IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Northwest Organics, Limited Partnership v. Maguire,* 2013 BCSC 1328

Date: 20130726
Docket: S117491
Registry: Vancouver

Between:

Northwest Organics, Limited Partnership and Northwest Group Properties Inc.

Plaintiffs

And

Sheila Maguire, John Doe 1, John Doe 2, John Doe, Jane Doe 1, Jane Doe 2 and Jane Doe 3

Defendants

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

Counsel for the Plaintiffs:	M.A. Clemens, QC
Counsel for the Defendants:	J. Gratl
Counsel for Interested Party, Attorney General of British Columbia:	R. Butler
Place and Date of Hearing:	Vancouver, B.C. July 2 and 3, 2013
Place and Date of Judgment:	Vancouver, B.C. July 26, 2013

Table of Contents

I. INTRODUCTION

[1] The defendants apply for an order dismissing the plaintiffs' claim of defamation as a "strategic lawsuit against public participation" ("SLAPP"). The defendants make this application pursuant to ss. 2(b) and 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), Rules 1-3, 9-5 and 9-6 of the *Supreme Court Civil Rules* (the "*Rules*"), and the inherent jurisdiction of the Court.

[2] The plaintiffs are corporations who own property in Botanie Valley, near Lytton, British Columbia, which they are actively developing as a composting facility. The defendants oppose the development of the facility. The plaintiffs commenced an action against the defendants, alleging that the plaintiffs have been defamed by a series of documents that they say the defendants are responsible for creating, or at least responsible for disseminating and publishing. The allegedly defamatory documents include an environmental study (the "Easdon Report"), two pamphlets ("What is the Truth" and "Beware of Half Truths"), and online material.

[3] The defendants say that the plaintiffs' claim is a SLAPP lawsuit, whose primary purpose or overwhelming effect is to infringe the defendants' freedom of expression. The defendants say the *Rules* must be interpreted in light of the *Charter* right to freedom of expression. As a result of the *Charter* issues, the Attorney General of British Columbia (the "Province") was represented in this matter and addressed those issues.

[4] The defendants propose that, informed by *Charter* rights and values and by Rule 1-3, the tests under Rules 9-5 and 9-6 should be revised in the context of SLAPP cases. They say that when it comes to a SLAPP lawsuit there is no genuine issue to be tried, and that the plaintiffs' claim is vexatious and an abuse of process In any event, the defendants claim entitlement to a remedy under Rules 9-5 and 9-6, as well as under the *Charter* and under the Court's inherent jurisdiction.

[5] In my view, using the *Rules* to address SLAPP cases in the way proposed by the defendant would radically change the substantive law of defamation. I do not think it appropriate to change the substantive law of defamation under the guise of

interpreting the *Rules*, informed by *Charter* values, or based on inherent jurisdiction, and I therefore dismiss the application as it relates to these arguments.

II. PROCEDURAL ISSUES

[6] At the outset, counsel for the plaintiffs argued that the only appropriate matter for consideration is whether the action should be dismissed as a SLAPP lawsuit based on the defendants' proposed "two-part test". The defendants say the proposed two-part test is based on an interpretation of the *Rules* informed by the *Charter* protection for freedom of expression.

[7] The defendants, however, say that their Notice of Application seeks remedies based on this argument, but also under the conventional application of Rules 9-5 and 9-6. The Notice of Application does expressly address those rules, and the plaintiffs' arguments address their interpretation. The defendants' arguments on these points have been in the hands of the plaintiffs for some five months, so the plaintiffs can hardly claim to have been taken by surprise.

[8] In making their arguments, however, the defendants also refer to various defences that they did not expressly plead: i.e., fair comment on a matter of public interest and responsible communication. Although the defendants did not expressly plead those defences, they did plead reliance on "all defences at common law and pursuant to the *Defamation Act*". The defendants explain the deficiency of their pleadings by arguing that the plaintiffs' pleadings were also deficient, namely, that "[t]he plaintiffs have failed to provide particulars of the alleged defamatory statements".

[9] The plaintiffs' Notice of Civil Claim, while referring to the impugned communications, says only that "[p]articulars of the defamatory words are lengthy and will be delivered in a separate Statement of Particulars". The defendants explain that the Statement of Particulars was only delivered after the defendants had filed their Response to Civil Claim, and thus they did not address the Statement of Particulars in the Response to Civil Claim. However, the particulars have now been in the hands of the defendants for more than a year. While the plaintiffs can be

faulted for failing to deliver particulars in a timely way, rectification of the pleadings is long overdue.

III. ALLEGED DEFAMATION

[10] In order to gain some flavour of the dispute I consider it useful to describe the allegedly defamatory materials.

A. The Easdon Report

[11] The Easdon Report is a 31-page report prepared by Michael Easdon, Ph.D. Dr. Easdon holds a Ph.D. in Ecological Genetics from the University of Liverpool. The Easdon Report was prepared for the Lytton First Nations. The Executive Summary describes the Botanie Valley as a "historic and current vegetable garden for the Nlaka'pamux people". It describes the Composting Facility as "a threat to the ecological integrity of the region". It says "[o]ur review of the potential impacts of the open window composting process as currently conceived indicates that there is excessive risk to the region in the form of the importation and spreading of plant and human disease pathogens, insect pests, noxious weeds and contaminants". Dr. Easdon recommends that the composting facility project not proceed.

B. "What is the Truth"

[12] The "What is the Truth" flyer is a two-page flyer that begins with the sentence: "[w]e wish to correct misconceptions stemming from greenwash spread by the NorthWest Organics layers and marketing team, about the proposed industrial composting operation in Botanie Valley". "Greenwash" is defined as "disinformation disseminated by an organization so as to present an environmentally responsible public image". The flyer purports to quote from statements made by Northwest Organics, which the flyer describes as "Greenwash", and then follows those statements with rebuttals under the headings by "Truth". For example, this passage occurs:

> Greenwash: From NOW's website Q&A Question 27: Is it true that one of the McRae brothers worked in a landfill for years? What roll (sic) did he play?" Answer: "No. None."

> Truth: Their answer is an evasion at best. The McRae's have owned and operated multiple municipal and even toxic waste disposal companies over the years. In fact, Ron was named "**The single worst employer**" by the B.C. and Yukon Territory Building and Construction Trades Council, for bugging union meetings and uttering death threats, amongst other offences".

[13] The flyer concludes by referring the reader to a website and a Facebook group.

C. "Beware of Half Truths"

[14] The "Beware of Half-Truths" flyer says the flyer "was written by locals of Botanie, not sophisticated corporate PR people" who oppose "the proposed industrial composting operations in Botanie". It has the same format as the "What is the Truth" flyer, containing headings titled "Half-Truth" with quotes and statements attributed to the plaintiffs, followed by responses under the heading "What NWO is not telling you".

D. The Online Material

[15] The Notice of Civil Claim references publications found on the website of the Botanie Valley Advisory Committee that the plaintiffs say "contains false and maliciously published statements concerning the plaintiffs". The Notice of Civil Claim says that "[p]articulars of the defamatory words are lengthy and will be delivered in a separate statement of particulars". The plaintiffs never delivered a separate statement of particulars regarding this material. A deponent for the plaintiffs, Mr. McCrae, deposed that the website is no longer accessible, although there have been applications and orders respecting access to archived material.

IV. THE RULES

A. Supreme Court Civil Rules

[16] The current *Rules* are enacted under the *Court Rules Act*, R.S.B.C. 1996, c. 80. The *Rules* are a regulation made by the Lieutenant Governor in Council (the "LGC"), following consultation with the Chief Justice of the British Columbia Supreme Court: *Court Rules Act* s. 6. In British Columbia it has always been so.

[17] The *Judicature Act*,*1879*, S.B.C. 1879, c. 12, provided that the LGC may from time to time make rules to be styled "Rules of Court", regulating the pleading, practice and procedure in Supreme Court, upon which followed *The Supreme Court Rules*, *1880*.

[18] The current *Rules* govern the conduct of proceedings, addressing such matters as practice and procedure, means of proof, modes of evidence, appearances, applications, records and costs: see ss. 1 and 2 of the *Court Rules Act*. The defendants rely on Rules 1-3, 9-5, and 9-6.

B. Rule 9-5

[19] Under Rule 9-5, a party may apply to strike pleadings when the action or defence as pleaded cannot succeed as a matter of law. It is equivalent to former rule 19(24). Applications under Rule 9-5 can raise only matters of law, not of fact, and an order striking pleadings under Rule 9-5 cannot support a finding of *res judicata* in subsequent proceedings: *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Ltd.*, 2011 BCCA 149 at paras. 9-10, 11 C.P.C. (7th) 238 [*International Taoist*].

[20] No evidence may be adduced in an application to strike pleadings on the grounds that they disclose no reasonable claim or defence: Rules 9-5(1)(a) and 9-5(2).

C. Rule 9-6

[21] Rule 9-6, which applies to applications for summary judgment, is similar but not identical to the Rule 18 of the former *Rules*. A claiming party may bring a summary judgment application on the basis that the responding pleading does not raise a "genuine issue" for trial: 9-6(2). A responding party may seek dismissal of a claim on the basis that the originating pleading does not raise a "genuine issue" for trial: 9-6(4). Judgments under Rule 9-6 can support a finding of *res judicata* in subsequent proceedings: *International Taoist* at para. 11.

[22] Although Rule 9-6 does not contain a provision preventing parties' from adducing evidence, former Rule 18 required affidavit evidence. In *International Taoist* at para. 13, Low J.A. opined that it was inconceivable that either a claiming or answering party could obtain judgment under Rule 18 without, respectively, sworn evidence that proves the claim or sworn evidence establishing that the claim is without merit. Thus the applicant must adduce at least some evidence in support of an application under Rule 9-6.

[23] As Griffin J. noted in *Sharrock v. Moneyflow Capital Corp.,* 2010 BCSC 1219 at para. 5, the summary judgment rule is not often used because the applicant must meet such a difficult threshold: the applicant must establish that there is no triable issue of fact. Evidence is generally not sworn in support of the application other than to confirm the facts pleaded by the applicant. The respondent need only then provide sufficient evidence to establish that there is a genuine issue for trial. In such circumstances, with the Court faced with oath against oath, the Court is most unlikely to grant judgment or dismiss a claim: *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 at para. 12, 61 B.C.L.R. (4th) 241, Thackray J.A., referred to by Low J.A. in *International Taoist* at para 14.

D. Rule 1-3

[24] Rule 1-3(1) states the object of the *Rules,* which remains the just, speedy and inexpensive determination of every proceeding on its merits, just as it was under Rule 1(5) of the former *Rules*. Rule 1-3(2) expressly includes in this object the principle of proportionality, and directs the Court to consider (as far as is practicable) the amount involved, the importance of the issues in dispute, and the complexity of the proceeding. The principle of proportionality militates for a more relaxed application of the rules of form, where appropriate: *The Owners, Strata Plan NES 97 v. Timberline Developments Ltd.,* 2011 BCCA 421 at para. 49, 24 B.C.L.R. (5th) 234.

[25] In light of the state of the pleadings described above and the way this matter was set down for hearing, I have concluded that I should deal with the *Charter* and

inherent jurisdiction arguments as they relate to the *Rules*, and leave the defendants' conventional arguments under Rules 9-5 and 9-6 for another day.

V. THE *CHARTER* AND SLAPP LITIGATION

A. Position of the Defendants

[26] The defendants argue that the plaintiffs' action in defamation constitutes "strategic litigation against public participation" ("SLAPP"). The parties considered, *inter alia*, *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129; *WIC Radio Ltd. v. Simpson,* 2008 SCC 40, [2008] 2 S.C.R. 420; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, and *Bank of British Columbia v. Canadian Broadcasting Corp.* (1995), 126 D.L.R. (4th) 644, 10 B.C.L.R. (3d) 201 (C.A), in their submissions. I will address the *Charter* arguments here.

[27] The defendants begin their argument by stating that speech engaging the search for truth and speech aimed at participation in social and political decision-making—in other words, speech that is in the public interest—is entitled to special protection. This protection should take the form of a switch of onus when a defendant argues that a claim of defamation discloses no genuine issue: rather than forcing the defendant to show that the plaintiff's case raises no genuine issue, the plaintiff should be required to show that it has a serious case worthy of pursuing and a case that justifies the chilling effect on the defendant's freedom of expression.

[28] To this end, the defendants say that the Court should adopt a "two-part test" in assessing a pre-trial challenge to a claim of defamation. The proposed two-part test is as follows:

> 1. Does the expression at issue fall within the core areas of protected speech under s. 2(b) of the *Charter*?
>
> 2. If yes, the respondent must justify the claim as genuine by establishing that the claim:
>
> (a) is to compensate a significant injury to reputation;
>
> (b) has a significant likelihood of success; and
>
> (c) is the only practicable response to the alleged defamatory speech.

[29] At various times, the defendants proposed a similar two-part test that omitted the third requirement of the second part of the test (that the only practicable response to the alleged defamatory speech is a lawsuit rather than responsive speech in the public arena).

[30] The defendants draw a parallel between this proposed test and the well-known "*Oakes* test". That test applies once a party demonstrates a government infringement of a *Charter* right. The government must then justify the infringement by showing that the infringement is both prescribed by law and demonstrably justified in a free and democratic society. To do so, the government must show that the objective of the infringement relates to concerns that are pressing and substantial. Then the government must demonstrate that the infringement is proportionate: the measures must be rationally connected to the objective; the infringement must minimally impair the freedom in question; and the salutary effects of the infringement must outweigh their deleterious effects.

[31] According to the defendants, the two-part test takes the same form. Once a defendant shows that his or her expression on a matter of public interest is infringed by a claim of defamation, it ought to be up to the plaintiff to justify the infringement.

[32] The defendants find support for the two-part test in two basic principles outlined in Supreme Court of Canada jurisprudence. The first principle is that the common law must be interpreted to conform with *Charter* values. The second principle is that Supreme Court has been engaged in a process of restricting the scope of the tort of defamation in favour of promoting freedom of expression when it comes to communications on subjects of public interest.

[33] The first principle is illustrated by cases such as *R. v. Mentuck,* 2001 SCC 76, [2001] 3 S.C.R. 442, where the Supreme Court of Canada restated the requirements for a common law publication ban in a criminal trial. In doing so, the Court created a two-part test with some similarity to that proposed by the defendants: (1) the publication ban should only be granted where necessary to prevent a serious risk to the proper administration of justice, and (2) the salutary effect of the publication ban

outweighs the deleterious effects on the right to freedom of expression, right to a fair trial, and the efficacy of the administration of justice (*Mentuck* at para. 32). The defendants say this reformulation takes its shape from the *Oakes* test.

[34] *Mentuck* and cases like it demonstrate that the Supreme Court of Canada is willing to reshape the common law to conform to evolving social norms and to *Charter* values. The defendants say this kind of evolution is required when it comes to the law of defamation as it applies to matters of public interest.

[35] The second principle forms the heart of the defendants' argument: that the Supreme Court has been moving towards protecting expression on matters of public interest. The applicant says that *Grant* and *WIC Radio Ltd.* represent a new era in respect of balancing freedom of expression and defamation. These cases created and expanded defences to defamation, defences upon which the defendants intend to rely.

[36] In *WIC Radio,* the Court was asked to re-examine the defence of fair comment. That defence applies to protect a defendant who makes a comment on a matter of public interest, provided that the comment is based on fact, is recognizable as comment, and is not motivated by malice. While historically the defendant also had to show that he or she subjectively and honestly held the opinion expressed, the Court in *WIC Radio* reconsidered that requirement.

[37] The Canadian Civil Liberties Association (the "CCLA") argued that to bring the common law of defamation into compliance with the *Charter* required a "presumption in favour of expressive activity". This would require the plaintiff "to bear the initial onus of establishing that the defendant's defamatory comment (i) is not a comment at all but a fact which must be proven or otherwise justified, or (ii) is not a comment on a question of public interest" (*WIC Radio* at para. 29).

[38] The Court declined to place an initial onus on the plaintiff in cases of defamation:

> [30] I do not think a shift of onus on these points is required. In the first place, the *Charter* is about "expressive activity" but it also protects the dignity and worth of individuals, whose reputation may be their most valued asset. Plaintiffs must prove defamation to get their case on its feet. At that point, it is the media that seeks to excuse defamatory remarks on the basis that they are "comment" on a "matter of public interest". Ordinary principles of litigation put the burden of proof on the party making the assertion (*Ontario Equitable Life and Accident Insurance Co. v. Baker*, [1926] S.C.R. 297). In any event, the onus on these two issues is relatively easy to discharge. The public interest is a broad concept. The cases establish that the notion of "comment" is generously interpreted. Putting the onus on the defendant in these respects is not too high a price to pay for a defamer to avoid legal liability for an allegation already found to have wronged the plaintiff's reputation.

[39] The Court moved on to the heart of the case: the “honest belief” requirement in the defence of fair comment. Before *WIC Radio,* the test for fair comment required that the communicator himself or herself subjectively and honestly believed the opinion communicated. The plaintiff in *WIC Radio* advocated that the Court retain a subjective honest belief requirement, while the CCLA asked the Court to eliminate the “honest belief” requirement from the fair comment test.

[40] The Court held that removing that element of the defence would be far more than an incremental change, and was not needed to bring the defence into conformity with *Charter* values. Instead, the Court adopted an objective version of the honest belief requirement: could <u>any</u> person honestly have expressed the defamatory comment on the proven facts. Thus the commentator himself or herself no longer needs to actually believe the opinion communicated, as long as some person could honestly believe it.

[41] This objective test balanced freedom of expression against the protection of reputation:

> [49] The test represents a balance between free expression on matters of public interest and the appropriate protection of reputation against damage that exceeds what is required to fulfill free expression requirements. …
>
> [50] Admittedly, the "objective" test is not a high threshold for the defendants to meet, but nor is it in the public interest to deny the defence to a

> piece of devil's advocacy that the writer may have doubts about (but is quite capable of honest belief) which contributes to the debate on a matter of public interest.

[42] The Court also considered whether in light of the new standard for fair comment (objective honest belief rather than subjective honest belief) the onus for proving malice ought to fall on the plaintiff or the defendant. Some pro-media groups argued that the issue of "honest belief" should simply be subsumed by the malice analysis, where the burden of proof lies on the plaintiff. The Supreme Court retained the current standard: the burden of establishing the defence of fair comment, including the burden of honest belief, lies on the defendant, while the burden of showing malice lies on the plaintiff (*WIC Radio* at para. 52).

[43] Therefore, the test for fair comment after *WIC Radio* is 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.

[44] The defendants draw on *WIC Radio* to say that the Courts have been willing to evolve the common law towards an appropriate balance between the worth and dignity of the individual, including reputation, and the value of freedom of expression. *WIC Radio* also demonstrates the particular regard given by the Supreme Court of Canada on matters relating to the public interest.

[45] The defendants then turn to another Supreme Court of Canada case: *Grant v. Torstar*. In *Grant*, the Supreme Court of Canada created a new defence of "responsible communication on a matter of public interest".

[46] The test for this defence has two branches. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that the publisher diligently tried to verify the allegations (*Grant* at para. 126).

[47] In support of this change, the Court considered whether the existing law of defamation struck an appropriate balance between freedom of expression and the protection of individual reputation.

[48] The Court considered the three core rationales of freedom of expression: the search for truth, participation in social and political decision-making, and the value of self-realization. The Court then noted that the third rationale—self-realization—was of dubious relevance to defamatory communications, because the plaintiff's reputation may be just as worthy of protection as the defendant's desire to self-realize through unfettered expression. The other two core rationales squarely apply to communications on matters of public interest, even those that ultimately prove false (*Grant* at paras. 47-52).

[49] To be in the public interest, the subject matter of the communication must be something about which the public has substantial concerns because it affects the welfare of citizens, or to which considerable public notoriety or controversy has attached. The public interest should be interpreted broadly to includes science, arts, environment, religion and morality, and not just government and political matters (*Grant* at paras. 105 and 106).

[50] The Court held that the current law of defamation could stifle vital reporting:

> [53] Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. But to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is

> different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.
>
> [54] The second rationale -- getting at the truth -- is also engaged by the debate before us. Fear of being sued for libel may prevent the publication of information about matters of public interest. The public may never learn the full truth on the matter at hand.
>
> …
>
> [57] I conclude that media reporting on matters of public interest engages the first and second rationales of the freedom of expression guarantee in the *Charter*. The statement in *Hill* (at para. 106) that "defamatory statements are very tenuously related to the core values which underlie s. 2(*b*)" must be read in the context of that case. It is simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth.

[51] The Court then considered the importance of protection of reputation. Protection of reputation recognizes the innate dignity of the individual and is innately related to the protection of personal privacy. Based on these concerns, the plaintiff argued against expanding a defence of responsible journalism: a plaintiff who has been defamed by a false statement will not take much comfort from the fact that the defamatory statement was made despite the journalist's responsible practices (*Grant* at paras. 58-60).

[52] The Court set out a number of factors to consider when determining whether the communication was responsibly made: the seriousness of the allegation; the public importance of the matter; the urgency of the matter; the status and reliability of the source; whether the plaintiff's side of the story was sought and accurately reported; whether inclusion of the defamatory statement was justified; whether the defamatory statement's public interest lay in the fact that it was made rather than its truth; and other relevant considerations (*Grant* at paras. 110-122).

[53] The defendants say the two-part test essentially tracks the tests used in *Oakes* and *Mentuck* and incorporates the principles found in *Grant* and *WIC Radio*. The first branch of the two-part test asks whether the communication falls into the public interest, just as is required in the defences of fair comment and responsible

communication. The second branch requires the plaintiff to justify its claim as genuine by establish that the claim is to compensate for significant injury to reputation and has a significant likelihood of success. This second branch mirrors, in the defendants' view, the proportionality assessment in *Oakes*.

[54] Ultimately, the defendants contend that the two-part test is needed to provide a fair balance between the protection of reputations on one hand and the interest of freedom of expression on the other.

B. Position of the Plaintiffs

[55] The plaintiffs accept that freedom of expression is an important value, but argue that the protection of reputation is also important. The plaintiffs further note that cases like *B.C.G.E.U. v. British Columbia (Attorney General*), [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1, stand for the proposition that access to the courts and rule of law are also worthy of protection. The plaintiffs say that the proposed two-part test gives too much weight to freedom of expression and not enough weight to these other values.

[56] The plaintiffs rely on the decision of the Court of Appeal in *Bank of British Columbia*. In that case, the Court of Appeal considered two questions: first, whether the onus of proof in defamation ought to be reversed to bring the common law into conformity with *Charter* values; and second, whether the *Charter* requires that the defence of truth be considered before any document disclosure takes place.

[57] The Court of Appeal concluded that the *Charter* did not apply directly to the action, since the dispute was essentially a private dispute between the parties. This finding obviated any claims of direct *Charter* infringement (*Bank of British Columbia* at para. 40).

[58] The Court of Appeal went on to consider whether the "actual malice" standard used in the United States and set out in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should be accepted. That approach does away with common law presumptions of falsity and malice, placing the onus instead on the plaintiff to

show that at the time the defamatory statements were made, the defendant either knew the statements to be false or was reckless as to their truth.

[59] The Court of Appeal concluded that it should not adopt the actual malice standard and that it should not reverse the common law onus of proof. Those kinds of changes needed to come from the legislature, not the Courts (*Bank of British Columbia* at paras. 42-46). The Supreme Court of Canada would soon come to a similar conclusion in *Hill*, as I will discuss below.

[60] On the second issue, the applicant in *Bank of British Columbia* argued that disclosure of documents should only take place once a court had determined that the allegedly defamatory communication was capable of being understood in a defamatory sense, and after a court had resolved the applicant's defence of justification. The applicant argued that these preliminary steps were required under the *Charter* to ensure freedom of the press and to avoid a significant media chill.

[61] The Court of Appeal held that the *Charter* did not require that the issue of truth be determined before document disclosure took place.

[62] The Plaintiffs say that *Bank of Canada* is authority squarely against the defendants' two-part test. The Court should not resolve defences before pre-trial matters like disclosure take place, and freedom of expression does not require that the onus in defamation cases be reversed.

C. Position of the Province

[63] The Province made submissions in this matter regarding the constitutionality of the *Rules* as they apply to the law of defamation.

[64] The Province argued that the onus of proving that a common law doctrine is not in accordance with the *Charter* always remains with the party asserting the non-compliance. Thus where there is a claim that the common law should be changed to conform to *Charter* values, the onus remains on the challenger. This is in contrast

with cases where a law directly infringes a *Charter* right: in those cases, the burden of justifying the infringement lies on the government.

[65] The Province argues that in this case no government infringement of a *Charter* right is being alleged, so the defendants' two-part test, which is modeled on the *Oakes* test and places a significant burden on the plaintiff, is inappropriate.

[66] The Province notes that in *Hill*, the Supreme Court declined to reverse the onus of proof for the common law tort of defamation.

[67] In *Hill*, the Supreme Court of Canada was asked to modify the common law of defamation in light of *Charter* values. The defendants in that case argued that the common law of defamation had failed to keep step with Canadian society and placed too little emphasis on the importance of freedom of expression. They advocated instead for the "actual malice" liability standard adopted by the United States in *New York Times v. Sullivan*.

[68] Mr. Justice Cory, writing for the majority, began by noting that since Hill was suing in his private capacity, the *Charter* had no direct application to the common law of defamation in the circumstances of that case. The *Charter* only applies to government actions. Courts could, however, turn to *Charter* values when applying and developing the common law. But in doing so, courts were not to apply an *Oakes*-like s. 1 analysis:

> [97] When the common law is in conflict with *Charter* values, how should the competing principles be balanced? In my view, a traditional s. 1 framework for justification is not appropriate. It must be remembered that the *Charter* "challenge" in a case involving private litigants does not allege the violation of a *Charter* right. It addresses a conflict between principles. Therefore, the balancing must be more flexible than the traditional s. 1 analysis undertaken in cases involving governmental action cases. *Charter* values, framed in general terms, should be weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.

[69] Instead, the onus remains at all times with the party asserting that the common law is inconsistent with *Charter* values:

> [98] Finally, the division of onus which normally operates in a *Charter* challenge to government action should not be applicable in a private litigation *Charter* "challenge" to the common law. This is not a situation in which one party must prove a prima facie violation of a right while the other bears the onus of defending it. Rather, the party who is alleging that the common law is inconsistent with the *Charter* should bear the onus of proving both that the common law fails to comply with *Charter* values and that, when these values are balanced, the common law should be modified. In the ordinary situation, where government action is said to violate a *Charter* right, it is appropriate that the government undertake the justification for the impugned statute or common law rule.

[70] Thus it is up to the party challenging the common law to bear the burden of proving not only that the common law is inconsistent with *Charter* values, but also that its provisions cannot be justified.

[71] The Court went on to consider the competing values of reputation and freedom of expression. The Court noted that while freedom of expression is universally recognized as important, it is not an absolute right. The Court also noted that defamatory statements are far from the core values that underlie s. 2(b): they are inimical to the search for truth, they cannot enhance self-development, and they detract from healthy participation in the affairs of the community (*Hill* at paras. 101-106).

[72] The Court reiterated the importance of protecting reputation. Reputation closely relates to the innate worthiness and dignity of the individual, and has long been valued in human society:

> [120] Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.

[73] Ultimately, the Court refused to reverse the traditional common law burden of proof in defamation and rejected the proposed "actual malice " rule:

> [137] The *New York Times v. Sullivan* decision has been criticized by judges and academic writers in the United States and elsewhere. It has not been followed in the United Kingdom or Australia. I can see no reason for adopting it in Canada in an action between private litigants. The law of defamation is essentially aimed at the prohibition of the publication of injurious false statements. It is the means by which the individual may protect his or her reputation which may well be the most distinguishing feature of his or her character, personality and, perhaps, identity. I simply cannot see that the law of defamation is unduly restrictive or inhibiting. Surely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish. The law of defamation provides for the defences of fair comment and of qualified privilege in appropriate cases. Those who publish statements should assume a reasonable level of responsibility.

[74] The Province argues the two-step test would effectively undo *Hill*: the two-part test would do away with the presumption of falsity and malice, placing the burden on the plaintiff to prove that the defamatory statements were false and harmful.

[75] The Province also referred to *WIC Radio*. In that case it was argued "that to bring the common law of defamation into compliance with the Charter requires 'a presumption in favour of expressive activity', so that a plaintiff ought to bear the initial onus of establishing that the defendant's defamatory comment (i) is not a comment at all but a fact which must be proven or otherwise justified, or (ii) is not a comment on a question of public interest." The Court held that such a switch in onus was unnecessary: the defence of fair comment provided an answer to any undue limit on freedom of expression (*WIC Radio* at paras. 29-30).

D. Discussion and Analysis

[76] Stepping back, in my view the defendants are proposing a substantive change to the law of defamation, not simply a change in the rules of civil practice. The substantive law, as it now stands, is that once the plaintiff commences its claim by asserting the publication of a defamatory statement, the onus shifts to the defendant to prove truth, to prove fair comment, to prove qualified privilege or to prove responsible publication. If the defendant pleads fair comment, then the burden lies on the plaintiff to prove malice. What the defendants are proposing are not

changes to procedural rules that would apply only in the case of SLAPP lawsuits, but changes to the substantive law of defamation that go to the merits of those claims.

[77] To the extent that the defendants rely on the *Rules*, and in particular on Rule 1-3, as the source for this change, they cannot succeed. Any rule that purports to change substantive law would surely be *ultra vires* the power of the Lieutenant Governor in Council (the "LGC") under the *Court Rules Act*. The rule making authority of the LGC is restricted, as I have noted, to addressing such matters as practice and procedure, means of proof, modes of evidence, appearances, applications, records and costs. The LGC has no authority under that *Act* to make changes to substantive law. Rule 1-3 makes this distinction clear by emphasizing that the ultimate object is determination of "every proceeding" (Rule 1-3(1)) or "a proceeding" (Rule 1-3(2)) "on its merits". I can find no authority under the *Court Rules Act* that would allow the LGC to revise or regulate substantive law. Therefore by enacting Rule 1-3, the LGC cannot have altered the substantive law of defamation.

[78] The underlying issues here are, of course, private law matters that do not *per se* attract *Charter* challenge. In a *Charter* case if legislation or state action infringes a *Charter*-protected right or freedom, the burden initially lies on the challenger to demonstrate the infringement. Once the challenger establishes an infringement, the onus shifts to the government to show using evidence that the infringement is demonstrably justified in a free and democratic society. If the challenger is successful, the remedies are under s. 24(1) or s. 52. But *Charter* remedies are available only against the government, not against private persons.

[79] The defendants accept this principle, and, shifting their position somewhat, they say that the *Rules* should be informed by *Charter* values. That is a proposition with which no party takes issue. However, this does not change the nature of the defendants' attack, which, in my view, still goes to the substantive law of defamation and not to the *Rules*. That is, the argument that the common law presumptions of falsity or malice or damages are not rationally connected with *Charter* values or

impermissibly impair those values is an argument about the common law of defamation, not about the *Rules*. The *Rules* are and should remain neutral with respect to common law questions and the substantive merit of claims.

[80] An examination of the proposed two-part test applicable to SLAPP lawsuits reveals the extent to which the applicant proposes changes to the substantive law of defamation. The two-part test effectively reverses the established premise that falsity, malice and damages are presumed, by requiring the plaintiff to establish that the claim has a significant likelihood of success, is the only practicable response to the alleged defamatory speech, and is needed to compensate a significant injury to reputation. This is not so much an incremental change to the common law as a wholesale change, something normally undertaken by the legislature or by higher courts with a full evidentiary record.

[81] *Bank of British Columbia* is similar to the case at bar. There the Court of Appeal considered whether the *Charter* value of freedom of expression was of such import that it should adopt the American approach and reverse the burden of proof, as determined by *New York Times Co. v. Sullivan*. At para. 44, the Court of Appeal referred to the decision of the Ontario Court of Appeal in *Hill v. Church of Scientology of Toronto* (1994), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1 (C.A.), where that Court of Appeal opined that such major changes in the law of defamation should be undertaken by the legislature, not the courts.

[82] The Supreme Court of Canada upheld the Ontario Court of Appeal's decision in *Hill*. The Supreme Court of Canada declined to follow the American jurisprudence, finding instead that the common law of defamation complies with the underlying values of the *Charter* and that there was no need to amend it (*Hill* at paras. 137 and 141).

[83] To some extent the matter was revisited in *WIC Radio,* where the Supreme Court of Canada was invited to "bring the common law of defamation into compliance with the *Charter* [which] requires a 'presumption in favour of expressive activity'", although the Court was being asked to change the traditional onuses in a

different manner than in *Hill*. The Court declined that invitation (*WIC Radio* at para. 29).

[84] Of course, there have been some incremental changes (*Hill* and *WIC Radio*) and some substantial changes (*Grant*) made to defamation law by the courts in the cases reviewed. So far, no court has seen fit to make the fundamental change urged here.

[85] Moreover, the courts that have made these incremental and substantial changes have done so after trial, where there has been a full evidentiary record. If the common law surrounding specific causes of action requires modification in the context of s. 2(b) of the *Charter,* that modification should not be done in a factual vacuum, or, for that matter, in a lean evidentiary matrix. Because of their present and future importance, *Charter* cases generally require a full factual background: see the reasons of Cory J., for the Court, in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-362, 61 D.L.R. (4th) 385. This case, at this stage, lacks such a full factual background.

VI. INHERENT JURISDICTION

[86] The defendants also rely on the inherent jurisdiction of the Court. *R. & J. Siever Holdings Ltd. v. Moldenhauer*, 2008 BCCA 59, 291 D.L.R. (4th) 328, demonstrates an application of the Court's inherent jurisdiction. In that case the Court of Appeal held at para. 14:

> In addition to the powers conferred by the ***Rules of Court***, the Supreme Court of British Columbia, as a superior court of record, has inherent jurisdiction to regulate its practice and procedures so as to prevent abuses of process and miscarriages of justice: see I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg. Prob. 23 at 23-25. As the author said, at 25,
>
> > The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by the Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

[87] Thus inherent jurisdiction exists to "prevent abuses of process and miscarriages of justice".

[88] While the precise boundaries of the Court's inherent jurisdiction remain unclear, that jurisdiction "is a procedural concept and courts must be cautious in exercising the power which should not be used to effect changes in substantive law": *Goodwin v. Rodgerson,* 2002 NSCA 137 at para. 17, 210 N.S.R. (2d) 42.

[89] Under the substantive law of defamation, the plaintiffs, as corporate entities, have a right to protect their reputation: *Home Equity Development Inc. v. Crow*, 2004 BCSC 124 at para. 183, Quijano J. Every defamation law suit has some dampening effect on speech. I cannot see how inherent jurisdiction can or should be used to change the substantive laws of defamation under the guise of a procedural change meant to protect the processes of the courts and the integrity of the judicial system.

[90] Moreover, the *Rules* already protect against abusive litigation. If the plaintiffs' claim proves baseless after a trial on the merits, those actions can be addressed through costs, as was done in *Scory v. Krannitz,* 2011 BCSC 1344, 13 C.P.C. (7th) 118.

VII. SUMMARY

[91] In summary, it reads too much into the language of the *Rules*, however they might be informed by *Charter* values, to require this Court to rewrite the substantive law of defamation to provide the defendants with an early remedy for their concerns about SLAPP lawsuits. Those legitimate concerns can be addressed under the current rules, as they were by Bruce J. in *Scory*, or by the legislature, should it see fit, or by the courts, addressing the substantive law of defamation in the context of a full factual record.

[92] For these reasons I would not adopt the proposed two-part test for dismissing strategic litigation against public participation. In light of the state of the pleadings

and the circumstances in which this application arose, I decline to address the applications under Rules 9-5 and 9-6.

"The Honourable Mr. Justice Savage"