QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2012 SKQB 359**

Date: **2012 08 31**
Docket: Q.B.G. No. 1725 / 2002
Judicial Centre: Saskatoon

IN THE COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

MAURICE VELLACOTT,

Plaintiff

- and -

SASKATOON STARPHOENIX GROUP INC., DARREN BERNHARDT and JAMES PARKER,

Defendants

Counsel:

Daniel N. Tangjerd — for the plaintiff
Sean M. Sinclair — for the defendants

Polson for Showing
652-7575

JUDGMENT
August 31, 2012

DANYLIUK J.

Introduction

[1] The cut-and-thrust of politics can be a tough, even vicious, business. Not for the faint of heart, modern politics often means a participant's actions are examined

under a very public microscope, the lenses of which are frequently controlled by the media. While the media has obligations to act responsibly, there is no corresponding legal duty to soothe bruised feelings.

[2] The plaintiff seeks damages based on his allegation that the defendants defamed him in two newspaper articles published in the Saskatoon Star-Phoenix newspaper on March 4 and 5, 2002. The defendants state the words complained of were not defamatory and, even if they were, that they have defences to the claim.

[3] To better organize this judgment, I have divided it into the following sections:

Facts

[4] In defamation actions, there is a need to examine the facts, including the words complained of and their context, in significant detail.

[5] The plaintiff is a Member of Parliament representing Saskatoon-Wanuskewin. He was first elected in 1997 and subsequently won federal elections held in 2002, 2004, 2006, 2008 and 2011. The plaintiff is married with four children, two of whom are independent adults and two of whom still reside at home. The plaintiff's education and employment background prior to politics were in the religious calling. He obtained several theological degrees and held positions both as a pastoral minister and as an educator in smaller religious colleges.

[6] As a Member of Parliament at the relevant time, the plaintiff enjoyed certain privileges regarding creation and dissemination of printed materials. Two are germane here. The first is the "franking" privilege. "Franking" is a process whereby Members of Parliament may sign their mail and send same postage-free via Canada Post. It can be sent anywhere in the country but not outside Canada. As well, mail sent to Members is postage-free if addressed to a recipient on Parliament Hill. Neither the member nor a citizen directly incurs any costs for such correspondence.

[7] The second type of communication privilege enjoyed by Members of Parliament is commonly referred to as a "ten percenter". These consist of photocopied materials which are reproduced in a quantity which cannot exceed ten percent of the number of households in the Member's constituency. Members are allowed to print and mail out an unlimited number of ten percenters in each year. However, the same item cannot be sent out time and again; the rules provide that at least 50 percent of the text content must be different from the other ten percenters sent out in that year. Also, these

items can only be distributed within the Member's constituency. On average, 4000 to 4500 ten percenters are sent with each separate mailing.

[8] Obviously, both types of communication carry an actual cost for production and distribution, but there is no direct cost to either the Member of Parliament or the recipient of such correspondence. The exact rules controlling these materials have been altered over the years. To some degree at least, partisanship is not prohibited and is even expected. There were, and perhaps still are, varying opinions as to the extent to which partisan politics may overlap with these mailing privileges.

[9] As a member of Parliament, the plaintiff was entitled to these privileges, irrespective of whether he was in government or opposition, or his party affiliation. Originally, the plaintiff was a member of the Reform Party of Canada, which subsequently became the Canadian Alliance. During the relevant time (in 2002), there was a leadership race. Stockwell Day, who had been the leader, declared his candidacy. From his testimony and the exhibits filed, it is abundantly clear the plaintiff was an ardent supporter of Mr. Day. The other candidates were Stephen Harper (ultimately successful), Grant Hill and Diane Ablonczy.

[10] During the leadership campaign and in the early months of 2002, the plaintiff sent out three communications under his official Member of Parliament letterhead. In the context of this legal action, each is worthy of some detailed examination.

[11] The first item was sent out January 4, 2002. In his testimony, the plaintiff characterized this as a report on his travel activities. In fact, the document is the plaintiff's endorsement of Mr. Day as leader and an invitation to a public campaign event. The plaintiff's travel activities described therein all relate to Mr. Day's leadership

campaign. The correspondence (with emphasis as in the original) reads as follows:

> **Vellacott Endorses Stockwell Day as**
>
> **"Tested, Tried and True"**
>
> **For Immediate Release** **January 4, 2002**
>
> **Saskatoon** – Maurice Vellacott, M.P. for Saskatoon-Wanuskewin will travel to Montreal Monday, January 7th to take part in the launch of Stockwell Day's Leadership Campaign.
>
> On Tuesday, January 8th, Stockwell Day gets the momentum rolling across the country at a stop in St. Catharines, Ontario where he's expected to address a large enthusiastic crowd.
>
> Vellacott will be back in Saskatoon on Wednesday, January 9th, where Stockwell Day will be speaking at a **public event at Prairie Harvest House, 702 Circle Drive East. Free coffee and dessert will be served starting at 6:30 p.m. and the formal program revs up at 7 p.m. There is no admission cost.**
>
> At that event Vellacott will be re-stating his support for Stockwell Day in the leadership campaign.
>
> Vellacott says, **"All my reasons for supporting Stock first time around still apply except now I have one major additional reason. I have seen his remarkable resilience in the face of adversity. He rebounded. He as a leader and we as the Canadian Alliance Party had a good fall session in the House of Commons setting the agenda in the aftermath of September 11. This man, Stockwell Day, is 'tested, tried and true!'"**

[12] The plaintiff testified that while this document was a media release, he also distributed it as a mailout to perhaps 400 or 500 people from his database. This would have included constituents as well as some people outside his riding. This document was sent out under the plaintiff's "franking" privilege.

[13] Another item was sent out bearing the date of January 28, 2002. This was a one-page document with printing on both sides. Page one was on the plaintiff's parliamentary letterhead and was a letter to the editor of the Saskatoon *StarPhoenix*

regarding an issue of alleged racism regarding a colleague. Printed in large font on the back of that letter was the following (again, emphasis is as in the original):

> Member of Parliament,
>
> **Stockwell Day,**
>
> will be speaking at a public event
>
> **Tuesday, February 12th**
>
> at **Circle Drive Alliance Church,**
> **Prairie Trail Lounge** located at
> *Circle Drive South at Preston Avenue*
> *in* **Saskatoon.**
>
> This public ***breakfast*** begins at ***7:15 a.m.***
>
> There will be a $5 cost-recovery charge
> for the breakfast.

[14] The plaintiff testified that this letter was originally sent to the newspaper but that the event notice was subsequently printed on the reverse of the letter and then distributed to the names on his database. The two items were combined because he felt it convenient to do so. This item was also sent out using the plaintiff's franking privilege. The plaintiff indicated he was away on February 12, 2002, and did not actually attend this event.

[15] The third document was undated but would likely have been sent by the plaintiff between February 23 and 28, 2002, as it refers to the results of a poll regarding the Alliance leadership race, which poll was released on February 23, 2002. This poll placed Mr. Day at the lead of that race. The entire communication is supportive of Mr. Day and is, in essence, campaign literature for him.

[16] All three of these documents were sent out to the names on the plaintiff's database as it existed at that time. All of these documents were sent using the franking privilege, thus the plaintiff incurred no direct costs for sending out communications

pertaining to his party's leadership race. Others involved in politics began to take exception to the plaintiff's use of these privileges.

[17] At some point during these events, the communications attracted the attention of reporters at the defendant newspaper, which received contact and complaints from other members of the Alliance party. Two news articles were published as a result.

[18] The first article was published Monday, March 4, 2002. The prior day, the plaintiff received a call from the defendant Darren Bernhardt ("Bernhardt"), a reporter at the defendant newspaper. Bernhardt advised the plaintiff of the potential story, indicating there were some expressions of concern about the plaintiff's use of his parliamentary privileges for what were, at their core, purely internal party matters. The plaintiff said he replied by advising that he had the franking privilege and that here was nothing improper in the way he had used it. The plaintiff testified he expected there would be an article published but not of the tone and content as that of March 4, 2002. The plaintiff indicated Bernhardt had not asked his permission to print the article; had he, the plaintiff would have refused.

[19] Bernhardt's article of March 4, 2002, appeared below the fold on the first page of the paper that day, with a continuation on the second page. It is reproduced in its entirety, as it forms much of the basis for the plaintiff's defamation claim:

> **Harper camp screams foul over mailouts by Vellacott**
>
> Several Saskatchewan Canadian Alliance members have accused party MP Maurice Vellacott of violating government privilege by using tax dollars to mail letters of support for CA leadership candidate Stockwell Day around the province.
>
> But Vellacott, the CA member for Saskatoon Wanuskewin, says he is within his right and chalks up the complaints to sour grapes by supporters of Stephen Harper, Day's top rival to become party leader.
>
> "There's certain kinds of politics, I suppose, played throughout the

course of a campaign. I think a certain amount of this is what we'd expect to happen," said Vellacott. "People feel strongly, at a point in time, in respect for a candidate and at the end of the day, whichever way this (leadership race) goes, I think people would respect democracy and be of the view that our real target is the Liberals, not each other."

Party member Tom Ballantyne, who backs Harper, says party politics has nothing to do with it. He says it's a matter of right and wrong.

"It bothers me that he is using the taxpayers' mailing system to do this. If an MP wants to back an individual and speak on their behalf, OK. But it's crooked to send that kind of mail by franking," he said.

Franking is a term used for mail sent through the government system on an MP's expense account regarding constituent business and stamped with the MP's name. The letters sent by Vellacott are clearly marked as coming from the House of Commons.

Arnold Murphy, who works in Prince Albert CA MP Brian Fitzpatrick's office, has received a handful of complaints about the mailings and explained that the MPs must be careful about what is in the letters.

"It can question things, criticize the government and raise various issues but it can't be a campaign for someone," he said.

Fitzpatrick, who is not supporting Day, is trying to stay away from the issue, but is aware of it.

"Let (Vellacott) make a contribution to Day out of his own pocket, not ours," said Ballantyne, who has received two letters as has Alice Fyfe, who lives in Nipawin.

"I'm just an ordinary citizen but I'm very perturbed when I see things like this. I'm raising the issue because it is my duty to do that as a citizen of this country," said Fyfe. "Those people are put in office to do a job for us, not to steal from us. These people (Day supporters) are trying to with this race on the basis of Christianity, but I see shades of Jim and Tammy Faye Bakker here."

TV evangelist Jim Bakker lost his lucrative ministry and his wife after being convicted of bilking followers out of $158 million.

If Vellacott's mailouts were aimed at the entire CA membership base of 1,700 in the province – and done more than once – the cost could be tremendous, said an Alliance member who is working on Harper's campaign and didn't want his name used.

"We're certainly talking thousands of dollars," he said, noting that Battlefords-Lloydminster CA MP Gerry Ritz is also behind Day but has

> been campaigning on his behalf with personal letters sent in his own envelopes with his own stamp.
>
> "Gerry is a gentleman about this stuff," he said. "That's the way that it should be done. Maurice is well aware he is wrong but he is able to get away with it because most decent people don't want to get involved.
>
> "I was going to leave this until after the election but I can't," he said, adding he is aware the issue could taint the party image "but I just don't think we should bury this."
>
> Vellacott said he sent letters to members, non-members and businesspeople and was commenting on political issues. One letter, obtained by The StarPhoenix, is in response to a Global TV/National Post survey released on Feb. 23. The poll showed Stockwell Day's support at 34 per cent and Harper's at 22 per cent among Alliance voters.
>
> Vellacott suggests in the letter that the margin of difference is greater in Saskatchewan. He praises Day's "impressive record" while in the Alberta government and says the "adjustment" to federal politics that gave Day some trouble is now past.
>
> "He is a solution-oriented kind of guy" and "most suited for the government side," Vellacott states in the letter. "He'll really shine when we're on the government side (in the House of Commons) and that's eventually where we intend to be."
>
> In an interview, Vellacott insisted he was "within the House of Commons boundaries" in mailing the letter.
>
> "I don't think it's any particular secret that, for months now, I've been in support of Stockwell Day," he said. "I do frank mailouts throughout the course of the year and I have a fairly extensive database.
>
> "All through the time that I've been an MP, you do stuff on all kinds of issues and some of it is obviously more of a partisan nature.
>
> "It's kind of indicating party policy, promoting the leader, what you're doing as an individual MP, an [*sic*] so on."

[20] The plaintiff stated he was bothered by this article. He testified that it upset not only himself, but his wife and family members. He took exception to the characterization of being crooked or wrong. He said that when he read the article, it "felt like a swift kick to the gut". He stated that as a politician, educator and clergyman, his integrity was of vital importance to him, both personally and in terms of his career.

[21] A second article appeared in the *StarPhoenix* on Tuesday, May 5, 2002. This one was by James Parker ("Parker"), at that time a reporter employed by the newspaper. This article appeared at page A4, and reads as follows:

> **Sask. MPs join attack on Vellacott mailouts**
>
> ❑Ex-parliamentary worker says all parties routinely violate mailing privileges.
>
> ...
>
> Canadian Alliance MP Maurice Vellacott is inviting a backlash from voters by abusing his communications privileges while campaigning for Alliance leadership candidate Stockwell Day, say other Saskatchewan MPs.
>
> "As parliamentarians, we have to be very judicious about how we use this," New Democrat Dick Proctor said Monday.
>
> "This is a great privilege awarded to elected members, to be in touch with your constituents and in some cases people who aren't your constituents. If we aren't careful how we use it, there will demands for restrictions on how we use it.
>
> "What Maurice has done doesn't pass the smell test."
>
> New Democrat Lorne Nystrom and former Alliance MP Jim Pankiw, now a member of a parliamentary coalition headed by Progressive Conservative Leader Joe Clark, said Vellacott seems to have broken the spirit of the regulations governing MP communications.
>
> Supporters of Alliance leadership hopeful Stephen Harper have complained about Vellacott's mailouts, some of which have been distributed to voters throughout the province.
>
> Recently, the MP for Wanuskewin sent out a letter detailing his response to a Global TV/National Post survey released Feb. 23 which showed Day was leading the leadership race with 34 per cent support among Alliance members.
>
> The mailout, printed with House of Commons letterhead, praised Day's abilities and endorsed the expulsion of MPs from the Alliance caucus who "treacherously backstabbed the leader and tried to hijack the party and steal it from the members."
>
> On at least two occasions, Vellacott has used his parliamentary expense account to print letters inviting people to hear Day speak.
>
> Vellacott did not return phone calls Monday. On Sunday, he told

The StarPhoenix the letter on the poll was "within the House of Commons boundaries."

He said he has sent letters on "political issues" to party members, non-members and business people.

Eric Duhaime, a spokesperson for Day, said Harper supporters such as Alberta MP Bob Mills have also used their communications allowance to campaign for their candidate.

"That's another issue," Duhaime said when asked if he thought it was appropriate.

MPs are allowed to send out four newsletters a year to all their constituents. They can also send an unlimited number of mailouts to the number of households equivalent to 10 per cent of their constituency population. The so-called "10 per centers" can be mailed anywhere in Canada.

The House of Commons' board of internal economy is responsible for enforcing rules governing the use of communications expenses. The two main rules are that MPs should not use their mailouts to fund-raise for their party or sell party memberships, said a government official, who stressed the letters should deal with parliamentary business.

The Alliance leadership race is a one-member, one-vote affair. Day and the other candidates are selling memberships at their public events.

"It's a fuzzy, foggy line," said Nystrom, who represents Regina Qu'Appelle.

"He's not asking them to buy a membership," he said.

"But he's inviting them to a meeting where they will be asked to buy a membership."

Nystrom said it's clear the mailouts discuss the internal business of the Alliance, not a broader public policy question such as bank mergers.

Richard Truscott, provincial director of the Canadian Taxpayers Federation, said MPs of all parties routinely abuse their communication privileges.

"When I worked on Parliament Hill (from 1993 to 1997), every MP was sending either householders or 10 per centers into neighbouring constituencies on various issues often coloured with partisan rhetoric," Truscott said.

"The bottom line is they shouldn't be using this for partisan purposes."

[22] In his testimony, the plaintiff was adamant that he did not violate the rules as they existed in 2002. He stated the rules contemplated partisan communications. He indicated he felt that as the leadership race in question would determine the leader of the Opposition who would, in turn, influence the Opposition's position on matters in the House, therefore this was a matter of broader concern than just for Alliance members. The plaintiff clearly did not, and does not, believe his conduct to be an abuse of his parliamentary privileges as they then existed. The plaintiff disavowed any knowledge whatsoever of any practical "smell test" or of the concept of violating the spirit, if not the letter, of these rules. He felt the second article was also unfair and defamatory.

[23] After these articles were published, the plaintiff wrote to the Board of Internal Economy on April 11, 2002, to see if he was offside. In his examination-in-chief, a letter of reply was tendered from the Board dated April 30, 2002. That very short letter indicated he did not violate the rules. However, it was not until cross-examination that the Court learned of a second letter received by the plaintiff, from the same author, dated May 2, 2002. The chair of the Board of Internal Economy, Speaker of the House Peter Milliken, advised the plaintiff as follows:

> On April 11, 2002, you wrote to the Board requesting an opinion of the *By-laws* governing the use of franking and postal privileges.
>
> As I wrote you previously, the Board considered your request at [*sic*] and agreed that you had not violated the *By-laws* as written. However, the Board was of the opinion that the printed matter you submitted was close to the edge of what <u>may</u> be acceptable, although as stated, the Board agreed that you had not infringed the *By-laws* as they presently exist.
>
> The questions raised in your letter provoked interesting discussion as to the whole issue of parliamentary functions and partisan activity and were of sufficient interest that a sub-committee of the Board has been established to study the *By-laws* relating to this matter in the hopes of providing greater clarity to all Members of Parliament.
>
> On behalf of the Board, I want to thank you for bringing this matter to our attention.

[Emphasis in original]

[24] In fact, evidence tendered during this trial disclosed that these rules have now been changed and, presently, it is highly doubtful that Mr. Vellacott could issue the same type of communications and engage his franking privileges.

[25] The plaintiff noted that in 2004 his plurality in the election had dipped slightly. On cross-examination, it was demonstrated that in each successive election the plaintiff's percentage of the votes cast actually increased:

- 2004 – 46.64 percent;
- 2006 – 49.38 percent;
- 2008 – 56.50 percent; and
- 2011 – 58.40 percent.

[26] The plaintiff remained steadfast in his view that there was "no cost" to anyone (including taxpayers) in sending out these franked envelopes, as opposed to "no cost to him".

[27] Four witnesses testified for the defence, one expert and three from the newspaper. Darren Bernhardt testified. He obtained his B.A. in 1995, and his B.A. (Journalism) in 1997. He worked as a Saskatoon *StarPhoenix* reporter from 1997 to 2008. Politics was not his "regular beat" in 2002, but he was on duty the first weekend in March and was assigned this story by one of the editors, a typical occurrence.

[28] Bernhardt was the author of the March 4, 2002, article. When asked what the actual "story" or focus was in the article, he stated it concerned internal strife within the Canadian Alliance party due to the merger and leadership race. Additionally, the

focus of the story was not whether the plaintiff had broken the law or any rules of the House of Commons. It was a "reactionary story", given the strong feelings expressed by some members of the Alliance to what the plaintiff had done. There had been a complaint or comment from one person to the newspaper, which is what drew attention to the issue. This was not a story initiated by the *StarPhoenix* or Bernhardt.

[29] Bernhardt conducted several interviews for the story, all via telephone. As others were criticizing the plaintiff, Bernhardt called him out of what he termed "a sense of fairness" and "balance to the story". He could not specifically recall the discussion but believed he would have followed his standard practice of outlining the tenor of the story and reading quotes from other people to the plaintiff and seeking the plaintiff's reaction to same. He confirmed all quotes in his article were accurate. All interviews were done on Sunday, March 3, 2002. Although he could not now locate same, he took notes during the interviews and used them to prepare his article for publication.

[30] Bernhardt testified, as did the other two *StarPhoenix* witnesses, that he was not aware of any corporate agenda to "get" the plaintiff nor did he harbour any such personal agenda. There was no benefit in this for him or for the newspaper. He wrote the story because it was assigned to him and because, as it developed, it was clear there was significant conflict within the party, which was "news".

[31] On cross-examination, Bernhardt said there was nothing unusual about the story assignment. This was a story about a federal political party, and the plaintiff was a high-profile figure within Saskatoon and area. It was not a story about the rules regarding franking, so he did no research in that regard.

[32] He was questioned about the quote from Ms. Fyfe regarding the Bakkers and his explanatory paragraph. Bernhardt confirmed the Fyfe quote was accurate and

indicated his view was this demonstrated how heated matters were getting within the party. While there was no direct connection between the Bakkers and the plaintiff, Bernhardt pointed out it is not his opinion that was the focus of the article. The following paragraph in the story was inserted by way of explanation and information. He again indicated the plaintiff would have had an opportunity to respond to all these direct quotes. While there was no urgency to get the story out, he felt it was completed and tendered it to the editorial desk for publication. He also confirmed that someone other than the reporter writes the headlines and chooses the photos.

[33] James Parker also testified. He was with the *StarPhoenix* from 1988 to 2003. He had obtained his B.A. in Management and Economics from Guelph University in 1984, and his journalism/communications degree from University of Regina in 1988. Parker was the author of the March 5, 2002, news story. His beat was politics, so this was squarely within his mandate at the newspaper.

[34] Parker saw the focus of his follow-up story as being different. His view was that issues existed as to whether the plaintiff's use of his franking privileges was appropriate, especially in the context of a leadership race. There had already been articles concerning franking. He felt this was newsworthy and in the public interest to report. He, therefore, spoke with several MPs and other party officials about the plaintiff's use of the privilege, obtaining several opinions. Parker also telephoned the plaintiff at his office but was unable to reach him. He said he wanted to be fair and give the plaintiff an opportunity to comment.

[35] As his focus was different and centred on the appropriateness of the plaintiff's use of his privilege, Parker did contact the Board of Internal Inquiry in Ottawa to obtain information about the rules. He also noted that he specifically contacted a Day supporter to elicit reaction. Nothing in the story reflected his personal opinion.

[36] Like Bernhardt, Parker swore he had no personal vendetta against the plaintiff nor was he aware of any *StarPhoenix* policy to attempt to "smear" the plaintiff. He was just reporting news.

[37] On cross-examination, plaintiff's counsel went through Parker's testimony, and Parker confirmed matters to which he had already testified. It was suggested to him that Parker's conversation with MP Lorne Nystrom contained an invitation to the latter to raise the matter in the House of Commons; this was denied by Parker. He pointed out that by the time he spoke with Nystrom, he already knew the matter was governed by the Board of Internal Economy and was not a House matter, so there would have been no reason for him to suggest anything of the sort to Mr. Nystrom. The plaintiff did not call Mr. Nystrom as part of his case.

[38] Steven Gibb testified for the defendants. He was with the *StarPhoenix* for 35 years, from 1975 to 2010, and ended his tenure as editor-in-chief for the last 17 years. He was responsible for the overall news operation. He described how news stories went from concept to completion, citing a variety of sources for the genesis of any particular story. He confirmed that it was quite common for related stories to have two or more reporters. He confirmed neither the newspaper nor he personally had any vendetta with the plaintiff nor was there any policy to pursue or persecute any individual. He corroborated the testimony of the two reporters.

[39] Finally for the defendants was Patricia Bell, who, by consent, was qualified as an expert witness and allowed to provide her opinion testimony on best practices for journalists and news reporting agencies, and what constitutes "news" in the news reporting industry. Ms. Bell teaches journalism at the University of Regina and has since 1999. She taught at Carleton University as well. She has taught and still lectures in the area of rights and ethical responsibilities of journalists. She obtained her Bachelor of Arts

in Journalism in 1963 from the University of Western Ontario. She has significant experience in the industry, much of it with the *Globe & Mail* and *Ottawa Citizen* newspapers. She has reported on education, health and international affairs. She has reported from India. She covered controversial and emotionally-charged stories such as abortion protests on Parliament Hill.

[40] Ms. Bell testified that while there are many definitions of "news", news includes three concepts:

(a) News should be timely. It should generally relate to something that is happening now, or has recently discovered to have occurred in the past. The concept of timeliness has changed and is faster now than it used to be in the industry, given the 24-hour news cycle.

(b) News should be important. In her words, "it should matter". A reporter or editor must ask "why is this story important?" The story should touch people.

(c) News should be interesting. It should be more than a flat factual recitation. It should relate something out of the ordinary. Often, a reporter must write with a particular reader or audience in mind.

[41] With respect to the two articles in issue in this action, Ms. Bell defined them as news. A reader would likely think them news, in her professional opinion. They were timely. The leadership race in a federal party that was appearing to gain in support and momentum was important. The fact there was strife within the party within the context of its leadership race was important and newsworthy. The fact that elected MPs and taxpayers' funds were at issue made the story important and newsworthy as well as interesting to a large number of people. Both stories, with their different emphases, were

news and were worth printing in her view.

[42] Ms. Bell also testified as to best practices in gathering and writing news stories. She analyzed both Bernhardt's and Parker's articles. In general, reporters and editors follow best practices when they ensure their news articles:

(a) contain information about something that is happening now, something that until now has not been known or reported;

(b) are of interest to readers of this particular newspaper. As a rule, local stories should be given precedence;

(c) always, except under very rare circumstances, have more than one source so that the story does not rely upon a single perspective. These sources should be identified and have a legitimate place in the news story;

(d) are verified, balanced and complete as possible given restraints of deadlines;

(e) are presented in a clear, unbiased manner with sufficient facts, details and explanations to allow readers to draw their own conclusions;

(f) are written in a tone appropriate to the subject-matter;

(g) include, within the original story, the response of any person who is the subject of accusations or criticisms, either express or implied. Where there are accusations or implied criticisms of any person or institution, there must always be a rigorous attempt to obtain a

response before publication, and the response should be included in the original story.

[43] Ms. Bell then applied these criteria to the two news stories in issue. In each case, her opinion was that the *StarPhoenix* reporters and editors complied with best journalistic practices. The following summarizes her views:

(a) These stories were "news". The events were in the midst of the leadership race. She felt it important to note that the "news peg" for the stories was not whether the plaintiff misused his franking privilege; rather, it was that some members of the Alliance were voicing objections to the use of franking privileges to support one internal candidate over another. She noted this could have remained a purely internal issue but for a member drawing it to the attention of the newspaper. With the second story the "news peg" was widened to more generally raise the appropriateness of this use of communication privileges, and other Saskatchewan MPs and taxpayers were brought into the debate.

(b) Both stories were of interest to *StarPhoenix* readers. Many would have received the letters in question; others are members of the party, on either side of the leadership race; non-members were taxpayers and interested in the use of this allowance; the plaintiff was a high-profile local MP. The first story raised the manner in which such allowances were used for internal party purposes. The second story picks up on readers' curiosity as to how they are used and whether this is appropriate. The second article is very much a broadening of the first in her view.

(c) Multiple sources were used in each story to an appropriate degree. In all but one case, the individuals were identified. One was deliberately anonymous in the first story, which Ms. Bell says could only have occurred with editorial approval. However, that person was identified as a Harper supporter, thus a reader could analyse his/her remarks in that context, rather than taking same as an objective opinion on the issue of permissible uses of franking. The second story used multiple and diverse sources appropriately; there is a reason for each person quoted to be in the article.

(d) The stories were balanced. The stories reflect the reporters' efforts to contact a variety of sources. The first article shows that there is, geographically, widespread concern about this amongst Saskatchewan's Harper supporters. The second story reflects Parker's efforts to reach as many people as possible, from different parties and even an official from the Board of Internal Economy.

(e) Both stories are clear and unbiased, with conclusions to be drawn left to the reader. While there was criticism contained in the first story, it was balanced for readers. Significant space is given to the plaintiff's explanation (9 of 23 paragraphs, about 35 percnet). It is criticism from the interviewees, rather than the newspaper, which is presented. The reporter used one paragraph to explain "franking" and another to explain the Fyfe reference to the Bakkers. Ms. Bell saw neither of these as problematic, as they were factual. The Parker article also cited numerous sources but included more explanation detailing some of the rules regarding use of such

privileges. He directly quoted from a mailout sent by the plaintiff.

(f) The tone of the stories was even and reflected the content and issues appropriately. It is clear opinions expressed are from third parties, not the reporters. When quoting others, the writers use the neutral word "said" rather than any language implying overly excited speakers. The language used allows readers to judge matters for themselves. In the first story, the accusations from other Alliance members are outlined, then the plaintiff's response is presented immediately after, which is appropriate and balanced. The structure shows these opinions are held by others and leaves it to the reader to judge who, if anyone, is correct. While some comments in both stories are strongly critical, both articles retained the proper overall tone to allow readers to reach their own conclusions. Even Ms. Fyfe's comment, which is somewhat extreme, said more about her and her views than about the plaintiff in Ms. Bell's view.

(g) The plaintiff's response was sought for both stories. In the first, it was obtained and given prominence. Efforts were made by Parker to contact the plaintiff, unsuccessfully. It was appropriate that readers be informed of such efforts and that the comments from the first article be reiterated. This ensured readers who had not seen the first story would know what the plaintiff's response to same had been and would serve as a reminder to those that had read the first story that this was what he had said. A fresh reply is better but, when not available, referring back one day is a valid, acceptable and common practice.

[44] Ms. Bell noted that news judgment is "a combination of careful observation, listening skills and critical thinking in order to bring clear, complete reports to readers". As a politician, the plaintiff could expect to be more "newsworthy" than other individuals. How he spends taxpayers' money becomes a matter of public interest, and when controversy arises over this spending, there is an obligation for the newspaper to investigate and report. With this dispute between the Day and Harper camps happening in the midst of the Alliance leadership race, this story could not be ignored by any of the defendants in her view.

[45] Her conclusion was that all of this was properly done and that the defendants used best practices and maintained journalistic standards regarding both articles.

Issues

[46] The issues are:

1. Are the words complained of defamatory?
2. Does the defence of responsible journalism avail the defendants?
3. Does the defence of qualified privilege avail the defendants?
4. Does the defence of fair comment avail the defendants?
5. Does the defence of consent avail the defendants?
6. If liability is found, what is the appropriate quantum of damages?
7. What is the appropriate disposition of costs?

Analysis

1. Are the words complained of defamatory?

• *Background*

[47] "Defamation" is a legal term, a term of art. While one might believe certain words to be defamatory, they are not so unless the legal test for such categorization has been met. Rhetoric, harsh words, unflattering, and even insulting, language – all may result in damaged feelings, but not all are necessarily defamatory, such that an analysis of liability and applicable defences is engaged.

[48] Public figures, such as politicians, bear many burdens. One is that they are subject to criticism, castigation and insults, some even made in bad taste or replete with vulgarity. Still, the law has long held that not all such statements are defamatory, particularly with respect to those holding public office. A public official can expect that his or her public conduct will be subject to searching criticism. But the legal test must still be applied to determine whether a publication is "searching criticism" or defamation: *Vander Zalm v. Times Publishers, a Division of F.P. Publications (Western) Ltd.* (1980), 109 D.L.R. (3d) 531, [1980] 4 W.W.R. 259 (B.C.C.A.); *Lund v. Black Press Group Ltd.*, 2009 BCSC 937, [2009] B.C.J. No. 1374 (QL).

[49] The determination of this test is important as a threshold issue. The plaintiff has the onus of showing defamatory language has been used. If so, then the onus shifts to the defendants to assert defences which would justify the use of that language. In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, Chief Justice McLachlin held at paragraphs 28 and 29:

> 28 A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the

> impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism .... The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
>
> 29 If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[50] There is no argument from these defendants about the last two elements. Clearly the words in both articles referred to Mr. Vellacott, and the words were published in the Saskatoon StarPhoenix. The defendants do take issue with the first element.

• *Positions of the parties*

[51] The plaintiff argues that several passages in both articles (discussed below) amount to defamation. Although not particularized in the pleadings, plaintiff's counsel itemized his concerns during final argument. The plaintiff relies on the literal meaning of the words contained in some of the passages and on an inferential meaning flowing from that ordinary meaning. Innuendo is not relied on. The plaintiff submits that these individual comments must be read in conjunction with, and in the context of, a broader impression left by these two news articles. He states they were calculated to capture the public's attention through the use of headlines, photographs and content.

[52] The defendants argue the test is not so simple and that an objective "reasonable person" overlay is superimposed on the classic three-prong test. With respect to the articles themselves, the defendants' approach is twofold.

[53] First, they argue that the articles do not contain any false statements of defamatory fact. Rather, they quote various persons who opine as to whether the

plaintiff's use of his franking privilege for these purposes was proper. The articles offer no editorial opinion on this point. The plaintiff overstates what might be inferred from the articles as such words are normal rhetoric during a political leadership campaign.

[54] Second, the plaintiff argues the articles did not have the effect of lowering readers' opinion of the plaintiff. As a politician, the plaintiff will frequently be subject to public scrutiny and criticism, which does not amount to defamation. It is argued the public should be taken to be aware that one's political opponents may use harsh and accusatory language.

• *The law*

[55] The basic test set out above, as repeated in *Grant v. Torstar Corp.*, remains the law in Canada. The standard for whether particular words are defamatory has also been judicially considered and adds complexity to the analysis.

[56] In *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27, 38 O.R. (3d) 97 (Ont. C.A.), the Ontario Court of Appeal stated at paragraphs 14 and 15:

> 14 ...
>
> > A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one ...
>
> [cites omitted]
>
> 15 The standard of what constitutes a reasonable or ordinary member of the public is difficult to articulate. It should not be so low as to stifle free expression unduly, nor so high as to imperil the ability to protect the integrity of a person's reputation. The impressions about the content of any broadcast – or written statement – should be

> assessed from the perspective of someone reasonable, that is, a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers.

[57] Further, the Court indicated that a court is to resist or avoid placing the worst possible meaning on the words used and, instead, is to use the meaning that reasonable and right-thinking people would use.

[58] *Lund v. Black Press Group Ltd., supra,* provides some insight into the test *per* Bracken J. at paragraph 114:

> 114 The law of defamation requires that it is not sufficient that the publications complained of contained derogatory words or expressions. The finding of a derogatory imputation is not an end of the matter; it must have been such as to adversely affect the reputation of the plaintiff. [cite omitted]

[59] The impugned passages of the articles, taken in their context, must be measured to determine whether they meet the above test.

- *The allegedly defamatory words*

[60] In the first news story, the plaintiff summarized his position on the specific impugned passages as follows:

> (a) Party member Tom Ballantyne, who backs Harper, says party politics has nothing to do with it. He says it's a matter of right and wrong.
>
> "It bothers me that he is using the taxpayers' mailing system to do this. If an MP wants to back an individual and speak on their behalf, OK. But it's crooked to send that kind of mail by franking," he said.

The plaintiff relied upon the plain and literal meaning of these

words. The plaintiff termed this language "volatile". In particular, the use of the word "crooked" to describe the plaintiff's conduct was said to be defamatory.

(b) "Let (Vellacott) make a contribution to Day out of his own pocket, not ours," said Ballantyne.

The plaintiff relied on the inferential meaning of these words. He said the passage implies some diversion of funds by the plaintiff that is inappropriate or, when read with the preceding passage, that the plaintiff's conduct was "crooked".

(c) "I'm just an ordinary citizen but I'm very perturbed when I see things like this. I'm raising the issue because it is my duty to do that as a citizen of this country," said Fyfe. "Those people are put in office to do a job for us, not to steal from us. These people (Day supporters) are trying to win this race on the basis of Christianity, but I see shades of Jim and Tammy Faye Bakker here."

There are two aspects to the plaintiff's complaint here. First, reading the plain language, an ordinary reader would understand that it was being said that the plaintiff was stealing from the people of Canada. Further, it leaves the impression of an individual being grudgingly drawn into the battle out of a sense of civic duty so as to deal with issues of fraud or diversion of funds.

(d) TV evangelist Jim Bakker lost his lucrative ministry and his wife after being convicted of bilking followers out of $158 million.

The plaintiff complained that of all the things Bernhardt could have

expanded upon by way of explanation or background, the Fyfe comment was the least worthy. It was sensationalism. While not directly accusing the plaintiff of theft, this comment provokes an ordinary reader to draw that inference, the plaintiff says.

(e) If Vellacott's mailouts were aimed at the entire CA membership base of 1,700 in the province – and done more than once – the cost could be tremendous, said an Alliance member who is working on Harper's campaign and didn't want his name used.

The plaintiff links this comment to the last and argues it creates an inferential defamation against him. The plaintiff says this comment creates a context of misuse of funds within which the other impugned passages would be read.

(f) "We're certainly talking thousands of dollars," he said, noting that Battlefords-Lloydminster CA MP Gerry Ritz is also behind Day but has been campaigning on his behalf with personal letters sent in his own envelopes with his own stamp.

The plaintiff contends that this creates an inference which an ordinary reader would draw, that is, that the plaintiff's expenditure of funds was somehow wrongful. It refers to the fact that a significant amount of public money would have been spent. The subsequent reference to Gerry Ritz's mode of spending being "proper" connotes that the plaintiff's was somehow improper.

(g) "Gerry is a gentleman about this stuff," he said. "That's the way that it should be done. Maurice is well aware he is wrong but he is able to get away with it because most decent people don't want to get involved.

"I was going to leave this until after the election but

> I can't," he said, adding he is aware the issue could taint the party image "but I just don't think we should bury this."

During testimony the plaintiff explained his understanding that Mr. Ritz was operating in a different capacity and therefore under a different set of rules. This, the plaintiff says, is innuendo. The comments give the impression that the speaker is a courageous individual being grudgingly dragged into a conflict he would rather not take part in, but doing so out of a compelling sense of moral duty to express outrage at this conduct. Further, the use of the plaintiff's first name suggests the speaker is "in the know".

[61] The second article, by James Parker, was admitted to be more balanced but was still a continuation of the defamation when a literal reading of four passages is considered:

(a) > Canadian Alliance MP Maurice Vellacott is inviting a backlash from voters by abusing his communications privileges while campaigning for Alliance leadership candidate Stockwell Day, say other Saskatchewan MPs.

While not attributed, the statement purports to emanate from other member(s) of Parliament. As well, the use of the word "abusing", while not as strong as "crooked" or "wrong", still connotes improper conduct on the part of the plaintiff. It reinforces the bad impression already made by the previous article.

(b) Dick Proctor's quote: "What Maurice has done doesn't pass the smell test."

Plaintiff's counsel stated, "This creates a visualization of something quite odorous, something quite improper, something foul."

(c) New Democrat Lorne Nystrom and former Alliance MP Jim Pankiw, now a member of a parliamentary coalition headed by Progressive Conservative Leader Joe Clark, said Vellacott seems to have broken the spirit of the regulations governing MP communications.

The plaintiff admitted this is the most moderate of the comments, although still inaccurate.

(d) Richard Truscott's quote: "The bottom line is they shouldn't be using this for partisan purposes."

Again, this is not accurate and demonstrates a lack of understanding of the rules then in force, according to the plaintiff. It states as a matter of fact what is really a matter of the speaker's opinion.

[62] The plaintiff emphasized that the articles must be read together to discern that a broader impression is being left with readers. Newspapers know this, says the plaintiff, and the articles must be looked at as a whole in that they target the plaintiff in a way that is far from complimentary. The fact that his photograph was published shows he was a particular target of the newspaper.

[63] Plaintiff's counsel further submitted that a newspaper has an obligation to know the makeup of its readership, in terms of intelligence, understanding and capacity, and publish its articles accordingly. No authority was cited to support this proposition.

• *Analysis of the words complained of*

[64] First, it must be noted that both articles were "news" within the definition

presented by the expert witness and as discussed in the case law. I have no doubt as to the defendants' motives for publishing on these matters. Overall, both stories were fair, accurate and balanced. I find that in the first article, that written by Bernhardt, there are only two passages that could be defamatory. The rest, while strong and even harsh criticism, all fall within legitimate criticism of the plaintiff's actions in the political arena during a period of controversy within his party. See *Lund, supra,* paragraphs 118 and 123.

[65] The passages quoting Mr. Ballantyne and Ms. Fyfe are troublesome. Ballantyne uses the word "crooked"; Fyfe's comment suggests the plaintiff is an MP who is stealing from the people. These two passages are, in my view, defamatory. The ordinary, reasonably informed person reading same would tend to think less of Mr. Vellacott. Had Ballantyne's comment been limited to suggesting the plaintiff was "wrong", it would not have crossed the line. The comments, as made, suggest criminality on the plaintiff's part.

[66] The defendants contend that cases such as *Lund* should still apply. With respect, there is a distinction that is clear from the language used in *Lund* itself. In that case a public official was criticized over his role in a zoning dispute. Statements were made, *inter alia*, alleging that plaintiff was acting in his own interest rather than the public's, that he was trying to consolidate his personal power, that he was a dictator, that he had not been totally honest and forthright during an election campaign, and that he was rigging the voting procedure regarding zoning decisions. Those statements were found not to be defamatory. It is acceptable to bring criticism of the conduct of public officials.

[67] However, in *Lund* it was clear from the evidence that none of the impugned statements suggested that plaintiff acted out of monetary interest or was guilty of any moral fault (*Lund*, paragraph 120). The same is not true here. The statements that Mr. Vellacott's conduct was "crooked" and that he was "stealing" from the public both

convey a moral blameworthiness of a personal nature going well beyond legitimate public expression of differences of opinion with an elected official. Those statements allege squarely that the plaintiff was guilty of moral fault by means of dishonest or criminal behaviour. Reasonably informed readers could conclude from these statements that the plaintiff had done something wrong, something bad and even something illegal.

[68] Also of assistance is *Wells v. Puddister*, 2007 NLCA 25, 265 Nfld. & P.E.I.R. 174. There, a commercial development in a city was in issue. The mayor went on a radio show and referred to the developers and some councillors as being not genuine and not sincere, as well as saying they were "crooked", a "bunch of crooks", a "bunch of shysters" and a "bunch of crooks playing games". The trial finding that these words were defamatory was upheld on appeal. The Court noted at paragraphs 14 to 19 a distinction between the other critical words and the use of words such as "crook". The facts and findings in *Wells v. Puddister* are of assistance in the instant analysis.

[69] Thus I find the following statements contained in the first *StarPhoenix* article to be defamatory:

> (a) Party member Tom Ballantyne, who backs Harper, says party politics has nothing to do with it. He says it's a matter of right and wrong.
>
> "It bothers me that he is using the taxpayers' mailing system to do this. If an MP wants to back an individual and speak on their behalf, OK. But it's crooked to send that kind of mail by franking," he said.
>
> (b) "I'm just an ordinary citizen but I'm very perturbed when I see things like this. I'm raising the issue because it is my duty to do that as a citizen of this country," said Fyfe. "Those people are put in office to do a job for us, not to steal from us. ..."

[70] I do not find the comments about the Bakkers, nor the explanatory paragraph, to be defamatory. While the plaintiff may have been particularly sensitive to the same given his personal background, a right-thinking, reasonably informed person would not be troubled by such statements. They are hyperbole. They are so outrageous, and the comparison so ludicrous, as to be unbelievable. They would not have lowered a right-thinking person's opinion of Mr. Vellacott. Aside from the two passages set out above, the rest of Mr. Bernhardt's article is fair, balanced and certainly newsworthy.

[71] With respect to the second article authored by Mr. Parker, I do not find any of the four impugned statements therein to constitute defamation, even taking them in the context of that article or both articles. That article is factual. It is properly researched. It is fair and balanced. It is newsworthy. That being the case, the action must be dismissed against Mr. Parker outright.

[72] In neither case do I find that the article was motivated by anything other than a desire to print news. There is absolutely no evidence of any hidden agenda on the part of any of the defendants nor of any desire to besmirch Mr. Vellacott's name for any reason. The plaintiff tendered no proof of malice.

[73] This being the finding, I must go on to consider whether the defendants raise defences to the claim. I will include the Parker article in this analysis in the event I am in error as to the finding of no defamation in that story.

2. Does the defence of responsible journalism avail the defendants?

[74] This was the primary defence raised by the defendants. Since it was articulated by the Supreme Court of Canada in a pair of 2009 decisions, it has, to some extent, supplanted the defence of qualified privilege, although the two remain distinct and viable as independent defences.

[75] In the companion cases of *Grant v. Torstar Corp.*, *supra*, and *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, the new defence of "responsible communication on matters of public interest" was created. This defence has two components. Initially, the burden is on the defendants to show that the publication was on a matter falling within the public interest. If so, the defendants must demonstrate that the publication was "responsible" in the sense that the author and/or publisher made diligent attempts to verify the allegations made within the context of the existing circumstances of the story.

• *Public interest*

[76] The Supreme Court essentially adopted the meaning of "public interest" ascribed to it in Raymond E. Brown, *The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1994). To be of public interest, the matter must be one which invites public attention or about which the public is substantially concerned because it affects the welfare of citizens or has attracted substantial public notoriety or controversy. The profile of the subject of the story may drive it to being a matter of public interest. Readers and viewers are naturally attracted to, and interested in, what is happening with public figures, but that alone is not sufficient, and the test is not limited to well-known persons. Matters of curiosity or prurience do not suffice. The public, or some portion thereof, must have a genuine and legitimate interest or stake in wanting to have information about the subject matter of the allegedly defamatory publication. There is no exhaustive list of such matters; each case turns on its facts. Courts have taken a fairly liberal view of what is included as the public has a legitimate interest in finding out about many things. It is not confined to political or governmental matters. Care must be taken not to define public interest too broadly or narrowly. See *Grant*, *supra*, paragraphs 102 to 107.

[77] Here, I find the two news articles engaged the public interest, albeit in

different ways. Taken in its temporal context (2002), the Canadian Alliance was a new, dynamic and growing national political party. There was wide interest in it, and that interest could not have been limited to supporters of the party. The fact that there was a leadership race, in and of itself, would engage the public interest on a national level. Add to that controversy and disputes, with disagreements as to the use of a publicly-funded communication allowance, and the matter was one which clearly would have engaged the interest of any reasonably well-informed member of the public. As stated at paragraph 106 of *Grant*, *supra*, while public interest includes governmental and political matters, it is broader: "The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality." Further, it is difficult for the plaintiff to argue against a public interest in this matter, given his own sworn testimony which explained his mailouts. The plaintiff said that as the leadership race would determine the Opposition leader, it was a matter of broad concern and that interest was not limited to party members. If that is his view, the plaintiff should understand why taxpayers would be interested in the two stories printed.

[78] The Bernhardt article's focus was not a deliberate attempt to smear the plaintiff. The newspaper had received complaints and comments on the plaintiff's use of his parliamentary communication allowance for internal party purposes. There were differing opinions on the propriety of this. But it was the fact that these differences existed, and the lengths to which party members with differing views were prepared to go, which formed the focus of the first article. Clearly, strife and dissension within the Canadian Alliance during a leadership race being held while that party's political fortunes were ascending would engage the public interest, certainly on a local basis and perhaps even nationally.

[79] The Parker article took a different focus and dealt more directly with the

propriety of this sort of use of monetary parliamentary privileges. It engaged broader principles of proper use of taxpayer resources within the larger democratic process. Again, I have no difficulty in finding that this article engaged the public interest.

• *Responsible publication and diligence*

[80] At paragraph 126 of *Grant, supra*, the required elements for this defence are summarized. It is useful to review those factors in the context of the evidence in this case.

[81] First, I have already determined that this was a matter of public interest and that the defendants were entitled to publish on point, providing they did so properly.

[82] The next criterion is that the publisher must have been diligent in trying to verify the allegation, having regard to a list of eight factors, as follows:

(a) The seriousness of the allegation.

The defendants state that the allegation is a questionable use of franking privileges, not an allegation of criminal conduct. Despite the use of "crooked" and "steal" in the first article, I agree with that characterization. Really, at the root of this story is a dispute as to whether the plaintiff's conduct was an improper use of taxpayers' money, as opposed to allegations of outright fraud or theft. A reasonably-informed member of the public reading the impugned articles would not conclude that Mr. Vellacott had committed a criminal offence nor that he was even being investigated for same or that it was being alleged as such. The gravamen of the story is that he was using an allowance that permitted him to communicate

with constituents for free for the purposes of advancing an internal party leadership candidate. Looking at those news articles as a whole, as the plaintiff urges, no reasonable person would conclude that it was seriously being alleged that Mr. Vellacott was a criminal, even with the defamatory statements being a part of the first article. This being the case, a less thorough effort at verification was permissible. In this case the defendants met, and likely exceeded, the standard.

(b) The public importance of the matter.

The plaintiff termed this as relatively insignificant. I disagree. The expenditure of taxpayers' funds and issues arising during a federal leadership race are important to the public. Such matters will always be accorded journalistic importance. As an elected official, the plaintiff has sought and received the trust of the public. The plaintiff should expect, and even welcome, close scrutiny.

(c) The urgency of the matter.

Both reporters candidly acknowledged there was no particular rush, but each submitted their article because it was "ready". The expert, Bell, indicated that news needed to be current and that best practices were to report on an event as close to its occurrence as possible. In this case, while there was certainly no rush to publish, there is no indication that anything would be different had the newspaper waited to do so. Given that the first story centred on the strife within the Alliance party during the leadership race, the reporting was done

in a timely manner, and the impact of the story was preserved. The timing of these stories does not give me concern.

(d) The status and reliability of the source.

The evidence disclosed that the *StarPhoenix* had actually received copies of the documents in question. While one source did not want to be named, all were known to the reporters and all but one were actually named in the articles. There was no truly anonymous source. Many of the quotes actually were from Alliance members or MPs. Some were from concerned members of the public. There was an appropriate level of canvassing of a variety of opinions from a variety of sources. Certainly, the articles could not be termed one-sided.

(e) Whether the plaintiff's side of the story was sought and accurately reported.

This criterion is perhaps the most important. Plaintiff's counsel characterized this as having been "badly overlooked". This is not borne out by the evidence. The first article was published only after the plaintiff was contacted by Bernhardt on a Sunday. That article actually begins with comments from the plaintiff, and much of the text is devoted to his view. The second article followed an unsuccessful attempt to contact the plaintiff but reiterated what he had said the previous day. According to Ms. Bell, this is acceptable journalistic practice. As well, on a plain reading, the second article is also balanced, quoting numerous sources which include the

plaintiff and a representative of the Board of Internal Economy. This criterion provides a safeguard, ensuring that news stories are presented in a fair and balanced way when measured on an objective standard. While the plaintiff does not feel he was treated fairly, on an objective assessment, he was. There is no suggestion in the evidence that the plaintiff was misquoted.

(f) Whether the inclusion of the defamatory statement was justifiable.

The plaintiff does not feel it was. He feels that the defamatory statements added nothing to the story and that there could still have been a story about internal party strife during the leadership campaign without these statements. While the latter statement is possibly correct, it is also correct that the statements sought and presented were from a wide variety of sources. While criminality is not alleged, the propriety of the plaintiff's conduct is called into question on moral and political bases. The defendants presented a variety of types of commentary on these points from a variety of sources. Interestingly, some of the harshest criticism of the plaintiff came from members within his own party rather than political foes. The range of comments in the first article presents what the "news peg" of the story was – the differing views of how to properly conduct the leadership campaign. As Ms. Bell stated, the hyperbole of some of those opinions may say more about the person stating same than about the plaintiff. The inclusion of the two defamatory passages was justifiable in these circumstances.

(g) Whether the defamatory statement's public interest lay in the fact

that it was made rather than its truth ("reportage").

On this point, the plaintiff argued that without the defamatory comments, this is a back-page story. This misses the point. The defendants were not adopting these statements as their own, they were simply reporting what was actually said. This is clear from a plain reading of the articles. The defendants attributed all sources but one, who specifically did not wish to be named. The makers of the defamatory statements were identified. There is no assertion that the plaintiff was clearly wrong in how he used his franking allowance; rather, there is a reporting that some people believed him to be wrong. The defendants were reasonably careful to report both sides of the argument about the use of franking privileges. It is abundantly clear from the two stories that these arguments were very much political, made in the heat of a leadership race. The stories do not assert that there has been any legal or other determination that the plaintiff was, in fact, using his allowance wrongfully. In summary, the utility of the public receiving these statements lay in the fact the statements were made at all, not in whether they were true. The defendants' repetition of the impugned statements qualify as reportage.

(h) Any other relevant circumstances.

Here, the plaintiff's strong complaint lies with the overall tone or tenor of the stories. He feels the combination of headlines, photographs and content combine to paint him in a derogatory light that is not justifiable. In fact, the articles did not amount to

distortion or sensationalism, though there was ample opportunity to do both. As the Supreme Court stated in *Grant* at paragraph 123, the media is not to be held to a standard of "stylistic blandness":

> ... Neither should the law encourage the fiction that fairness and responsibility lies in disavowing or concealing one's point of view. ... An otherwise responsible article should not be denied the protection of the defence simply because of its critical tone.

While the tone of neither article strikes me as overly harsh or critical (indeed, it is fairly benign), even if it was, the defendants did not have a legal obligation to write their articles in a manner that satisfied the plaintiff. The plaintiff admitted that had his permission been sought to run the articles, he would have withheld same. But that is not a duty the defendants laboured under. They owed him some legal duties, but writing in an overall tone satisfactory to the plaintiff was not one of them. As well, there was no allegation or evidence of malice on the part of any of the defendants.

[83] The defendants have met all the criteria required to establish the defence of responsible journalism. In many respects, the defendants appear to have gone beyond what is required. This defence avails the defendants and, accordingly, I dismiss the plaintiff's claim on this basis. However, I will go on to examine the other defences which were raised in the alternative.

3. Does the defence of qualified privilege avail the defendants?

[84] While defendants' counsel was careful to clearly note this defence was not being abandoned, he indicated he relied primarily on the responsible journalism defence,

above. However, qualified privilege was asserted in the pleadings, was left alive at the conclusion of this trial and is relied upon by the defendants as an alternative defence.

[85] Unlike other forms of privilege, qualified privilege in the defamation context does not attach to a document or utterance. Rather, it attaches or applies to an occasion on which such a statement is made. Once an occasion is shown to be privileged, the defendants' *bona fides* is presumed, and the defendants may publish remarks about the plaintiff which ultimately turn out to be untrue and defamatory. Qualified privilege may be defeated as a defence if the plaintiff shows the dominant motive behind publication is actual or express malice. A classic discussion of qualified privilege is found in Brown, *The Law of Defamation in Canada*, *supra*, at pages 662-669:

> ... No action can be maintained against a defendant unless it is shown that he or she published the statement with actual or express malice. An occasion is privileged if a statement is fairly made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided it is made to a person who has some corresponding interest in receiving it. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to these to whom it was published.
>
> A privilege is recognized where a person seeks to protect or further his or her own legitimate interests, or those of another, or interests which he or she shares with someone else, or the interests of the public generally. ...
>
> There are occasions where the interest sought to be protected is not so compelling and important as to warrant an absolute privilege, but is important enough to justify a limited immunity from actions for libel and slander for defamatory publications. This privilege is referred to as "defeasible", "qualified" or "conditional". Baron Parke in *Toogood v. Spyring* [(1834), 1 C.M. & R. 181, 149 E.R. 1044] has offered one of the more popular legal formulas:
>
> > "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another ... and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is

concerned."

It enables a person to make defamatory and untrue statements about another without incurring legal liability, so long as he or she acts honestly, in good faith and without malice. "Good faith, a right, duty, or interest in a proper subject, a proper occasion, and a proper communication to those having a like right, duty, or interest, are all essential to constitute words spoken, that are actionable per se, a privileged communication".

The protection is justified on the basis of public policy and utility, and in furtherance of the "common convenience and welfare" or "general interest" and "advantage" of society. The purpose of the immunity is not so much to protect the parties involved as it is to promote the public welfare. As Bankes J. in *Gerhold v. Baker* [[1918] W.N. 368 at 368-69 (C.A.)] said:

> "It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions when it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in protection of some common interest."

... In such cases, a person should not be deterred from disclosing prejudicial information by the fact that he or she may be mulcted in damages, even though it turns out that the information is untrue and defamatory, and its disclosure creates a personal hardship on someone else. If the law were otherwise, cautious persons might not be candid in their appraisal of the character of others. ...

A qualified privilege does not change the actionable quality of the words. It merely rebuts 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 and his honesty of belief in the truth of his statements is presumed", and the defendant is free to publish with impunity remarks which are defamatory and untrue about the plaintiff. In such a case, no action will lie unless the plaintiff can prove that the words were spoken or written with express or actual malice.

[86] Qualified privilege was explained more succinctly by Lord Atkinson in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at page 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. ...

[87] The law will recognize such privilege in several circumstances: where the person making the statement seeks to protect (or further) his own legitimate interests, or those of another, or interests which he shares with someone else, or even the interests of the public generally.

[88] The common law as to qualified privilege was considered and somewhat streamlined by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129. At paragraphs 144 and 145:

> 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. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe*, [1975] A.C. 135 (H.L.), at p. 149.
>
> 145 Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey* [[1979] 1 S.C.R. 1067], at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. ...

[89] In the case at bar, the task is to determine whether the defendants had any legitimate interest in communicating to the public at large the information contained in the two articles, as well as determining whether the public had a corresponding interest in the receipt of this information.

[90] Here, the initial story concerned infighting during a national leadership race in a newly-formed political party, a party which appeared ascendant and which looked

as though it could (indeed, it ultimately did) form a government. The second story contained a similar focus but also dealt with the alleged impropriety of the manner in which the plaintiff was using one of his communication allowances. Taken in its temporal context, there can be little doubt that the public generally would have an interest in such matters. As previously noted, the plaintiff's own explanation of the importance of the leadership race to all persons, not just party members within his constituency, should also have informed him as to why the media and the public would be interested in another aspect of that contest.

[91] There are a number of cases in which courts have found that the media has a legitimate interest in disseminating such information to the public and that the public has a corresponding interest in receipt of same. As well, courts have consistently determined that there is a genuine public interest in the manner in which governments and elected officials conduct their business. See the following:

(a) *Loos v. Robbins* (1987), 37 D.L.R. (4th) 418, [1987] 4 W.W.R. 469 (Sask. C.A.). There, a provincial cabinet minister made public statements as to the reasons some 13 employees of a Crown corporation were terminated and alluded to their incompetence. He successfully defended himself on the basis of qualified privilege, in that there was a legitimate public interest in the manner in which a public corporation was being operated, thus eliminating the allegation of malice.

(b) Similar in nature was *Stopforth v. Goyer* (1979), 97 D.L.R. (3rd) 369, 23 O.R. (2d) 696 (Ont. C.A.). A federal cabinet minister spoke to reporters concerning the demotion of a high-ranking bureaucrat. He indicated the demotion resulted from a dereliction of

duty. The civil servant sued, but the comment was held covered by qualified privilege as the minister had a public duty in satisfying the electorate's interest in the reasons driving the demotion. In that case, the *bona fide* interests of the public were held to be represented by the media.

(c) *Milgaard v. Mitchell*, [1997] 3 W.W.R. 82, 151 Sask.R. 100 (Q.B.). After the plaintiff's release from custody, he criticized certain public officials. The provincial justice minister made public statements rebutting these allegations, even going so far as to indicate he believed the plaintiff was guilty. In a defamation action the defendant relied on qualified privilege. The plaintiff applied to strike that pleading, unsuccessfully. Barclay J. indicated at paragraph 37:

> [37] In my view, the electorate, as represented by the media, has a real and *bona fide* interest in the administration of justice in the Province of Saskatchewan, and in particular the alleged public wrongdoing concerning the manner in which certain senior officials ... handled Milgaard's case in 1971. However, Mitchell, as Minister of the Crown and as Attorney General, has a corresponding public duty and interest in satisfying the electorate. ...

(d) *Parlett v. Robinson* (1986), 30 D.L.R. (4th) 247, [1986] 5 W.W.R. 586 (B.C.C.A.). The defendant was the federal NDP critic for the solicitor-general. He suggested there was scandalous behaviour within Corrections Canada and unsuccessfully lobbied the federal minister for an inquiry. He then expressed his concerns to the media and was sued by an impugned official with Corrections Canada. The

action failed. It was held that where there was an allegation of official misuse of power or privilege, the federal member had a duty to "ventilate his concerns" through the media. Qualified privilege was held to apply. His statements to the media were not unduly broad because the group having a *bona fide* interest in the matter was the electorate of Canada.

(e) Qualified privilege traditionally was held to depend in part upon a special relationship between the maker and recipient of the impugned statement. As a result, the media often found it difficult to rely upon this defence. However, more modern cases have recognized the media's role in the public interest concerns relating to governments and relaxed the old strictures. See *Grant v. Torstar Corp., supra*, paragraphs 35 to 37. Also see *Clement v. McGuinty* (2001), 143 O.A.C. 328, 18 C.P.C. (5th) 267 (Ont. C.A.); *Lee v. Globe and Mail* (2001), 52 O.R. (3d) 652, 6 C.P.C. (5th) 354 (Ont. Sup. Ct.); *Silva v. Toronto Star Newspapers Ltd.*, (1998), 167 D.L.R. (4th) 554, [1998] O.J. No. 6491 (QL) (Ont. C.J.); *Grenier v. Southam Inc.*, [1997] O.J. No. 2193 (QL), 1997 CarswellOnt 1892 (Ont. C.A.); and *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.).

[92] That our courts have so found, and found consistently, is hardly surprising. The ability to discuss governments and political matters is one of the cornerstones of any true democracy. It has been upheld in other countries with a common law system, such as Australia. See *Council of the Shire of Ballina v. Ringland* (1994), 33 N.S.W.L.R. 680 (C.A.), where the Court of Appeal said:

> The idea of a democracy is that people are encouraged to express their criticisms, even their wrong-headed criticisms, of elected governmental institutions, in the expectation that this process will improve the quality of the government. The fact that the institutions are democratically elected is supposed to mean that, through a process of political debate and decision, the citizens in a community govern themselves. ...

Albeit made in the context a suit by a government institution, the concept of free speech and criticism regarding elected officials, as set out above, is no less apposite to the within situation.

[93] It may be that our Supreme Court has incorporated the United Kingdom's rather "elastic" expansion of the application of qualified privilege into the new responsible journalism defence, discussed above. Nevertheless, the cautious common law trend is to expand the media's access to the defence of qualified privilege, where the matter is of such public interest that publication appears warranted.

[94] In my view, the unique facts of this case do give rise to the defence of qualified privilege. Surely the public had an interest both in the leadership race on at that time, as well as in whether its elected representatives were spending their allowances properly. I find on these facts there is a sufficient nexus between the ability of these defendants to publish this information and the interest of the public in receiving same to give rise to qualified privilege. As a result, qualified privilege avails all the defendants and I would dismiss the plaintiff's action on that basis as well.

4. Does the defence of fair comment avail the defendants?

[95] The defendants also placed significant reliance upon the defence of fair comment, as an alternative to that of responsible publication.

[96] In Canada, persons are allowed to comment fairly on matters of public

interest. This is to encourage discourse on matters of public interest, without a defamation action hanging over commentators' heads like the sword of Damocles. A type of qualified privilege applies to such commentary, but only if:

- the comments are actually comments and not statements of fact;
- they are made honestly and in good faith;
- they are made regarding facts which are true; and
- a matter of public interest is involved.

In this legal context "comment" means a subjective expression of an opinion. It may come in the form of a deduction, inference, conclusion, criticism, judgment, remark or observation – items generally incapable of proof.

[97] Not every such comment is protected. For this defence to avail, the comment must be fair; that is, the facts upon which the comment is based are true, and the comment itself amounts to the expression of the honestly held opinion which arises from such facts. If the comment is highly negative in nature (suggesting, for example, corrupt motivation to a person), it must be shown that such imputations are warranted by and could be reasonably inferred from the facts underlying such opinion. Evidence of malice can negative the defence of fair comment.

[98] The test for the applicability of the defence of fair comment was set out in *Myers v. Canadian Broadcasting Corp.* (1999), 47 C.C.L.T. (2d) 272, 103 O.T.C. 81 (Ont. Sup. Ct.):

> 84 The defence of fair comment protects words that are *prima facie* defamatory provided they are comments, based on true facts, made honestly and without malice, with reference to a matter of public interest: *Drew v. Toronto Star Ltd.*, [1947] O.R. 730 (Ont. C.A.).
>
> 85 The defence of fair comment requires the defendant to establish the following: (*Hodgson*, [(1998), 39 O.R. (3d) 235 (Ont. C.J.)] at 385)

> (a) That the words complained of are recognizable by the ordinary viewer as comment, although the comment may consist of, or include inferences from, facts;
>
> (b) That the comment is based on true facts set out in the article (broadcast) or clearly indicated therein;
>
> (c) That the comment is on a matter of public interest; and
>
> (d) That the comment is one which a person could honestly make on the facts proven, and some authorities indicate must, at least where dishonourable motives are imputed, be fair, in the sense that a fair-minded person could believe it.
>
> 86 The defence will fail if the plaintiff shows that the defendant was actuated by express malice. It is here that the question of actual belief in the comments made becomes an issue.
>
> 87 In order for the defence to apply, two hurdles must be overcome. First, at the objective stage, the words must be capable of being fair comment. Here, the burden of proof is on the defendant. Second, at the subjective stage, the issue is whether the comment was actuated by malice. The burden of proof is on the plaintiff to establish malice: Milmo, [Milmo & Rogers, *Gatley on Libel and Slander*, 9th ed., 1998] at para. 12.21. I will deal with the issue of malice separately.

[99] The Supreme Court of Canada most recently dealt directly with fair comment in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420. Binnie J. set out the test at paragraph 28:

> [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* [[1979] 1 S.C.R. 1067] 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 in original deleted]

[100] *WIC Radio Ltd. v. Simpson* is notable for more than its reaffirmation of the test for this defence. It also confirms that the defence has a wide or generous application. Comments which many people would consider outrageous or "offside" have been protected by this defence.

[101] In *WIC Radio Ltd.*, Mair was a radio talk show host, a "shock jock" well known for being controversial. On his program, the defendant took aim at the views of the plaintiff, Kari Simpson, who was described by the Supreme Court as a widely known social activist. She was engaged in a public debate concerning the introduction of materials dealing with homosexuality into the public school system in British Columbia. The plaintiff was opposed to such material and was well known to the public as a spokesperson for people opposed to any positive portrayal of a gay lifestyle. The defendant took the opposite side of the debate and broadcast an editorial which in part stated:

> 3. ...
>
> Before Kari was on my colleague Bill Good's show last Friday I listened to the tape of the parents' meeting the night before where Kari harangued the crowd. It took me back to my childhood when with my parents we would listen to bigots who with increasing shrillness would harangue the crowds. For Kari's homosexual one could easily substitute Jew. I could see Governor Wallace – in my mind's eye I could see Governor Wallace of Alabama standing on the steps of a schoolhouse shouting to the crowds that no Negroes would get into Alabama schools as long as he was governor. It could have been blacks last Thursday night just as easily as gays. Now I'm not suggesting that Kari was proposing or supporting any kind of holocaust or violence but neither really – in the speeches, when you think about it and look back – neither did Hitler or Governor Wallace or [Orval Faubus] or Ross Barnett. They were

> simply declaring their hostility to a minority. Let the mob do as they wished.

He went on to compare her position to those taken by skinheads, the Ku Klux Klan, anti-evolutionists and vigilantes. He concluded by stating the public could recognize "a mean-spirited, power mad, rabble rousing and, yes, dangerous bigot when they see one."

[102] The plaintiff lost at trial but succeeded at the Court of Appeal. The Supreme Court restored the trial judge's dismissal of her action. It was held that the defence of fair comment has a wide ambit. Vigorous public debate on both sides of any issue in which the public interest was engaged was to be encouraged. It was held, at paragraph 26, that words which might appear to be factual may actually be comment, especially "in an editorial context where loose, figurative or hyperbolic language is used [cite omitted] in the context of a political debate, commentary, media campaigns and public discourse."

[103] Two recent decisions have considered *WIC Radio Ltd.* and fair comment generally: *Gichuru v. Pallai*, 2012 BCSC 693, [2012] B.C.J. No. 979, and *2964376 Canada Inc. v. Bisaillon*, 2012 ONSC 3113, [2012] O.J. No. 2348 (QL). Both were delivered after this trial was heard and final submissions presented. Both involved the defence of fair comment and applied *WIC Radio Ltd.*, although with respect to different aspects of the test and with different results. Each is of some assistance when considering the various criteria of the test for fair comment, which I will now do.

- *Comment or statement of fact?*

[104] Based on the totality of the evidence entered in this trial, I find the two defamatory passages (alleging that the plaintiff was "crooked" and that he was not to "steal from" the taxpayers) were comments as opposed to statements of fact. The speaker in each case was voicing his or her opinion as to what the plaintiff had done. The

comments were not statements of fact defining the acts of the plaintiff; they amounted to characterizations of his conduct as somehow being criminal in nature. A reasonable reader of this newspaper would recognize these to be opinions or comments rather than statements of fact.

• *Public interest*

[105] As previously set out herein, the comments pertained to the manner in which the plaintiff had used taxpayers' money through his use of his parliamentary mailing privileges. The context in which those funds were used was that of the hotly contested national leadership of a relatively new political party. I find the function of the national government and system of government were engaged by these actions.

• *Comments based on facts?*

[106] In this case, the basis of the comments was objective facts which can be proven. There is no doubt from the evidence before me that the plaintiff sent out a mailout to persons within this province using his franking privilege. Further, the first newspaper article clearly sets this out in the very first paragraph.

[107] It was admitted by the plaintiff that he sent out the mailers, that he used his parliamentary mailing privileges to do so and that the items mailed contained expressions of support for Mr. Day, a leadership candidate. While the plaintiff never admitted that ultimately the taxpayers of Canada paid for these mailouts (instead insisting there was "no cost" to same), it is clear from all of the evidence that this is the case.

[108] I am therefore fully satisfied the comments were based on actual established facts.

• *Could anyone honestly make the comment based on those facts?*

[109] This aspect of the test for fair comment was dealt with in *WIC Radio Ltd.* at paragraphs 49 to 51:

> [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. The objective test is now widely used in common law jurisdictions as the "honest belief" component of fair comment, including the United Kingdom: *Telnikoff v. Matusevitch,* [1991] 3 W.L.R. 952 (H.L.), quoting with approval Dickson J.'s dissent, at p. 959. In Australia, the High Court recently affirmed a similar approach; see the observation of Gleeson C.J.:
>
> > The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts.
>
> (*Channel Seven Adelaide Pty Ltd. v. Manock* (2007), 241 A.L.R. 468, [2007] HCA 60, at para. 3 (emphasis added))
>
> In New Zealand, the objective test at common law has now been replaced by a more subjective test in the *Defamation Act 1992* (N.Z.), 1992, No. 105, s. 10. See generally B. Marten, "A Fairly Genuine Comment on Honest Opinion in New Zealand" (2005), 36 *V.U.W.L.R.* 127; *Mitchell v. Sprott* [2002] 1 N.Z.L.R. 766 (C.A.).
>
> [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.
>
> [51] Of course, even the latitude allowed by the "objective" honest belief test may be exceeded. "Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective"; *Reynolds* [[1999] 4 All E.R. 609] at p. 615.

[110] There was a debate as to whether the franking privilege could be used for internal party purposes. It should not surprise anyone that from time to time citizens and

taxpayers become upset as to how government officials, particularly those who are elected, use tax dollars. Certainly in this case, people could (and did) become irate at how the plaintiff used his mailing allowance and make the comments in the article. My conclusion is that persons could make comments as to crookedness or stealing when they honestly arose from the facts set out in the article.

[111] It must always be remembered that this branch of the test does not import a requirement of reasonableness nor that the comments be fair, impartial, reasonable or balanced. There is only the requirement of a nexus between the facts and the comments; that is, that the comments flow from the established facts. *WIC Radio Ltd.* illustrates this. On air, the defendant referred to the public speaker as a Nazi and likened her to notable bigots who were elected or were at least notable public figures. Here, the views of the plaintiff that he properly used his mailing allowance were attacked.

[112] Accordingly, the defence of fair comment also avails these defendants, and they also avoid liability on this basis.

5. Does the defence of consent avail the defendants?

[113] At trial, the defendants abandoned the defence of consent.

6. If liability is found, what is the appropriate quantum of damages?

[114] I have not found liability on the part of any of the defendants and, thus, assess no damages against them. Neither counsel filed authorities that would be of substantial assistance regarding the assessment of damages. I, therefore, make no provisional assessment.

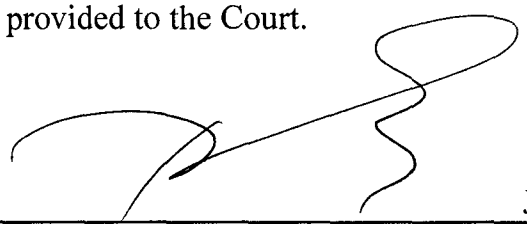
7. What is the appropriate disposition of costs?

[115] The defendants have been successful in this action. There was no argument advanced by either side as to any need for a special award of costs. I, therefore, award the defendants a single set of costs of these proceedings, to be assessed on Column 4.

Conclusion

[116] The plaintiff's action against the defendants is dismissed, with a single set of costs to the defendants to be assessed on Column 4.

[117] My thanks to counsel for the courteous and capable manner in which this trial was conducted and for the assistance each provided to the Court.



J.
R.W. Danyliuk