

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

AZIM RIZVEE and RABIYA AZIM

Plaintiffs (Respondents)

and

STACEY NEWMAN

Defendant (Moving Party)

FACTUM OF THE MOVING PARTY, STACEY NEWMAN

(Motion to dismiss pursuant to s. 137.1 of the *Courts of Justice Act*,
returnable October 13, 2016)

September 22, 2016

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TABLE OF CONTENTS

PART I: OVERVIEW.....	1
PART II: FACTS.....	2
A. THE PARTIES	2
B. BACKGROUND.....	3
C. THE LPC NOMINATION MEETING	4
D. MR. RIZVEE AND MEMBERS OF HIS CAMPAIGN HARASSED MS. NEWMAN	5
1. <i>July 2015: Mr. Rizvee Forces Ms. Newman into a Hug at a CN Rail Open House</i>	5
2. <i>August 2015: Mr. Rizvee’s Inappropriate Conduct Continued at Milton Ribfest</i>	6
3. <i>September 2015: Mr. Rizvee Harasses Ms. Newman at a Candidates’ Debate</i>	8
4. <i>September 2015: A Member of Mr. Rizvee’s Campaign Threatens Ms. Newman</i>	8
E. MS. NEWMAN’S PUBLIC STATEMENTS ABOUT THIS HARASSMENT	9
F. THE PEACE BOND APPLICATION	11
G. THE RIZVEES FILE A \$17.5 MILLION CLAIM AGAINST MS. NEWMAN	11
PART III: ISSUES	12
PART IV: LAW AND ARGUMENT	12
A. SECTION 137.1 OF THE CJA IMPOSES A RIGOROUS THRESHOLD ON PLAINTIFFS	12
1. <i>The Test on This Motion and Relevant Policy Considerations</i>	12
2. <i>A Plaintiff Faces a High Burden To Survive a s. 137.1 CJA Motion</i>	14
3. <i>Conflicts in the Evidence Do Not Prevent the Dismissal of the Plaintiff’s Claim</i>	15
B. MS. NEWMAN’S STATEMENTS RELATE TO A MATTER OF PUBLIC INTEREST	17
C. THE RIZVEES CANNOT MEET THEIR EVIDENTIARY BURDENS.....	18
1. <i>The Rizvees’ Claim Does Not Have Substantial Merit</i>	18
2. <i>The Rizvees Cannot Show that Ms. Newman Has No Valid Defence</i>	19
3. <i>Harms Suffered by the Rizvees Do Not Outweigh the Value in Protecting Expression on Matters of Public Interest</i>	23
PART V: ORDER REQUESTED	23
SCHEDULE “A” – LIST OF AUTHORITIES	25
SCHEDULE “B” – RELEVANT STATUTES.....	26

PART I: OVERVIEW

1. The plaintiffs, Azim Rizvee and Rabiya Azim, are wealthy businesspeople turned politicians. The defendant, Stacey Newman, is a freelance journalist of modest means. During the 2015 federal election campaign, Ms. Newman publicly criticized Mr. Rizvee and his campaign team during Mr. Rizvee's bid to become the Member of Parliament representing Milton. In retaliation, the plaintiffs have filed a \$17.5 million defamation lawsuit against Ms. Newman. They have sought this extraordinary amount in order to (in Mr. Rizvee's words) hold Ms. Newman "to account".¹ The legal bills from defending this claim alone will bankrupt Ms. Newman² — and that is the point. Mr. Rizvee plans on running for office again in the next election.³ His defamation claim sends a message to anyone thinking of criticizing him. This lawsuit (and similar claims) are precisely why the Ontario Legislature recently enacted the *Protection of Public Participation Act*, 2015 SO 2015 c23 ("PPPA").

2. This case falls squarely within the intent and ambit of the PPPA, which is aimed at protecting ordinary citizens who engage in expression on matters of public interest from lawsuits aimed at stifling their constitutional right to freedom of expression. The PPPA establishes a two-part test, which imposes a heavy burden on the plaintiffs to withstand a motion to dismiss. The test reflects the Legislature's clear policy decision to encourage such expression. At the first stage, the defendant must establish that the case arises from expression that relates to a matter of public interest. Where, as here, the impugned expression is about a public figure seeking high political office, and where the impugned speech relates directly to this public figure's campaign tactics, this prong is easily met. The onus then shifts to the plaintiff to establish the following three requirements:

- (a) that the plaintiffs' claim has *substantial merit*; and
- (b) that the defendant has *no valid defence*; and

¹ Affidavit of Stacey Newman, sworn July 8, 2016 ("First Newman Affidavit"), Exhibit "O", Motion Record of the Moving Party ("Newman MR"), Tab 2(o), page 92.

² First Newman Affidavit, ¶39, Newman MR, Tab 2, page 17.

³ First Newman Affidavit, Exhibit "O", Newman MR, Tab 2(o), page 92.

- (c) that the harm likely to be suffered by the plaintiff is *sufficiently serious* that the public interest in allowing the claim to proceed *outweighs* the public interest in protecting expression.

3. Far from being able to establish all three of these elements, the plaintiffs cannot discharge their burden on any of them. *First*, the plaintiffs cannot establish that their claim has substantial merit. For a defamation claim to succeed, the plaintiff must show that the defamatory statements have harmed the plaintiff's reputation. Ms. Newman's statements were no different from the chorus of other critical statements about the Rizvees being posted on social media by other Milton residents. *Second*, the plaintiffs cannot show that Ms. Newman has no valid defences available to her: At a minimum, Ms. Newman has available to her the defence of "fair comment" and an equally strong statute-of-limitations defence. *Third*, as the plaintiffs have not adduced any evidence to show that they have suffered harm as a result of the allegedly defamatory statements, they cannot discharge their onus of showing that allowing their claim to proceed outweighs the public interest in free speech about matters of public interest. Accordingly, the defendant respectfully requests that this Honourable Court dismiss the plaintiffs' claim in its entirety.

PART II: FACTS

A. The Parties

4. The moving party, Stacey Newman, is a freelance photograph and print journalist. She earns a modest income.⁴ Ms. Newman lives in Milton, Ontario and is an active member of this community. She frequently volunteers for political campaigns, usually in support of the Liberal Party of Canada ("**LPC**"). She also participates in grassroots campaigns and works with her community to hold politicians accountable.⁵ An example of her community involvement and political engagement is her leadership position in a group called "Milton Says No" ("**MSN**"). The objective of this group is to oppose the construction of a rail yard that CN Rail proposes to build in Milton.⁶

⁴ First Newman Affidavit, ¶3, 6, Newman MR, Tab 2, page 8.

⁵ First Newman Affidavit, ¶7, Newman MR, Tab 2, page 9.

⁶ First Newman Affidavit, ¶12, 13, Newman MR, Tab 2, page 10.

5. The plaintiffs in this matter are Azim Rizvee and his spouse Rabiya Azim.⁷ They are co-founders of a Milton-based real estate brokerage, MinnMaxx Realty Inc. (“**MinnMaxx**”).⁸ MinnMaxx is a successful company. In his affidavit, Mr. Rizvee states that it is the “biggest listing company market share-wise in Milton”.⁹ MinnMaxx’s website describes itself as having “over \$1 Billion of real estate sold”.¹⁰ In addition to his business endeavours, Mr. Rizvee was the LPC candidate in the Milton riding for the 2015 Federal election. Ultimately, Mr. Rizvee was not elected to Parliament.¹¹ Ms. Azim was Mr. Rizvee’s campaign manager for this campaign.¹²

6. Prior to the events material to this action (all of which relate to the 2015 election campaign) Ms. Newman had no relationship with the plaintiffs.¹³

B. Background

7. Two background facts are helpful to understand the origins of the Rizvees’ contempt towards Ms. Newman.

8. The first involves Mr. Rizvee’s failed attempt to gain MSN’s support. By early 2015, Mr. Rizvee announced his candidacy for the LPC nomination in Milton.¹⁴ In or around this same time, Mr. Rizvee tried to persuade MSN to support his political candidacy. Ms. Newman and the MSN leadership were skeptical of Mr. Rizvee’s sincerity and rejected his efforts.¹⁵ Despite this rejection, Mr. Rizvee would falsely claim in public that he was a part of MSN.¹⁶

9. The second contextual factor is that Ms. Newman became a well known and vocal supporter of one of Mr. Rizvee’s competitors for the LPC nomination in Milton, Zeeshan

⁷ This factum will refer to the plaintiffs collectively as the “Rizvees”.

⁸ Affidavit of Azim Rizvee, sworn August 16, 2016 (“**Rizvee Affidavit**”), ¶3, Respondents’ Motion Record (“**Rizvee MR**”), Tab 1, page 2.

⁹ Rizvee Affidavit, Rizvee MR, Tab 1, page 2.

¹⁰ First Newman Affidavit, ¶9, Newman MR, Tab 2, page 9.

¹¹ First Newman Affidavit, ¶8, 31, Newman MR, Tab 2, pages 9, 16.

¹² Rizvee Affidavit, ¶8, Rizvee MR, Tab 1, page 2.

¹³ First Newman Affidavit, ¶10, Newman MR, Tab 2, page 10.

¹⁴ First Newman Affidavit, ¶13, Newman MR, Tab 2, page 10; Transcript from cross-examination of Rabiya Azim, held on August 30, 2016 (“**Rabiya Transcript**”), p 11, q 47; Supplementary Motion Record of the Moving Party (“**SMR**”), Tab 3, page 262.

¹⁵ First Newman Affidavit, ¶13, Newman MR, Tab 2, pages 10, 11.

¹⁶ Transcript from cross-examination of Stacey Newman, held on August 31, 2016 (“**Newman Affidavit**”), p 62, q 183; SMR, Tab 1, page 62.

Hamid. Mr. Hamid was Ms. Newman's ward councillor in Milton for six years and she agreed with many of his policies.¹⁷ In addition, the two worked together on MSN.¹⁸

C. The LPC Nomination Meeting

10. On July 11, 2015, the LPC nomination meeting for the Milton riding took place at a school in Milton.¹⁹ Ultimately, Mr. Rizvee won the candidacy. During the nomination meeting, dozens of Mr. Rizvee's supporters congregated outside the entrance of the school.²⁰

11. Ms. Newman was part of Mr. Hamid's campaign team, which had assembled its team office down the road from the school hosting the meeting.²¹ As such, members of the Hamid campaign had to continually enter and exit the nomination meeting in order to co-ordinate with the team office.²² Each time that Ms. Newman entered the school, Rizvee supporters would taunt her to make her feel uncomfortable.²³ These supporters yelled at Ms. Newman that she "should respect Azim"; that she should "leave" and "go be quiet"; and that she did not "belong in the community".²⁴ At one point, one of these supporters physically interfered with Ms. Newman's ability to enter the nomination meeting. Understandably, Ms. Newman found this conduct intimidating and disturbing. She believed that the conduct was intended to dissuade her and others from opposing Mr. Rizvee's political goals.²⁵ Afterwards, one of the Rizvee supporters involved in this harassment wrote to Ms. Newman to apologize for this conduct.²⁶

12. The day after the nomination meeting, July 12, 2015, Ms. Newman wrote the following on Facebook:

We were told numerous times by the opponent's supporters, henchmen frankly, by messages on fb [Facebook], by shouting and intimidation to keep our opinions to ourselves. This is not

¹⁷ First Newman Affidavit, ¶14, Newman MR, Tab 2, page 11.

¹⁸ Affidavit of Rabiya Azim, sworn August 16, 2016 ("**Rabiya Affidavit**"), Exhibit "A", Rizvee MR, Tab 2(a), page 53.

¹⁹ Rabiya Affidavit, ¶14, Rizvee MR, Tab 2, page 43.

²⁰ Affidavit of Khushnigar Saiyed, sworn August 23, 2016 ("**Saiyed Affidavit**"), ¶4, Reply Motion Record ("**Reply MR**"), Tab 2, page 5.

²¹ Newman Transcript, pp51-52, q 140; SMR, Tab 1, page 51.

²² Newman Transcript, pp 47-48, q 136; SMR, Tab 1, page 47.

²³ Saiyed Affidavit, ¶4, Reply MR, Tab 2, page 5; Newman Transcript, p 48, q 136; SMR, Tab 1, page 48.

²⁴ First Newman Affidavit, ¶16, Newman MR, Tab 2, page 11.

²⁵ First Newman Affidavit, ¶17, Newman MR, Tab 2, page 11.

²⁶ First Newman Affidavit, Exhibit "G", Newman MR, Tab 2(g), page 41.

democracy, it is bullying and it is dirty politics. A true leader would have instilled values of peace and solidarity in his followers ...²⁷

13. On cross-examination on her affidavit, Ms. Newman stated that she only referred to supporters of Mr. Rizvee as henchmen after reviewing the dictionary. She found that the definition referred to a person who would do “soliciting or bidding” on the behalf of a politician. Ms. Newman reasonably believed that the word correctly applied.²⁸

14. In late September 2015, Ms. Newman wrote about the nomination meeting again, advising the public of the LPC’s lack of response to these tactics:

I can only imagine this candidate is laughing at all of us, he is being allowed to pervert the political process, to hurt constituents, to flout the law, ethics, invade personal space and carry out intimidation and other nefarious activities in order to get what he wants. I am particularly disturbed that those in charge with our local Liberals, all of whom have been notified, have not acted.²⁹

D. Mr. Rizvee and Members of his Campaign Harassed Ms. Newman

15. Following the July 2015 nomination meeting, there were several instances where Mr. Rizvee or someone from his campaign either harassed or physically intimidated Ms. Newman. For his part, Mr. Rizvee denies that any interaction “out of the ordinary” occurred. He concedes, however, that during the campaign he interacted with “many thousands of people” and that “none of them stands out in my mind and this includes Stacey Newman”.³⁰

1. July 2015: Mr. Rizvee Forces Ms. Newman into a Hug at a CN Rail Open House

16. On July 16, 2015, CN Rail hosted an open house event to discuss the proposed rail yard. When Mr. Rizvee saw her at this event he attempted to hug her. Ms. Newman stated that she made it clear to him that she did not want him to touch her, but that he forced her into a hug in any event.³¹ This was corroborated by her husband’s uncontested affidavit evidence.³² Later that evening, when she was participating in a discussion with the media,

²⁷ Rabiya Affidavit, Exhibit “B”, Rizvee MR, Tab 2(b), page 59.

²⁸ Newman Transcript, p 14, q 31; SMR, Tab 1, page 14.

²⁹ Frist Newman Affidavit, ¶25, Exhibit “H”, Newman MR, Tabs 2, 2(h), pages 14, 44.

³⁰ Rizvee Affidavit, ¶48, Rizvee MR, Tab 1, page 9.

³¹ First Newman Affidavit, ¶19(a), Newman MR, Tab 2, page 12.

³² Affidavit of Stephen Newman, sworn July 15, 2016, Newman MR, Tab 5, page 194.

Mr. Rizvee suddenly appeared at her side.³³ On cross-examination Mr. Rizvee conceded that it was possible that he was standing next to Ms. Newman during one of her interviews that day.³⁴

2. August 2015: Mr. Rizvee's Inappropriate Conduct Continued at Milton Ribfest

17. On August 23 and 24, 2015, MSN set up a pavilion at the Milton Ribfest to discuss the CN rail yard issue with the public. All of the political parties also attended this event. Ms. Newman affirmed that Mr. Rizvee attended the MSN pavilion and touched her, standing close to her as she spoke to people. Ms. Newman told Mr. Rizvee to stop touching her, to no avail.³⁵ This evidence is corroborated by the unchallenged affidavit evidence of Jennifer Meyer. Ms. Meyer stated that Ms. Newman was “visibly uncomfortable” with this contact.³⁶

18. The evidence of the Rizvees is unclear and contradictory. To begin with, Ms. Azim gave an initial affidavit in which she stated that Ms. Newman set up the MSN tent in space reserved for the Rizvee campaign and that Ms. Azim then spoke to the Ribfest organizer, Scott Anders, to assist in moving the MSN tent.³⁷ However, Ms. Azim changed her evidence after Ms. Newman's reply materials contained an affidavit from Mr. Anders stating that: (i) there are no reserved spots at Ribfest; and (ii) he did not speak with Ms. Azim or anyone else from the LPC. Ms. Azim then swore a second affidavit stating that “[a]fter reading Mr. Anders' affidavit” she recalled that Mr. Anders was correct that she did not speak with him, but instead an associate of his.³⁸

19. When confronted with this change in evidence during cross-examination, Ms. Azim changed her story again. Her new evidence was that she spontaneously realized this error once she read her affidavit “one more time” while on vacation:

QUESTION: But you only provided this affidavit after seeing the affidavit of Mr. Anders. Correct?

³³ First Newman Affidavit, ¶19(a), Newman MR, Tab 2, page 12.

³⁴ Transcript from cross-examination of Azim Rizvee held on August 30, 2016 (“**Rizvee Transcript**”), p 16, q 91; SMR, Tab 4, page 429.

³⁵ First Newman Affidavit, ¶19(b), Newman MR, Tab 2, page 12.

³⁶ Affidavit of Jennifer Meyer, sworn July 8, 2016, ¶6, Newman MR, Tab 4, page 191.

³⁷ Rabiya Affidavit, ¶15, Rizvee MR, Tab 2, page 43.

³⁸ Affidavit of Rabiya Rizvee, sworn August 30, 2016 (“**Second Rabiya Affidavit**”), ¶3, 6; SMR, Tab 7.

MS. AZIM: No. I realize [*sic*] this once I read my affidavit one not time. Because, I was leaving on a trip on 17th, and, 16th, it was a long day, I was in rush. So, I just signed it without paying much attention. But, while I was on my trip and I had a copy, I realized this mistake. So my first preference was to come back and inform my counsel that I have picked up this ... mistake.³⁹

20. When counsel for Ms. Newman pressed Ms. Rizvee for which version of events was correct, Ms. Azim's lawyer refused to allow his client to answer this question (despite being unable to articulate a valid basis for the refusal).⁴⁰ Further, when counsel for Ms. Newman put to Ms. Azim that he had good faith basis⁴¹ to believe that she did not speak with this unnamed associate and that no one affiliated with Ribfest moved the MSN tent, Ms. Azim's lawyer also refused to let her client answer these questions.⁴²

21. Mr. Rizvee's evidence on the events at Ribfest was likewise problematic. Mr. Rizvee stated in his affidavit:

I was only at the event [*i.e.*, Ribfest] for an hour or less, and spent the majority of my time in front of our booth so that I could interact with people and answer their questions... For the remainder of the time, I walked around, visited booths and introduced myself to other attendees at the Ribfest.⁴³

22. However, during his cross-examination, Mr. Rizvee said that although he would periodically leave to go door knocking, he was there "the entire day", from approximately 1PM until 6PM.⁴⁴ The difference between his affidavit evidence and his testimony on cross-examination was put to Mr. Rizvee. His attempt to reconcile the two compounded the difference. Whereas in his affidavit he stated that he spent the majority of his time at the event at his booth, his evidence on cross was completely contrary:

MR. RIZVEE: At the booth, I would say that I would be there for that particular piece, an hour or so. But, again, I was wandering around, I was going at door knocking, coming back. So, in total, you

³⁹ Rabiya Transcript, p 47, q 233; SMR, Tab 3, page 298.

⁴⁰ Rabiya Transcript, p 51, q 259; SMR, Tab 3, page 302.

⁴¹ In *R v Lyttle*, 2004 SCC 5, ¶46-48, the Supreme Court of Canada confirmed that counsel can cross-examine on matters that are not independently proven, so long as a good faith basis exists for the question. Here, counsel for Ms. Newman advised that the basis for these questions was a conversation that he had with Mr. Anders who stated that Ms. Azim's second affidavit was not correct and that he was prepared to swear an affidavit to that end.

⁴² Rabiya Transcript, pp 64, 66, 67-68, qq, 285, 286, 287, 291; SMR, Tab 3, pages 315, 317, 318.

⁴³ Rizvee Affidavit, ¶36, 37, Rizvee MR, Tab 1, page 8.

⁴⁴ Rizvee Transcript, pp 18-21, qq 103, 115, 120; SMR, Tab 4, page 431.

can say that. But, in other times, while I'm going out there, going, like, to meet people or I go door knocking after that, then I'm coming back again. All that kind of time is in that kind of window, whatever you're calling it ... five, six hours.⁴⁵

23. Finally, Ms. Azim and Mr. Rizvee's evidence regarding this event contradicted one another. Ms. Azim testified that Mr. Rizvee was at the event for seven hours and spent 85% of that time at the LPC pavilion with her.⁴⁶ Even the Rizvees' own lawyer noted that it was an "unavoidable conclusion" based on Mr. Rizvee's evidence that he did not spend 85% of his time at the Ribfest with his wife.⁴⁷

3. September 2015: Mr. Rizvee Harasses Ms. Newman at a Candidates' Debate

24. On September 30, 2015, Ms. Newman attended the Milton candidates' debate for the Federal Election. After the debate, Mr. Rizvee saw Ms. Newman and approached her, backing her into a desk that was behind her. He then grabbed Ms. Newman's forearm. Ms. Newman told him to let her go.⁴⁸ At this point, a colleague of Ms. Newman, George Soltysik, intervened to tell Mr. Rizvee that this was "enough" and that he should leave her alone.⁴⁹ Mr. Soltysik swore an affidavit for this motion that corroborates Ms. Newman's affidavit.

25. Mr. Rizvee's evidence of this evening is that when he approached Ms. Newman she advised that she does not want to meet with Mr. Rizvee because of a rumour that Ms. Azim was spreading about her family. Mr. Rizvee does not deny that there was an incident where Ms. Newman attempted to pull her hand away from Mr. Rizvee. However, on Mr. Rizvee's recollection of this event, Ms. Newman was the initiator of this contact. According to him, after advising him that she would not want to meet with Mr. Rizvee, she bizarrely decided to take his hand, only to later "jerk her hand back".⁵⁰

4. September 2015: A Member of Mr. Rizvee's Campaign Threatens Ms. Newman

26. The final incident occurred on September 30, after the debate. Ms. Newman was in the near-empty parking lot just outside of the facility that hosted the debate. She was with

⁴⁵ Rizvee Transcript, p 32, q 204; SMR, Tab 4, page 445.

⁴⁶ Rabiya Transcript, p 72, q 313; SMR, Tab 3, page 323.

⁴⁷ Rizvee Transcript, p 40, q 248; SMR, Tab 4, page 453.

⁴⁸ First Newman Affidavit, ¶20, Newman MR, Tab 2, page 13.

⁴⁹ Affidavit of George Soltysik, sworn June 24, 2016 ("**Soltysik Affidavit**"), ¶3, Newman MR, Tab 3, page 188.

⁵⁰ Rizvee Affidavit, ¶45, Rizvee MR, Tab 1, page 9.

Mr. Soltysik. Suddenly a car drove up. It pulled to a stop in front of Ms. Newman and a man got out of the car and aggressively walked towards her. He yelled at her, calling her by name and telling her that he was going to teach her “some manners”. This frightened Ms. Newman.⁵¹ Mr. Soltysik stepped in front of this man to protect Ms. Newman.⁵²

27. The man who approached Ms. Newman was Haroon Butt. Initially, Ms. Newman mistakenly believed that he was the campaign manager.⁵³ In any event, she recognized him as a member of the Rizvee campaign.⁵⁴ Mr. Butt swore an affidavit for this motion. He stated that he did not threaten Ms. Newman, but he does not deny that he approached her that evening. His evidence also confirms that Ms. Newman immediately expressed fear as a result of Mr. Butt’s conduct.⁵⁵

28. That night, Ms. Newman reported this event to the police. The police suggested that she seek a peace bond, which she ultimately did.⁵⁶

E. Ms. Newman’s Public Statements About This Harassment

29. Ms. Newman spoke out about the above incidents. At the outset, these discussions were part of ongoing conversation threads on Facebook where several citizens were discussing the conduct of the candidates in the Milton riding. However, Ms. Newman became much more active on social media after the events of September 30th. This is a reflection the seriousness of this conduct. Contrary to the position taken by counsel for the Rizvees on cross-examination, the mere fact that Mr. Butt did not physically assault Ms. Newman does not diminish the harassment.⁵⁷ Ms. Newman added context on to this on cross-examination, stating:

MS. NEWMAN: Mr. Butt exited his vehicle and ran towards me, saying my name and telling me that women like me were going to be taught some manners, that I needed to be taught some manners, at which point Mr. Soltysik intervened, and I stood back.

⁵¹ First Newman Affidavit, ¶20, 21, Newman MR, Tab 2, page 13.

⁵² Soltysik Affidavit, ¶5, Newman MR, Tab 3, page 188.

⁵³ During her cross-examination, Ms. Newman explained that the confusion may have arisen because the police officers investigating this matter advised her that they had spoken to the “campaign manager”. See Newman Transcript, p 97, q 287; SMR, Tab 1, page 97.

⁵⁴ First Newman Affidavit, ¶20, Newman MR, Tab 2, page 13.

⁵⁵ Affidavit of Haroon Butt, sworn August 16, 2016 (“**Butt Affidavit**”), ¶8-10, Rizvee MR, Tab 3, page 123.

⁵⁶ First Newman Affidavit, ¶22, Newman MR, Tab 2, page 13.

⁵⁷ Newman Transcript, pp 93, 95, qq 274, 277; SMR, Tab 1, page 93, 95.

In that moment, I didn't know what he was going to do to me. It was absolutely petrifying. This is late at night, after an event. There's no context that makes this behavior appropriate.

QUESTION: I'm waiting for the part that says there was some physical contact... ⁵⁸

30. Ms. Newman felt that it was important that citizens of Milton be made aware of this pattern of conduct and the LPC's lack of a response.⁵⁹ Thus, on October 3, 2016, Ms. Newman posted a letter on her website that contained the following passage:

Politics can be seen as a vicious game at times. But there is a line, a definite line. This line has been crossed numerous times in blatant and very threatening ways by one of our federal candidates and his team in the Milton riding. I've been the repeated victim of behaviour, threats, intimidation, and two nights ago a very threatening, upsetting verbal assault in a dark parking lot, where this candidate's campaign manager was waiting for me...

We must speak up if we wish to stop this negative, unacceptable situation.⁶⁰

31. On October 6th, in response to a Facebook thread discussing the Rizvee campaign's conduct, Ms. Newman asked, "if we don't hold our elected official to the standards of conduct we expect in our society, what does it say about us?". She questioned why a candidate who "prey[ed] on and attack[ed] constituents/anyone in the way" would be allowed to behave in this manner.⁶¹ Consistent with this theme, Ms. Newman's posts also discussed the LPC's lack of response to her concerns despite her various requests for an investigation. In her October 17th Facebook posting, she questioned the LPC for failing to address these concerns.⁶² On November 5, 2015, Ms. Newman published an article on a discussion board where she summarized the harassment that she suffered as well as LPC's failure to act. She concluded the article with a call for the LPC to address this harassment:

The Liberal Party should know what their candidate has done to people in this riding. He and his campaign and its tactics in our Milton Riding should be investigated and the situation resolved...

⁵⁸ Newman Transcript, p 96, q 279; SMR, Tab 1, page 96. See also Newman Transcript, p 99, q 294; SMR, Tab 1, page 96, where Ms. Newman stated that she required counselling as a result of this incident.

⁵⁹ Newman Affidavit, ¶23, Newman MR, Tab 2, page 14.

⁶⁰ Rabiya Affidavit, Exhibit "H", Rizvee MR, Tab 2(h), page 76.

⁶¹ Rabiya Affidavit, Exhibit "J", Rizvee MR, Tab 2(j), page 80.

⁶² Rabiya Affidavit, Exhibit "M", Rizvee MR, Tab 2(m), page 98.

As a woman, a journalist, a community advocate, I will continue to
[sic] say it out loud, to document it, because this is what I do.⁶³

32. One month later on December 7, 2015, Ms. Newman published an open letter to the Prime Minister where she again summarized the nature of Mr. Rizvee's conduct and demanded that the LPC take some action. She also discussed the impact of harassment on women and women's rights more generally and closed her letter as follows:

Please respond in the interest of women, in the interest of justice,
and in the interest of Canadians and the values we hold dear.⁶⁴

F. The Peace Bond Application

33. The Federal Election occurred on October 19, 2015. Despite the election being over, Ms. Newman remained fearful of Mr. Rizvee and sought a peace bond against him. On November 2, 2015, without the assistance of a lawyer, she followed the advice of the Halton police and filed the necessary paperwork to commence a proceeding to obtain the peace bond.⁶⁵ At the March 11, 2016 Court appearance, the assigned Assistant Crown Attorney advised Ms. Newman that it would be difficult to obtain such a peace bond because of an error made when filing the necessary paper work. Ultimately, Ms. Newman accepted the Crown Attorney's advice to withdraw the peace bond application.⁶⁶ The Crown put on the record that despite the withdrawal, Ms. Newman remained fearful of Mr. Rizvee and that Mr. Rizvee should stay away from her. Mr. Rizvee's counsel said nothing in response.⁶⁷

G. The Rizvees File a \$17.5 Million Claim Against Ms. Newman

34. On March 11, 2016, the same day as the peace bond hearing, Mr. Rizvee posted an open letter on Facebook, wherein he advised the public that Ms. Newman would be "held to account".⁶⁸ Less than a week later, on March 17, the Rizvees served Ms. Newman with a \$17.5 million claim, largely for defamation. As Mr. Rizvee conceded, this claim was in part

⁶³ Rabiya Affidavit, Exhibit "P", Rizvee MR, Tab 2(p), page 106.

⁶⁴ Rabiya Affidavit, Exhibit "R", Rizvee MR, Tab 2(r),

⁶⁵ First Newman Affidavit, ¶32, 33, Newman MR, Tab 2, page 16.

⁶⁶ First Newman Affidavit, ¶34, Newman MR, Tab 2, page 16.

⁶⁷ First Newman Affidavit, Exhibit "N", Newman MR, Tab 2(n), page 88.

⁶⁸ Newman Affidavit, Exhibit "O", Newman MR, Tab 2(o), page 92.

what he was referring to when he said he would hold Ms. Newman “to account”.⁶⁹ The claim was based on the above-discussed statements made by Ms. Newman.

PART III: ISSUES

35. Ms. Newman takes the following positions on the issues in this motion:

- (a) section 137.1 of the *Courts of Justice Act* (“**CJA**”) imposes a high burden on plaintiffs to withstand a motion to dismiss where the allegedly defamatory statements relate to a matter of public interest;
- (b) this claim arises from expression relating to a matter of public interest; and
- (c) the plaintiffs cannot meet their burden in this motion. Specifically:
 - (i) their proceeding does not have substantial merit;
 - (ii) Ms. Newman has a valid defence; and
 - (iii) any harms suffered by the plaintiffs do not outweigh the public interest in protecting expression on matters of public interest.

PART IV: LAW AND ARGUMENT

A. Section 137.1 of the CJA Imposes a Rigorous Threshold on Plaintiffs

1. The Test on This Motion and Relevant Policy Considerations

36. This motion is brought pursuant to s. 137.1 of the CJA. This is a recent revision to the CJA made pursuant to the PPPA. Section 137.1(1) of the CJA explicitly states the purpose of the PPPA provisions is to discourage litigation that will limit expression on matters of public interest. Specifically, these purposes include:

- encouraging individuals to express themselves on matters of public interest;
- discouraging the use of litigation as a means of unduly limiting matters of public interest; and

⁶⁹ Rizvee Transcript, p 92, q 473; SMR, Tab 4, page 505.

- reducing the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

37. Pursuant to ss. 137.1(3) and (4) of the CJA there is a two part test on this motion, specifically:

- *First*, the moving party has onus of satisfying the judge that the plaintiff's proceeding arises from an expression that "relates to a matter of public interest".
- *Second*, if the defendant meets this threshold, the burden then falls on the respondent/plaintiff to show all of the following:
 - (i) grounds to believe that his or her proceeding has "substantial" merit; *and*
 - (ii) grounds to believe that the moving party has no "valid" defence; *and*
 - (iii) that the harm "likely to be suffered" by the respondent is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting that expression.

38. Commentators have noted that the procedure set out in the PPPA is intended to guard against the chilling effect caused by lawsuits aimed at stifling expression.⁷⁰ As the Attorney General noted when introducing the PPPA, the bill "will empower citizens and organizations to speak out against injustices".⁷¹ During the same debate, the assistant to the Attorney General, MPP Berardinetti noted that the PPPA would identify strategic lawsuits "quickly" in order to stop individuals from using such suits to "silence critics".⁷² MPP Berardinetti further elaborated on the purpose of the PPPA:

We all know that strategic lawsuits against public participation have long been used as a tactic by companies or individuals to tie the hands of weaker opponents—typically those who cannot afford the cost of a lengthy legal battle. What we have is an unfair way to win an argument, and this needs to come to an end... As a proud Ontarian, one of the values I treasure the most is my right to speak up when I see wrongdoing in my community, so that I may bring

⁷⁰ Canadian Civil Liberties Association, *Fact Sheet: Bill 52 – Protection of Public Participation Act*, online: < <http://www.cela.ca/sites/cela.ca/files/Bill-52-Fact-Sheet-CCLA-and-CJFE.pdf>>, page 3, Newman Book of Authorities ("BOA"), Tab 14.

⁷¹ Ontario, Legislative Assembly, *House of Commons Debates*, No 112 (27 October 2015) at 1549 (Hon Madeleine Meilleur), Newman BOA, Tab 15.

⁷² Ontario, Legislative Assembly, *House of Commons Debates*, No 112 (27 October 2015) at 1620 (Hon Lorenzo Berardinetti), Newman BOA, Tab 15.

about positive change for the benefit of all. Currently, this is not a right that everyone enjoys, as some organizations and individuals are being unfairly silenced through strategic lawsuits. With this bill, it is our hope that this practice will be brought to an end.⁷³

2. A Plaintiff Faces a High Burden To Survive a s. 137.1 CJA Motion

39. A plaintiff responding to a s. 137.1 motion must pass a rigorous test in order for his or her action to survive. This follows from principles of statutory interpretation pursuant to which, s. 137.1 must be interpreted in context, with regard to its “grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”.⁷⁴

40. “Substantial merit” is a high bar. In its ordinary sense, this phrase requires the plaintiff to show that there is considerable merit to his or her claim. This would also be consistent with the legislature’s concern to protect expression on matters of public interest: only claims with strong merits can justify impinging on expressions dealing with matters of public interest.

41. Similarly, the requirement to show that “no valid defence” exists similarly represents a high threshold. On the face of it, it requires that the plaintiff demonstrate that the defendant has no applicable defence to the defamation claim. This is consistent with the definition given to “valid” in Black’s Law Dictionary, which defines it as meaning “legally sufficient”.⁷⁵ An appropriate analog would be the threshold applied to a Rule 21 motion where a party has to satisfy the “plain and obvious threshold”. In fact, a review of the Rule 21 case law shows that courts use the terms “no reasonable cause of action” and “no valid cause of action” interchangeably.⁷⁶ Again, such a threshold is also consistent with the clear purposes of the PPPA.

⁷³ Ontario, Legislative Assembly, *House of Commons Debates*, No 112 (27 October 2015) at 1620 (Hon Lorenzo Berardinetti), Newman BOA, Tab 15.

⁷⁴ R Sullivan, *Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc, 2014), at page 7, Newman BOA, Tab 16 [“**Sullivan, Statutes**”]; *Imperial Oil v Jacques*, 2014 SCC 66, ¶47, Newman BOA, Tab 1.

⁷⁵ B Garner, *Black’s Law Dictionary*, 9th ed (St Paul, MN: Thomson Reuters, 2009), at page 1690, Newman BOA, Tab 17.

⁷⁶ *Rausch v Pickering (City)*, [2013] OJ no 5584, ¶30-34 (CA), Newman BOA, Tab 2; *Kim v Trump*, [2014] OJ no 1948, ¶83 (Sup Ct J), Newman BOA, Tab 3.

42. The high threshold is also supported by a review of related legislation.⁷⁷ In addition to amending the CJA, the PPPA also amends the *Libel and Slander Act* (“LSA”). Section 12 of the LSA deals with motions for security for costs, and establishes a multi-part test on such motions. One factor to consider is whether the defendant has a “good defence on the merits”. Given the relationship between the LSA and the PPPA, the legislature’s choice to apply a different standard to assess a defence under the PPPA must be given meaning, particularly given the purposes of the PPPA.

43. The policy interests inherent to the PPPA weigh in favour of protecting free speech over the rights of plaintiffs bringing defamation claims. Section 137.1(4)(b) provides that a potentially meritorious claim, where there is no valid defence, can still be dismissed where the public interest in protecting the expression outweighs the interest permitting the proceeding to continue. This point was made clear during the debates at the legislative assembly:

This bill also requires demonstrating that there is a loss associated with it. Not only do we want to see that there is impact to an individual’s character, which was the law before, but there is a certain element that needs to be satisfied with respect to the loss suffered. I think it’s important, because a comment that’s made in the interests of public participation that doesn’t result in a loss to the individual should certainly be allowed. There should be a broad deference given to the idea of allowing public debate.⁷⁸

3. Conflicts in the Evidence Do Not Prevent the Dismissal of the Plaintiff’s Claim

44. The PPPA does not require the court to wade into the evidence and resolve conflicts in the evidence. In fact, it is precisely because of difficulties inherent in resolving such issues at the early stage that the PPPA was created. The PPPA is intended to address the *lacunae* in existing court procedures that prevented strategic claims against public participation (“SLAPP”) from being dealt with quickly. As the Advisory Panel noted in their report to the Attorney General:

[I]n practice, [existing] remedies are not effective. Courts are often reluctant to dismiss cases on preliminary motions based on

⁷⁷ In her treatise, Professor Sullivan notes that courts may look to other provisions in related statutes to assist interpretation. See Sullivan, *Statutes*, at page 430.

⁷⁸ Ontario, Legislative Assembly, *House of Commons Debates*, No 112 (27 October 2015) at 1700 (Hon Jagmeet Singh), Newman BOA, Tab 15.

affidavit evidence and oral argument. Traditionally, a trial with viva voce evidence has been the preferred procedure for determining questions of law or fact which are complex or novel. If it is necessary to decide a disputed issue as to the motive or intent of a party, a court may appropriately consider the issue to require the hearing of viva voce evidence. Going on to discovery and trial can be very expensive and time-consuming. Imposing the expense and time of a lawsuit on a defendant, quite apart from whether the claim is successful, has been identified as a central purpose of a SLAPP...

For these reasons, it is important that the new legislation should be distinct from the existing rules.⁷⁹

45. This statement is completely consistent with the legislative decision to place the onus on the plaintiff to satisfy the court that “no valid defence” exists. Because of this threshold, a detailed forensic assessment of the facts to make credibility assessments is not necessary. As long as this Court can find any validity to the defence, that is sufficient for the purposes of s. 137.1. This point is further demonstrated by the fact that the Legislature chose not to provide the court with the forensic powers that it has under rule 20. To the contrary, the legislature placed a seven-hour limit on cross-examinations (s. 137.2(4)).

46. Simply put, under s. 137.1 the court is not asked to determine liability because this is not the purpose of the PPPA. It is not alternative form of summary judgment. It is a *sui generis* regime, intended to quickly weed out strategic suits so as to encourage expression on matters of public interest and discourage retaliatory lawsuits. As such, where there is a conflict in the evidence, so long as the court can identify a plausible defence, the plaintiff’s claim must be dismissed. Any other conclusion would undermine the PPPA.

47. Although the text and intent of the PPPA are clear, the case law is a blank canvass. There is only one reported case. In *Pointes Protection*,⁸⁰ the defendants’ motion to dismiss was denied. That case, however, was a poor test case for the PPPA, as it did not appear to come within the Legislature’s intent. *Pointes Protection* did not arise out of an action in defamation but rather from a breach of contract claim. The plaintiffs and the defendants had entered into minutes of settlement, and then one of the defendants gave testimony before the Ontario Municipal Board that allegedly violated the terms of the settlement. The plaintiffs

⁷⁹ Ontario, Anti-Slapp Advisory Panel Report to the Attorney General, *Report to the Attorney General*, ¶11, Newman BOA, Tab 18.

⁸⁰ *1704604 Ontario Ltd v Pointes Protection Assn*, [2016] OJ no 2395, ¶50 (Sup Ct J), Newman BOA, Tab 4.

sued for breach of contract, and the defendants sought to dismiss that claim on the ground that the defendant's testimony was protected "expression" within the meaning of the PPPA. Unsurprisingly, the Court denied the motion to dismiss.⁸¹ *Pointes Protection*, however, was not about protecting the underdog from a retaliatory lawsuit, but about two sophisticated parties locked in a contractual dispute. Against this factual background, it is unsurprising that the Court was unwilling to give full effect to the PPPA.

48. The instant case, however, involves a dispute within both the letter and spirit of the PPPA.

B. Ms. Newman's Statements Relate to a Matter of Public Interest

49. Section 137.1 broadly defines the protected conduct. The provision states that the PPPA will apply where the proceeding "arises" from an expression that "relates" to a matter of public interest. This reflects the recommendations of the Advisory Panel that the act contain a "broad scope of protection".⁸² It is also consistent with comments at the legislative assembly that the act reflects a "broad deference" towards allowing public debate.⁸³

50. In defining the scope of the protection, the Advisory Panel referred to the *Grant v Torstar* decision where the Supreme Court of Canada defined "matter of public interest" as follows:

To be of public interest, the subject matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached";.... The case law on fair comment "is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews"...⁸⁴

51. Ms. Newman's statements satisfy this test. Her comments focused on making the public aware of the manner in which a candidate from a federal political party conducted his campaign, as well as the harassment that he and his campaign engaged in. She also advised

⁸¹ Ibid. at para. 56.

⁸² Ontario, Anti-Slapp Advisory Panel Report to the Attorney General, *Report to the Attorney General*, ¶28, Newman BOA, Tab 11.

⁸³ Ontario, Legislative Assembly, *House of Commons Debates*, No 112 (27 October 2015) at 1700 (Hon Jagmeet Singh), Newman BOA, Tab 15.

⁸⁴ *Grant v Torstar Corp*, [2009] 3 SCR 640, ¶105, Newman BOA, Tab 5.

the public of the reaction of the LPC to this conduct. These are matters for which the public should have substantial concern. The character that a candidate exhibits during a campaign indicates how that candidate would conduct himself or herself in office. They inform how citizens vote. The importance to the public of information about Mr. Rizvee is underlined by the fact that, in addition to Ms. Newman, other members of the public forcefully criticized the plaintiffs' campaign tactics.⁸⁵

C. The Rizvees Cannot Meet Their Evidentiary Burdens

1. The Rizvees' Claim Does Not Have Substantial Merit

52. The Rizvees will not be able to show that their claim has substantial merit. To succeed in an action for defamation, a plaintiff must prove four elements:

- that the words complained of were spoken or published to a third person;
- that the words complained of referred to the plaintiff;
- that the words complained of are defamatory of the plaintiff; and
- that the alleged defamation harmed the plaintiff's reputation.⁸⁶

53. Courts have described the last factor as whether the words complained of "may tend to lower the plaintiff in the estimation of reasonable persons".⁸⁷ Further, this assessment requires a contextual analysis. As the seminal text on defamation law makes clear, a different standard applies to political actors:

However, public officials have also been admonished not to go about with their feelings on their sleeves; persons who expose themselves to public life must expect closer scrutiny. They frequently are the subject of comments and criticism, sometimes unfair and warranted; the public recognition of this insures that such remarks are likely to have less of an impact than similar remarks made against others in different circumstances. For this reasons, courts general recognize that greater latitude should be allowed to persons who criticize those who hold public office. Criticism which might

⁸⁵ Newman Affidavit, ¶30, Exhibit "L", Newman MR, Tabs 2, 2(i), pages 15, 62-70.

⁸⁶ *Assesmed Inc v CBC* (2004), 22 CCLT (3d) 89 (Ont Sup Ct J), ¶100, 113, aff'd [2006] OJ no 2226 (CA), Newman BOA, Tab 6.

⁸⁷ *Boyer v Toronto Life Publishing Co*, [2000] OJ no 5999, ¶6 (Sup Ct J), Newman BOA, Tab 7

not be acceptable in the case of a private person may be acceptable where it assesses the conduct of a public official.⁸⁸

54. Taking a contextual approach to this analysis, Mr. Rizvee has failed to show, on a substantial merit basis, that that Ms. Newman's statements caused harm to his reputation. The statements that Ms. Newman made were consistent with other people's conversations on social media in Milton about Mr. Rizvee's campaign where, for example, he was accused of converting a fundraiser for a sick child into a political event; "hijacking" polling stations; making a "dishonest mockery" of the political process; and being untrustworthy.⁸⁹ In this context, it is not clear on a "substantial merit" standard that Ms. Newman's statements would actually lower the public's esteem of Mr. Rizvee.

2. The Rizvees Cannot Show that Ms. Newman Has No Valid Defence

(a) Ms. Newman Has a Valid Limitations Defence

55. The plaintiffs will be unable to demonstrate that Ms. Newman has no valid limitations defence. In *John v Ballingall*, the court applied the limitation period in the LSA to electronic publication, such as blogs or Facebook postings.⁹⁰ Given that the Rizvees' claim is based on electronic publications, and the fact that the LSA limitation period has expired on this claim, this decision suggests that Ms. Newman has, at the very least, a plausible defence.

56. Section 5(1) of the LSA provides that no action for libel in a "broadcast" lies unless the plaintiff sends notice to the defendant within six weeks after the alleged libel has come to the plaintiff's knowledge. Section 6 of the LSA creates a three month limitation period for such actions. Prior case law was unclear regarding whether internet postings or broadcasts are covered by the LSA. This issue was addressed by the Court of Appeal in three prior decisions.⁹¹ In *Weiss*, the Court of Appeal held that the notice application in s. 5 of the LSA applied to internet postings. In *Bahlieda*, because of "conflicting evidence" regarding whether the publication was "broadcast" from a station in Ontario, the Court of Appeal found

⁸⁸ R Brown, *Brown on Defamation*, Looseleaf (Toronto: Thomson Reuters Canada Ltd, 2016) at page 4-179, Newman BOA, Tab 19 [**"Brown, Defamation"**].

⁸⁹ First Newman Affidavit, ¶30, Exhibit "L", Newman MR, Tabs 2, 2(l), pages 15, 62, 63, 67, 70.

⁹⁰ *John v Ballingall*, [2016] OJ no 1717, ¶16 (Sup Ct J), Newman BOA, Tab 8.

⁹¹ *Schtaif v Toronto Life Publishing Co*, 2013 ONCA 405, *Weiss v Sawyer* (2002), 61 OR (3d) 526 and *Bahlieda v Santa* (2003) 68 OR (3d) 115, Newman BOA, Tabs 9, 10 and 11, respectively.

that this was an issue for trial. The Court of Appeal reached a similar conclusion in *Shtaif*, another decision with a deficient evidentiary record, where the Court again found that whether the publication was broadcast from Ontario was an issue for trial.

57. In *Ballingall*, the court summarized these decisions and concluded that “the weight of jurisprudence favours the view that an internet posting or broadcast is covered by the Libel and Slander Act, unless specific facts dictate otherwise”.⁹² To this end, the court referred to several cases that found that the LSA “does apply to an internet publication or broadcast”.⁹³ As such, the court dismissed the plaintiff’s claim on the basis that he failed to meet the LSA limitation period.

58. The same applies here. The statements complained of here were all made from July 12, 2015 until December 7, 2015 – all more than three months before the Rizvees issued their statement of claim on March 17, 2016.⁹⁴ There is no evidence in the record of any notice being served. There are no issues regarding discoverability – the affidavits of both Mr. Rizvee and Ms. Azim state that they were made aware of the statements during the election campaign.⁹⁵

59. In any event, even if this Court finds that *Shtaif* applies, Ms. Newman would still have a valid limitations defence, but would have to wait until trial to prove it. However, forcing Ms. Newman to go through the costly litigation process in order to prove that claims that were commenced more than one month after the limitation period expired is precisely the type of circumstance that the PPPA was intended to avoid.

(b) Ms. Newman Has a Valid Fair Comment Defence

60. In addition to her limitations defence, Ms. Newman also has a valid fair comment defence. In *WIC Radio v Simpson*, the Supreme Court set out the following four-part test for this defence:

- the comment must be on a matter of public interest;
- the comment must be based on fact;

⁹² *John v Ballingall*, [2016] OJ no 1717, ¶16 (Sup Ct J), Newman BOA, Tab 8.

⁹³ *John v Ballingall*, [2016] OJ no 1717, ¶20 (Sup Ct J), Newman BOA, Tab 8.

⁹⁴ First Newman Affidavit, Exhibit “P”, Newman MR, Tab 2(p), page 96.

⁹⁵ Rizvee Affidavit, ¶69, Rizvee MR, Tab 1, page 13; Rabiya Affidavit, ¶17, Rizvee MR, Tab 2, page 43.

- the comment, though it can include inferences of fact, must be recognisable as comment;
- the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts; and
- even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.⁹⁶

61. As demonstrated above, the comments in question all relate to the conduct of a political candidate in a federal election and as such are on matters of public interest. Further, the statements all are recognizable as comment. The Supreme Court noted that comment is to be “generously interpreted” and a “relatively easy” onus to discharge.⁹⁷ It also held that “loose, figurative or hyperbolic language... in the context of political debate” is indicative of comment.⁹⁸ For example, the Supreme Court found that comparisons to Hitler and suggestions that the plaintiff was so “hostile toward gay people to the point that she would condone violence toward gay people” both qualified as comment. As Justice Binnie held in explaining this decision:

We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones.⁹⁹

62. With respect to the “based on fact” test, the case law is clear that satisfying this factor does not require a detailed summary of the factual foundation. To the contrary, “the facts do not have to appear in the material in which a comment is made”.¹⁰⁰ All that is required is that the comment “implicitly” refers to the facts,¹⁰¹ or that they “otherwise be known to the listeners”.¹⁰² Ms. Newman’s evidence is that the questionable conduct of the Rizvee campaign was already known by the community. This is also supported by the online postings attached to her affidavit.¹⁰³ Further, in her October 3rd posting, she summarized the events of September 30th when a member of the Rizvee campaign threatened her in a

⁹⁶ *WIC Radio v Simpson*, [2008] 2 SCR 420, ¶28, Newman BOA, Tab 12.

⁹⁷ *WIC Radio v Simpson*, [2008] 2 SCR 420, ¶30, Newman BOA, Tab 12.

⁹⁸ *WIC Radio v Simpson*, [2008] 2 SCR 420, ¶26, Newman BOA, Tab 12.

⁹⁹ *WIC Radio v Simpson*, [2008] 2 SCR 420, ¶4, Newman BOA, Tab 12.

¹⁰⁰ Brown, *Defamation*, at page 15-58, Newman BOA, Tab 19.

¹⁰¹ Brown, *Defamation*, at page 15-58, Newman BOA, Tab 19.

¹⁰² *WIC Radio v Simpson*, [2008] 2 SCR 420, ¶31, Newman BOA, Tab 12.

¹⁰³ Newman Affidavit, ¶30, Exhibit “L”, Newman MR, Tab 2(1), pages 15, 62-70.

parking lot. Subsequent posts discussing this event would have been understood by recipients as referring back to these events.¹⁰⁴

63. Also, as the court has no forensic powers to weigh or assess competing facts, the existence of any credible facts in the record upon which Ms. Newman's statements could be based on are sufficient to show at least the validity of the defence. Here, Ms. Newman's comments about the Rizvee campaign's conduct of the nomination meeting are based upon her first-hand account of what occurred that evening as well as similar comments made by others in the community. Similarly, her comments about the harassment of Mr. Rizvee and his campaign are supported by her first-hand account of what occurred, and have been corroborated by affidavit evidence from third parties.

64. With respect to the honest expression factor, the Supreme Court noted that the defendant would have to show that anyone could honestly have expressed the impugned comments on the basis of the facts proven. This is assessed on an objective standard and "is not a high threshold for the defendants to meet".¹⁰⁵ For the purposes of this motion, the Rizvees cannot show that there is no validity to the argument that this threshold could be met. Assuming, as this court must for the purpose of this motion, that the Rizvee campaign engaged in intimidating conduct at the nomination meeting, it is reasonable to express the view that the campaign "perverted" the political process or acted in a "corrupt or excessive manner". This is particularly the case since the *Canada Elections Act* prohibits voter suppression.¹⁰⁶ Similarly, one could honestly express that a campaign worker aggressively walking towards someone while yelling that the person needed to be taught manners was acting "effectively [as a] hired thug".

65. Finally, there is no basis upon which this Court can be satisfied that Ms. Newman acted out of malice to a degree where it can conclude that she has "no valid defence".

¹⁰⁴ Rabiya Affidavit, Exhibit "H", Newman MR, Tab 2(h), page 76.

¹⁰⁵ *WIC Radio v Simpson*, [2008] 2 SCR 420, ¶49, Newman BOA, Tab 12.

¹⁰⁶ See *Canada Elections Act*, SC 2000, c 9, ss. 281 and 491.

3. Harms Suffered by the Rizvees Do Not Outweigh the Value in Protecting Expression on Matters of Public Interest

66. Finally, the Rizvees will not be able satisfy the Court that that the harms they have suffered outweigh the value of protecting expression on a matter of public interest. The Rizvees have adduced no evidence of such harms, outside of mere allegations in their affidavits. When these allegations were tested on cross-examination the Rizvees conceded that they had no actual evidence of harm.¹⁰⁷ Ms. Azim conceded that the Rizvees have not commissioned any report or survey to demonstrate that Ms. Newman's statements caused them business losses.¹⁰⁸ Certainly, there is no basis to support the \$17.5 million in damages that the Rizvees seek against Ms. Newman (which Mr. Rizvee implicitly concedes in his affidavit).¹⁰⁹

67. In contrast, Ms. Newman's statements were about the conduct of a candidate for Parliament and may have provided important information to help a citizen decide whether to elect this individual as his or her representative. The Supreme Court has described expression that goes to political decision-making or self-fulfillment as going to the "core" of the values underlying the right to free expression.¹¹⁰ In such circumstances, the balance between these two interests must favour free expression.

PART V: ORDER REQUESTED

68. Ms. Newman seeks an order:

- (a) dismissing the Rizvees' claim pursuant to s. 137.1 of the CJA;
- (b) awarding her costs on a full indemnity basis pursuant to s. 137.1(7) of the CJA;
and
- (c) such further order as this Honourable Court deems just.

¹⁰⁷ Rabiya Affidavit, pp 113-119, qq 484-510.

¹⁰⁸ See for example, Rabiya
, p 119, qq 506, 509; SMR, Tab 3.

¹⁰⁹ Rizvee Affidavit, ¶72, Rizvee MR, Tab 1, page 13.

¹¹⁰ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, at 976, Newman BOA, Tab 13.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of September, 2016.

Two handwritten signatures in blue ink. The first signature is on the left, and the second is on the right.

Nader R. Hasan / Carlo Di Carlo

STOCKWOODS LLP
Barristers LLP

Lawyers for the Moving Party, Stacey Newman

SCHEDULE “A” – LIST OF AUTHORITIES

- 1 *Imperial Oil v. Jacques*, 2014 SCC 66
- 2 *Rausch v. Pickering (City)*, [2013] OJ no 5584 (CA)
- 3 *Kim v. Trump*, [2014] OJ no 1948 (Sup Ct J)
- 4 *1704604 Ontario Ltd v. Pointes Protection Association*, [2016] OJ no 2395 (Sup Ct J)
- 5 *Grant v. Torstar Corp*, [2009] 3 SCR 640
- 6 *Assessmed Inc. v. CBC*, [2004] OJ no 802 (Sup Ct J)
- 7 *Boyer v. Toronto Life Publishing Co.*, [2000] OJ no 5999 (Sup Ct J)
- 8 *John v. Ballingall*, [2016] OJ no 1717 (Sup Ct J)
- 9 *Schtaif v. Toronto Life Publishing Co.*, 2013 ONCA 405
- 10 *Weiss v. Sawyer*, (2002) 61 OR (3d) 526
- 11 *Bahlleda v. Santa*, (2003) 68 OR (3d) 115
- 12 *WIC Radio v. Simpson*, [2008] 2 SCR 420
- 13 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927

Secondary Sources

- 14 Canadian Civil Liberties Association, *Fact Sheet: Bill 52 – Protection of Public Participation Act*, online: <<http://www.cela.ca/sites/cela.ca/files/Bill-52-Fact-Sheet-CCLA-and-CJFE.pdf>>
- 15 Ontario, Legislative Assembly, *House of Commons Debates*, No 112 (27 October 2015) (excerpts)
- 16 R Sullivan, *Construction of Statutes*, 6th ed (Markham: LexisNexis Canada Inc, 2014)
- 17 B Garner, *Black’s Law Dictionary*, 9th ed (St Paul, MN: Thomson Reuters, 2009)
- 18 Ontario, Anti-Slapp Advisory Panel Report to the Attorney General, *Report to the Attorney General*
- 19 R Brown, *Brown on Defamation*, Looseleaf (Toronto: Thomson Reuters Canada Ltd, 2016)

SCHEDULE “B” – RELEVANT STATUTES

1. *Courts of Justice Act*, RSO 1990, c C43

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

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

Definition, “expression”

(2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

- (a) there are grounds to believe that,
 - (i) the proceeding has substantial merit, and
 - (ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding;
or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

Procedural matters

Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice.

Appeal to be heard as soon as practicable

137.3 An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal.

AZIM RIZVEE et al.
Plaintiffs

and

STACEY NEWMAN
Defendant

Court File No. 880/16

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at MILTON

**FACTUM OF THE MOVING PARTY,
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