell everybody she knew” about her dealings with Level One (and I do not find there was), it would pale in comparison to what I find to be Mr. Kautzman’s somewhat nasty communication towards her. During the trial, Mr. Kautzman revealed some animus towards Ms. Burnham by stating more than once that he found her “unstable”. In my view, there is no basis whatsoever in that context to accept the allegation of malice against Ms. Burnham.

[198] When viewed as a whole, I do not find the plaintiffs have proven that the words in the CBC Interview or the Yelp Posting were made knowing they were false, with reckless indifference whether it was true or false or for the dominant purpose of injuring the plaintiff because of spite or animosity. I find that Ms. Burnham published the statements in good faith and for the dominant purpose of informing the public in respect of a legitimate consumer interest.

[199] I therefore find that Ms. Burnham is entitled to rely on the defence of fair comment and is not liable to the plaintiffs in defamation.

[200] Given my primary finding that Ms. Burnham did not defame the plaintiffs, and my alternative conclusion if I am wrong about that she is entitled to the defence of justification or fair comment, I will not review the defence of qualified privilege.

## VI. IF THE CBC DEFENDANTS DEFAMED THE PLAINTIFFS, ARE THEY ENTITLED TO RELY ON ANY DEFENCE?

[201] I find the meaning conveyed by the Television Broadcast and the Online Story to be substantially the same, thus if I am wrong that they are not defamatory, I will address them collectively for the purpose of analyzing the defences pled by the CBC Defendants below.

### A. Responsible Communication

[202] In my view, there can be little question that the CBC has easily made out the defence of responsible communication.

[203] To be protected by responsible communication, the CBC Defendants must demonstrate that: (i) the publication was a matter of public interest and; (ii) the publication of the defamatory communication was responsible in that the publisher was diligent in trying to verify the allegations.

[204] The matter was of public interest is not in dispute, but the plaintiffs submit that the CBC Defendants failed to communicate responsibly. I will review the non-exhaustive factors set out in *Grant* with regard to whether the publication was responsible.

#### 1. *The seriousness of the allegation*

[205] The degree of diligence required of the CBC Defendants will increase in relation to the seriousness of the allegation and its potential effects on the person defamed: *Grant* at para. 111.

[206] The CBC Defendants say that the two primary allegations raised in the Television Broadcast and Online Story are that the Level One retained the \$5,000 deposit for renovations that were never commenced and that the plaintiffs subsequently offered to refund a portion of that deposit on the condition that Ms. Burnham agree not to write a negative online review of the company.

[207] I accept that a negative broadcast or publicity about a business may have serious consequences, but a great deal depends upon the nature of the asserted wrongful actions and the type of business. While it may be unwarranted, it is fair to say there is a general anxiety whenever someone proceeds with a renovation project that costs will escalate and it will take more time than originally estimated. It is also true that generally, people accept there can be perfectly legitimate and reasonable reasons for that. The allegations here were more specific, but in the context of the renovation business, I do not accept the allegation that the price doubled for the same job is the most serious type that would necessarily result in lost business.

[208] I point to the evidence in this case that supports that conclusion: the only potential client to testify having seen one of the publications was Ms. Glendenning. During her direct testimony she stated that she had wanted to hire Level One but decided not to after viewing the Television Broadcast<sup>1</sup>. However, that evidence was drawn into question during her cross-examination. Mr. Kautzman followed up by email with Ms. Glendenning to ask why she decided to hire a different company and her response was that it was “mainly” because of the Television Broadcast, but also “a little bit about the fact that the contractor I’m going with has not pushed anything I said I didn’t want”, implying she felt pursued from Level One. She also confirmed that she had not yet entered into a contract with Level One when she informed them she would choose a different company; in other words, her evidence does not amount to a “lost client”, only a lost potential client. I also note the evidence that Level One received industry awards relating to their work after the Television Broadcast.

[209] Based on the foregoing, I conclude that these were only moderately serious allegations. Even if not the most serious, I also accept that the story required a relatively high degree of diligence by reviewing and researching the allegations.

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<sup>1</sup> She testified she saw a “Marketplace” episode but nothing turns on the fact it was a news story instead.

## **2. The public importance of the matter**

[210] The degree of diligence required by the CBC Defendants is proportional to the public importance of the matter: *Grant* at para. 112.

[211] The CBC Defendants say that at their core the allegations are about a local business refusing to refund a deposit unless a customer agreed to sign a non-disclosure release. They submit that the allegations are of public importance because they involve reporting on the silencing of a customer's complaints and a consumer's freedom of expression.

[212] I agree a story about consumer protection garners public importance, but not the highest public importance as contemplated for matters of national security in *Grant*.

## **3. The urgency of the matter**

[213] If a reasonable delay could have assisted the CBC Defendants in finding the truth and correcting any defamatory falsity without compromising the story's timelines, this factor will weigh in favour of the plaintiffs: *Grant* at para. 113.

[214] The plaintiffs submit that there was no urgency to the CBC publications. The question that arises is whether the CBC Defendants rushed the story to publication in a manner disproportionate to the urgency of the matter. The plaintiffs say they did and thus did not exercise adequate diligence in researching the allegations.

[215] I start by commenting that the court must be very cautious in second-guessing conclusions by members of the Press about the timeliness of reporting a story. In my respectful view, too much scrutiny of this issue or a censorious review could unduly interfere with the freedom of the press, a cherished ideal of our democracy. That freedom encompasses not only the content of what is reported, but how and when.

[216] To assess this factor, a review of the chronology of events is in order:

- a) January 20, 2014 – Ms. Burnham sent her complaint to CBC Investigates by e-mail;
- b) February 11, 2014 – Ms. Woodward identified the complaint as a potential story and forwarded it to Mr. Rankin;
- c) February 12, 2014 – Mr. Rankin testified that the CBC Defendants took several steps in the initial phase of investigation including contacting the Better Business Bureau to inquire if there were any outstanding complaints against the plaintiffs, researching Mr. Kautzman and Ms. Burnham’s respective backgrounds, attempting to contact previous Level One customers and reviewing an email sent to Ms. Burnham by Mr. Kautzman;
- d) February 12, 2014 (early afternoon) – Mr. Rankin called Ms. Burnham to conduct a “pre-interview” and attended Ms. Burnham’s home for two hours to shoot visuals for the story and interviewed Ms. Burnham;
- e) February 13, 2014 – Mr. Rankin contacted Mr. Kautzman by telephone at approximately 10:45 a.m. and obtained the plaintiffs’ version of events and encouraged Mr. Kautzman to do an on-camera interview;
- f) February 13, 2014 – Mr. Rankin phoned Mr. Kautzman approximately two hours after the first call to “follow up” and later that day went to the Level One office to film outside visuals for the Television Broadcast at which point he spoke to Mr. Kautzman and again encouraged him to do an on-camera interview (Mr. Rankin says that Mr. Kautzman declined but Mr. Kautzman disputes that he was asked to do an on-camera interview);
- g) February 13, 2014 (2:00 p.m.) – Mr. Kautzman emailed Mr. Rankin asking for the questions for the on-camera interview in advance. Mr. Rankin testified that he consulted with Mr. Williams about Mr. Kautzman’s request;
- h) February 13, 2014 (3:00 p.m.) – Mr. Rankin informed by email Mr. Kautzman it was contrary to CBC policy to provide the questions in advance and gave Mr. Kautzman a deadline of noon the next day to respond;
- i) February 13, 2014 (5.42 p.m.) – Mr. Kautzman emailed Mr. Rankin declining the on-camera interview and provided a statement to Mr. Rankin concerning its version of events; and
- j) February 14, 2014 – the CBC Defendants published the Television Broadcast and Online Story.

[217] Mr. Rankin testified that while there was no particular urgency to the story, neither was there any reason not to go on air on February 14, 2014; all stories have deadlines. Mr. Rankin stated that Mr. Kautzman had formally declined to give an on-camera interview and provided him with Level One's formal statement, so there was no reason to "hold" the story. I agree.

[218] I also agree with the CBC Defendants that even if Mr. Kautzman requested more time to give an interview, he still "would never have gone on camera", which is consistent with Mr. Kautzman's testimony. In *Vellacott v. Saskatoon Star Phoenix Group Inc.*, 2012 SKGB 359 at para. 82, the Court stated that while there may not have been a necessary rush to publish the story, there was no indication that anything would have been different had the newspaper waited to do so. I find the same principle applies here.

[219] The plaintiffs say that the lack of urgency required the CBC Defendants to, at the very least, contact and request an interview with Mr. Helder and Mr. Blair before airing the Television Broadcast. However, at no point during his interactions with Mr. Rankin did Mr. Kautzman suggest that Mr. Rankin contact Level One employees for their version of events. I agree with the CBC Defendants that they are entitled to rely on the president of a local renovation company to convey its side of the story. Moreover, given what I have found to be Mr. Kautzman's defensive and somewhat aggressive demeanour, his suggestion that CBC ought to have gone behind his back to interview Mr. Blair or Mr. Helder cannot be sincere.

[220] I am satisfied that Mr. Rankin and the CBC Defendants exercised the adequate diligence necessary in the circumstances by contacting Mr. Kautzman on multiple occasions for an on-camera interview and receiving Mr. Kautzman's formal statement.

#### ***4. The status and reliability of the source***

[221] Another consideration when evaluating the responsible communication defence is the status and reliability of the sources and whether there was a particular need to consult other sources to verify the allegations. The less trustworthy the

source, the greater the need to use other sources to verify the allegations: *Grant* at para. 114.

[222] The CBC Defendants submit that Ms. Burnham was a first-hand, identifiable source and that they attempted to verify her allegations through corroborating documents, including the Final Estimate, the Final Forecast, email exchanges between the plaintiffs and Ms. Burnham, and the pleadings filed in the Provincial Court small claims action. Mr. Rankin testified that he requested documentation from Level One during the investigation and that seeking Level One’s official response from the president of the company (Mr. Kautzman) was sufficient in the circumstances.

[223] I agree.

[224] In support of their submission under this heading, the plaintiffs allege that Mr. Rankin and the CBC Defendants took Ms. Burnham’s account at face value, relied on the language in the Final Estimate where it says “Build a Sauna” to confirm Ms. Burnham’s account that the price had doubled for the same work and failed to contact Mr. Blair or Mr. Helder. I do not agree that the CBC publications conveyed that the language of the Final Estimate “confirmed” Ms. Burnham’s side of the story.

[225] With respect, this submission is not about the reliability of a source as that phrase is meant in *Grant*; it is a criticism about *how* CBC reported the story. That is not what is contemplated by this aspect of the test. The key element to all factors in the responsible communication test relates to the extent to which the defendant was diligent. Diligence refers to efforts made to verify information, not whether any inferences or impressions made by the reporting accords with the plaintiff’s point of view.

[226] Also, to the extent Level One felt coverage was lopsided (I make no finding about that), it must bear substantial responsibility for that because of Mr. Kautzman’s refusal to go on camera, and his attitude and approach generally.

**5. Whether the plaintiff's side of the story was sought and accurately reported**

[227] The Supreme Court of Canada said that “in most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond” and the “importance of this factor varies with the degree to which fulfilling its dictates would actually have bolstered the fairness and accuracy of the report”: *Grant* at paras. 116-117.

[228] I have already concluded above that the plaintiffs’ side of the story was sought by Mr. Rankin in contacting and obtaining a statement by Mr. Kautzman. I am not convinced that interviewing Mr. Helder or Mr. Blair would have bolstered the fairness or accuracy of the publications.

[229] The primary issue then is whether Mr. Kautzman’s statements to Mr. Rankin were accurately reported.

[230] In addition to the official statement sent to Mr. Rankin after declining the on-camera interview, Mr. Kautzman testified that he told Mr. Rankin that the contract price had doubled because the Final Estimate was for a shed and the Final Forecast included a fully-functional sauna. The plaintiffs say that Mr. Kautzman’s explanation was not adequately conveyed in the Television Broadcast nor the Online Story. I disagree.

[231] A review of the publications concerning how they conveyed the plaintiffs’ side of the story is helpful. In the Television Broadcast, Mr. Rankin said the following:

...A project manager with Level One gave Burnham an \$18,000 estimate. ... So she signed a contract and handed over a \$5,000 deposit. ... But a short time later a different project manager from Level One came out to draw up a work schedule. ... Burnham went on vacation for a week only to return to a new costing: \$35,000 dollars. .. Almost double the original \$18,000 estimate.

...Level One President Randy Kautzman stepped in, pointing out the contract contained a 15% cancellation penalty. ... If she promised not to post a negative review on the internet he would settle for a little less: labour expenses, and only pocket \$1,000 of her deposit.

[232] In the Online Story, the CBC Defendants wrote the following:

When first contacted by CBC News, Kautzman said he'd reconsidered and would give Burnham a full refund. But after talking to his lawyer, he'd changed his mind.

Burnham will be fighting him and has filed a statement of claim in small claims court.

"It would be one thing if they had gone on the job and found there was pipe going through the property that had to be removed or something, but no one so much as lifted a hammer in this situation."

Two days ago, Kautzman filed his own statement of defence in response, agreeing to refund \$2750 of the deposit, but claims that Burnham changed the scope of work before cancelling, and therefore the company is entitled to keep the rest.

On Thursday Kautzman sent a statement to CBC News saying:

Level One Construction entered into a signed contract which included a provision for costs associated with cancellation. She is being charged the cancellation fee.

When we enter into our contracts we have to go through the process of putting together the bids and confirm estimates, commit our workers to schedules which precludes us from other jobs.

"Ms. Burnham cancelled the job and then was subject to the cancellation fee."

None of the allegations have been proven in court."

[233] I am satisfied that the Television Broadcast and Online Story do include the plaintiffs' position that the scope of the work had changed. In addition, the Online Story attached both Ms. Burnham's and Level One's small claims pleadings. The statement in the Television Broadcast was that Ms. Burnham went on vacation "only to return to a new costing". That wording is accurate and does not indicate anything about the nature of that costing or why it was "new".

[234] The plaintiffs' position was put in the Online Story with the comment that "Kautzman...claims that Burnham changed the scope of work before cancelling, and therefore the company is entitled to keep the rest" in addition to reproducing his formal statement to the CBC Defendants verbatim.

[235] Based on the explicit inclusions of Mr. Kautzman's formal statement as well as the inclusion of the gist of the plaintiffs' central argument (that the price was not

doubled for the same work), I find the plaintiffs' side of the story was sought and accurately reported.

**6. Whether inclusion of the defamatory statement was justifiable**

[236] It is for the trier of fact to determine whether inclusion of a defamatory statement was necessary to communicate on a matter of public interest: *Grant* at para. 118. In doing so, however, it is important to grant generous scope about the editorial choices made about what particular statements to include in a publication: *Lougheed Estate v. Wilson* at para. 186.

[237] In my view, the court must exercise great caution under this heading. Long-standing and reputable members of the press and legitimate and respected journalists must be granted the widest possible scope in order to protect press freedom lest the court get drawn into second-guessing content or editorial choices.

[238] In the Television Broadcast, Ms. Burnham's words "extortion" and "scam" are used but they are not printed in the Online Story. The CBC Defendants say they avoided using those words in the Online Story in order to adopt a neutral tone and to avoid a one-sided repetition of Mr. Burnham's version of events.

[239] The CBC Defendants argued that the newsworthy point of the story was that once she had a dispute with the company, and asked for her refund, she was asked to sign a non-disclosure agreement in order to get it. The CBC's position is that the public interest in the story relates to the impact of non-disclosure agreements signed by dissatisfied customers on the reliability and accuracy of online reviews for businesses. However, without including Ms. Burnham's version that she cancelled the contract and asked for a deposit because she believed the price doubled, CBC had no anchor to its story. It was necessary for the narrative of the story to say why Ms. Burnham was a dissatisfied customer.

[240] I find the inclusion of the defamatory statements is justifiable.

**7. Whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage")**

[241] At paragraph 76 of *Grant*, the Court defines "reportage" in the following terms:

... 'Reportage' refers to defamatory statements clearly attributed to someone other than, and not adopted by, the defendant. On one view, reportage is simply the accurate reporting of facts -- the fact of what someone said. Such reportage is essential, the media argue, to comprehensive coverage of public debate. Charges flung back and forth between contending factions in a dispute are themselves, it is argued, an essential part of the story, and will be understood by the public as such. However, the reporting of defamatory statements is barred by the "repetition rule" of defamation law, which holds that someone who repeats a defamatory statement is no less liable than the person who originated it. ...

[242] The CBC Defendants say that the 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, and that they should not incur liability even if some of the statements made are defamatory, as the dispute itself is a matter of public interest, and the allegations are fairly reported: *Loughheed Estate* at paras. 187-188.

[243] I agree that viewing the Television Broadcast and Online Story as a whole, it is clear that the defamatory words are attributed to Ms. Burnham. Significantly, the publications state that neither of the parties' position in the dispute has been proven in court.

[244] I find the reportage rule does apply and that the repetition rule does not apply as both the plaintiffs and Ms. Burnham's respective positions are expressed in the publications, including Mr. Kautzman's formal statement that Ms. Burnham changed the scope of the work, and that was why she was charged the cancellation fee. The context is apparent.

**8. Conclusion**

[245] I agree with the comments of the Court in *Vellacott* at para. 82(h) that "the defendants did not have a legal obligation to write their articles in a manner that satisfied the plaintiff. ... They owed him some legal duties, but writing in the overall tone satisfactory to the plaintiff was not one of them".

[246] I conclude that the CBC Defendants are entitled to rely on the defence of responsible communication. I am satisfied the publication was a matter of public interest and that the publication of the Television Broadcast and the Online Story were responsible in that the CBC Defendants were diligent in trying to verify the allegations.

**B. Fair Comment**

[247] If I am wrong, I will analyze the defence of fair comment.

[248] The CBC Defendants rely on fair comment and submit that the facts upon which Ms. Burnham's allegedly defamatory comments were made were disclosed. They refer to certain uncontroversial facts: Level One refused to refund Ms. Burnham her entire deposit; Mr. Blair gave an initial estimate of just under \$19,000; Ms. Burnham signed a contract and paid \$5,000; and when she returned from vacation she received a proposal with an estimate for over \$35,000.

[249] For the same reasons set out above at paras. 177-194 (where I found the fair comment defence applied to Ms. Burnham's defamatory words), I find that the CBC Defendants are also entitled to rely on the fair comment defence.

[250] With regard to the fact that the fair comment defence may be defeated if the plaintiffs can show the CBC Defendants acted maliciously, there is no reasonable basis and no evidence whatsoever upon which it can be found the CBC Defendants were actuated by malice.

[251] Again, given my primary conclusion that there was no defamation, and my alternative findings that the CBC Defendants are entitled to both fair comment and responsible communication defences, I will not analyze qualified privilege.

**VII. CONCLUSIONS**

[252] The plaintiffs have failed to establish that any of the impugned publications were defamatory, so the action is dismissed on that basis.

[253] In the alternative, if any defamatory meanings were conveyed, I find that Ms. Burnham has made out the defences of justification (to the extent explained at para. 176) and fair comment with regard to the CBC Interview and the Yelp Posting. Accordingly, even if I am wrong about defamatory meaning, the claims against Ms. Burnham are dismissed.

[254] Similarly, if am wrong and the Television Broadcast and Online Story were defamatory, the CBC defendants are all absolved from liability under the defence of responsible communication and fair comment.

## **VII. COSTS**

[255] Unless there are facts or circumstances relevant to costs that I am unaware, the defendants are entitled to their costs. If the parties believe I need to address some aspect of costs, they may seek a brief hearing before me by contacting the registry no later than 30 days from the date of this judgment.

“Sharma J.”