

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE QUÉBEC

N° : 200-09-006887-092
(200-22-051156-099)

DATE : 6 juin 2011

**CORAM : LES HONORABLES ALLAN R. HILTON, J.C.A.
NICHOLAS KASIRER, J.C.A.
JEAN BOUCHARD, J.C.A.**

ACADIA SUBARU, ACURA OPTIMA, AUDI STE-FOY, AUTO FRANK & MICHEL INC., AUTO FRANK & MICHEL (PORTNEUF) INC., AUTOMOBILES A. GOSSELIN INC., AUTOMOBILES B.G.P. INC., AUTOMOBILES DALTON INC., AUTOMOBILES DESCHAILLONS (1986) INC., AUTOMOBILES DU BOULEVARD KIA, AUTOMOBILES GUY BEAUDOIN INC., AUTOMOBILES SITTELE INC., B. DUPONT AUTO INC., BEAUCE AUTO (2000) INC., BEAUCE MITSUBISHI, BEAUPORT MAZDA, BEAUPORT NISSAN, BEAUPRÉ CAPITALE CHRYSLER INC., BÉGIN CHEVROLET INC., BLAIS MAZDA, BMW VILLE DE QUÉBEC, BOULEVARD LEXUS, BOULEVARD TOYOTA, CAPITALE NISSAN, CHARLESBOURG AUTOMOBILES LTÉE, CHATEL AUTOMOBILES LTÉE, CLOUTIER PONTIAC BUICK LTÉE, DANIEL PARÉ DODGE CHRYSLER JEEP, DROUIN & FRÈRES AUTO LTÉE, DROUIN AUTOMOBILES LTÉE, EINSTEIN NISSAN, FORD APPALACHES INC., FOURNIER CHEVROLET INC., GERMAIN AUTOMOBILES INC., GERMAIN PONTIAC BUICK GMC INC., GRAND PORTNEUF MAZDA, HONDO CHARLESBOURG, HONDA DE LA CAPITALE, HYUNDAI BEAUCE, HYUNDAI ST-RAYMOND, INFINITI QUÉBEC INC., J.L. CLICHE AUTOMOBILES LTÉE, KENNEBEC DODGE CHRYSLER INC., KIA BEAUPORT, KIA CAP-SANTÉ, KIA LÉVIS, KIA QUÉBEC, KIA STE-FOY, LALLIER STE-FOY, LANGLOIS VOLKSWAGEN, LAPOINTE AUTOMOBILE INC., LAQUERRE PONTIAC BUICK INC., LAURIER PONTIAC BUICK GMC CADILLAC HUMMER LTÉE, LAVAL VOLKSWAGEN, LE NOUVEAU J.D DODGE CHRYSLER JEEP, LE NOUVEAU J.D. SUZUKI, LES AUTOMOBILES DEGIRO INC., LEVIKO HYUNDAI, LÉVIS CHRYSLER DODGE JEEP INC., LÉVIS MAZDA, LÉVIS SUBARU ENR., LÉVIS SUZUKI AUTOMOBILES, LÉVIS TOYOTA, LÉVY HONDA, M. LESSARD LTÉE, MAISON CHRYSLER CHARLESBOURG, MARLIN CHEVROLET INC., MAZDA CHATEL,

MONTMAGNY HYUNDAI, MONTMAGNY MAZDA, OPTION SUBARU, PAQUET MITSUBISHI, PAQUET NISSAN INC., PARÉ CHEVROLET INC., PLAMONDON AUTOS INC., PREMIER MAZDA, QUÉBEC MITSUBISHI, QUÉ-BOURG AUTO LTÉE, RINFRET VOLKSWAGEN, ROYAL SUZUKI AUTOMOBILES, SATURN DE STE-FOY INC., SATURN SAAB DE LÉVIS, SATURN SAAB DE QUÉBEC INC., STE-FOY HYUNDAI, STE-FOY TOYOTA, ST-GEORGES CHEVROLET PONTIAC BUICK CADILLAC GMC INC., ST-GEORGES NISSAN INC., ST-GEORGES TOYOTA, ST-RAYMOND PLYMOUTH CHRYSLER INC., ST-RAYMOND TOYOTA, VACHON AUTO LTÉE, VALLÉE AUTOMOBILE INC., VOLVO DE QUÉBEC

APPELANTES (INTIMÉES INCIDENTES) – demandereses

C.

PIERRE MICHAUD

INTIMÉ (APPELANT INCIDENT) – défendeur

ARRÊT

[1] **LA COUR** : Statuant sur le pourvoi d'un jugement de la Cour du Québec, district de Québec (l'honorable Charles G. Grenier), rendu le 3 décembre 2009 qui a accueilli en partie une requête pour faire déclarer la demande en justice des appelantes abusive, a déclaré cette demande abusive en ce qui a trait au montant des dommages punitifs réclamés par chacun des appelantes, et a ordonné la modification de la demande en justice afin de limiter le montant des dommages punitifs réclamés par chaque appelante à 200 \$;

[2] Pour les motifs du juge Kasirer auxquels souscrivent les juges Hilton et Bouchard;

[3] **ACCUEILLE** l'appel principal à la seule fin de rayer du dispositif du jugement les paragraphes suivants :

DÉCLARE que la demande en justice est abusive en ce qui a trait au montant des dommages-intérêts punitifs réclamés par chacune des demandereses;

ORDONNE la modification des conclusions de la demande en justice afin de limiter le montant des dommages-intérêts punitifs réclamés par chaque demanderesse à 200 \$, dans un délai de dix jours de la date du présent jugement, à défaut de quoi, **REJETTE** la demande en justice des demandereses, avec dépens;

[4] **ACCUEILLE** l'appel incident en partie;

- [5] **DÉCLARE** que la demande en justice des appelantes paraît être abusive;
- [6] **ORDONNE** aux appelantes de fournir solidairement un cautionnement pour frais de 65 000 \$ dans les trente (30) jours de cet arrêt;
- [7] **AUTORISE** le juge du fond à ordonner le remboursement du montant contribué au cautionnement par celles des appelantes qui, le cas échéant, auraient gain de cause avec dépens en leur faveur;
- [8] Sans frais, tant en première instance qu'en appel.

ALLAN R. HILTON, J.C.A.

NICHOLAS KASIRER, J.C.A.

JEAN BOUCHARD, J.C.A.

Me Donald Béchard
DeBLOIS ET ASSOCIÉS
Pour les appelantes

Me Alain Barrette
BARRETTE & ASSOCIÉS
Pour l'intimé

Date d'audience : Le 17 juin 2010

MOTIFS DU JUGE KASIRER, J.C.A.

[9] Journalist Pierre Michaud comments on matters of consumer interest relating to new and used cars on FM 93, a radio station based in Quebec City. During a broadcast on March 2, 2009, Mr. Michaud used raw language to draw attention to what he described as inappropriately high prices charged by car dealers in Quebec compared to their counterparts in the United States. Without mentioning any person or business by name, he complained of high preparation and transport fees as well as unfair pricing of extended warranties and anti-rust protection. Mr. Michaud claimed that car dealers charged too much to consumers considering the value of the products they sold and the services they rendered. He said repeatedly of consumers who paid such prices that "on se fait 'fourrer'" and that the dealers' practices amounted to "du 'crossage'". He remarked that the car dealers lacked professionalism and showed a disrespectful attitude towards consumers. Aired at primetime on a frequency that can be heard in the wider Quebec City region, the comments were made on the eve of the annual auto show in the provincial capital.

[10] He came to regret his crass choice of words and two days later he offered apologies on air. As to the opinions he had expressed, Mr. Michaud was unrepentant – indeed, he briefly reiterated his view that the prices charged by the car dealers were not justified – but said "[...] quand je rajoute en plus des mots injurieux, et un langage plus gras que ce que je devrais avoir, je pense que ç'a pas sa place". He said he was sorry for the vulgarities if they gave offence. He closed his comments that day by adding "je trouve que mes propos étaient disproportionnés et peut-être même un peu injurieux; ce que je déteste, moi".

[11] On April 16, 2009, Mtre Jacques Béchard, the chief executive officer of the province-wide Corporation des concessionnaires d'automobiles du Québec (CCAQ) addressed a demand letter to Mr. Michaud, the radio-show host and the manager of the radio station. Mtre Béchard wrote that he had the mandate from the members of the local car dealers' association for Quebec City, the Corporation des concessionnaires d'automobiles de la régionale de Québec (CCRAQ), to obtain a further apology from Mr. Michaud and compensation for consequential damage to reputation suffered by its 136 members. The amount claimed was \$5,000 for each car dealer, to be paid within ten days of receipt of the letter. Mtre Béchard conveyed the threat of legal action in the event of non-payment, and stated that the dealers would withdraw their business from the station and claim higher damages, including punitive damages and payment of extrajudicial fees, if the matter went before the courts.

[12] The demands were not met. On June 26, 2009, 93 car dealers of the CCRAQ took legal action against Mr. Michaud for defamation, alleging damage to their reputation arising out of the comments he made over the radio. By joinder of cause of

action pursuant to article 67 C.C.P., they filed a single motion to institute proceedings before the Court of Quebec in which each car dealer claimed from Mr. Michaud, as sole defendant, \$5,000 in compensatory damages and a further \$5,000 in punitive damages, as well as all extrajudicial fees. Exclusive of court costs and legal fees, the total claim was \$930,000.

[13] Before filing his defence and with nothing in the record beyond the plaintiffs' motion and attending exhibits, Mr. Michaud moved to declare the action in defamation improper under article 54.1 C.C.P.

[14] The Court of Quebec granted Mr. Michaud's motion in part. The Court declared the action to be improper only in respect of the amount of punitive damages. The judge reduced the amount of those damages and ordered that the action proceed to trial. The car dealers appealed and Mr. Michaud filed a cross-appeal.

* * *

[15] Mr. Michaud argued before the Court of Quebec that the action brought by the 93 car dealers was designed to silence him as a radio commentator rather than to compensate them for any loss they may have suffered to their reputation as individuals from the March 2, 2009 broadcast. The judge decided, however, that at this early stage in the proceedings it could not be said that the cause of action was either improper or that it appeared to be improper under article 54.1 C.C.P. On this point he wrote:

[62] Le Tribunal est d'avis qu'en raison de l'existence démontrée des propos tenus par monsieur Michaud et leur teneur, le tout suivi par des excuses – ce que chaque partie peut invoquer à son avantage –, il ne peut être d'emblée statué que le recours des demanderesses-intimées basé sur la faute extracontractuelle qui aurait été commise à leur endroit [article 1457 C.C.Q.], soit la diffamation, n'est aucunement fondé ou qu'il est frivole ou dilatoire et que pour cette raison, il doit être déclaré abusif ou paraissant l'être.

[63] Les demanderesses-intimées peuvent donc prétendre à une apparence suffisante de droit au soutien de leurs demandes en justice pour justifier un procès au fond.

[16] The judge further observed at paragraph [67] that this finding precluded him from either dismissing the action or reducing the amount of compensatory damages claimed.

[17] The judge did hold that the quantum of punitive damages sought by the appellants was improper. He wrote that the amount reflected "l'utilisation de la procédure de manière excessive ou déraisonnable au sens de l'article 54.1, deuxième alinéa, C.p.c." (para. [68]). He continued:

[69] Il s'agit de l'utilisation des dommages-intérêts punitifs qui, s'il est tenu compte de la somme de 5 000 \$ réclamée à ce titre au défendeur-requérant par chacune des quatre-vingt-treize demanderesses-intimées totalisent 465 000 \$, dans l'unique but de publiquement lui faire mal, si on veut reprendre une expression populaire ou à tout le moins, de l'impressionner suffisamment pour qu'il se tienne tranquille.

[18] Accordingly, he ordered that the claims for punitive damages of each of the appellants be reduced to \$200.

[19] The judge declined to order security for costs in favour of Mr. Michaud, noting both the court's limited jurisdiction to make such orders under article 54.3 C.C.P. and his own sense, given the change to the amount of punitive damages, that such security was not needed to place the parties on the same footing as the suit proceeded to trial.

* * *

[20] In the principal appeal, the car dealers ask that the motion pursuant to article 54.1 C.C.P. be dismissed. They submit that the judge erred in reducing the amount of punitive damages in issue. Pointing to the criteria set forth at article 1621 C.C.Q., they contend that the record contained insufficient information to measure the appropriateness of that amount.

[21] The cross-appeal brought by Mr. Michaud presents a more substantial challenge to the judgment of the Court of Quebec. He argues that the judge erred in not finding the whole of the action to be improper as "clearly unfounded" in law and "an attempt to defeat the ends of justice" under article 54.1 C.C.P. The judge was mistaken as well in his application of the burden of proof pursuant to article 54.2 C.C.P., which should have fallen to the appellants once Mr. Michaud established summarily that the action might have been improper. As a remedy under article 54.3 C.C.P., the judge should have dismissed the principal action. In the alternative, he should have ordered the appellants to furnish security for costs as the case proceeded to trial.

* * *

[22] There are, naturally enough, common issues in the appeal and cross-appeal bearing on whether or not the principal action is improper or appears to be improper pursuant to the *Code of Civil Procedure*, who bears the burden of proof of establishing this abuse, and what specific sanctions are available in the circumstances. These questions invite the Court to examine, as a preliminary matter, the rules in articles 54.1 *et seq.* C.C.P. enacted in 2009 that set out the power to impose sanctions for improper use of procedure.¹

¹ An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate, S.Q. 2009, c. 12.

[23] Mr. Michaud alleges in his motion that the appellants' action is improper in two different ways. These submissions may both be cast in the language of article 54.1, paragraph 2, which set forth grounds for finding a "procedural impropriety". First, he contends that the action in defamation is improper as it is "clearly unfounded", and thus deserves to be dismissed. Second, he argues that the action by the car dealers is a strategic lawsuit against public participation. The action in defamation seeks to silence Mr. Michaud rather than obtain compensation for the car dealers. It was undertaken "as an attempt to defeat the ends of justice" that restricts his right to freedom of expression in public debate. On this further basis, it should also be dismissed as improper.

[24] Article 54.1, paragraph 2 C.C.P. includes these distinct grounds, as well as the basis for finding the use of procedure to be "excessive" or "unreasonable" as cited by the motions judge in respect of the conclusions on punitive damages:

54.1. Les tribunaux peuvent à tout moment, sur demande et même d'office après avoir entendu les parties sur le point, déclarer qu'une demande en justice ou un autre acte de procédure est abusif et prononcer une sanction contre la partie qui agit de manière abusive.

54.1. A court may, at any time, on request or even on its own initiative after having heard the parties on the point, declare an action or other pleading improper and impose a sanction on the party concerned.

L'abus peut résulter d'une demande en justice ou d'un acte de procédure manifestement mal fondé, frivole ou dilatoire, ou d'un comportement vexatoire ou quérulent. Il peut aussi résulter de la mauvaise foi, de l'utilisation de la procédure de manière excessive ou déraisonnable ou de manière à nuire à autrui ou encore du détournement des fins de la justice, notamment si cela a pour effet de limiter la liberté d'expression d'autrui dans le contexte de débats publics.

The procedural impropriety may consist in a claim or pleading that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.

(Emphasis added.)

[25] By separating the grounds of "clearly unfounded" from some of the other measures of impropriety, the legislature has made plain that circumstances exist in which an action might have a basis in law or in fact yet still be subject to dismissal or some other sanction. These other grounds include conduct that is in bad faith, a use of procedure that is excessive or unreasonable or causes harm to another person, or an

attempt to defeat the ends of justice. Mr. Michaud claims that the real objective of the 93 dealers is not to obtain reparation for damage to reputation but instead to prevent him from speaking out publicly on the radio. In other words, he argues that should the Court decide that the action in defamation of the car dealers is not clearly unfounded – that it shows "colour of right" or an "*apparence de droit*" – it may nevertheless be dismissed if it is an attempt to defeat the ends of justice that restricts his freedom of expression in public debate.

[26] Secondly, the rules for establishing impropriety provide an advantage to the party alleging the wrong, when certain pre-conditions are met, by reversing the burden of proving an abuse of process. Placing emphasis on the requirement that he only needs "summarily" establish that the car dealers' action "may" be improper, Mr. Michaud argues that he succeeded in reversing the onus before the Court of Quebec. The car dealers should have been required to show that their action was not excessive or unreasonable and was justified in law. Article 54.2 C.C.P provides:

54.2. Si une partie établit sommairement que la demande en justice ou l'acte de procédure peut constituer un abus, il revient à la partie qui l'introduit de démontrer que son geste n'est pas exercé de manière excessive ou déraisonnable et se justifie en droit.

La requête visant à faire rejeter la demande en justice en raison de son caractère abusif est, en première instance, présentée à titre de moyen préliminaire.

54.2. If a party summarily establishes that an action or pleading may be an improper use of procedure, the onus is on the initiator of the action or pleading to show that it is not excessive or unreasonable and is justified in law.

A motion to have an action in the first instance dismissed on the grounds of its improper nature is presented as a preliminary exception.

[27] Thirdly, article 54.3 C.C.P. sets forth distinct remedies available when a court finds an improper use of procedure (paragraph 1) or an appearance thereof (paragraph 2). The principal action may only be dismissed – the primary remedy sought here by Mr. Michaud – pursuant to paragraph 1. Alternatively, Mr. Michaud invokes paragraph 2 in order to obtain redress should it be decided that there is only an appearance of improper procedure. The dealers contend that the judge wrongly invoked paragraph 2 to reduce the punitive damages they claimed. Article 54.3 provides:

54.3. Le tribunal peut, dans un cas d'abus, rejeter la demande en justice ou l'acte de procédure, supprimer une conclusion ou en exiger la modification, refuser un interrogatoire ou y mettre fin ou annuler le bref

54.3. If the court notes an improper use of procedure, it may dismiss the action or other pleading, strike out a submission or require that it be amended, terminate or refuse to allow an examination, or annul a writ of

d'assignation d'un témoin.

summons served on a witness.

Dans un tel cas ou lorsqu'il paraît y avoir un abus, le tribunal peut, s'il l'estime approprié:

In such a case or where there appears to have been an improper use of procedure, the court may, if it considers it appropriate,

1° assujettir la poursuite de la demande en justice ou l'acte de procédure à certaines conditions;

(1) subject the furtherance of the action or the pleading to certain conditions;

2° requérir des engagements de la partie concernée quant à la bonne marche de l'instance;

(2) require undertakings from the party concerned with regard to the orderly conduct of the proceeding;

3° suspendre l'instance pour la période qu'il fixe;

(3) suspend the proceeding for the period it determines;

4° recommander au juge en chef d'ordonner une gestion particulière de l'instance;

(4) recommend to the chief judge or chief justice that special case management be ordered; or

5° ordonner à la partie qui a introduit la demande en justice ou l'acte de procédure de verser à l'autre partie, sous peine de rejet de la demande ou de l'acte, une provision pour les frais de l'instance, si les circonstances le justifient et s'il constate que sans cette aide cette partie risque de se retrouver dans une situation économique telle qu'elle ne pourrait faire valoir son point de vue valablement.

(5) order the initiator of the action or pleading to pay to the other party, under pain of dismissal of the action or pleading, a provision for the costs of the proceeding, if justified by the circumstances and if the court notes that without such assistance the party's financial situation would prevent it from effectively arguing its case.

* * *

[28] For the purposes of the appeal and the cross-appeal, it is important to bear in mind that the parties were at an early point in the proceedings before the Court of Quebec on the principal action. The car dealers had filed their action in defamation on June 25, 2009, supported by exhibits including a transcription of the two radio broadcasts, the demand letter, and some information regarding the CCAQ and the radio station. On August 19, 2009, prior to the filing of any evidence in the record by either party, Mr. Michaud presented his motion to have the action declared improper pursuant to article 54.1 C.C.P. He was entitled, of course, to do so. Indeed not only do the rules in the *Code of Civil Procedure* contemplate that such a motion may be presented "at any time" (article 54.1, paragraph 1 C.C.P.), but one might well argue that the law

welcomes early consideration of abuse of process as a means of ensuring that the proceedings are proportionate in terms of cost and time required in keeping with articles 4.1 and 4.2 C.C.P. When properly available, early adjudication of an application for abuse of process promises that access to court resources will not be wrongly depleted by improper proceedings standing in the way of other litigants on the rolls.

[29] By allowing a party to establish impropriety "summarily" (article 54.2, paragraph 1), and by empowering the courts to sanction abuse or apparent abuse of process on that basis (article 54.3), the legislature has sought to provide judges with tools for acting expeditiously and inexpensively when faced with abuse or apparent abuse of process.² Prior to the enactment of article 54.1 C.C.P., some criticism had been levied against courts that they were seen as too skittish to take bold action to counter abuse, including dismissing claims entirely, for fear of putting an end to an action that might have some basis in law. The reversal of the burden of proof and the powers to sanction apparent impropriety were enacted in part to answer the shortcomings of the former rules.³

[30] By the same token, however, the traditional cautiousness evinced by courts before dismissing claims completely, especially early in the proceedings, remains an appropriate approach in some circumstances, notwithstanding the renewed resolve to prevent abuse of process. Courts must even guard against article 54.1 C.C.P. itself being invoked abusively by defendants who are inclined to cry wolf in the absence of any palpable threat of impropriety. After all, proper access to the courts is a value to be preserved for both sides to a dispute.⁴ Moreover, an action or proceeding that appears to be an abuse of process early in the proceedings will sometimes reveal itself to be quite proper as fuller evidence supporting the claim enters the record. In those cases, it would be wrong to dismiss an action outright, and article 54.3, paragraph 2 C.C.P. directs that the apparent abuse may be attended to in another way. As to how the advent of articles 54.1 and following changed the approach courts should take where it is alleged that proceedings are clearly unfounded, my colleague Thibault J.A. wrote in *Aliments Breton*:⁵

[37] Dans ce contexte, la jurisprudence découlant des articles 75.1 et 75.2 C.p.c. demeure pertinente, particulièrement quant à la notion d'abus et à la

² My colleague Dalphond J.A. quoted the House of Lords in *Ashmore c. Corp. of Lloyds*, [1992] 2 All E.R. 486, 488 to the effect that it is the trial judge's duty to see that cases "are tried as expeditiously and inexpensively as possible" as consonant with the mandate of Quebec courts, pursuant to articles 4.1, 4.2 and 54.1 C.C.P., to take an active hand in preventing abuse of process: *Droit de la famille – 092186*, 2009 QCCA 1712, para. [24].

³ It may be noted that speaking before the Commission permanente des institutions on the occasion of the study of the proposed articles 54.1 et seq. C.C.P., the Minister of Justice alluded to the need to reinforce the former rules at articles 75.1 and 75.2 C.C.P. given their "strict" interpretation by the courts: Quebec, National Assembly, *Journal des débats*, 39th Leg., 1st Sess., 26 May 2009, 13-4, 25.

⁴ See in this context *Fabrikant v. Swamy*, 2010 QCCA 330.

⁵ *Aliments Breton (Canada) inc. v. Bal Global Finance Canada Corporation*, 2010 QCCA 1369, references omitted.

définition d'acte de procédure manifestement mal fondée. Sans entrer dans les détails, la jurisprudence a consacré la règle selon laquelle le rejet d'une procédure doit reposer sur la conviction du tribunal qu'elle est manifestement mal fondée. La jurisprudence a aussi enseigné que le rejet doit être appliqué avec la plus grande prudence. Ces précédents devront toutefois être nuancés pour tenir compte de la question du renversement du fardeau lorsque la procédure paraît abusive. Les nouvelles dispositions vont plus loin que les anciennes en ce qu'elles visent non seulement les procédures abusives, mais aussi celles qui « peuvent » constituer un abus (article 54.2 C.p.c.) ou qui paraissent abusives (54.3 C.p.c.) et en ce qu'elles prévoient des mesures alternatives au rejet de la procédure ou non, qui constituaient les deux seules options possibles sous l'article 75.1 C.p.c.

[31] For these reasons, when seized of an early petition like the one that came before the Court of Quebec, judges should continue to exercise a measure of caution before summarily dismissing an action, but now may consider other ways of providing redress. Where they have something less than a conviction that the use of procedure is improper, the law now provides remedies short of what is sometimes called the "ultimate procedural sanction" of dismissal.⁶ That lack of conviction in respect of Mr. Michaud's early petition here is a decisive factor in the outcome of both the appeal and the cross-appeal, even if one takes into account a restriction of his freedom of expression in public debate. I shall endeavour to show why the action in defamation should therefore be allowed to proceed, subject to new restrictions to respond to the appearance of procedural impropriety alluded to in article 54.3, paragraph 2 C.C.P.

I The Appeal

[32] The main issue in dispute in the principal appeal is the question whether the motions judge erred in reducing the amount of punitive damages from \$5,000 to \$200 for each of the car dealers.

[33] As already noted, he found that the appellants' action could not be declared entirely improper or improper in appearance at the present stage of the dispute. Only the individual claims for punitive damages, totalling \$465,000, were "excessive" or "unreasonable" and thus improper under article 54.1 C.C.P. (para. [68]).

[34] The judge recognized that it would be inappropriate to reduce the compensatory damages claimed without evidence of the extent, if any, of the loss the car dealers had suffered as a result of the broadcast. That matter should be decided, he wrote, by the judge charged with deciding the case on the merits. He was nevertheless of the view that a distinction could be made in respect of the punitive damages claimed which, by their very dimension, were improper. Given his view that these damages were

⁶ *Cosoltec inc. v. Structure Laferté inc.*, 2010 QCCA 1600, para. [55]; *Clinique Ovo inc. v. Curalab inc.*, 2010 QCCA 1214, para. [19].

excessive and demanded for the purpose of silencing Mr. Michaud, the judge decided that he should intervene immediately, rather than choosing the "option commode" of deferring the matter to the judge on the merits (para. [79]). Invoking article 54.3 C.C.P., he decided to reduce the punitive damages claimed to \$200 for each of the appellants (para. [80]).

[35] The appellants argue that the judge could not evaluate the sufficiency of the claim for punitive damages according to the criteria in article 1621 C.C.Q. at this preliminary stage of the proceedings. While Mr. Michaud stopped short of conceding this point, he did not make strenuous arguments in support of the judge's finding on punitive damages.

[36] With respect for the judge's contrary opinion, I am of the view that the punitive damages could not be reduced in this case without evidence of the amount that would be sufficient to fulfil the preventative purpose of this kind of award.

[37] Article 1621 C.C.Q. regulates the assessment of punitive damages when such damages are authorized by law. The amount sufficient for meeting their preventive purpose must be ascertained before punitive damages may be awarded. To do so, article 1621, paragraph 2 C.C.Q. sets out a series of potentially relevant factors that a judge ruling on the merits of a claim must take into account.⁷ In our case, these might eventually include evidence relating to the patrimonial situation of Mr. Michaud, the gravity of the fault he may have committed, and even whether or not damages are to be paid by a third party.

[38] At this preliminary stage of the proceedings, there was no evidence allowing for this assessment in the record. It is easy to understand that the sheer amount of the punitive damages claimed took the judge aback. For him, the amount was plainly excessive and only designed to silence Mr. Michaud. At the end of the day, the evidence may prove his instinct on this point to be right but there is no way of knowing that now. Even in connection with a petition under article 54.1 C.C.P., the quantum of punitive damages cannot as a general rule be decreed as excessive or unreasonable in the abstract. In the absence of proper evidence, the motions judge was not in a position to measure the preventive purpose of the claim. By reducing the amount of punitive damages claimed by each plaintiff from \$5,000 to \$200, the judge inappropriately made an order that would bind the trial judge hearing the case on the merits and, in the absence of evidence, the \$200 amount can only be viewed as arbitrary. There may be a further opportunity, as the file progresses and the relevant evidence comes to light, to attack the amount of punitive damages claimed in accordance with the criteria of article 1621 C.C.Q. At this early stage, however, I am respectfully of the view that the conclusion of the motions judge that the amount was improper cannot be sustained.

II The Cross-Appeal

⁷ See on this point the reasons of Morissette J.A. in *Fillion v. Chiasson*, 2007 QCCA 570 para. [107].

[39] In the cross-appeal, Mr. Michaud asks the Court to declare the appellants' action in defamation to be improper in its entirety as either clearly unfounded in law or as an attempt to defeat the ends of justice. He asks that the action be dismissed at this early stage or, in the alternative, that a lesser remedy be granted now based on an appearance of impropriety. I propose to consider in turn the relevant measures of procedural impropriety, the effect of the reverse burden of proof, and the sanction available to the judge.

A) Is the action "clearly unfounded" under article 54.1, paragraph 2 C.C.P.?

[40] In his motion to dismiss, Mr. Michaud alleged that the principal action is unfounded in law because the essential elements of a claim in defamation are not present. At paragraph 21 of the motion, he affirms "l'action des demanderesse est mal fondée et, de plus, est ou paraît être abusive". While the title given to this proceeding speaks only to article 54.1 C.C.P., his motion encompasses, from a substantive point of view, arguments generally made pursuant to a preliminary exception to dismiss under article 165(4) C.C.P. This of course proceeds on the assumption that the facts alleged are true. Mr. Michaud's motion goes further in alleging that the principal action is "clearly unfounded" in law – one of the criteria under article 54.1 C.C.P. – and thus constitutes a procedural impropriety.

[41] These are linked but qualitatively different arguments. As Professor Archambault has written, "la mesure de la légitimité de l'exercice du droit d'ester ne réside pas dans le succès ou le fruit du recours".⁸ A finding made under article 165(4) C.C.P. does not require proof of impropriety for the obvious reason that not all actions that are "unfounded in law" can be characterized as abuses of process.⁹ By leaving article 165(4) C.C.P. among the tools available to defendants at the time of the enactment of article 54.1 C.C.P., the legislature confirmed the view that these two proceedings are different in character.¹⁰ This interpretation finds confirmation in the different treatment,

⁸ Jean-Denis Archambault, *L'exercice anormal du droit d'ester en matière civile et sa sanction judiciaire* (Cowansville: Éd. Yvon Blais, 2005) 5, referring to the prior state of the law.

⁹ See, e.g., *Lapointe v. Lacroix-Loiselle*, 2010 QCCS 3609, para. [32]. See generally the warning of Forget, J.A. in *Préfontaine v. Lefebvre*, 2011 QCCA 196, against an "amalgame" of recourses designed to remedy different situations (para. [19]).

¹⁰ An earlier version of the Bill that resulted in the enactment of article 54.1 proposed the repeal of article 165(4) and an addition allowing for a total or partial dismissal of an action if it was either abusive or unfounded in law: s. 4, *An Act to amend the Code of Civil Procedure to prevent abusive use of the courts and promote freedom of expression and citizen participation in public debate* [Bill 99, Introduction] (Quebec City: Official Publisher, 2008). This was not carried forward by S.Q. 2009, c. 12. See the useful analysis on this point, made in service of a different argument, in Raphaël Lescop, "Les articles 54.1 et suivants du *Code de procédure civile* : la mise au rancart de l'article 165(4) et le retour de l'irrecevabilité partielle en droit québécois" (2010) 69 R. du B. 319.

in several provisions in the *Code of Civil Procedure*, for judicial decisions made under article 165(4) and those under article 54.1.¹¹

[42] Among other differences, there is a measure of blame associated with a finding that an action or proceeding is improper that is not necessary under article 165(4) C.C.P. If the French word "*abus*" signals this more resolutely than the term "impropriety", both linguistic texts of article 54.1, paragraph 2 C.C.P. make the underlying idea of a wrongful use of procedure plain in the description of what constitutes improper proceedings.¹² The finding that a claim or pleading is "clearly unfounded" is presented alongside alternatives that it is "frivolous or dilatory". Other instances of impropriety in article 54.1 speak to conduct that is "vexatious or quarrelsome", in "bad faith" or to a use of procedure that is "excessive", "unreasonable" or prejudicial to the interests of another. Likewise, an "attempt to defeat the ends of justice" carries with it a connotation of wrongful conduct on the part of a litigant that is not necessarily present in respect of preliminary exceptions brought outside the ken of article 54.1. Abuse under article 54.1 brings consequences that, as a general rule, would not flow from a ruling made under article 165(4).¹³ Indeed the remedies available in the event of a finding that a claim is improper or appears to be improper are wider, allowing a court to tailor a sanction to answer the specific character of the wrongful behaviour in question. In principle, the preliminary exception brought under article 165(4) C.C.P., where granted, allows only for a complete dismissal of the action and an ordinary order as to costs.

[43] A careful reading of his motion to dismiss reveals that, alongside Mr. Michaud's argument that the principal action is improper, he also alleges that there is no basis in law for the claim brought by the car dealers because there is no proper allegation of fault, damage or causation in law to sustain the action in defamation. Directing myself to the argument under article 165(4) C.C.P., I am of the same view as the motions judge that the essential elements of the cause of action are properly alleged and that the suit is founded in law if one assumes the facts alleged are proved. I will examine Mr. Michaud's arguments in turn.

(i) Absence of fault:

[44] Mr. Michaud contends that his comments on the radio did not constitute defamation in law. He says that while some of his words were ill-chosen, he did not

¹¹ For example, an appeal from a judgment that dismisses an action because of its improper nature requires leave of the Court of Appeal, whereas no leave is required for an action dismissed pursuant to article 165(4) unless the value of the object of the dispute is less than \$50,000: compare articles 26, paragraph 1(1) and 26, paragraph 2 (4.1) C.C.P.

¹² As Dalphond J.A. observed in *Cosoltec*, *supra*, note 6, para. [63] "avant de qualifier une procédure d'abus, il faut se rappeler que l'abus ne se présume pas, contrairement à la bonne foi, et que la jurisprudence a toujours été exigeante avant de conclure en ce sens".

¹³ For example, the personal liability of directors and officers of a legal person that resorts to impropriety can, in certain circumstances, result from this misconduct (article 54.6 C.C.P.).

defame the car dealers. He merely offered legitimate criticism of their pricing practices, which, in his view, are too high. Mr. Michaud states in his written argument that "[l]'intimé ne les a jamais traitées de voleuses ou de fraudeuses", and argues further that the appellants do not assert that what he said was in any way false. In any event, he says, the appellants failed to allege fault in their proceedings.

[45] I disagree. Fault was properly alleged. The motion to institute proceedings in defamation quotes at length from the transcript of the radio broadcast and specifically advances, at paragraph 2, that the words used by Mr. Michaud constitute "des propos diffamatoires". Whether or not this will be substantiated at trial, this is a proper allegation of fault. The language he used to describe car dealers, read alongside his account of the pricing practices, suggested that these practices are unfair and possibly dishonest and thus may constitute a civil fault.

[46] As my colleague Rochon J.A. explained in *Prud'homme v. Rawdon*,¹⁴ the use of crass language such as that employed by Mr. Michaud can be the basis for an action in defamation where the epithets seek to ridicule and humiliate the persons so described. Moreover, the manner in which the comments were made could lead a reasonable person to conclude that the car dealers wrongly took advantage of consumers to sell them worthless products in a manner that constitutes an improper business practice. The apology offered two days later may or may not make good the wrong – that is a matter best decided upon on the merits. Whether or not the comments made by Mr. Michaud were true and, if so, whether that relieves him from liability for defamation, are again matters best measured when all the evidence is in the record. But as the record stood before the judge, it would have been wrong to say that the comments made on the radio are so innocent or so obviously not defamatory that the appellants' action was unfounded in law. Assuming the facts to be true at this stage, there is plainly a basis in law to argue that he was at fault.

(ii) Absence of damage:

[47] Mr. Michaud argues further that there was no damage suffered by the individual car dealers because none of them was mentioned by name during the radio broadcast. Nothing is alleged to suggest that any of them has sustained a loss, let alone the \$5,000 of compensatory damages that each has claimed. He asserts further that his comments were made at a level of generality such that the personal harm that the law requires in defamation cases is absent. Citing a venerable line of cases, he contends that if the appellants were collectively wronged by his remarks, any harm would have been "lost in the crowd" of Quebec car dealers generally in such a way that no one dealer can claim to have suffered individual damage.¹⁵ Because the appellants, as individuals, have

¹⁴ 2010 QCCA 584, in particular paras. [47] and [48].

¹⁵ In support of this view Mr. Michaud cites, *inter alia*, *Germain v. Ryan*, (1918) 53 C.S. 543, *Goyer v. Duquette*, (1937) 61 B.R. 503 and *Malhab v. Métromédia CMR Montréal inc.*, [2003] R.J.Q. 1011 (C.A.).

failed to allege loss specific to themselves, this "collective loss", if it exists, cannot be the basis of an action in defamation. Moreover, the fact that they brought the action together, and the important role that the CCRAQ and the CCAQ played in the preparation of the demand letter, would confirm that no individuals have suffered a loss. The absence of damage means that, in his view, the action in defamation is unfounded in law.

[48] It is true that the motion to institute proceedings affirms summarily, without further detail, that each of the 93 car dealers suffered damage to reputation for which the same amount of \$5,000 is claimed (para. 17). It is true too that the demand letter contents itself with the mention that "ces propos [...] ont gravement porté atteinte à la réputation de l'ensemble des concessionnaires faisant partie du territoire de diffusion de la station FM 93,3" and contains no specific detail as to how each of the dealers felt the injury of which they complain.

[49] The allegations lack detail, to be sure, but they are sufficient to put the matter of individual damage in play at this stage of the proceedings. The appellants should be allowed the opportunity to present evidence that each one of them suffered for review at trial.

[50] According to the Supreme Court, injury in a defamation case exists where "an ordinary person [...] believe[s] that the remarks made, when viewed as a whole, brought discredit on the reputation"¹⁶ of the victim. At trial, the plaintiffs will be called upon to bring evidence to discharge the burden of demonstrating the existence and extent of their individualized loss in fact. Each car dealer will have to satisfy the trier of fact that an ordinary person would believe that Mr. Michaud's comments tarnished that individual dealer's reputation. That test is no different due to Mr. Michaud's comments being directed at a group of car dealers. The general character of the remarks made by Mr. Michaud does not insulate him from suit: "the victim does not have to be expressly named or designated to be able to bring an action in defamation. [...] The person who made the impugned comments cannot avoid liability by hiding behind the fact that he or she used general terms applying to a group".¹⁷

[51] There are plainly some circumstances in which a group that has been collectively defamed is so large that harm is too diffused to visit injury, individually, on any one group member. But it is premature, in the absence of evidence from the appellants, to say that the harm they allege was not felt by them individually or that it was so diffused across a wide group of car dealers as to be lost in the crowd. In *Bou Malhab*, a case

¹⁶ *Prud'homme v. Prud'homme*, 2002 SCC 85, para. [34]. See also *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 SCC 53, para. [57] and *Bou Malhab v. Diffusion Métromédia CMR inc. et al.*, 2011 SCC 9, paras [28] (per Deschamps J.) and [104] (per Abella J.).

¹⁷ *Bou Malhab*, *ibid.*, para. [49] (per Deschamps J.). *Bou Malhab* was a class action, and the 2011 judgment of the Court dealt with the case on the merits.

decided since the motions judge rendered his judgment, the Supreme Court identified a series of non-limitative factors that can assist in determining whether a victim, as a member of a group, has suffered individualized loss entitling him or her to compensation.¹⁸ Based on the allegations in the motion to institute proceedings, many of these factors appear to be relevant here. The car dealers can be expected to argue that the relatively small size of the group in the listening area of FM 93 make them easily identifiable; that the cohesiveness of the group of local car dealers makes it more likely that the ordinary person would perceive the comments as bringing individualized harm to each member; and that the credibility of Mr. Michaud as a journalist would suggest to the ordinary person that his remarks would be taken seriously.

[52] As the record stood before the motions judge, there were already signs of individualized harm. Only dealers within the range of the FM 93 radio frequency in the Quebec City region took action, indicating that, as a sub-class of the 850 car dealers in Quebec, they felt personally injured by the remarks. Indeed not all members of the regional association joined the action, suggesting that some of the 136 car dealers mentioned in the demand letter excluded themselves from those taking action, arguably based on their own sense that they had suffered no personal loss. Interestingly, it would seem that in the mind of Mr. Michaud, he knew that he was directing his comments to a subset of the 850 car dealers in the province: "quand j'utilise un langage de même", he said on air in his proposed apology for having used bad language two days before, "c'est parce que j'ai en tête des gens précis, toujours les mêmes bêtes noires de l'industrie qui font [...] mal paraître l'ensemble [...]".

[53] The plaintiffs will have the burden of showing that they were singled out, or at least damned by association, such that the loss they claim is sufficiently individualized notwithstanding the generalized character of Mr. Michaud's comments. When the facts are in and tested at trial, the judge charged with evaluating the evidence will be in a position to decide whether Mr. Michaud's comments were directed at identifiable individuals or at a group sufficiently limited such that all members of that group can justifiably claim compensation for loss personal to themselves. It will not necessarily be easy to show that they were individually taken to task as a result of the on-air remarks. But it cannot be said, at this stage, that their suit is unfounded in law for lack of injury.

(iii) Absence of causation:

[54] In addition, Mr. Michaud asserts that there is no causal link between the wrong and the loss. He says the car dealers fail to explain how the radio broadcast caused their supposed injury in their motion to institute proceedings.

[55] Again, I disagree with Mr. Michaud here. His argument that the action as presented fails to disclose a causal link between the alleged fault and the alleged

¹⁸ *Ibid.*, paras [57] to [79] (per Deschamps J.). Abella J., while dissenting in the result, accepted the factors set out by Deschamps J. as "helpful" (para. [109]).

damage is incorrect. While the motion to institute proceedings is not fulsome in the detail it provides on the link between fault and injury, paragraph 15 does mention that Mr. Michaud chose to make his remarks immediately prior to the auto show and that he was "parfaitement au courant de l'effet dévastateur que ces propos pourraient avoir à l'égard des demanderesses la veille du Salon de l'auto". Coupled with the allegation of individualized loss at paragraph 17 and the allegation of defamatory remarks at paragraph 2, this allusion to causation is sufficient, for present purposes, to say that the suit is not unfounded in law. The issue as to whether a causal link has been established should be left to the trier of fact.

[56] To conclude on this point, I am of the view that the foregoing is sufficient to decide against Mr. Michaud's submission that the suit is unfounded in law and should be dismissed.

[57] This is no less true by reason of the fact that he alleges the suit is "clearly unfounded" in law based on article 54.1 C.C.P. rather than simply "unfounded in law" at article 165(4) C.C.P. As my colleague Dufresne J.A., sitting in chambers, held in *Commission des normes du travail v. Benjamin*,¹⁹ the enactment of article 54.1 C.C.P. does not relieve a judge from deciding, on the basis of the presumptive truth of the facts alleged, whether or not a suit is founded in law.

[58] When it is argued that a suit is "clearly unfounded" in law, article 54.1 C.C.P. requires a further finding of blame on the part of the litigant who brought the suit.²⁰ In other words, the litigant must not only have brought a suit that is unfounded in law, he or she must have done so in a manner that is so patent, or so frivolous or dilatory as to be an abuse of process. I take guidance on this point from the reasons of Dalphond J.A. in *Royal LePage*: "le fait de mettre de l'avant un recours ou une procédure alors qu'une personne raisonnable et prudente, placée dans les circonstances connues par la partie au moment où elle dépose la procédure ou l'argumente, conclurait à l'inexistence d'un fondement pour cette procédure".²¹ Dalphond, J.A. also noted, echoing the sentiment of Rochon J.A. expressed in *Viel*,²² that a finding of impropriety on this basis is not to be arrived at lightly.²³ The compass for this evaluation of impropriety is expanded at article 54.1 C.C.P. as against former article 75.1 C.C.P., to include an evaluation of the evidence filed at whatever stage of the proceedings the motion for improper proceedings is brought. At whatever stage it may be, however the additionally blameworthy character of the litigant's conduct must be shown for the claim to be declared "clearly unfounded" in law. Because Mr. Michaud has failed to show that the suit was unfounded pursuant to the criteria of article 165(4) C.C.P., it is, perforce, not "clearly unfounded" in law under article 54.1.

¹⁹ 2011 QCCA 721, para. [6].

²⁰ *Duni c. Robinson Sheppard Shapiro, S.E.N.C.R.L./L.L.P. et al.*, 2011 QCCA 677, para. [14].

²¹ *Royal LePage commercial inc. v. 109650 Canada Ltd.*, 2007 QCCA 915, para. [46].

²² *Viel v. Entreprises immobilières du terroir ltée*, [2002] R.J.Q. 1262, para. [82].

²³ *Royal LePage*, *supra*, note 21, para. [44].

[59] The record as it stands suggests that the appellants' claim enjoys colour of right. In noting this, I say nothing about the prospects of success of the proceedings taken against Mr. Michaud.

B) Is the action improper as "an attempt to defeat the ends of justice" under article 54.1, paragraph 2 C.C.Q.?

[60] A finding that the principal action in defamation is not clearly unfounded in law does not preclude it from being declared improper on some other basis identified by the legislature. The authors of the report of the committee struck to advise the Minister of Justice on strategic lawsuits against public participation recommended that courts should be allowed to take remedial measures to combat abuse of process "même dans le cas où il subsiste une apparence de droit".²⁴ As noted above, this was carried forward with the enactment of distinct bases for impropriety in article 54.1, paragraph 2 C.C.P., including "an attempt to defeat the ends of justice". I turn now to a consideration as to whether the appellants' claim is improper on that ground.

[61] Mr. Michaud argues that the action brought by the car dealers is an attempt to defeat the ends of justice because it restricts his freedom of expression in public debate. He says this case presents a textbook example of what has become to be known in the literature as "strategic lawsuit against public participation" brought in the guise of an action in defamation.²⁵ The appellants seek to defeat the ends of justice, he says, because their primary purpose is not to obtain compensation for a civil wrong but to silence Mr. Michaud from speaking out on consumers' interests in purchasing new cars. He argues that even if one were to acknowledge that the action in defamation of the car dealers enjoys a colour of right at this stage, it nevertheless deserves to be summarily dismissed as improper.

[62] To this end, Mr. Michaud says the judge erred in deciding that the preliminary motion before the Court of Quebec did not meet the primary burden under article 54.2 C.C.P. of establishing that impropriety summarily. Pointing to the resulting reversal of the onus of proof in article 54.2 C.C.P., he says the appellants failed to show that their action is not "excessive or unreasonable and is justified in law". This should have led the Court of Quebec to dismiss the action as improper.

²⁴ Roderick A. Macdonald, Pierre Noreau and Daniel Jutras, *Rapport du comité au Ministre de la justice: Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)* March 15, 2007, 78 [hereinafter the Macdonald Report].

²⁵ The Macdonald Report, *ibid.*, 7, offered the following definition of the proceeding known in French as a *poursuite-bâillon*: "[...] la notion de *poursuite stratégique*, ou *poursuite-bâillon*, présente des caractéristiques plus générales. Il s'agit, pour l'essentiel, 1) de poursuites judiciaires 2) entreprises contre des organisations ou des individus 3) engagés dans l'espace public dans le cadre de débats mettant en cause des enjeux collectifs, 4) et visant à limiter l'étendue de la liberté d'expression de ces organisations ou individus et à neutraliser leur action 5) par le recours aux tribunaux pour les intimider, les appauvrir et les détourner de leur action".

[63] It should be recalled that the motions judge concluded that the action as a whole was neither improper nor improper in appearance because it could not be said that the action was clearly unfounded in law (para. [62]). He decided, as a result, that "([I]es demanderesses-intimées peuvent donc prétendre à une apparence suffisante de droit au soutien de leurs demandes en justice pour justifier un procès au fond" (para. [63]). With respect for his view, this finding did not dispose of the argument that, notwithstanding the colour of right, the action nevertheless appeared to be improper as an attempt to defeat the ends of justice by restricting Mr. Michaud's freedom of expression in public debate. While the judge correctly raised that possibility at paragraph [48] of his reasons, and relied on it for part of his finding on punitive damages, he did not address it exhaustively in accordance with the new rules enacted in 2009.

[64] This is not to say that the judge was not alive to the potentially abusive character of the proceedings in defamation. He remarked on his sense that the motive of the car dealers in asking for punitive damages from Mr. Michaud was "de publiquement lui faire mal [...], de l'impressionner suffisamment pour qu'il se tienne tranquille" (para. [69]). It was a "tactique destinée à l'ébranler suffisamment pour le faire taire en tant que critique du domaine de l'automobile – ce qui, il faut le rappeler, est une forme de rôle public important au niveau du droit de la consommation [...]" (para. [76]). He wrote that he was prepared to impose a sanction for this impropriety "malgré les apparences de légitimité du recours" (para. [78]). The judge did properly identify many considerations relevant to the criterion of "an attempt to defeat the ends of justice". Yet, his principal finding that the action as a whole was not apparently improper, in my respectful view, was mistaken. Even at this early stage, the fact that the claim was not "clearly unfounded" was not a bar to finding the whole action to be apparently improper as an attempt to defeat the ends of justice. In particular, Mr. Michaud did not benefit from the full range of remedies at article 54.3 C.C.P.

[65] The path for analyzing procedural impropriety is set out by the legislature in articles 54.1 C.C.P. and following: first, one must consider whether Mr. Michaud has summarily established what may be an abuse of process on the distinct basis of "an attempt to defeat the ends of justice"; second, if Mr. Michaud has acquitted that burden, the onus to disprove impropriety falls to the appellants under article 54.2, paragraph 1; and, third, if there is an abuse or an appearance of abuse the appropriate remedy must be identified (article 54.3, paragraphs 1 and 2). I propose to canvass these alternatives.

(i) The primary burden on the defendant:

[66] Has Mr. Michaud met his primary burden in order to trigger the reverse onus? In order to conclude on this narrow point, he must establish summarily that the action by the car dealers may be an attempt to defeat the ends of justice pursuant to article 54.2, paragraph 1 C.C.P.

[67] By "summarily", the legislature can be taken to have meant this demonstration by the defendant can be made expeditiously – prior to full proof and hearing of the matter at trial. As indicated in the explanatory notes to the enacting legislation,²⁶ "summarily" here is suggestive of the degree of dispatch, not the degree of proof, relevant to the reversal of the burden of showing impropriety.²⁷ As Chaput J. remarked on the word "sommairement" in *Fortin v. Fortin*, "[l]e texte de l'article [54.2] ne définit pas ce terme. Il convient d'en retenir le sens usuel, c'est-à-dire brièvement, promptement, sans les formalités de l'enquête et de l'instruction au fond".²⁸

[68] By establishing summarily that the action in defamation "may" be an improper use of procedure, article 54.2 C.C.P. provides that the court can apply a sanction with less than the firm conviction that there has been an abuse. This is not to say that the law creates a presumption of bad faith – on the contrary: here, the car dealers benefit from the presumption due to all litigants, in the absence of a legal rule to the contrary, that their action has been taken for a proper purpose.²⁹ The burden is reversed when the party alleging abuse establishes summarily that there *may* be abuse, after which the onus falls to the initiator of the action or pleading to show that it is not excessive or unreasonable and is justified in law.

[69] The mechanism is the reflection of a policy choice by the legislature to assert freedom of expression as a fundamental value and to give it precedence, as a procedural matter, over the right to reputation in this limited way. Amendments brought to article 54.2, paragraph 1 C.C.P. through the legislative process confirm that the provision shifts the burden significantly to the party who seeks to restrict freedom of expression and allows this shift to occur, as is the case here, at an early stage in the proceedings.³⁰ But freedom of expression in public debate is not a licence to defame and does not trump the right to reputation absolutely. The appellants have the opportunity to discharge the reverse burden and thereby avoid the sanctions set forth at article 54.3 C.C.P.

[70] What does Mr. Michaud have to show as his primary burden before the onus shifts to the appellants?

[71] As a first point, Mr. Michaud has to establish that the restriction to his freedom of speech occasioned by the action in defamation brought by the car dealers occurred in

²⁶ The Explanatory Notes state that "the Act allows the courts to promptly dismiss a proceeding that is improper", making reference to the criterion "summarily established": S.Q. 2009, c. 12.

²⁷ See, for a convincing exposition of this point of view, the reasons of Riordan J. in *McKibben v. Townend et al.*, 2011 QCCS 135.

²⁸ 2009 QCCS 5345 cited by Riordan J., *ibid.*, para. [6].

²⁹ See *Costolec, supra*, note 6, paras [63] and [68]-[69].

³⁰ Bill 99, *supra*, note 10, s. 1 (54.2) would have required, as primary burden, that "a party establishes that an action or pleading is *prima facie* an abuse of procedure" before the burden shifted. By substituting "may be improper" for "is [...] an abuse", it may be presumed that legislature sought to impose a lesser degree of conviction for primary burden.

connection with what article 54.1, paragraph 2 C.C.P. describes as "public debate". Only when freedom of expression is restricted in "public debate" does the advantage of the reverse onus in proving procedural impropriety come to the aid of defendants in defamation actions such as Mr. Michaud under article 54.2 C.C.P. In *Bou Malhab*, Deschamps J. observed a trend in decided cases whereby the law of defamation has evolved to provide a more adequate protection for freedom of expression on matters of public interest.³¹ The enactment of rules designed to give special protection to freedom of expression in public debate by the Quebec legislature might well be seen as partaking of this same trend. The preamble to the law enacting articles 54.1 and following underscores the special importance of freedom of expression and the need to prevent the improper use of the courts to "thwart the right of citizens to participate in public debate".³²

[72] The action in defamation brought by the car dealers plainly bears on views expressed on what might be styled as the public debate on consumer interests in the purchase of new and used cars. The Supreme Court has provided, in a not unrelated context, a wide enough berth for the notion of public interest.³³ "Public debate" deserves, as well, at least a wide enough understanding to include the present circumstance. Mr. Michaud's words were expressed editorially as a journalist. Spoken in the public square, his remarks were meant to guide consumers in the purchase of automobiles. He denounced publicly what he sees as the car dealers' inappropriate behaviour, by warning others or at least inviting his audience to reflect critically as they considered car prices. The comments may or may not have been defamatory, but they can fairly be said to partake of a participation in "public debate" within the meaning of that term in article 54.1 C.C.P. I note that the motions judge was of this view, aptly describing Mr. Michaud as adopting "une forme de rôle public important au niveau du droit de la consommation" (para. [76]).

[73] Has Mr. Michaud established that the action in defamation "may be improper" as an attempt to defeat the ends of justice?

[74] The answer depends on what "an attempt to defeat the ends of justice" means in this connection and how the burden for establishing it is divided between the person alleging the abuse and the litigant initiating the allegedly improper suit. Does the measure of the abuse turn on whether the car dealers had an improper motive in

³¹ *Bou Malhab*, *supra*, note 16, para. [19], citing *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 and *Grant v. Torstar*, 2009 SCC 61.

³² Mr. Michaud points in particular to part of the preamble of the Act in support of his interpretation of legislative intent: "AS it is important to prevent improper use of the courts and discourage judicial proceedings designed to thwart the right of citizens to participate in public debate". The title of the Act reinforces the same interpretation: *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*, S.Q. 2009, c. 12.

³³ *Grant v. Torstar*, *supra*, note 31, para. [104].

bringing suit against Mr. Michaud? Alternatively, can abuse be measured simply by the effect of the dealers' action on Mr. Michaud's freedom of expression?

[75] In his argument before the Court, Mr. Michaud stressed both the wrongful motive and the wrongful effect of the car dealers' action in defamation in order to show an attempt to defeat the ends of justice. He endeavoured to establish that the appellants' intention in bringing suit was to stigmatize him rather than to obtain compensation for a civil wrong. Mr. Michaud also alleged that the effect of the action – notably by the sheer size of the claim brought against him – is to restrict his freedom of expression in public debate by intimidating him from speaking out.

[76] The relevance of wrongful motive and wrongful effect are both alluded to in the Code. The French text of article 54.1, paragraph 2 places a plain emphasis on the effect of the impugned use of procedure ("notamment si cela a pour effet de limiter la liberté d'expression d'autrui dans le contexte de débats publics"). While the English text does not allude directly to effects, it may be read to include that idea in so far as the expression "restricts freedom of expression" may be understood to refer to the action's effect on the victim of alleged impropriety. If the "effects-based" interpretation of article 54.1, paragraph 2 is plainer in the French text, so too is the purpose-based interpretation. The choice of the phrase "détournement des fins de la justice" is highly suggestive of behaviour that defeats the ends of justice not just in its effects but in its purpose. To be improper, the action must defeat the ends of justice by subverting them or undermining them. Where an action in defamation limits freedom of expression in its effects without subverting the ends of justice, it cannot be said to be a "*détournement*" in the full sense of the word and may well not be improper. Viewing the burden as a whole, the court must be satisfied that the car dealers' attempt to defeat the ends of justice reflects a measure of blame that, as we have seen, is characteristic of abuse of process generally. An attempt to defeat the ends of justice is a species of impropriety relating to a distortion of the judicial function. The Supreme Court has repeatedly identified the "integrity of the adjudicative process" as a core aspect of the doctrine of abuse of process, which extends to preventing a civil party from using the courts for an improper purpose.³⁴ An attempt to defeat the ends of justice is similarly predicated on an indication that the offending litigant's action is a bad faith attempt to deny the legitimate right of another person. In this sense, an attempt to defeat the ends of justice stands in violation of the principle that a litigant should only take action before the courts in good faith, as consecrated by articles 4.1 C.C.P.³⁵

³⁴ *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, para. [43] (per Arbour J.), cited with approval by Gonthier J. in *I.A.T.S.E. Local Stage Local 56 v. Société de la Place des Arts de Montréal*, 2004 SCC 2, para. [16].

³⁵ The observation of Dalphond J.A. made in a related context is apposite: "la bonne foi requiert [that parties to litigation] exercent leur droit d'ester dans le respect de certaines règles afin de sauvegarder les finalités du système juridique et non les pervertir". *Royal LePage commercial inc.*, *supra*, note 21, para. [39].

[77] Ultimately, the abuse of process alleged by Mr. Michaud under article 54.1 is not to be found merely in the effect of the action in defamation on his freedom of expression, but in the car dealers' motive that deflects the court from its proper judicial duty. As the authors of the Macdonald Report indicated, this is the notion at the core of a rule designed to strike at the "strategic" character of lawsuits that seek to deny freedom of speech: "[l]a défense des finalités propres au système judiciaire exige principalement que le recours aux tribunaux ne constitue pas une forme de détournement de la fonction judiciaire en vue de limiter l'exercice d'un droit fondamental".³⁶ Professor Macdonald stressed this idea when he was called upon to comment on the wording of the proposed legislation in its initial form after the preparation of his report: "'détournement'", he said, "c'est la norme la plus importante".³⁷ The Minister of Justice underscored the same point in her comments in the National Assembly by emphasizing the "purpose" as the defining characteristic of a "poursuite-bâillon" as regulated in the new law.³⁸

[78] In many instances, the primary burden of demonstrating impropriety, even summarily, may be significant given the difficulty of establishing a litigant's motivation for conduct, especially at an early stage in the proceedings where the car dealers themselves have given no evidence.³⁹ It may be that an effects-based approach may not only alleviate the primary burden falling to the person alleging impropriety but, because it does not depend on the vagaries of proving motive or purpose, provides a more efficient way for courts to dispose of these kinds of demands.⁴⁰ The legislature indicates at article 54.2 that measuring the effect of the use of procedure is one basis for inferring the wrongful purpose – this is a classically proven technique of inductive reasoning in law for discerning an actor's purpose through his or her outward conduct and its effects. But whatever the relevance of effects to the primary burden, effects cannot be the sole measure of abuse at the end of the day. Plainly, it cannot be said that every claim that has the effect of restricting freedom of expression in public debate is improper since that would render all actions in defamation *ipso facto* abusive. Only those that have an undue or disproportionate effect on freedom of expression, in the

³⁶ Macdonald Report, *supra*, note 24, 78.

³⁷ Quebec, National Assembly, *Journal des débats*, Commission permanente des institutions, 38th Leg., 1st Sess., 15 October 2008, p. 69.

³⁸ Quebec, National Assembly, *Journal des débats*, Commission permanente des institutions, 39th Leg., 1st Sess., 26 May 2009, p. 3:

Le projet propose de modifier le Code de procédure civile afin d'y prévoir ce qui peut constituer une procédure abusive. Un tel abus peut notamment résulter d'une poursuite-bâillon, soit une poursuite qui a pour but essentiel non pas d'obtenir la réparation d'un préjudice, mais en fait de limiter l'expression des points de vue et de neutraliser l'action de personnes qui s'opposent ou critiquent un projet. Cette poursuite vise ainsi à les intimider ou à les épuiser. Il s'agit donc là d'un détournement des fins de la justice.

³⁹ This criticism of anti-SLAPP legislative models is not uncommon: see Mayo Moran *et al.*, *Anti-SLAPP Advisory Panel: Report to the Attorney General [Ontario]*, October 28, 2010, para. [32] *et seq.*

⁴⁰ It has been argued that the word "effet" in article 54.1, paragraph 2 C.C.P. means the calculus is effects-based: see Lucie Lemonde and Gabrielle Ferland-Gagnon, "Les étapes de la mobilisation citoyenne et l'adoption de la loi contre les poursuites bâillons" (2010) 51 C. de D. 195, 216-217.

balancing of interests that article 54.1 calls upon a judge to undertake, should be held to be improper. Where the primary burden is established using an effects-based measure of impropriety, this should not obscure the blameworthy character of the conduct that ultimately is the normative core of an "attempt to defeat the ends of justice".

[79] It is not necessary, in this case, to determine whether the primary burden can be met by alleging undue effects on freedom of expression alone. The record before the Court of Quebec, as sparse as it was, provides basis for establishing summarily that the action was brought for an improper motive and, as such, may amount to an attempt to defeat the ends of justice.

[80] Three aspects of the record as it stands, considered together, indicate that the action "may be improper" in this way: the motive for the action as revealed by the demand letter; the fact that the action was directed only at Mr. Michaud; and the fact that the appellants will give any funds they receive as compensation for the alleged defamation to charity.

[81] The text of the demand letter sent to him following the broadcast is evidence that the car dealers' motive in taking legal action may well be to silence Mr. Michaud rather than to obtain compensation. The letter, sent by the Corporation des concessionnaires automobiles du Québec on CCAQ letterhead, sought an apology and damages for each of the car dealers, both of which reflect the compensatory function of an action in defamation. But the letter concluded with a collective threat to withdraw all advertising from the radio station:

De surcroît, les concessionnaires, à moins d'un règlement rapide leur donnant satisfaction, ont convenu à l'unanimité lors de ladite assemblée qu'ils ne pourront plus faire confiance à une station radiophonique qui a permis qu'eux et leurs employés soient diffamés d'une manière aussi grave, ce qui inclut l'arrêt immédiat de toute relation contractuelle tant pour le présent que pour l'avenir.

[82] This is a sign that the purpose of the threatened lawsuit may be not just to seek compensation but also to stop Mr. Michaud and others from speaking out critically on matters germane to the car dealers.

[83] This is compounded by the fact that the car dealers have launched the action against Mr. Michaud as sole defendant. While the demand letter was written to the radio-host and the manager of the station as well, Mr. Michaud was singled out as defendant and wrongdoer in the motion to institute proceedings. While this point is not in itself decisive, one might well have imagined that the radio station shared responsibility for whatever loss arose out of the broadcast and, given his participation, perhaps even the radio host as well. Yet, by singling Mr. Michaud out as solely responsible for the loss, he is also taken to task alone for having voiced his views. Coupled with the threat of cutting business from the station, the effect of isolating Mr.

Michaud as defendant might have the consequence of pitting his interest against that of the station, encouraging the latter to give in to the pressure to silence him.

[84] A further feature of the car dealers' claim suggests that their real purpose is not to seek compensation for defamation. In paragraph 19 of their motion to institute proceedings, under the heading of "dommages", the car dealers undertake formally to remit the whole of the amounts they would receive as a result of the action, once costs and fees are paid, to a charity. An allegation of this nature is of course irrelevant to whether damages are due and, if they are due, what the extent of those damages should be. And however fine this sentiment, it may suggest a motive less noble. The fact that every single one of the car dealers is prepared to give up the damages they have claimed goes a way to showing that they have taken the action for another purpose than to obtain compensation. There are, of course, circumstances in which a person who suffers a true financial loss following the fault of another will legitimately choose to demand compensation and simultaneously undertake to give the money away. But here the offer to give the money away is more detailed than the allegation of the loss suffered, the whole creating the impression that compensation may well be a secondary concern. There is no reason to fault the appellants for their generosity, but it is not unfair to see in their selfless gesture a sign that restitution is not the primary purpose of their lawsuit. Here is another indication that their action may be an attempt to defeat the ends of justice.

[85] Is the total amount of damages claimed – \$930,000 of compensatory and punitive damages, plus costs and fees – so excessive as to suggest that the effect of the action is to frighten Mr. Michaud into submission and silence? Mr. Michaud urges this, arguing specifically that the effect of the high amount claimed, as perceived from his point of view, is excessive and unreasonable and that it would be wrong not to consider the total amount of the damages claimed in measuring the effect of the action on his right to freedom of expression.

[86] It will be recalled that the judge wrote that the high amount of the punitive damages was a tactic designed to stop Mr. Michaud from speaking out critically of the automobile industry (paras. [69] and [76]). He also wrote that the concerted character of the action in defamation, in particular the role that the CCAQ and the CCARQ played in mobilizing the car dealers to act, was most obvious (para. [55]).

[87] While Mr. Michaud is right that the role of the CCAQ and the CCARQ suggest an orchestrated action, several considerations encourage the Court to resist characterizing the proceedings as a single claim for \$930,000 plus costs and fees. The concerted action of the 93 dealers may look like an intimidation tactic at first blush, but there is no doubt the appellants were permitted to join their separate actions under article 67 C.C.P. There is nothing, of course, to suggest that their claim against Mr. Michaud is solidary in character or that, in law, they should be precluded from benefiting from the effects of joinder under the Code, itself a measure enacted to ensure the proportionality

of proceedings before the courts.⁴¹ Moreover, as the judge observed, there was no way of knowing at this stage of the proceedings whether the quantum of compensatory damages was justified on the evidence. There is always good reason to be wary of using the raw amount of the claim as the sole factor for measuring abuse. Taken separately, each car dealer's claim is easily within the range of damage awards in defamation.

[88] Yet alongside other indications of apparent abuse, and given the policy orientation of article 54.1 that undoubtedly bears on asserting the importance of freedom of expression in public debate, it would be wrong to ignore the effects of this on the global context of the claim against Mr. Michaud.⁴² From the point of view of the number of claimants and cumulative extent of the claim that Mr. Michaud faces, he finds himself answerable to virtually the whole of the industry in the Quebec City region. While there is no specific evidence in the file in respect of the respective resources of the 93 car dealers, on the one hand, and Mr. Michaud, on the other, it is not unfair to suspect that these are disproportionately weighted in favour of the appellants. By gathering together their claims fixed in identical amounts, and by benefiting from the economy of scale in respect of the costs of legal services, the car dealers encourage the view that the effect of this concerted behaviour is to intimidate Mr. Michaud. It seems likely that it will inhibit Mr. Michaud from speaking critically about the pricing practices of car dealers in the same way and, by extension, will invite other journalists to exercise caution or even a form of self-imposed censure before speaking their minds in public on the matter. It is possible, as Mr. Michaud contended in argument, that the impact will be widespread, and have an adverse effect on the free flow of information on matters of consumer interest in this sector.

[89] I hasten to say, however, that I do not base my reasons for finding that Mr. Michaud has met the primary burden of showing abuse of process here on a purely effects-based measure. The determinative criterion is the purpose of the car dealers' action based on the signs already present that the appellants' motives may be improper. The argument based on the effect of the total amount of the claim only serves to confirm my sense that there is apparent abuse here. It is the combination of the above-mentioned factors relating to motive and effects of the car dealers' action invites the conclusion that Mr. Michaud has established summarily the appearance of impropriety. I expressly leave to another day the question as to whether effects on their own – and particularly the mere size of the amount claimed – can meet the primary burden.

⁴¹ *Groupe Cantrex v. Tapis Cowansville inc.*, 2009 QCCA 1576.

⁴² See the remarks of Dallaire J. in a comparable context in *2332 4197 Québec inc. v. Galipeau*, 2010 QCCS 3427, paras. [32] and [33].

(ii) The reverse onus falling to the appellants:

[90] Article 54.2, paragraph 1 C.C.P. provides that once Mr. Michaud summarily establishes that the action may be improper, the car dealers have the onus of showing that their action is not excessive and unreasonable and is justified in law.

[91] While the appellants have gone some way to discharge their burden by showing that the suit is founded in law, they have not dispelled the impression that their action in defamation appears to have been an improper use of procedure. In my view, they have not succeeded in showing that their action is "not excessive or unreasonable" as article 54.2 requires. The demand letter, in particular its final paragraph relating to the withdrawal of business from the radio station quoted above, is strongly suggestive of the fact that the action is an attempt to defeat the ends of justice. The fact that they have only sued Mr. Michaud is unexplained. When added to the other factors, their disinclination to view the compensatory amount they claim as true restitution suggests that it is unreasonable to characterize the action as primarily one in civil liability. None of these matters has been satisfactorily answered by the appellants.

[92] The appellants have brought no persuasive arguments to counter the impression that the effect of their concerted action against Mr. Michaud is to restrict his freedom of expression in public debate. The perception that the effect of the action on Mr. Michaud results in an undue restriction to his freedom to speak out is a reasonable one. As it stands, the record merely asserts that 93 car dealers have suffered damage – by coincidence in an identical amount – for which they do not seem to need compensation judging from their willingness to forego it. It is true that they availed themselves of the right to join action and that the smaller amounts of their individual claims may prove to be well founded. But this does not alter the fact that they have not dispelled the impression that their essential purpose in bringing suit renders their action an abuse of process.

[93] The appellants have succeeded in showing, to the limited extent possible at this stage of the proceedings, that the elements in law for a cause of action in defamation are present if the facts alleged in the proceedings are taken to be true. This is, of course, not synonymous with the burden of demonstrating, as part of the reverse onus that falls to them, that their action is "justified in law" as required by article 54.2. What they brought to the Court of Quebec was enough, however, to conclude that it would be incautious to declare, with the degree of certainty required to dismiss an action at this very early stage, that the action is an abuse of process.

[94] On balance, the appellants have not succeeded in removing the stain that the appearance of abuse has left on their action. Mr. Michaud is deserving of redress to that extent.

C) Redress under article 54.3, paragraph 2 C.C.P. for appearance of impropriety

[95] Unlike its analogues in the Code as it stood prior to 2009, the regime for procedural impropriety has sanctions where an appearance of abuse exists (article 54.3, paragraph 2 C.C.P.). This allows courts to fashion a sanction consonant with a lesser conviction that impropriety exists, in circumstances where dismissing the principal action cannot be justified. In the past, courts were bound by an all or nothing choice and, for good reason, hesitated to dismiss an action where there was doubt as to whether the proceedings were clearly unfounded, frivolous or vexatious.

[96] Mr. Michaud asked the motions judge to order security for costs of \$65,000.

[97] The judge declined to do so because this is not one of the remedies explicitly contemplated by the legislature at article 54.3 C.C.P. He also was of the view that the remedy he granted in reducing the amount of punitive damages brought the claim down to a "relatively normal" amount compared to like claims that come before the courts. Accordingly, security for costs was not necessary as a means of balancing the relative financial strengths of the parties.

[98] With due respect for this opinion, I am of the view that security for costs would provide proper redress in the circumstances. This is especially so given the fact that punitive damages cannot be reduced at this stage of the proceedings.

[99] The fact that security for costs is not explicitly mentioned among the remedies set forth in article 54.3 is not a bar to awarding them in the circumstances. Article 54.3, paragraph 2, (1) provides that the court may, if it considers it appropriate, subject the furtherance of the action to "certain conditions". It is true, as the appellants urge, that security for costs are generally awarded in a narrow set of circumstances, such as to ensure the reliable presence of a foreign plaintiff ready to pay costs before the court. This said, it seems most appropriate that security for costs be counted among the range of discretionary remedies available where there is an appearance of procedural impropriety.

[100] An analogy can be drawn with the powers of the Court of Appeal when faced with a motion to dismiss an appeal by reason of its improper or dilatory nature. When the Court decides against dismissing the appeal – where, for example, the signs of impropriety are present but not substantial enough to justify putting an end to the proceedings – it has the power pursuant to article 501, paragraph 2 C.C.P. to subject the appeal to conditions, including the requirement that the appellant furnish security. That security acts as a sort of bond that protects the respondent against certain consequences of what may turn out to be an abusive appeal. It can also serve as a test of the seriousness of an appellant's resolve in proceeding with his or her appeal.

[101] In an analogous way, Mr. Michaud has established an appearance of abuse and the car dealers have failed to eradicate that appearance thus far. Subsequent materials filed in evidence may indeed reveal the action in defamation to be improper with a degree of certainty that would justify dismissal of the claim. Conversely, that evidence may fall short of the blameworthiness required to show that the action was an attempt to defeat the ends of justice. As the action proceeds, a condition should be imposed to make the pursuit of the claim by the plaintiffs conditional on a protection of the defendant's interests. Article 54.3 allows the court to fashion a sanction that is proportional to how serious the appearance of impropriety is in the circumstances.⁴³ While caution at this stage is appropriate – after all, the appellants' action has only an appearance of abuse – it is also true that an excess of caution gives a disproportionate disadvantage to Mr. Michaud who would bear the full brunt of the inconvenience of moving forward with the action. For the appellants, to quote my colleague Pelletier, J.A. in an analogous context, "il s'agira d'un inconvénient mineur, car largement contrebalancé par l'effet d'une démonstration palpable de bonne foi dans l'utilisation du système judiciaire."⁴⁴

[102] Mr. Michaud asks for security for costs in the amount of \$65,000 to guarantee payment of damages caused by the appellants' action should it prove to be improper. This would include, should the applicable degree of evidence be mounted in service of the claim, an amount of damages for extrajudicial fees. Article 54.4 provides that, at the end of the day, a court ruling that the action is improper may award damages to Mr. Michaud to cover, in particular, costs and extrajudicial fees in the action. I think it not inappropriate, given what appears to be the imbalance of resources in this fight between 93 car dealers and a single defendant, to provide security for the extrajudicial fees that Mr. Michaud will have to spend in order to defend himself in what appears to be an abusive action.⁴⁵ In the event, those damages will have to be proven, of course, and if the action turns out not to be improper, the amounts must be returned to the appellants.

[103] I observe that Mr. Michaud has only asked for \$65,000 security, which is the amount I propose to order even if one might imagine the circumstances justifying an argument for a higher amount. Divided by the number of plaintiffs in the principal action, this amount would only be approximately \$700 for each car dealer in respect of a total claim of over \$930,000.

[104] But I note that, in the case of joinder, article 67, paragraph 3 C.C.P. requires, as a general rule, unsuccessful plaintiffs to be held solidarily liable for costs. I am of the

⁴³ See the comments of Dalphond J.A. in this context who advises an attitude of "modération en matière de perte de droit, de la proportionnalité de la sanction aux manquements et de la meilleure administration de la justice": *Cosoltec*, *supra*, note 6, para. [78].

⁴⁴ *L'Érablière aux versants inc. v. Fédération des producteurs acéricoles du Québec*, 2002 CanLII 11267 (C.A., in chambers).

⁴⁵ By analogy to provision for costs, see *Héту v. Notre-Dame-de-Lourdes (Municipalité de)*, 2005 QCCA 199, para. [56] (per Dalphond J.A.), referred to in *Colostec*, *supra*, note 6, para. [70].

view that this same principle may be applied, by analogy, to the security for costs ordered against the appellants here.⁴⁶ Mr. Michaud will face substantially the same costs even if some of the appellants decide to discontinue their suit. Those who remain shall be required to post the full amount of the \$65,000 security and, in the event that the action in defamation is dismissed, they shall be solidarily responsible for the security rather than calculating the amount on a pro rata basis. I am mindful that even a small amount of security for costs is a disincentive to pursuing the action which, given the value the law associates with the integrity of a person's reputation and the right to seize the courts to substantiate that right, needs to be justified. I am of the view that the aggregate amount of such security, for which the appellants shall be solidarily liable, is proportionate to the degree of impropriety shown to this stage in the proceedings and should be ordered as a condition for the action going forward. It will have the added virtue of testing the mettle of the plaintiffs in pursuing their complaint against Mr. Michaud.

[105] To the extent that any of the appellants succeed with costs in their favour on the merits, the trial judge should order that the proven amount of their individual contribution to the security be returned to them in the exercise of his or her discretion in awarding costs.

[106] The findings on the cross-appeal may be summarized as follows:

1) Mr. Michaud's allegation that the action is clearly unfounded in law pursuant to article 54.1 C.C.P. begs the question, as a preliminary matter, whether it should be dismissed under article 165(4) C.C.P. Assuming the facts alleged in the motion to institute proceedings to be true, the car dealers' claim properly alleges the grounds for an action in civil liability. Given that the suit cannot be dismissed under article 165(4), it cannot be considered to be clearly unfounded in law under article 54.1;

2) the fact that the car dealers' claim has colour of right does not, in itself, preclude a declaration that the action in defamation is improper or appears to be improper under article 54.1 as an attempt to defeat the ends of justice;

3) Mr. Michaud acquitted the primary burden of establishing summarily that the action may be improper under article 54.2. He did so by indicating how, at this preliminary stage, the car dealers' motives appear to be aimed at silencing Mr. Michaud rather than obtaining compensation for a civil wrong. It is not necessary to decide whether his further argument based on the effect of the total claim on

⁴⁶ In *Dreyfus v. York-Hannover Development Ltd.*, J.E. 88-1332, EYB 1988-78206 in which the Superior Court ordered three foreign plaintiffs to be held solidarily liable for security for costs. See generally Henri Keleda, *Les préliminaires de défense en procédure civile* (Cowansville: Ed. Yvon Blais, 2009) 41-3.

freedom of expression in public debate is enough, on its own, to reverse the burden on the facts of this case;

4) the car dealers did not meet the reverse onus that fell to them under article 54.2 by showing that the action was not excessive or unreasonable and justified in law;

5) the appearance of abuse justifies an order for relief pursuant to article 54.3. As the action proceeds, security for costs should be ordered in favour of Mr. Michaud to protect him from the untoward financial consequences of what appears to be, at this preliminary stage, an abuse of process.

* * *

[107] I would thus allow the appeal for the sole purpose of striking out the order of the motions judge that reduced the amount of punitive damages claimed. I would allow the cross-appeal in part and declare that the appellants' action appears to be improper. I would order further that security for costs to be deposited by the appellants in an aggregate amount of \$65,000, in the registry of the Court of Quebec within thirty days of this judgment.

[108] As the outcome of the appeal and the cross-appeal is divided, I propose that no order be made as to costs.

NICHOLAS KASIRER, J.C.A.