IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hobbs v. Warner,*
2019 BCSC 2196

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Registry: Vancouver

2019 BCSC 2196 (CanLII)

Between:

Kevin Hobbs, Lisa Cheng and Vanbex Group Inc.

Plaintiffs

And

Kipling Warner

Defendant

Before: The Honourable Madam Justice Donegan
in Chambers

Reasons for Judgment on Application for Dismissal

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INTRODUCTION

[1] This is an application brought by a defendant in a defamation action to have the case against him dismissed pursuant to s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*]. The underlying action involves a claim brought by Kevin Hobbs, Lisa Cheng and their company, Vanbex Group Inc. ("Vanbex"), against Kipling Warner, a software engineer who worked at Vanbex for about two months in 2016.

[2] The personal plaintiffs are involved in other litigation. Mr. Hobbs and Ms. Cheng are defendants in a proceeding brought under the *Civil Forfeiture Act*, S.B.C. 2005 c. 29 [*CFA*] where some of their assets have recently been made the subject of an interim preservation order (the "CF Action"). They are vigorously defending the

CF Action and say that it has caused reputational and financial harm to them and their company.

[3] The corporate plaintiff, Vanbex, is involved in other litigation as well, having sued Mr. Warner for defamation, among other things, in 2017. It is through that proceeding that Mr. Hobbs recently learned that Mr. Warner sent an email "tip" to a member of the Vancouver Police Department ("VPD") on April 12, 2017 where he relayed his suspicions that Vanbex and Mr. Hobbs may be involved in criminality and then later communicated those concerns to the British Columbia Securities Commission ("BCSC") and the Royal Canadian Mounted Police ("RCMP").

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[4] In this action, the plaintiffs claim that Mr. Warner's statements to authorities are false and were the cause, or at least a significant contributing cause, of the investigation leading to the CF Action, which has caused them harm. They commenced this defamation action on May 1, 2019 and seek substantial damages against him.

[5] Prior to filing his defence, Mr. Warner opted to avail himself of a newly enacted pre-trial screening process that allows him to apply to have this claim dismissed under s. 4 of the *PPPA*.

[6] Before turning to the background that underpins this application, I think it will be helpful to first outline the legal framework engaged by it.

LEGAL FRAMEWORK

[7] Lawsuits brought for an improper purpose, namely to silence expression and financially punish one's critics, have come to be known as strategic lawsuits against public participation, or by the acronym "SLAPP". They have evoked various legislative responses, sometimes referred to as anti-SLAPP legislation: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at paras. 3-4 [*Pointes Protection*].

[8] The *PPPA* is British Columbia's anti-SLAPP legislation. It came into force on March 25, 2019 and, as of the time of this application, there were no reported decisions considering or applying its provisions.

[9] Section 4 of the *PPPA* creates a pre-trial procedure allowing a defendant to apply to the court quickly and early in a proceeding for an order dismissing a claim arising out of an expression by him or her on matters of public interest. The proceeding will often be a defamation action, but it does not have to be. Because the application pauses the litigation until it is resolved (s. 5), it must be heard "as soon as practicable": s. 9(3).

[10] Section 4 provides:

> **4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[11] In short, this new test requires a defendant to clear a "threshold hurdle" and demonstrate that the litigation arises out of his or her expression on a matter relating to the public interest: s. 4(1). If the defendant does so, the onus then shifts to the plaintiff to demonstrate that his or her lawsuit clears both the "merits-based" and the "public interest" hurdles: s. 4(2).

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[12] Although there were no reported cases interpreting and applying s. 4 of the *PPPA* at the time of this hearing, guidance can be taken from Ontario jurisprudence considering nearly identical provisions.

[13] Ontario enacted its anti-SLAPP provisions in 2015 by amending the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [*CJA*], to add s. 137.1. The test to be applied is analogous to s. 4 of the *PPPA*. Subsections 137.1(3) and (4) of the *CJA* provide:

> **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. 2015, c. 23, s. 3.
>
> **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. 2015, c. 23, s. 3.

[14] The Ontario Court of Appeal recently considered six appeals involving the interpretation of s. 137.1: *Pointes Protection*; *Fortress Real Development Inc. v. Rabidoux*, 2018 ONCA 686; *Platnick v. Bent*, 2018 ONCA 687; *Veneruzzo v. Storey*¸ 2018 ONCA 688; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689; and *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690. The Supreme Court of Canada has granted leave to appeal two of these decisions, but it is unknown when a decision may be rendered.

[15] As the *PPPA* is modeled on the Ontario provisions and I find the interpretation and reasoning of the Ontario Court of Appeal in these authorities persuasive, I will rely on the analysis they provide.

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[16] I will first identify and discuss the purposes of the *PPPA*.

The Purposes of the *PPPA*

[17] Unlike the Ontario provisions, the *PPPA* does not specifically identify its purposes. Ontario's legislation begin with a statement of its 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.

[18] In *Pointes Protection*, the Court considered these purposes and held that they leave "no doubt that the legislation was intended to promote free expression on matters of public interest by 'discouraging' and 'reducing the risk' that litigation would be used to 'unduly' limit such expression: para. 37. Calling its purpose "crystal clear", the Court held:

> [45] The purpose of s. 137.1 is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.

[19] The Court recognized that the pre-trial remedy created by s. 137.1 seeks to achieve these purposes by providing a judicial screening or triage device designed to eliminate certain claims at an early stage of the litigation process: para. 73. The defendant must demonstrate that the proceeding arises from an expression that relates to a matter of public interest. If the defendant meets this onus, in order to strike a balance between preventing abusive litigation and allowing legitimate

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actions, the plaintiff must then clear the "merits hurdle" by satisfying the application judge that the proceeding has substantial merit and that the defendant has no valid defence. The plaintiff must also show that the harm he or she has suffered is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: paras. 38-42.

[20] Doherty J.A. went on to explain how this pre-trial remedy seeks to achieve the purposes of the legislation:

> [48] Instead of creating new defences, removing or modifying existing causes of action, or providing for a more vigorous abuse of process remedy, s. 137.1 seeks to achieve the purposes stated in s. 137.1(1) by, first, distinguishing between claims that arise from an expression that relates to a matter of public interest and other claims, and second, by providing for the early and inexpensive dismissal of claims based on expressions relating to matters of public interest, either because those claims lack sufficient merit to proceed, or because the public interest is, on balance, not served by allowing the action to proceed to an adjudication on the full merits.

[21] I view the purposes of the *PPPA*, and the manner in which its provisions seek to achieve those purposes, in the same way. I find support in this view, not only from the similarity in language between the two provisions, but from the debates of the British Columbia Legislature where the *PPPA*'s purpose, and its modelling after the Ontario provisions, were expressly discussed.

[22] At first reading, the Honourable David Eby introduced the bill to enact this legislation in the following terms:

> The purpose of this act is to enhance public participation by protecting expression on matters of public interest and litigation that unduly limits such expression. Lawsuits that are improperly motivated by the intent to silence expression are often referred to as strategic lawsuits against public participation, or by the acronym SLAPP.
>
> The act would not, however, require the difficult assessment of a plaintiff's motive. Rather, the act would provide for a legal basis and expedited process by which, at an early stage in the proceedings, a court would be able to determine whether a lawsuit arises out of expression on a matter of public interest and, if so, to weigh whether the likely harm to a plaintiff is serious enough that the public interest in allowing the lawsuit to continue would outweigh the public interest in protecting the expression that gave rise to the lawsuit. In so doing, the act would improve access to justice,

> would balance the protection of freedom of expression with the protection of reputation and economic interests.
>
> The act is based on the Uniform Protection of Public Participation Act adopted by the Uniform Law Conference of Canada in 2017, which in turn is based on the 2015 Ontario act of the same name.
>
> Many British Columbians and a large number of civil society groups in B.C. have called for legislation to protect public participation. In 2017, the Union of B.C. Municipalities adopted a resolution endorsing such legislation, and in February of last year, 15 eminent legal figures signed an open letter calling for legislation based on the model of the Ontario act.
>
> The ability of citizens to participate freely in discussion and debate on matters of public interest without fear of undue legal threat is vital to a vibrant democratic society. The Protection of Public Participation Act will be of great importance in protecting that fundamental democratic value.

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British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 197 (February 13, 2019) at 6974.

[23] At second reading, the Hon. D. Eby began his speech by expressly outlining the intention of the legislation:

> This is a bill that is intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day, and in particular, to respond to a mischief that has arisen, which is people who are powerful and wealthy and able to afford lawyers initiating lawsuits or threatening lawsuits against individuals who are critical of them in order to stop them from participating in that public debate.
>
> What the bill proposes to do is strike a balance between a couple of values. One is the value of protecting an individual's reputation or a company's reputation. The other is the value of a robust and rigorous debate that the courts have described as freewheeling, that can be heated, that can result in intemperate comments. But that's part of public debate, and it shouldn't be met with threats of litigation to stop people from talking about the issues of the day. Those are the values that this bill is aimed at addressing.

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 198 (February 14, 2019) at 7018.

[24] Later in his presentation, he specifically pointed to the Ontario provisions as the basis of the *PPPA* and encouraged members to read *Pointes Protection*:

> Importantly, and importantly for this bill, in the pendency of the time from when we first introduced this bill to today, the Ontario Court of Appeal released the decision where they considered the Ontario bill. They went

> through it in some detail and they said…They made lots of comments about the Ontario bill, and it has a lot of relationship to our bill, because our bill is based on the Ontario bill.

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 199 (February 14, 2019) at 7031.

[25] In closing, he referred again to the purpose of the legislation:

> That brings to a close my remarks on the bill - the reason why we brought the bill; the text of the bill that's in front of the House and some of the background in relation to the defamation tort, traditionally and as it's evolved through the Supreme Court of Canada. We're not trying to displace that jurisprudence or those decisions of the court, the direction of the court. We're attempting to provide greater effect to it by providing a procedural remedy, where people can have this considered by the court sooner, rather than at the end of the trial, so they don't have to spend their life savings defending themselves in court in multiple years. They can have it dealt with right off the bat.

British Columbia, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 4th Sess., No. 199 (February 14, 2019) at 7031.

[26] I am satisfied that the *PPPA* is closely modelled on the Ontario *CJA* provisions and that its purposes, and the manner in which its provisions seek to achieve those purposes, are the same as articulated in the Ontario legislation, and as explained by the Ontario Court of Appeal in *Pointes Protection* and the other concurrently released decisions.

[27] I turn now to the specific provisions of s. 4 of the *PPPA*.

Section 4(1): The Threshold Hurdle

[28] For convenience, I repeat the subsection:

> **4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> > (a) the proceeding arises from an expression made by the applicant, and
> >
> > (b) the expression relates to a matter of public interest.

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> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order…

[29] This puts the onus on the defendant to satisfy the court that the proceeding arises from an expression he or she made that relates to a matter of public interest. Use of the phrase "satisfies the court" in s. 4(2) indicates that the defendant must establish both criteria on the balance of probabilities.

[30] "Expression" in s. 4(1)(a) is defined in s. 1 as "any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity."

[31] "Relates to a matter of public interest" is not defined in the *PPPA*, but guidance on its interpretation can again be found from *Pointes Protection*, as the Court there was required to consider the same, undefined phrase.

[32] Doherty J.A. held that the phrase should be read broadly, in a manner consistent with the purposes of the provision, and decided that whether something is a "matter of public interest" should be determined by asking what the expression is about, or, what the expression pertains to: paras. 54 and 57.

[33] Relying on *Grant v. Torstar Corp.,* 2009 SCC 61, Doherty J.A. then set out a number of principles to help inform the determination of whether something relates to a matter of public interest. These principles can be summarized as follows:

- The phrase does not require that the expression actually furthers the public interest. Nothing in this section justifies any distinction among expressions based on quality, merits, or manner of the expression. An expression that relates to a matter of public interest remains so even if the language used is intemperate or even harmful to the public interest: para. 55;

- There is no exhaustive list of topics that fall under the rubric "public interest". Some topics, such as the conduct of governmental affairs and the operation of courts, are inevitably matters of public interest, but other topics may or may

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not raise matters of public interest depending on the specific circumstances: para. 59;

- Context of a particular expression can be crucial in determining whether it relates to a matter of public interest: para. 60;
- A matter of public interest must be distinguished from a matter about which the public is merely curious or has a prurient interest: para. 61;
- An expression can relate to a matter of public interest without engaging the interest of the entire community, or even a substantial part of the community. It is enough that some segment of the community would have a genuine interest in the subject matter of the expression: para. 62;
- Public interest does not turn on the size of the audience: para. 63;
- The characterization of the expression as a matter of public interest will usually be made by reference to the circumstances as they existed when the expression was made: para. 64; and
- An expression may relate to more than one matter, provided at least one of those matters is "a matter of public interest": para. 65.

[34] The Court then summarized the concept of "public interest" as it is used in the *CJA* as follows:

> [65] In summary, the concept of "public interest" as it is used in s. 137.1(3) is a broad one that does not take into account the merits or manner of the expression, nor the motive of the author. The determination of whether an expression relates to a matter of public interest must be made objectively, having regard to the context in which the expression was made and the entirety of the relevant communication. An expression may relate to more than one matter. If one of those matters is a "matter of public interest", the defendant will have met its onus under s. 137.1(3).

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[35] If the defendant clears this threshold hurdle by establishing that the proceeding involves an expression that relates to a matter of public interest, the inquiry then moves on to s. 4(2).

Section 4(2): The Merits-Based and Public Interest Hurdles

[36] Again, for ease of reference, I will reproduce the subsection here:

> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[37] This puts the onus on the plaintiff to satisfy two requirements – the merits-based hurdle (s. 4(2)(a)) and the public interest hurdle (s. 4(2)(b)). Again, use of the phrase “satisfies the court” indicates that the standard of proof is the balance of probabilities.

Section 4(2)(a): The Merits-Based Hurdle

[38] The merits-based hurdle has two aspects. The plaintiff must establish that there are grounds to believe both that the proceeding has substantial merit and the defendant has no valid defence.

[39] The phrase “grounds to believe” should be understood to mean “reasonable grounds to believe”: *Pointes Protection* at para. 69.

[40] As the Court observed in *Pointes Protection*, the distinction drawn in this section particularly makes sense in defamation actions, where there is a “clear demarcation between the elements of the tort that the plaintiff must prove, and the

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various affirmative defences that the defendant must prove if the plaintiff meets its initial onus”: para. 72.

[41] In evaluating how to determine whether there are grounds to believe the plaintiff’s case has merit, it is important to remember what these pre-trial applications are <u>not</u>.

[42] In *Pointes Protection*, Doherty J.A. emphasized that these applications are not an alternative means by which the merits of a claim can be tried. They are not a form of summary judgment or summary trial intended to allow a defendant to obtain a quick and favourable resolution of the merits of allegations. These applications are not the proper forum in which to make a detailed assessment of the ultimate merits of a case: para. 73.

[43] A plaintiff is not expected to present a fully developed case. As the Court observed, the timing of these pre-trial applications (a Response to Civil Claim need not even be filed) and the procedures that control them (affidavit evidence, time-limited cross-examinations) are not “conducive to either party putting its best foot forward”, as is expected in summary judgment or summary trial proceedings: para. 76.

[44] A proceeding will have “substantial merit” in this context if, upon examination of the application record, “the claim is shown to be legally tenable and supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success”: paras. 79-80.

[45] Although not a “deep dive” into the merits of a claim, Doherty J.A. also stressed that in order to evaluate the potential merits of a claim based on a “grounds to believe” standard, an application judge may have to engage in a limited weighing of the evidence and, in some cases, credibility evaluations. In this regard, the Court held:

> [82] While I have stressed that s. 137.1 motions are not a form of summary judgment, nor the proper forum in which to make a detailed assessment of the ultimate merits of the case, I do not mean to suggest that

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> a motion judge must simply take at face value the allegations put forward by the parties on the motion. An evaluation of potential merit based on a "grounds to believe" standard contemplates a limited weighing of the evidence, and, in some cases, credibility evaluations. Bald allegations, unsubstantiated damage claims or unparticularized defences are not the stuff from which "grounds to believe" are formulated. Similarly, if on a review of the entirety of motion material, the motion judge concludes that no reasonable trier could find a certain allegation or piece of evidence credible, the motion judge will discount that allegation or evidence in making his or her evaluation under s. 137.1(4)(a). Once again, the question is not whether the motion judge views the evidence as credible, but rather whether, on the entirety of the material, there are reasonable grounds to believe that a reasonable trier could accept the evidence.

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[46] If a plaintiff can satisfy the court that there are reasonable grounds to believe there is substantial merit to his or her claim, the plaintiff must then satisfy the court that there are reasonable grounds to believe the defendant has no valid defence under s. 4(2)(a)(ii).

[47] Justice Doherty observed that this section would be unworkable if it required a plaintiff to somehow address all potential defences and establish that none had any validity. For it to be workable, there must be an evidentiary burden on the defendant to advance details of any proposed defence in either its pleadings, or, if no Response to Civil Claim is yet filed, in its application materials. Then, once a defendant puts a particular “defence in play”, the persuasive burden moves to the plaintiff to establish that there are reasonable grounds to believe that none of the defences put in play are valid: para. 83.

[48] “Valid” is not defined in either the *PPPA* or the *CJA*. In *Pointes Protection*, the Court interpreted “valid” to mean “successful”. The Court explained:

> [84] … I would interpret “valid” as meaning successful. The onus rests on the plaintiff to convince the motion judge that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the plaintiff has met its onus.

[49] If the plaintiff satisfies the court that there are reasonable grounds to believe both that there is substantial merit to the claim and the defendant has no valid defence, the inquiry moves on to the public interest hurdle (s. 4(2)(b)).

Section 4(2)(b): The Public Interest Hurdle

[50] The plaintiff must also meet the public interest hurdle. The plaintiff has the persuasive burden here. He or she must satisfy the court that the harm likely to have been or to be suffered by the plaintiff as a result of the expression is serious enough that the public interest engaged in allowing the plaintiff to proceed with the claim outweighs the public interest in protecting the defendant's freedom of expression.

[51] Again, this provision is nearly identical to that considered in *Pointes Protection* and guidance can again be taken from this decision. Calling it "in some ways…the heart of Ontario's anti-SLAPP legislation" (para. 86), Doherty J.A. discussed its interpretation and the approach to the balancing exercise it requires.

[52] The Court began with a discussion of the Legislature's intention behind the "public interest hurdle":

> [86] …The section declares that some claims that target expression on matters of public interest are properly terminated on a s. 137.1 motion, even though they could succeed on their merits at trial. The "public interest" hurdle reflects the legislature's determination that the success of some claims that target expression on matters of public interest comes at too great a cost to the public interest in promoting and protecting freedom of expression. As explained by the Anti-SLAPP Advisory Panel, at para. 37 of its Report:
>
>> If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve. The value of public participation would make any remedy granted to the plaintiff an unwarranted incursion into the domain of protected expression. In such circumstances, the action may also be properly regarded as seeking an inappropriate expenditure of the public resources of the court system. Where these considerations clearly apply, the court should have the power to dismiss the action on this basis.

[53] The Court then discussed the first side of the balancing exercise – the assessment of harm suffered by the plaintiff as a consequence of the defendant's expression. Doherty J.A. held:

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> [88] The harm suffered or likely to be suffered by the plaintiff as a consequence of the defendant's expression will be measured primarily by the monetary damages suffered or likely to be suffered by the plaintiff as a consequence of the impugned expression. However, harm to the plaintiff can refer to non-monetary harm as well. The preservation of one's good reputation or one's personal privacy have inherent value beyond the monetary value of a claim. Both are tied to an individual's liberty and security interests and can, in the appropriate circumstances, be taken into account in assessing the harm caused to the plaintiff by the defendant's expression: *Hill v. Church of Scientology of Toronto* (1995), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, at paras. 117-21; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, [2000] S.C.J. No. 43, 2000 SCC 44, at paras. 79-80.
>
> …
>
> [90] On the s. 137.1 motion, the plaintiff must provide a basis upon which the motion judge can make some assessment of the harm done or likely to be done to it by the impugned expression. This will almost inevitably include material providing some quantification of the monetary damages. The plaintiff is not, however, expected to present a fully-developed damages brief. Assuming the plaintiff has cleared the merits hurdle in s. 137.1(4)(a), a common sense reading of the claim, supported by sufficient evidence to draw a causal connection between the challenged expression and damages that are more than nominal will often suffice.
>
> [91] The plaintiff cannot, however, rely on bald assertions in the statement of claim relating to damages, or on unsourced, unexplained damage claims contained in the pleadings or affidavits filed on the s. 137.1 motion. The motion judge must be able to make an informed assessment, at least at a general or "ballpark" level, about the nature and quantum of the damages suffered or likely to be suffered by the plaintiff: see *Able Translations Ltd. v. Express International Translations Inc.*, [2016] O.J. No. 5740, 2016 ONSC 6785, 410 D.L.R. (4th) 380 (S.C.J.), at paras. 85-95, affd [2018] O.J. No. 4443, 2018 ONCA 690; *Thompson v. Cohodes*, [2017] O.J. No. 2113, 2017 ONSC 2590 (S.C.J.), at paras. 33-38.
>
> [92] Equally important to the quantification of damages, the plaintiff must provide material that can establish the causal link between the defendant's expression and the damages claimed. Evidence of this connection will be particularly important when the motion material reveals sources apart from the defendant's expression that could well have caused the plaintiff's damages.

[54] The Court then discussed the other side of the balancing exercise – the public interest in protecting the defendant’s freedom of expression:

> [93] Turning to the other side of the balancing exercise in s. 137.1(4)(b), the public interest in protecting the defendant's freedom of expression, the motion judge must assess the public interest in protecting the actual expression that is the subject matter of the lawsuit. On a general level, the importance of freedom of expression, especially on matters of public interest,

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> both to the individual and to the community, is well understood: see Grant v. Torstar Corp., at paras. 32-57. However, if the defendant asserts a public interest in protecting its expression beyond the generally applicable public interest, the evidentiary burden lies on the defendant to establish the specific facts said to give added importance in the specific circumstances to the exercise of freedom of expression.
>
> [94] Unlike the "public interest" inquiry in s. 137.1(3), in which the quality of the expression or the motivation of the speaker are irrelevant (see above, at para. 65), both play an important role in measuring the extent to which there is a public interest in protecting that expression. Not all expression on matters of public interest serves the values underlying freedom of expression in the same way or to the same degree. For example, a statement that contains deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language may still be an expression that relates to a matter of public interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, vitriol, and obscenities: Able Translations Ltd., at paras. 82-84 and 96-103.
>
> [95] In addition to the quality of the expression and the defendant's motivation for making the expression, the consequences of the plaintiff's claim will figure into the weight to be given to the public interest in protecting that expression. Evidence of actual "libel chill" generated by the plaintiff's claim can be an important factor in the public interest evaluation required under s. 137.1(4)(b): Able Translations Ltd., at para. 102.
>
> [96] The public interest evaluations required under s. 137.1(4)(b) cannot be reduced to an arithmetic-like calculation. It would be misleading to pretend they can be. The assessments are qualitative and, to some extent, subjective. Because the balancing of the competing public interests will often be determinative of the outcome of the s. 137.1 motion, and because the analysis contains an element of subjectivity, it is crucial that motion judges provide full reasons for their s. 137.1(4)(b) evaluations.

[55] The Court concluded its analysis of the public interest hurdle with two practical observations, the first of which has relevance to the application at bar:

> [99] I will conclude my analysis of ss. 137.1(4)(a) and (b) with two observations that will hopefully be of some practical use. First, the plaintiff’s claim will be dismissed if the plaintiff cannot meet its persuasive burden under either ss. 137.1(4)(a) or (b). A motion judge is under no obligation to address both. In some cases, and I think this may have particular application to defamation claims, the public interest analysis under s. 137.1(4)(b) may well be more straightforward than the merits-based analysis required under s. 137.1(4)(a). For example, if the defendant has demonstrated that the plaintiff has not suffered any significant harm and has brought the lawsuit to silence or punish the defendant, the public interest analysis should be straightforward and lead to a dismissal of the action without the need to engage in the more difficult and time-consuming merits-based analysis.

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[56] I am mindful of the Court's caution that in determining whether the plaintiff has met its onus under the public interest hurdle, an application judge must "appreciate the very significant consequences to the plaintiff if the motion is allowed" in that the "courtroom door will be closed on the plaintiff even though the claim may have ultimately succeeded on the merits": para. 98.

[57] With this overview of the governing legal framework, I turn now to setting out the general background facts relevant to this application. I will address more specific facts, some controversial, as they arise naturally in the narrative or during my analysis of the issues.

RELEVANT BACKGROUND FACTS

[58] In support of his application, Mr. Warner has tendered four affidavits: two from himself and two from police officers filed in the CF Action. Counsel for the defendants object to the admissibility of the police officers' affidavits in their entirety and object to certain portions of Mr. Warner's affidavits. I will address these objections as the proposed evidence from these sources arise naturally in the narrative.

[59] In accordance with s. 9(5) and (6) of the *PPPA*, Mr. Warner was cross-examined, out of court before an official reporter, on his affidavits by counsel for Mr. Hobbs and Vanbex and by counsel for Ms. Cheng on July 16 and 17, 2019. Further brief and narrowly confined, cross-examination was ultimately agreed to by the parties at the hearing. The transcripts of Mr. Warner's cross-examination and documents referred to during the proceedings are before the court.

[60] Mr. Hobbs and Vanbex have tendered three affidavits, one from Mr. Hobbs (where he attaches the CF Action pleadings and attaches and adopts two affidavits from the CF Action), another from the current vice-president of Vanbex and one from a legal assistant in their counsel's office. Ms. Cheng has tendered no evidence on this application.

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[61] In accordance with s. 9(5) and (6) of the *PPPA*, Mr. Hobbs and the current vice-president of Vanbex have both been cross-examined out of court before an official reporter on their affidavits by counsel for Mr. Warner on June 27 and 28, 2019. Those transcripts are before the court. Further brief, and narrowly confined, cross-examination of Mr. Hobbs was permitted by the court at the hearing. I determined that the two narrowly confined areas of further cross-examination were relevant to material issues on this application; specifically to the court's assessment of whether any of the harm alleged by the plaintiffs was caused by the defendant's expressions to law enforcement agencies and, to a lesser degree, the credibility of Mr. Hobbs.

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[62] Before I begin, I will say a brief word about the credibility of both Mr. Hobbs and Mr. Warner.

[63] Both sides to this dispute have argued vigorously in favour of adverse credibility findings against the other. This is not the forum in which to make a detailed assessment of a party's credibility and/or the ultimate merits of the case, but I am permitted a limited weighing of the evidence and evaluations of credibility in order to evaluate potential merit on a "grounds to believe" standard. The question is not whether I view a particular piece of evidence as credible, but rather, on the entirety of the material, whether there are reasonable grounds to believe that a reasonable trier could accept the evidence. It is within this framework that I found a reasonable trier could not accept certain aspects of the evidence of both Mr. Warner and Mr. Hobbs. I will identify those specific areas as they arise.

[64] Mr. Warner is a senior software engineer with a Bachelor of Science degree in artificial intelligence (cognitive systems: computation intelligence and design) from the University of British Columbia. He has worked for several companies in the past and is currently self-employed at his own software start-up company that develops artificial intelligence technology for the commercial music space.

[65] One of the companies that Mr. Warner worked for in the past was Vanbex. He worked there for two months in the fall of 2016.

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[66] Mr. Warner describes himself as a concerned Canadian citizen who is interested in and concerned about prominent political and public issues, including the opioid crisis, the international drug trade and money laundering. As a software engineer with an advanced knowledge of artificial intelligence and cryptography, he possesses a personal and professional interest in the legitimacy and regulation of the cryptocurrency industry.

[67] Vanbex started as a company in 2014. Since 2015, it has been run by Mr. Hobbs and Ms. Cheng, who are its officers, directors and major shareholders. Between 2014 and 2016, Mr. Hobbs describes that Vanbex was mainly involved in marketing and consulting for companies in the crypto-currency and blockchain industries.

[68] In simple terms, crypto-currency is a digital currency, a representation of value that can be digitally traded and is designed to work as a medium of exchange. It does not have legal tender status. It differs from legal tender in that it is encrypted and decentralized. “Bitcoin” is one example of the many crypto-currencies that exist. Just as banks use ledgers to record financial transactions, crypto-currencies also use a ledger, but it is a decentralized one called the “blockchain”. The blockchain is a method by which crypto-currencies are verified. It records transactions on a published ledger that identifies the transactions, but does not identify those conducting the transactions.

[69] In about 2015 to early 2016, Mr. Hobbs describes that Vanbex began moving into the development side of crypto-currency and blockchain technology, and development of products in-house. By 2016, Mr. Hobbs considered Vanbex essentially a start-up technology company.

[70] By about mid-2016, Vanbex was seeking to develop two products called “Etherparty” and “Genisys”. In late September 2016, Vanbex hired Mr. Warner to build and develop a code for Genisys, which is a new blockchain technology. While there is some dispute over the position Mr. Warner held and the precise categorization of his employment relationship with Vanbex, there is no dispute that

he began working for Vanbex on October 1, 2016 and stopped working there on November 30, 2016. His job during this short period of time had been to perform research and develop Genisys.

[71] The circumstances surrounding Mr. Warner's cessation of employment at Vanbex are controversial and are matters that cannot, and need not, be resolved in this forum. Suffice it to say that Mr. Warner felt he was constructively dismissed because Vanbex did not honour the payment provisions of their agreement. Vanbex took the position that Mr. Warner did not perform the duties for which he had been hired and quit when pressed on the issue.

[72] Mr. Warner claims that following his alleged constructive dismissal, Ms. Cheng asked him to stay working at Vanbex and Mr. Hobbs expressed anger toward him when he refused to stay. He further claims that when he went to return some research materials and his Vanbex key fob, Mr. Hobbs threatened his livelihood by telling him that he "knew people" and that Mr. Warner would "never work again in Vancouver". Mr. Hobbs denies this occurred.

[73] On December 2, 2016, Mr. Warner commenced an action against Vanbex in the Provincial Court of British Columbia where he sought damages arising from breach of contract and payment of an unpaid invoice (the "Small Claims Action").

[74] After leaving Vanbex, Mr. Warner learned of some information regarding the company and Mr. Hobbs that, in conjunction with his experiences working at Vanbex, caused him to suspect Mr. Hobbs might be using Vanbex for criminal purposes. The information he discovered came from other Vanbex workers, the Canada Revenue Agency ("CRA") and his own online research of Mr. Hobbs.

[75] Specifically, Mr. Warner says that he learned other Vanbex workers had not been paid, either in whole or in part, just like him. He also says he learned in December 2016 that Vanbex had failed to remit all its employees' social security contributions, among "other anomalies within the CRA's jurisdiction", including that Vanbex had been "flagged multiple times for general compliance audits".

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[76] Mr. Warner deposes that he received this information from the CRA as a result of a call he made to Service Canada regarding his eligibility for employment insurance. This evidence is one area the plaintiffs identify as objectionable hearsay, but I accept that the evidence is not tendered for the truth of its contents; rather, it is important context tendered to explain why Mr. Warner decided to contact police. His communications to police are at the heart of this defamation action. I accept this evidence for that purpose only.

[77] Mr. Warner also discovered some information from an online search of Mr. Hobbs. From publically available documents, he learned that Mr. Hobbs had been convicted in Nova Scotia in 2008 for possession of property obtained by crime and laundering the proceeds of crime. He found an online news commentary where the author discussed this conviction and aspects of the court's reasons for judgment. He also found that Mr. Hobbs had been sentenced to nine months imprisonment, concurrent on each count, followed by two-years probation.

[78] Upon reading the Nova Scotia court's reasons for judgment on conviction, Mr. Warner learned that Mr. Hobbs had admitted to 2006/2007 felony drug and intimidation of a witness convictions in the United States, and been sentenced to one-year imprisonment, concurrent on each count. Upon reading the Nova Scotia court's reasons for judgment on sentence, Mr. Warner learned some information about Mr. Hobbs' employment history that seemed inconsistent with what he knew.

[79] Mr. Warner attached the court's reasons for judgment on sentence (*R. v. Hobbs*, 2008 NSSC 424) to his first affidavit. The plaintiffs object and argue the court's reasons are irrelevant to this application. To the extent that Mr. Warner seeks to rely on the information found in the reasons, I agree. To the extent that Mr. Warner adduces the reasons to show what he found in his online search as context, to explain why he decided to contact authorities, I find it admissible. It is admissible for that limited purpose and not for the truth of the information the reasons contain.

[80] Mr. Warner also found another sentencing decision from the Nova Scotia Supreme Court in 2009, where Mr. Hobbs was sentenced to 30 months

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imprisonment as a result of jury convictions for possession for the purpose of trafficking and unlawfully producing marihuana (*R. v. Hobbs*, 2009 NSSC 258). Notably, these convictions were set aside on appeal and a new trial ordered (*R. v. Hobbs*, 2010 NSCA 62). Mr. Warner testified that his online legal research at the time did not reveal the Nova Scotia Court of Appeal decision setting aside these convictions.

[81] Mr. Warner also found an online news article dated September 25, 2010 that discussed an assault perpetrated against Mr. Hobbs while he was incarcerated in Nova Scotia.

[82] On April 4, 2017, Mr. Warner, Ms. Cheng and Mr. Hobbs (along with counsel for Vanbex, Mr. Dixon) attended a settlement conference in the Small Claims Action. The settlement conference was unsuccessful.

[83] While there, Mr. Dixon gave Mr. Warner a "cease and desist" letter, demanding that he immediately stop making allegedly defamatory statements against Vanbex and Mr. Hobbs. The letter itemized ten instances of alleged defamatory statements arising from two different emails sent by Mr. Warner. The letter informed Mr. Warner that Vanbex would commence legal proceedings against him if the conduct described in the letter, or any similar conduct, did not stop. The statements outlined in this letter are not the subject matter of the within action.

[84] Later that same day, Mr. Warner emailed Mr. Dixon. After referencing a Law Society of British Columbia inquiry he had initiated against Mr. Dixon, Mr. Warner then offered to withdraw the Small Claims Action, withdraw the Law Society complaint and settle the Small Claims Action for an amount he proposed. No settlement occurred.

[85] Eight days later, Mr. Warner sent an email to the VPD.

[86] Mr. Warner deposes that based on all of the information that he had at the time, he became suspicious that Vanbex might be used for crime or a criminal purpose. He did not know precisely what the crime or criminal purpose was, but he

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suspected that it could be related to the illegal drug trade, money laundering or both, because of Mr. Hobbs' criminal history. He decided that he could not dismiss his suspicions, so he sent an email to his friend, Detective Constable Jordan Lennox, a member of the VPD's Organized Crime Section in the Gang Crime Unit (the "Police Tip"). Mr. Warner and Constable Lennox had previously served together in the same light infantry unit in the Canadian Armed Forces.

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[87] With the subject line "Shell Company", the Police Tip reads:

> Hey Jordan,
>
> I hope I catch you in good health and you're busy cleaning up the streets of the bad guys. I'm writing you in confidence.
>
> I was recently working for a company here in Vancouver that was purporting to be developing bitcoin/FinTech related technology. I was offered the position of Director of Engineering.
>
> When I got there I found it a bit unusual that as the Director of Engineering I had no engineers to direct, despite their having existed for several years prior. I also found it a tad odd that I didn't have a computer. There were no engineering notes, no product, nothing. Just the CEO's power point slides and his MBA buzz words.
>
> Over time I realized what was happening couldn't be dismissed as simple naivete on the part of the guy running the company, but there have been more going on. It appeared to be a shell company. But for what?
>
> The CEO, Kevin Patrick Hobbs, hadn't paid my bill, nor several other peoples'. He always had a story. Eventually I left, but that was when it got interesting. I did some research and what I found is significant:
>
> [link to online news article discussing the Nova Scotia court's rejection of Mr. Hobbs' evidence and convictions omitted]
>
> This led me to a bunch of other public records, including all of the enclosed. Your colleagues had him under surveillance prior to putting him in the slammer for 30 months for drug trafficking. They also found traces of cocaine on him at the airport.
>
> It could well be that this new company he's setup [Vanbex website link omitted] is just a mechanism for laundering drug money or some other nefarious purpose. He was, after all, busted in a hotel in NYC with about $180K USD in cash and you don't make that kind of money in a few days selling weed.
>
> Your people might want to look into him if they have the resources. I am available for interview and to provide any documentation or assistance that I can. My mobile is [content omitted for privacy].

[88] The “enclosed” documents Mr. Warner referenced in the body of the Police Tip were sent to Constable Lennox as email attachments. The attachments were:

1. *R. v. Hobbs*, 2008 NSSC 226;
2. Metronews article of July 17, 2008 entitled “Cash, Coke and Flop” testimony;
3. *R. v. Hobbs*, 2009 NSSC 258 (library heading);
4. *R. v. Hobbs*, 2008 NSSC 424;
5. *R. v. Hobbs*, 2009 NSSC 258 (oral reasons for sentence);
6. News 95.7 article of September 25, 2010 entitled “Melvin Jr. Hurls Shirt at Corrections Director, Throws Punches at Fellow Inmate”;
7. *Hobbs v. HMTQ* – Supreme Court of Canada case summaries; and
8. Letter from Student Systems and Records Supervisor, Douglas College Registrar’s Office dated April 10, 2017.

[89] On April 15, 2017, Constable Lennox replied to Mr. Warner via email. He wrote:

> Copy your message KIP. I’m going to be forwarding this email to the Drug section SERGEANT for his consideration.
>
> Cheers…. Jordan

[90] In or around May 2017, VPD officers from the Criminal Intelligence Unit, Organized Crime Section, spoke to Mr. Warner and met with him twice. From what they told him the second time they met, Mr. Warner understood they were not continuing with their investigation.

[91] Vanbex carried on its business after Mr. Warner’s departure on November 30, 2016. Its activities in 2017 included development of Etherparty (a “smart contract creator” that would run on the Ethererum blockchain), incorporation of Etherparty Smart Party Contracts Inc. (later renamed Vanbex Labs Inc.), a plan by Etherparty

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Smart Party Contracts Inc. to create a blockchain token called "FUEL" to be deployed on the Ethererum network, a pre-crowd sale of FUEL tokens, an initial coin offering ("ICO") of FUEL tokens and eventually the public trading of FUEL tokens on crypto-currency exchanges. Of course, as Mr. Warner was no longer with the company, he had no involvement in any of these or any other of Vanbex's activities following his departure.

[92] At some point after learning from the VPD that they were not continuing their investigation, Mr. Warner provided information to the BCSC about Vanbex and Mr. Hobbs. He first submitted an online tip, followed later by an in-person interview with a BCSC investigator and later yet a second in-person interview with a BCSC investigator and an RCMP officer. At some point prior to the second interview, Mr. Warner provided the BCSC with a number of documents. Other than the second in-person interview, which was recorded and a transcript produced, precisely when Mr. Warner had these other contacts with the BCSC is unclear. The second in-person interview occurred on August 28, 2018.

[93] Mr. Warner's online tip to the BCSC does not form part of the application record, nor do any of its details. Mr. Warner was unable to recall precisely when he submitted this tip, other than that it was in response to his learning about Vanbex's ICO, which he found suspicious. The ICO was in the fall of 2017. From this evidence and the timing of his later interactions with authorities, I can reasonably infer that Mr. Warner submitted the tip to the BCSC sometime between the fall of 2017 and early 2018.

[94] Mr. Warner's first interview with the BCSC does not form part of the application record, nor do any of its details. Mr. Warner was unable to recall precisely when this interview occurred.

[95] The documents Mr. Warner provided to the BCSC do not form part of the application record. Mr. Warner was unable to recall when he provided these documents, other than he believes it was about two months before his August 28, 2018 interview. Among the documents were an affidavit and an examination for

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discovery transcript from Mr. Hobbs in relation to other proceedings Mr. Hobbs brought against Mr. Warner.

[96] On July 5, 2018, the Small Claims Action went to trial and judgment was granted in favour of Mr. Warner. Damages were assessed in an amount lower than what Mr. Warner had claimed.

[97] During his August 28, 2018 interview with the BCSC investigator and RCMP officer, Mr. Warner answered questions in which he, among other things, repeated substantially the same information contained in the Police Tip. For example, he told investigators that he had been the director of engineering for Vanbex, yet did not have any engineers to direct, did not have a computer there, that the company did not have any engineering notes, schematics or books, and that it was just an empty office. He also told investigators that Mr. Hobbs and Ms. Cheng each held a 50% stake in the company and both made business decisions on a day-to-day basis, and that Vanbex was "basically just an alter ego" for them. Mr. Warner further told investigators that Vanbex did not pay other employees, was probably a shell company, was likely mixing personal and business money, was being sued by a former client, that Mr. Hobbs had fake educational credentials, criminal convictions, liked to drink and gamble and had "skipped out on payroll" when he went to Mexico in around November 2016.

[98] On March 14, 2019, the Director of Civil Forfeiture (the "Director") commenced the CF Action, seeking forfeiture of certain of Mr. Hobbs and Ms. Cheng's assets.

[99] This is a convenient point to discuss the admissibility, weight and use to be made of the material the parties have tendered from the CF Action. I have before me:

1. Notice of Civil Claim filed March 14, 2019 (attached to the affidavit of Mr. Hobbs);

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2. Response to Civil Claim filed April 3, 2019 (attached to the affidavit of Mr. Hobbs);

3. Notice of Application to Set Aside Interim Preservation Order filed by Mr. Hobbs and Ms. Cheng on April 29, 2019 (attached to the affidavit of Mr. Hobbs);

4. Affidavit #1 of Mr. Hobbs filed April 30, 2019 (attached to the affidavit of Mr. Hobbs and its contents "adopted as true" in the within application);

5. Affidavit of Ms. Cheng filed April 30, 2019 (attached to the affidavit of Mr. Hobbs because he had "adopted as true" the contents of this affidavit in his Affidavit #1. Ms. Cheng "adopted as true" the contents of the entire Response to Civil Claim at para. 3 of her affidavit);

6. Transcript of Proceedings in Chambers on March 14, 2019 before Justice Power;

7. Oral Reasons for Judgment by Justice Myers, indexed as *Director of Civil Forfeiture v. Hobbs*, 2019 BCSC 1344;

8. Affidavit #1 of Corporal Steve Johnson filed March 14, 2019 (tendered by Mr. Warner);

9. Affidavit #2 of Corporal James Laton filed May 23, 2018 (tendered by Mr. Warner).

[100] Of course, these are only some of the materials from the CF Action. Other than the affidavits of the two police officers, which I will address shortly, the parties agree that the pleadings, transcript and reasons for judgment are admissible, not for the truth of their contents, but for the purpose of establishing context, the timing of certain uncontroversial events and to show the nature of the Director's allegations against Mr. Hobbs and Ms. Cheng.

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[101] As will be evident in my analysis of the issues, the plaintiffs assert that the CF Action is harm caused by Mr. Warner's false statements to authorities. A central issue on this application is whether the plaintiffs have established a causal link between Mr. Warner's expressions to law enforcement personnel and the CF Action that is said to be harming them. The plaintiffs deny the Director's allegations, intend to vigorously defend the CF Action and are not seeking to litigate the CF Action in this forum, nor could they. Rather, they have adduced and rely on the pleadings and certain aspects of the other material from the CF Action to show that the Director's allegations in the CF Action are substantially the same as those made by Mr. Warner, particularly that Vanbex was a "shell company" and that the plaintiffs were engaged in illegal activity, which they argue demonstrates the causal link between the two. Of course, Mr. Warner takes the opposite view and says these materials demonstrate there is no causal link between his communications to authorities and the CF Action. In any event, no objection is taken to the admissibility of the pleadings, transcript and reasons for judgment, and there is no dispute about the limited use to which I may make of this material.

[102] The contents of the CF Action affidavits of Mr. Hobbs and Ms. Cheng have been adopted by Mr. Hobbs as true in the within application. Ms. Cheng's affidavit is not before me as her evidence on this application. She has chosen to tender no evidence on this application.

[103] The controversy in the CF Action material lies in the admissibility of, or alternatively the weight to be given to, the affidavits of the two police officers.

[104] Mr. Warner seeks to tender these affidavits not for the truth of their contents or as some attempt to litigate the merits of the CF Action, but rather to provide the full context of certain uncontroversial facts such as the nature, scope and timing of key events in the CF Action investigation, including facts with respect to the issue of causation.

[105] Mr. Hobbs and Vanbex take the position that these affidavits, as a whole, are inadmissible as hearsay evidence and/or because neither officer would make

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himself available for cross-examination pursuant to s. 9(5) of the *PPPA*, effectively depriving the plaintiffs of their right to test or elicit contextual evidence from the deponents. Alternatively, they submit the affidavits should be given little weight.

[106] Ms. Cheng takes the same position and emphasizes that these affidavits were filed in an interlocutory motion where the rules of evidence regarding hearsay do not apply as they do here, where a final order is being sought. She also submits that it would be inappropriate for the court to rely on these contested, untested affidavits outside of the context in which they were produced in the absence of a complete record from the CF Action proceedings.

[107] While some of the statements in the two affidavits are based on information and belief, in determining whether these statements are hearsay and therefore presumptively inadmissible, I must consider the purpose for which they are being tendered.

[108] Like the plaintiffs' reliance on certain materials from the CF Action, the defendant is not seeking to prove the truth of the contents of the impugned affidavits; this is not the civil forfeiture proceeding or a criminal proceeding. Rather, the defendant is relying on the affidavits for context, for the nature and scope of the Director's allegations and to respond to the plaintiffs' evidence about causation. As a result, on this basis alone, I see no reason to exclude the affidavits.

[109] In my view, the real issue (and counsels' ultimate focus) is the plaintiffs' inability to cross-examine the affiants. As I previously noted, s. 9(5) of the *PPPA* allows an applicant or respondent to cross-examine a witness on the witness' affidavit; leave of the court is not required.

[110] Counsel advised that Mr. Warner was unable to compel the officers, who cited the necessity of protecting the integrity of their ongoing investigation, to be cross-examined out of court as requested by the plaintiffs. The plaintiffs did not bring an application seeking to compel them to do so. The legislation does not address

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this unique scenario, nor have counsel identified any jurisprudence upon which the court might draw guidance.

[111] I am of the view that this issue is one of weight rather than admissibility. Again, these affidavits are not offered for the truth of their contents. There is no question that the evidence they contain is relevant for the purposes of context, determining the nature, scope and timing of key events in the CF Action and to respond to the plaintiffs' evidence on the issue of causation. There is also no question that a great deal of the information they contain is before me, without objection and relied upon by both parties, in the transcript of the Director's submissions from the *ex parte* hearing and in the reasons for judgment of Justice Meyers on the with-notice hearing.

[112] As well, I also note that it is not only the defendant that seeks to rely on certain aspects of these affidavits. The plaintiffs do as well.

[113] For example, the plaintiffs specifically rely upon paragraph 40 of Corporal Johnson's affidavit. This affidavit was filed by the Director in support of its *ex parte* interim preservation order application, and some of its contents the subject of submissions by counsel for the Director at the hearing. Paragraph 40 was <u>not</u> referenced by counsel for the Director at the application.

[114] At paragraph 40, Corporal Johnson deposes that Mr. Hobbs was found guilty of possession for the purposes of trafficking and unlawfully producing marihuana and was sentenced to 30 months in a federal institution. This was an error, as the officer neglected to include that this conviction was overturned on appeal and a new trial ordered. The plaintiffs rely on Corporal Johnson's error as demonstrative of the causal link between Mr. Warner's communications and the CF Action (and the harm caused by it) because Mr. Warner made the same error in the Police Tip.

[115] As another example, the plaintiffs point to paragraph 7 of Corporal Laton's affidavit where he identifies that the RCMP investigation arose from a tip from the BCSC in April 2018. The plaintiffs specifically identify this as part of the timeline of

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events supportive of their theory of causation. This is the same paragraph the defendant highlights as supportive of his position that causation has not been established.

[116] I also note that Mr. Hobbs, in his affidavit filed in the within application, has specifically adopted the contents of his first affidavit from the CF Action. In that affidavit, Mr. Hobbs responds to certain aspects of Corporal Johnson's affidavit. Those portions of Corporal Johnson's affidavit are necessary for me to understand the context of Mr. Hobbs' evidence.

[117] All of this to say that, despite the plaintiffs' objections to the admissibility of these affidavits, it seems clear that they are relying on certain portions of them as well. It cannot be the case that the plaintiffs are permitted to introduce these matters, introduce their own affidavits (which include responses to aspects of one of the affidavits at issue), rely upon certain discrete aspects of the two affidavits at issue that may assist them on the issue of causation and then object to the admissibility of those very affidavits when Mr. Warner seeks to put them before the court for complete context and as a response on the issue of causation. In these circumstances, to not have all of the relevant context before the court would present a very one-sided picture of the Director's allegations and responses to those allegations, to the prejudice of Mr. Warner.

[118] Given the limited purpose for which they, along with all of the other materials from the CF Action, have been tendered and the relevance of the affidavits to the issues at bar, it seems clear that the issue here really lies in the plaintiffs' alternative argument - the weight to be given them.

[119] The legislature intended for applications under the *PPPA* to be screening applications, decided on the basis of affidavit evidence upon which the affiant could be subject to cross-examination outside of court, without leave of the court. The plaintiffs asked the defendant to produce the officers for cross-examination before the hearing, but the officers declined for the reasons I have explained.

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[120] The purpose of cross-examination is to test the deponent's credibility, the reliability of his or her evidence and to elicit evidence that would assist in determining the issues material to the application. That the legislature intended for cross-examination under s. 9(5) to be focussed on issues material to the application is evident from the time restrictions it imposed. While refusal to submit to cross-examination in other circumstances may lead to an inference that the affiant's evidence is unreliable, the refusals of Corporal Laton and Corporal Johnson, in the unique circumstances of this application, does not lead to the same conclusion. These officers provided their evidence in the context of another case, where their criminal investigation is ongoing. They did not prepare these affidavits for use in this application and I accept the explanation counsel has provided that their refusal is grounded in the legitimate and necessary goal of protecting the integrity of their ongoing investigation.

[121] That being said, the right to cross-examine affiants under s. 9(5) of the *PPPA* must be taken into account. While a refusal to submit to cross-examination in these circumstances should not result in the affidavits being inadmissible, it should go to weight. An application under s. 4 allows a defendant to have a proceeding dismissed before all of the evidence has been put forward and before each party has presented a fully-developed case. In light of this and the procedure provided by s. 9(5), I am of the view that where a party seeks to test an affidavit through cross-examination and is denied that opportunity, that untested affidavit should be given less weight than one in which an affiant has undergone cross-examination.

[122] Returning to the narrative.

[123] On the same day the Director commenced the CF Action, he also applied, without notice, for an interim preservation order pursuant to s. 9 of the *CFA* in respect of luxury properties, luxury vehicles and bank accounts owned by Mr. Hobbs and Ms. Cheng. Referencing an ongoing "fairly sophisticated and large scale investor fraud" investigation by the RCMP's Federal Serious Organized Crime

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Section ("FSOC"), counsel for the Director made submissions in favour of such an order in front of Justice Power that same day.

[124] Counsel for the Director described that the Director was seeking forfeiture of these assets on the basis that they were both instruments and proceeds of the unlawful activities of possession of proceeds of crime, money laundering, committing fraud over $5,000 and failure to declare taxable income. He summarized the basis for seeking the preservation order in these terms:

> So the – the circumstance of the fraud though is – is somewhat complicated. Ms. Cheng and Mr. Hobbs have jointly been the sole directors, shareholders, and officers of a number of companies. Those companies are all related companies. They're engaged in the – the crypto-currency market. The principal company that has been engaged in this fraud has been Vanbex Brew Inc. This is set out in the affidavit of – of Mr. – of Corporal Johnson at paragraph 15, that's Tab 2 of the chambers record.
>
> And what Vanbex is – is some sort of a crypto-currency firm where it has a bunch of different companies, Etherparty, it has Vanbex Labs, Inc., Genesis Ventures. And essentially, what it did is – it's akin to a securities initial public offering. In the crypto-currency world, it's referred to as an initial coin offering, sort of, capitalizing on the bitcoin piece. And what they did is they engaged upon this initial coin offering and launched a crypto-currency coin called the "Fuel Token". This is paragraph 210 of Corporal Johnson's affidavit.
>
> They marketed and promoted the sale of this token and generated sales, and therefore, revenue for Vanbex which the Director alleges they converted into their personal properties, both the real estate, the vehicles, and the bank account. And this fuel token was effectively marketed as a security, but it is not regulated by the BC Securities Commission because it's not a security. It's just akin to it given the nature of crypto-currency.
>
> Paragraph 21 of the affidavit, Corporal [Johnson] deposes to Vanbex, in fact, never launching this smart contract system which included this fuel token and indicating that it raised millions of dollars over the course of several months in 2017. In fact, if you look further down the affidavit at paragraph 24, the way the fundraising model worked, there is an initial presale of these fuel tokens. That raised in September of 2017 about $25 million USD. The effect of this, of course, was that, ultimately, in paragraph 32 of the au – of the officer's affidavit sets this out – a summary, about 30 to $50 million was raised in this initial coin offering.
>
> But concurrent with this Mr. Hobbs and Ms. Cheng did the following things: They purchased the subject property, the townhouse, which is presently listed for over $7 million. They purchased it for $4.1 million. They purchased this 2017 Range Rover which is the subject of – a claim by the Director. They also purchased real property on Bay Street for just under $4 million in cash. Leased – that's not, obviously, the subject of the Director's

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> claim because it's outside the provincial jurisdiction. They leased a 2018 Lamborghini for – with a $500,000 value. They purchased the 2018 Range Rover.
>
> And then there's a significant history within the BC Lottery's Commission of gambling. And in fact, Mr. Hobbs was denied access to – to gambling as a consequence of the nature of his gambling activities. And again, I will take Your Ladyship to the evidence with respect to that. He was, ultimately, put on a watch list from the BC Lottery's Commission and, as I say, denied access. Paragraph 34 of the affidavit of Corporal Johnson deposes to that taking place on November 27th of 2017. And that was predicated upon a period of just about seven months or so, between September of 2016 and March of 2018 where casino disbursements for Mr. Hobbs totalled just shy of $2 million.
>
> Ultimately, the FIN – the FINTRAC is a – the financial tracking and organization that takes a look at how money laundering – or it identified potential money laundering activities. There are FINTRAC reports that are attached here. And I'll – if you're agreeable, I'll walk with Your Ladyship through the evidence of the corporal and then we can take a look through the FINTRAC reporting.
>
> What it will show, essentially, is that Vanbex Group – I'm just generally describing all of these companies that were engaged as part of – what we say is this – this fraud, raised funds. Funds were deposited directly into Vanbex accounts, but also directly into Mr. Hobbs' accounts on account of this fundraising ISO, the initial coin offering for the fuel token and so on. So the – the fundamental claim of the Director, of course, is that they have misappropriated these funds. They've perpetrated a fraud upon all these investors and they've done so for their own personal benefit gaining these various assets. And concurrent with that, they've been engaged in a – well, it's only Mr. Hobbs whose been found in the casinos who's been engaged in this high-risk gambling.

[125] Justice Power granted the order, with liberty to apply to set it aside on 48 hours notice (the "*Ex Parte* Order"). Justice Power was not called upon to make any findings of fact or make any determinations on the merits. She needed only to be satisfied of the low threshold questions set out in the legislation.

[126] Later, by consent, the *Ex-Parte* Order was extended until the Director's with-notice application for an interim preservation order under s. 8 of the *CFA* could be brought and determined.

[127] News about the CF Action broke on April 1, 2019.

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[128] The Vancouver Sun ran an article entitled "Civil Forfeiture Office Seeks Assets Linked to Alleged $30 Million Crypto-Currency Scam". The article identified Mr. Hobbs and Ms. Cheng as the subjects of the lawsuit and outlined some of the details alleged by the Director's pleadings. Among those details, the article reported that Mr. Hobbs and Ms. Cheng (and their companies) were the subject of an RCMP FSOC investigation, as well as a CRA investigation. The article further outlined that the Director alleged that their companies, Vanbex and Etherparty Smart Contracts Inc.:

> …launched a crypto-currency coin called a FUEL token for which they raised money from investors by 'deceit, falsehood or fraudulent means'… they raised more than $30 million by falsely representing corporate investment opportunities… knowing that they did not intend to use the invested funds to develop products they were marketing but rather with intention to misappropriate the corporately invested funds raised for their own personal benefit.

[129] The Vancouver Sun article also discussed the assets alleged to be proceeds of crime (a Coal Harbour townhouse purchased by Mr. Hobbs and Ms. Cheng for $4.1 million in cash, two Range Rover SUVs and funds in a bank account), as well as allegations that Mr. Hobbs used misappropriated funds to buy a Bay Street apartment in Toronto for just under $3.74 million, to purchase a three-year lease for a luxury vehicle and to gamble $1.82 million between late 2016 and March 2018. The article went on to outline the Director's further allegations that Mr. Hobbs and Ms. Cheng began to liquidate their assets when they learned of the investigation. It also outlined Mr. Hobbs' criminal history.

[130] Also on April 1, 2019, Business in Vancouver ran an article entitled "Company Behind Canada's Largest Crypto-Currency Offering Hit by Fraud Allegations". The articled outlined some of the same details as above. In the article synopsis, the author wrote:

> What Happened: Court documents alleged that money from up to $33 million raised in Canada's crypto-currency offering was fraudulently used to finance gambling, the lease of a Lamborghini and the purchase of multimillion dollar condos.
>
> What it means: Investors lost millions of dollars by investing in a crypto currency that court documents say has become virtually worthless.

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[131] This article also discussed Ms. Cheng's and Mr. Hobbs' denials of the charges and that they attributed the false claims against them to a "former contractor".

[132] On or about April 2, 2019, Vanbex issued a news release on the Etherparty sub-Reddit entitled an "Official Response to Civil Claims". It reads, in part:

> Recently, a disgruntled former worker for Vanbex has made false, damaging claims against the company and its founders, justifiably, several government agencies have been required to investigate. We support these investigations, and have been fully cooperating with their representatives for several months now. We will continue to do so until they reach their conclusion.
>
> …
>
> The core allegation is that Vanbex's business is a fraud - a shell company with no real product under development. This is completely untrue, and an insult to the hard work of the software developers, marketing experts, and other professionals who are working hard to build the future of blockchain, each and every day. It is completely inconsistent with ascertainable facts.
>
> …

[133] Mr. Hobbs and Ms. Cheng filed their application to set aside the *Ex Parte* Order on April 29, 2019.

[134] The plaintiffs commenced the within defamation action against Mr. Warner on May 1, 2019. That same day, Vanbex issued a news release about the within action, which was shared on social media and crypto-currency industry websites. Through at least one online news story, the reader could access the publicly available Notice of Civil Claim through a hyperlinked word "lawsuit" in the first line of the news release. The news release places the blame for the CF Action, at least in "large part", on Mr. Warner's Police Tip.

[135] Mr. Warner filed his application seeking dismissal of the within action under s. 4 of the *PPPA* on May 14, 2019.

[136] Meanwhile, the litigation in the CF Action continued. The Director's with-notice application for an interim preservation order and Mr. Hobbs' and Ms. Chengs'

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application to set aside the *Ex Parte* Order was heard by Justice Myers on May 30 and 31, 2019.

[137] In reasons delivered on June 19, 2019, Justice Myers granted the interim preservation order and dismissed Mr. Hobbs' and Ms. Cheng's application to set aside the *Ex-Parte* Order. In so doing, the court found the Director had established a serious case to be tried and that the defendants had not shown that it was clearly not in the interests of justice to continue the interim preservation order. In his analysis, Justice Myers was clear that he was conducting only a preliminary review of the merits of the case and was not engaging in an exercise of preferring evidence or making findings of fact.

[138] In considering whether the Director had established a serious question to be tried, Justice Myers summarized the Director's allegations and position as put forward at the hearing in the following terms:

> [13] Mr. Hobbs and Ms. Cheng are the principals of Vanbex Group Inc.("Vanbex") and Vanbex Labs Inc. (formerly known as Etherparty Smart Contracts Inc.) Vanbex conducts business under Etherparty, Vanbex Ventures Inc., Vanbex Cares Foundation, Genisys Ventures Inc., and Vanbex Labs Inc.
>
> [14] In September and October 2017, Vanbex launched a cryptocurrency coin called the FUEL token and sold it to the public through an Initial Coin Offering ("ICO"). The ICO generated in excess of US$30 million. The public paid for their FUEL tokens largely by Bitcoin.
>
> [15] Stating it at its most general level, the Director claims that the defendants, through Vanbex, marketed the sale of the tokens, generated revenue for Vanbex, and then converted this directly to their personal bank accounts. They then used the funds to buy personal assets including a condominium in Toronto and two high-end cars.
>
> [16] The Director alleges the following offences:
>
> a) Fraud over $5,000 contrary to s. 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46;
>
> b) Affecting market price of anything offered for sale to the public contrary to s. 380(2) of the *Criminal Code*;
>
> c) Failure to declare taxable income contrary to the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.); and
>
> d) Laundering the proceeds of crime contrary to s. 462.31 of the *Criminal Code*.

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[17] The alleged fraudulent acts involve the marketing and sale of the tokens (which I will refer to as the "front-end" of the alleged wrongs) and the siphoning of cash from the company to the personal benefit of Hobbs and Chen (which I will refer to as the "back-end"). The use of the funds is also the subject of the alleged *Income Tax Act* offence. At the hearing in front of me, the Director focussed on back end. I will deal with that first.

[18] The RCMP investigation disclosed a series of transactions in which Bitcoin was converted by Etherparty into U.S. currency through a US cryptocurrency company, Cumberland Mining and Minerals, LLC, and then money was transferred by Etherparty to Hobbs and Cheng. For example:

a. August 17, 2017 Etherparty Inc. received its first ICO pre-sale contribution reported to FINTRAC (Exhibit "B" page 36);

b. August 21, 2017 Etherparty Inc. received US$200,000 from Cumberland (Exhibit "B" page 36);

c. August 29, 2017 Etherparty Inc. received US$500,341 from Cumberland (Exhibit "B" page 36);

d. September 1, 2017 Etherparty Inc. received US$1,000,000 from Cumberland (Exhibit "B" page 36);

e. October 10, 2017 Mr. Hobbs received US$200,000 from Cumberland (Exhibit "B" page 10);

f. November 21, 2017 Mr. Hobbs received US$150,000 from Cumberland (Exhibit "B" page 10);

g. November 27, 2017 Mr. Hobbs received US$500,000 from Cumberland (Exhibit "B" page 10);

h. November 30, 2017 Etherparty Inc. received $500,000 from Cumberland (Exhibit "B" page 36);

i. December 1, 2017 Mr. Hobbs received US$500,000 from Cumberland (Exhibit "B" page 10); and

j. December 4, 2017 Mr. Hobbs received US$2,000,000 from Cumberland (Exhibit "B" page 10).

[19] In December 8, 2017 Hobbs and Cheng purchased the Real Property (a condominium in Coal Harbour) for CDN$4.1 million in cash. The day prior to that, Hobbs withdrew over $4.1 million of the Cumberland transactions from his personal accounts.

[20] At the same time and shortly after, Mr. Hobbs made the following purchases:

a) On or about February 16, 2018 Mr. Hobbs purchased a 2017 Range Rover SV with an estimated retail value of CDN$178,703 to CDN$187,089 (one of the Vehicles referred to in the style of cause);

b) On March 2, 2018 Mr. Hobbs purchased real property at 5204 – 311 Bay Street, Toronto, Ontario for CDN$3,738,053 in cash; and

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> c) On or about April 21, 2018 Mr. Hobbs purchased a 2018 Range Rover with an estimated retail value of $122,935 to $129,485 (the other Vehicle referred to in the style of cause).

[21] A mortgage was registered on the Bay Street property in the amount of CDN$2,250,000 on February 25, 2019. Mr. Hobbs and Ms. Cheng also mortgaged the Real Property on December 20, 2018. The Director draws the inference that some or all of the proceeds of these financings form the Bank Funds held at the Bank of Montreal, which are captured by the current IPO. I draw the same inference.

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[22] The RCMP investigator deposes that Mr. Hobbs apparently had no substantial wealth or assets prior to the ICO. As of September 29, 2017 Mr. Hobbs had only CDN$15,122.99 in his personal bank accounts. Ms. Cheng does not appear to have any active personal Canadian bank accounts. Mr. Hobbs lives in a residence owned by Ms. Cheng's parents.

[23] Section 380 of the *Criminal Code* sets out the offence of fraud:

> 380(1) Every one who, by deceit, falsehood ***or other fraudulent means***, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,
>
> > (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars […]
>
> [Emphasis added.]

[24] The Director relies on fraud by "other fraudulent means". He argues that the taking of funds from the company was done without authorisation and for no proper corporate purpose. He relies on *R v. Zlatic*, [1993] 2 S.C.R. 29, which dealt with this aspect of fraud. The court noted (cited to 1993 CarswellQue 6):

> **Fraud by "Other Fraudulent Means"**
>
> 18 … Most frauds continue to involve either deceit or falsehood. As is pointed out in Théroux, proof of deceit or falsehood is sufficient to establish the *actus reus* of fraud; no further proof of dishonest action is needed. However, the third category of "other fraudulent means" has been used to support convictions in a number of situations where deceit or falsehood cannot be shown. These situations include, to date, the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property. [citations eliminated]

> 19 The fundamental question in determining the actus reus of fraud within the third head of the offence of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest: *Olan*, supra. In determining this, one applies a standard of the reasonable person. Would the reasonable person stigmatize what was done as dishonest?...
>
> 21 Appellate courts have followed the same approach, asking whether the diversion of funds at issue could reasonably be thought to serve personal rather than bona fide business ends….

…

[29] Turning back to the substance of the alleged offence of fraud by other fraudulent means, the Director argues that the unauthorised taking of funds from the company in and of itself amounted to fraud. As mentioned in *Zlatic*, the taking of funds without a proper corporate purpose can constitute fraud by dishonest means. The unusual feature of this case is that the defendants owned the shares of the company, which was a private corporation. The Director goes further: he also argues that the purchasers of the tokens had an expectation that the purchase funds would be used for *bone fide* corporate purposes. He notes the following statement from the white paper, which was used to promote the ICO:

> The ICO will allow us to hire new talent, pay for marketing, as well as for business and product development so that we can be the first to market with a smart contract platform that anyone can use.

[139] Justice Myers summarized the position of Mr. Hobbs and Ms. Cheng as put forward at the hearing in the following terms:

> [25] The defendants argue that the evidence is entirely speculative. It is true that the evidence is circumstantial, but the courts are permitted to draw inferences and this is especially so with respect to an ITO that is determined on the low standard of an arguable case.
>
> [26] Given the timing of the various transfers and the amounts involved it is reasonable to draw the inference that the funds that made their way to Hobbs and Cheng came from the coin offering and the company and that the funds were used to purchase the assets sought to be attached. With resect to taking the funds without authorisation, the former CFO stated that he discovered the funds had been withdrawn and he booked it as a shareholder's loan. The defendants argue that lends the transaction some legitimacy. However, an ex *post facto* accounting treatment is not an authorisation.
>
> [27] Hobbs and Cheng swore affidavits. They did not attempt to explain the source of the funds or offer evidence that the corporation authorised their withdrawal. However, they did make broad denials of having committed any fraud or of misusing corporate funds.

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[140] After consideration of the jurisprudence and the evidence described above, the court concluded that the Director had made out a serious case to be tried for fraud by other means, and had also made out a serious case to be tried that the assets sought to be preserved by the application are the proceeds of that alleged crime: para. 31.

[141] Justice Myers then turned to consider the interests of justice aspect of the test for an interim preservation order. He noted that the thrust of the defendants' oral submissions on this topic focussed on their allegation that the Director had failed to make full and frank disclosure at the *ex-parte* hearing. Mr. Hobbs and Ms. Cheng argued that Justice Power was misled about, among other things, Mr. Hobbs' criminal record because the affidavit that had been filed in support of the application referred to a drug conviction, but failed to mention that the conviction had been overturned on appeal. They also argued that the Director's pleadings inaccurately referred to Vanbex as a shell company. Justice Myers found the former to be an honest mistake (the officer provided an affidavit to that effect). With respect to the latter, he found that the duty of full and frank disclosure does not extend to pleadings and that, in any event, the case before Justice Power on the *ex-parte* hearing was not presented on the basis that Vanbex was a shell company.

[142] Although Justice Myers found that disclosure at the *ex-parte* hearing was not perfect, he ultimately concluded that the defendants had failed to demonstrate that the seizure is clearly not within the interests of justice: para. 62. Again, as the plaintiffs emphasize, Justice Myers was not called upon to make any findings of fact or decide the issues in the CF Action. There are no conclusions to be drawn from the continuation of the interim preservation order other than that the Director demonstrated a low threshold of a case to be tried and the defendants were not able to meet the hurdle of demonstrating that it was clearly not in the interest of justice.

[143] I heard Mr. Warner's application to dismiss the within action over six days in July and August 2019.

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ANALYSIS

The Threshold Hurdle

[144] The expressions at issue in this proceeding involve Mr. Warner's communication of information about suspected criminal activity to law enforcement personnel. The plaintiffs appropriately concede that the defendant has established that this proceeding involves expressions made by the defendant that relate to a matter of public interest.

[145] The Police Tip and Mr. Warner's later statements to BCSC/RCMP investigators are expressions because they were communications directed to law enforcement. They are expressions that relate to matters of public interest because they were about a suspected crime or crimes.

[146] I agree with the defendant's submission that communications about suspected crimes should, like matters such as the operation of the courts and government affairs, inevitably be characterized as matters relating to the public interest. However, even if such a characterization should not be inevitable, I am of the view that the content of Mr. Warner's expressions, as they relate to suspicions of drug crime and money laundering in the crypto-currency industry, makes them matters relating to the public interest.

[147] Now that the defendant has cleared the threshold hurdle, the onus shifts to the plaintiffs.

The Merits-Based Hurdle

[148] Again, the merits-based hurdle has two aspects. The plaintiff must establish that there are grounds to believe the proceedings have substantial merit and must establish that there are grounds to believe the defendant has no valid defence.

Grounds to Believe the Proceedings Have Substantial Merit

[149] The plaintiffs are required to establish reasonable grounds to believe there is substantial merit on the three main elements of the test for defamation:

1. that the impugned words were defamatory, in the sense that they would tend to lower the plaintiffs' reputations in the eyes of a reasonable person;
2. that the words in fact referred to the plaintiffs; and
3. that the words were published, meaning that they were communicated to at least one person other than the plaintiffs.

Grant at para. 28

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[150] As many authorities recognize, the establishment of these criteria is not an onerous task and most defamation cases tend to focus on defences. Before consideration of any defences, I am satisfied the plaintiffs have established reasonable grounds to believe the proceeding has substantial merit. In other words, before consideration of any defences, I am satisfied that they have established a legally tenable claim supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success.

[151] First, I am satisfied that the plaintiffs have established reasonable grounds to believe the impugned words are defamatory.

[152] The test for whether an expression is defamatory is objective. An expression will be defamatory when it has the tendency to lower a person's reputation in the estimation of ordinary, reasonable members of society generally, or to expose a person to hatred, contempt or ridicule: *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067 at 1079. Several authorities have recognized that expressions alleging, even by implication or insinuation, criminal conduct are "extremely serious and damaging to a person's reputation" and are defamatory: *Mann v. International Association of Machinists and Aerospace Workers et al.*, 2012 BCSC 181 at para. 73. The expressions in this case would fall into such a category.

[153] With regard to the second part of the test for defamation – that the words referred to the plaintiffs – Mr. Warner concedes that Mr. Hobbs and Vanbex have established reasonable grounds to believe there is substantial merit that the words in

the expressions in fact referred to them, but he makes no such concession with respect to Ms. Cheng.

[154] Mr. Warner submits that the Police Tip does not refer to Ms. Cheng, either directly by name or even by implication. He argues that she has failed to adduce any evidence that could show any alleged defamatory statements made by him actually referred to her or that an ordinary person would understand the expressions referred to her. Further, Mr. Warner says that Mr. Hobbs' evidence on this topic is inadmissible as it is "unsupported opinion that anyone would automatically assume Ms. Cheng was implicated in potentially criminal activity by him and/or Vanbex".

[155] Ms. Cheng takes the position that there is admissible evidence in the record from which a reasonable person could conclude there are reasonable grounds to believe the expressions at issue concern her. She points to evidence contained in Mr. Hobbs' affidavit that she and Mr. Hobbs have run Vanbex together since 2015, that they are the officers, directors and sole shareholders and are, in effect, the operating minds of the company. She also points to Mr. Warner's own description of Vanbex when interviewed by a representative of the BCSC where he referred to Vanbex as their [Hobbs and Cheng's] "alter-ego".

[156] A defamatory statement is required to refer to - or be published of and concerning - the plaintiff. The question is considered from the perspective of the ordinary person. A statement that does not refer to a plaintiff by name will still meet this requirement if it may reasonably be found to refer to the plaintiff in light of the surrounding circumstances. A plaintiff must establish that the statement would lead reasonable people acquainted with the plaintiff to the conclusion that the statement refers to the plaintiff: *Mainstream Canada v. Staniford*, 2012 BCSC 1433 at paras. 124-125; rev'd on other grounds, 2013 BCCA 341.

[157] As well, in some circumstances, defamatory statements about a group may be defamatory of the group's individual members, even though they are not identified by name. The question remains whether the expression at issue about a group could reasonably be found to be defamatory of individual members of the

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group: *Butler v. Southam Inc.*, 2001 NSCA 121 at paras. 49 and 53. In *Bou Malhab v. Diffusion Metromedia CMR Inc.*, 2011 SCC 9, Deschamps, J. (for the majority) provided guidance on this issue by outlining a number of factors for courts to consider. Justice Adair summarized these factors in *Mainstream Canada* at para. 128 as follows:

> [128] The factors described by Deschamps J. are as follows (see *Bou Malhab*, at paras. 58-78): (a) the size of the group; (b) the nature of the group; (c) the plaintiff's relationship with the group; (d) the real target of the defamation; (e) the seriousness of the allegations; (f) the plausibility of the comments; and (g) extrinsic factors. The list is not exhaustive, and no one factor is determinative on its own.

[158] As with all aspects of this application, it is important to remember that this is not a trial. It is a screening process. I am satisfied that there is evidence in the record before me that would lead a reasonable person acquainted with Ms. Cheng to the conclusion that the expressions at issue refer to Ms. Cheng. In other words, I am satisfied that the expressions at issue may reasonably be found to refer to Ms. Cheng in light of the surrounding circumstances.

[159] Mr. Warner's allegations of criminal activity were directed at Mr. Hobbs and at Vanbex. Since 2015, Mr. Hobbs and Ms. Cheng ran Vanbex together. They were its officers, directors and majority shareholders at the relevant times. In other words, the group running Vanbex was very small. Mr. Warner had a close, albeit brief, relationship with the group, as he worked at the company for a time. When he describes his suspicion that Vanbex may be a shell company used for illegal purposes, it is reasonable to conclude that he was targeting the people running the company – not only Mr. Hobbs, but Ms. Cheng as well. As a person who worked there, Mr. Warner had knowledge of the structure of the company at the time he provided information alleging potential criminality. Indeed, in his later statements to the BCSC and RCMP, Mr. Warner specifically referred to Ms. Cheng and Mr. Hobbs having an equal ownership in the company and sharing the business of running its day-to-day operations. In these circumstances, I am satisfied that the expressions complained of could reasonably be seen to be of and concerning not only Mr. Hobbs

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and Vanbex, but Ms. Cheng as well. Those expressions would tend to lower all of the plaintiffs' personal and corporate reputations in the eyes of a reasonable person.

[160] Overall, on the second aspect of the test, I am satisfied that all three plaintiffs have established reasonable grounds to believe there is substantial merit that the words in the expressions in fact referred to them.

[161] With regard to the third aspect of the defamation test, the defendant appropriately concedes that the plaintiffs have established there are reasonable grounds to believe the Police Tip and later statements made to and recorded by representatives of the BCSC and the RCMP were "published".

[162] Overall, I am satisfied the plaintiffs have discharged their burden on the first part of the merits-based hurdle. They have demonstrated that their claim is legally tenable and that it is supported by evidence that could reasonably lead a trier to conclude that their claim against Mr. Warner, before consideration of any defences, has a real chance of success.

[163] The next step is, of course, to consider defences.

Grounds to Believe the Defendant Has No Valid Defence

[164] This step drew much of counsel's focus. Again, it requires the plaintiffs to satisfy the court that there are reasonable grounds to believe the defendant has no valid defences.

[165] In defamation actions, the expressions alleged to be defamatory are presumed to be false and the burden is on the defendant to either show that the statements were true or that a defence, such as qualified privilege, applies: *R. v. Dhillon*, 2014 BCSC 1986 at para. 18.

[166] Although the plaintiffs bear the ultimate burden on this part of the test, Mr. Warner first bears an evidentiary burden to advance any proposed defences. He has not filed a Response to Civil Claim, so it is through his application materials that he has put two defences "in play" - the statutory prohibition against civil liability for

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police informants created by s. 462.47 of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46, and the defence of qualified privilege.

[167] For the purposes of this application, I will consider only the latter of these. Section 462.47 of the *Criminal Code* has not been considered in the civil context as a defence to defamation, so Mr. Warner's argument is a novel one. Given the absence of any developed or meaningful submissions on its application to this case, it would be imprudent to consider it here. As counsel's focus was firmly on the defence of qualified privilege, so too will be the court's.

[168] The British Columbia Court of Appeal recently discussed the defence of qualified privilege in the context of a police complaint in *Caron v. A*. 2015 BCCA 47. The Court held:

> [15] Qualified privilege applies when there is a "duty, legal, social or moral, to publish the matter complained of to persons with a corresponding duty or interest to receive it": *Pressler v. Lethbridge* (2000), 86 B.C.L.R. (3d) 257 at 296 (C.A). The legal effect of the defence of qualified privilege is to "rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. . . . However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 144. In short, where there is a public or shared interest in support of the statement both being made and received, a defendant cannot be held to have defamed a plaintiff unless the plaintiff can show that the defendant made the alleged publication for a malicious purpose.

[169] I am satisfied that there are grounds to believe that the expressions at issue were made on occasions of qualified privilege. The plaintiffs do not argue otherwise, but say that the privilege is defeated in this case because they have established reasonable grounds to believe that Mr. Warner made the publication for a malicious purpose.

[170] "Malice" in this context means much more than having negative feelings or animosity toward a person. Our Court of Appeal discussed the elements of malice in this context in *Smith v. Cross*, 2009 BCCA 529:

> [30] The defence of qualified privilege can be defeated by a finding of malice on the part of the defendant or by a finding that the limits of the privilege were exceeded. Malice in this sense is also called "express malice"

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> or "malice in fact" to differentiate it from the legal malice assumed by the very publication of defamatory comments (Brown, *The Law of Defamation in Canada*, looseleaf, 2nd ed. (Toronto: Carswell, 1999 at 16.2(1))).
>
> …
>
> [32] The term "malice" is more expansive than the everyday meaning of a desire to harm another. Brown at 16.3(2) suggests the alternate language of "bad faith". This Court summarized the definition in *Creative Salmon* at para. 37:
>
> > In *Botiuk* at para. 79, malice was defined to include "ill will" and "any indirect motive which conflicts with the sense of duty created by the occasion [in the case of qualified privilege]". The definition of malice stated by Mr. Justice Dickson in *Cherneskey* at 1099, and adopted by Mr. Justice LeBel in *WIC Radio* at para. 102, includes "spite or ill will" and "any indirect motive or ulterior purpose".
>
> [33] The Supreme Court of Canada summarized the law of malice and qualified privilege in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 at para. 145:
>
> > Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey, supra*, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin, supra*, at pp. 323-24, and *Netupsky v. Craig*, [1973] S.C.R. 55, at pp. 61-62.
>
> [34] In *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 299, R.D. McConchie and D.A. Potts reduce this statement to a helpful framework for the categories under which a finding of malice can be made. A defendant is actuated by malice if he or she publishes the comment:
>
> > i) Knowing it was false; *or*
> >
> > ii) With reckless indifference whether it is true or false; *or*
> >
> > iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; *or*
> >
> > iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.
>
> More than one finding can be present in a given case (McConchie and Potts at 299).

[171] Evidence of malice may be extrinsic (evidence other than the statements from which improper motive can be inferred) or intrinsic (found within the defamatory

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expressions themselves). When considering extrinsic evidence said to relate to malice, the court may look at conduct of the defendant throughout the course of events both before and after the defamatory publication, including:

a) his or her relationship with the plaintiff;

b) personal motivation;

c) the emotional state in which the publication was made;

d) any repetition or republication of the same or comparable defamatory remarks;

e) the circumstances surrounding the investigation into or verification of the accuracy of the charges;

f) the conduct of the defence to the action; and

g) whether there has been a correction of charges that have later been found to be false.

Wang v. British Columbia Medical Association, 2011 BCSC 1658 at para. 32, citing Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States,* 2d ed. (Toronto: Thomson Rueters Canada Limited, 1999), ch. 16 at 86 to 89.

[172] The plaintiffs submit that they have led evidence upon which a trier of fact could infer that Mr. Warner was actuated by malice when he sent the Police Tip and later provided information to the BCSC and RCMP. Specifically, at para. 109 of the written submissions of Vanbex and Mr. Hobbs, they point to the following:

> 109. In the present case, the Plaintiffs have led evidence upon which a trier of fact could infer that Mr. Warner was actuated by malice when he made his reports to the VPD and RCMP, including:
>
> (a) Mr. Warner ceased working for Vanbex due to a fee dispute and following a heated discussion with Mr. Hobbs, from which Mr. Warner seems to believe Mr. Hobbs threatened his livelihood (which is denied);

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(b) After Mr. Warner left Vanbex, he sued Vanbex and received only the amount Mr. Hobbs said he would pay once properly invoiced. Mr. Warner lost on his other claims;

(c) Mr. Warner did not raise any concerns with anyone at Vanbex, or with the VPD or RCMP, until after he did not receive the amount he claimed at an unsuccessful conference of his Small Claim proceeding;

(d) The VPD email goes well beyond what a "concerned citizen" acting reasonably would do, with unfounded speculation that the Plaintiffs were involved in money laundering, the illegal drug trade, or both;

(e) in Mr. Warner's email to the VPD, he did not include a copy of the Nova Scotia Court of Appeal decision overturning one of Mr. Hobbs' criminal convictions, despite the decision being available on CanLII;

> Warner Cross (August 2, 2019) at p. 34, lines 13-47 and p. 37, lines 9-41.

(f) Contrary to Mr. Warner's claim that he made his report to the VPD as a concerned citizen, in the face of the VPD's decision to discontinue any investigation, he continued publishing the impugned statements, including the BC Securities Commission, the RCMP, members of the media; the Attorney General, David Eby; University of British Columbia professors; a former customer of Vanbex, Elev3n; former employees of Vanbex; and recruiter used by Vanbex in the past.

> Warner Cross (August 2, 2019) at p.1, lines 37-43; p. 3, lines 2-25; p. 4, lines 11-35; p. 5, lines 1-4; p. 8, lines 14 to p. 10, line 29.

(g) Mr. Warner repeated many of his claims about the Plaintiffs to the BCSC and RCMP shortly after the conclusion of his civil trial at which he was largely unsuccessful.

(h) Mr. Warner assisted a former customer of Vanbex in filing a civil claim against Vanbex.

> Warner Cross (August 2, 2019) at p. 5, line 40 to p. 6, line 9.

(i) Mr. Warner routinely searches Court Services Online for cases involving Vanbex or Mr. Hobbs, [then] reaches out to parties adverse in interest to the Plaintiffs;

> Warner Cross (August 2, 2019) at p. 22, lines 33-39, p. 23, lines 32-34.

(j) In making his statements to the VPD and RCMP, Mr. Warner intentionally left out key information that would have explained or put into context some of his assertions. For example, Mr. Warner did not tell the VPD and RCMP:

(i) he was initially hired as a senior software developer specifically to develop a proof of concept for one new product;

> Wotherspoon Cross (July 16, 2019) at Q. 189-190.
> Warner Cross (July 17, 2019) at Q. 375-384

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(ii) he was not hired to manage personnel;

Hobbs Affidavit at para. 17 and Exhibit A.

(iii) he was not involved in the accounting or finances of the business.

Wotherspoon Cross (July 16, 2019) at Q. 160-170.

(iv) he was hired as a contractor and knew that the practice of a company providing a computer or him using his own varied;

Wotherspoon Cross (July 16, 2019) at Q. 94.

(v) that Mr. Hobbs and Ms. Cheng had personally invested a lot of money in the business;

Wotherspoon Cross (July 16, 2019) at Q. 157-158.

(vi) that the reason the Plaintiffs had not paid Mr. Warner's last invoice was because there was a dispute between the parties regarding how much Mr. Warner was owed, and that there was an ongoing civil action related to that issue;

(vii) that the criminal charges Mr. Warner referred to in his email to the VPD dated back to 2005; and

Warner Cross (July 17, 2019) at Q. 330.

(viii) that Vanbex had physical offices with employees, including others working in development, and customers.

[173] Ms. Cheng adopts these submissions and adds one further point. She submits that if a trial judge were to conclude that Mr. Warner intentionally omitted information that Mr. Hobbs' 2009 conviction (leading to his 30 month jail sentence) was overturned on appeal from his Police Tip, this could be seen as evidence of malice. She urges the court to disbelieve Mr. Warner's explanation for omitting this information from the Police Tip and says it would be open to a trial a judge to find this to be evidence of malice.

[174] Mr. Warner submits that the plaintiffs have failed to adduce any evidence upon which a trier of fact could infer that he was actuated by malice when he went to police. Mr. Warner deposed that he did not send the Police Tip out of malice toward any of the plaintiffs, but rather because he was a concerned citizen interested in political and public issues, including issues surrounding the international drug trade, money laundering in Canada and the cryptocurrency industry. He argues that the things identified by the plaintiffs, when put in context of all of the information he provided to authorities, cannot reasonably support even an inference of malice.

[175] This is one of those discrete areas of Mr. Warner's evidence where, viewed in the entirety of the material, I think a reasonable trier of fact could not fully accept the evidence. Mr. Warner does seem to have a history of involving himself in political and public issues as a concerned citizen, but it seems rather disingenuous to claim this was his only motivation here. Mr. Warner was involved in a dispute with Vanbex at the time he sent the Police Tip. While I accept that his motivations came, in part, from his sense of moral obligation, all of the surrounding circumstances suggest his motivations were also more personal and more particularly motivated when it came to Vanbex and/or Mr. Hobbs.

[176] In any event, the parties' debate on the topic of malice was vigorous, with each advocating for findings of fact supportive of their positions. Were this a trial, I imagine the evidence related to this issue would occupy many days, with submissions occupying many more. But, this is not a trial. It is a screening process. The court is not in a position to make findings of fact on this contentious issue. To attempt to do so would require an impermissible "deep dive" into the merits of this case and would necessarily involve rigorous assessments of credibility, which is simply not possible with the procedural tools provided by the *PPPA.*

[177] Section 4 of the *PPPA* is intended to be a judicial "triage device" to promote free expression on matters of public interest by discouraging and reducing the risk that litigation would be used to unduly limit such expression. While the *PPPA* requires the plaintiffs to be prepared from the filing of their claim to address its merits (and to demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression), the nature of the application itself inherently recognizes that the parties may not have yet fleshed out their cases.

[178] Viewed in this way, two things must be highlighted. First, it is clear that in order to establish reasonable grounds to believe the defence of qualified privilege would not succeed, the plaintiffs must do more than make mere allegations of malice. Second, it is equally clear that the plaintiffs are not required to prove that Mr.

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Warner's asserted defences are doomed to fail. They are only required to show that there are reasonable grounds to believe that the asserted defences would not succeed. This is a low standard.

[179] I am satisfied on the evidence adduced that the plaintiffs have not simply made bald assertions that Mr. Warner was actuated by malice when he sent the Police Tip and later provided information to BCSC and RCMP investigators. Looking at the application record through a reasonableness lens, I am satisfied a trier of fact could conclude that Mr. Warner was actuated by malice when he sent the Police Tip and later communicated with the BCSC and RCMP and, therefore, that his defence of qualified privilege would not succeed. Since this assessment is among those reasonably available on the record, the plaintiffs have met their onus under s. 4(2)(a)(ii).

[180] In reaching this conclusion, I wish to emphasize that I am making no comment about the strength of the parties' arguments on this highly contentious topic. An assessment that a reasonable trier could conclude that Mr. Warner was not actuated by malice is also among those reasonably available on the record.

[181] Having met the merits-based hurdle, the plaintiffs now must meet the public interest hurdle.

The Public Interest Hurdle

[182] The plaintiffs are required to satisfy the court that the harm they suffered, or may suffer, by the defendant's expressions is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting the defendant's expressions.

The Positions of the Parties

[183] I will begin with the position of the plaintiffs. I will summarize their positions collectively, as counsel for Ms. Cheng largely adopted the submissions of counsel for Mr. Hobbs and Vanbex. I will identify those discrete areas where submissions

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related solely to the interests of Ms. Cheng or differed in some small way from the other plaintiffs, but for the most part, the positions of all three plaintiffs aligned.

[184] The plaintiffs begin by asking the court to conduct this balancing exercise in a purposive way. They ask that I keep in mind that the *PPPA* was not intended to "legislate away" the law of defamation. It was intended to provide protection from improper use of litigation to stifle public discussion on issues of public interest and not to protect false statements and statements made with malice. Overall, they say their suit is not improper and that Mr. Warner's expressions are false and motived by malice. They deserve no protection.

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[185] The plaintiffs argue that their action against Mr. Warner bears none of the hallmarks typical of *SLAPP* suits. There is no evidence that they have used litigation or threats of litigation in the past to silence critics; rather, it is Mr. Warner who has extensively litigated as a plaintiff in the past. There is no evidence of a power imbalance; rather, it is Mr. Warner who asserts the plaintiffs will be unable to pay damages and costs. Their action was not commenced to punish Mr. Warner or stifle his right to free speech; rather, they commenced the action solely to defend their reputations and livelihoods against Mr. Warner's false claims. They emphasize that they have suffered more than minimal or nominal damages from his false allegations.

[186] Moreover, the plaintiffs say that Mr. Warner's false and malicious statements are not the quality of expression that the legislature intended to be protected by the *PPPA*. Here, they emphasize that Mr. Warner has not even suggested truth as a defence.

[187] In the balancing exercise, the plaintiffs submit that they have established they have suffered serious harm as a result of the defendant's expressions.

[188] With respect to harm, they emphasize that it is not the court's function on this application to make findings in respect of the plaintiffs' damages claim. Evidence of potential damages is sufficient. They highlight the authorities that support the

presumption of general damages in cases such as this, as well as Mr. Hobbs' affidavit evidence (paragraphs 73-81) where he outlined the various aspects of their corporate and personal financial and reputational losses said to arise from Mr. Warner's false allegations and the corresponding CF Action.

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[189] With respect to causation, Mr. Hobbs and Vanbex argue that there is evidence to show that Mr. Warner was the source of the CF Action allegations. They point to the following evidence in support of their theory of causation:

1. In April 2017, Mr. Warner sent the Police Tip where he alleged, among other things, that Vanbex appeared to be a "shell company". He provided publically available details about Mr. Hobbs' criminal history, but did not include that the 2009 conviction that led to Mr. Hobbs receiving a 30 month jail sentence had been overturned on appeal.

2. Mr. Warner subsequently submitted a tip to the BCSC. He also provided over 90 MB of documents about the plaintiffs to the BCSC.

3. In early 2018, the BCSC submitted a tip to the RCMP about the plaintiffs.

4. In August 2018, Mr. Warner participated in an interview with the RCMP and BCSC where he repeated his belief that Vanbex appeared to be a "shell company".

5. In March 2019, the Director commenced the CF Action on the basis of information provided by the RCMP. The plaintiffs argue that the Director's pleadings allege things that are substantially the same as those alleged by Mr. Warner, including that Vanbex was a "shell company" and that Mr. Hobbs and Ms. Cheng were engaged in illegal activities. Also like Mr. Warner had done, Corporal Johnson filed an affidavit in the *ex parte* hearing that reported Mr. Hobbs' 2009 conviction and 30-month sentence, but failed to disclose that the conviction had been overturned on appeal.

6. The media reports on the CF Action involve some allegations that were initially made by Mr. Warner, including that Vanbex was a shell company and engaged in illegal activities.

[190] Ms. Cheng largely adopts these submissions, but takes a more nuanced stance on the causation issue. She submits that there is evidence adduced at the hearing that supports a finding that Mr. Warner's statements to law enforcement are a contributing cause of the CF Action, probably a substantial contributing cause, but in any event far in excess of *de minimus*. She recognizes that there is evidence in the CF Action that Mr. Warner did not provide, but argues "that says nothing about whether he was involved in initiating the investigations". Ms. Cheng also points to some similarity of language between Mr. Warner's expressions and the Director's pleadings ("shell company" and the identical error in Mr. Hobbs' criminal record made by Corporal Johnson and Mr. Warner). That the Director later resiled from the "shell company" allegation and the officer acknowledged his error demonstrates, she says, that these allegations originated with Mr. Warner.

[191] Overall, the plaintiffs submit they have shown that the harm to them from these false allegations is sufficiently serious that there is a strong public interest in allowing them the opportunity to protect their reputations and livelihoods through this litigation.

[192] The plaintiffs contrast what they say is the significant public interest in protecting their reputations and livelihoods with what they argue is the low public interest in protecting Mr. Warner's expressions. When evaluating the public's interest in protecting these particular expressions, they ask the court to consider the quality of the expression, Mr. Warner's motivation, the negligible consequences of the claim to Mr. Warner and the absence of any evidence related to actual "libel chill".

[193] The plaintiffs submit that while they support protecting reports to authorities, there must be some scrutiny of the *bona fides* of such reports, as there is no public interest in false reports. They say that scrutiny of Mr. Warner's reports shows that he made considered decisions to provide false statements that contained glaring,

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misleading and reckless omissions. Such reports are not worthy of protection. To protect such reports would deprive victims of false and malicious police reports of legitimate recourse through the court. Dismissing a claim seeking to vindicate one's reputation in the circumstances of a false report would only encourage false reports, which is not in the public interest.

[194] They further argue that the public interest in protecting Mr. Warner's expressions is further lowered because there is evidence to support a finding that Mr. Warner was motivated by malice and ill-will toward the plaintiffs, rather than a legitimate public concern. They also say that Mr. Warner has adduced no evidence of any likely consequences to his right of expression if the claim is allowed to proceed against him. To the contrary, the plaintiffs emphasize that Mr. Warner is a well-versed litigant that has been involved as a plaintiff in eight actions over the last five years, making the toll that litigation can have on some individuals much less likely for him.

[195] The plaintiffs also submit that Mr. Warner's allegation of "libel chill" is not grounded in any evidence. They stress that while legitimate reports to police enjoy broad protection from civil suits, there is no reason to think that permitting an action to proceed alleging that a false and malicious report was made would have any chilling effect on persons making legitimate police reports.

[196] In the end, the plaintiffs argue that when the evidence and the context in which Mr. Warner's statements were made are considered as a whole, the court should conclude that the significant financial harm and reputational damage to them outweighs the public interest in shielding Mr. Warner's statements from further scrutiny.

[197] Turning now to the defendant's position, Mr. Warner submits that the plaintiffs have fallen far short of satisfying their burden here. In fact, his primary position is that the court need not engage in any public interest balancing exercise at all because the plaintiffs have failed to adduce any evidence capable of being weighed on their side of the scale.

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[198] First, he argues that the plaintiffs have failed to adduce any evidence capable of proving they suffered (or will suffer) harm. Second, he submits that if any evidence of harm can be found to exist, the plaintiffs have failed to present any evidence from which a causal link could be established, or even inferred, between his expressions and that alleged harm. With no evidence of harm and/or no evidence of a causal link between any alleged harm and his expressions to authorities, there is simply nothing to balance against the high public interest in protecting his communications with law enforcement agencies.

[199] Alternatively, if there is to be a balancing exercise, Mr. Warner submits the public interest in protecting his expressions to law enforcement agencies to assist with the detection and prevention of crime carries significant weight and should tip the scale heavily in his favour. He argues that the quality of his expressions and his motivations were such that there is no basis to reduce the very high public interest that clearly exists in such expressions. Moreover, Mr. Warner emphasizes that the criminal investigation(s) and CF Action are continuing. As simply one person of many who had dealings with the plaintiffs and their companies, investigators will require information and cooperation from others. In light of the plaintiffs' publication of this defamation action, blaming him for the criminal investigation(s) and CF Action, he argues that to permit their suit to proceed would allow for the real likelihood of "libel chill" in respect of other potential witnesses.

[200] In summary, Mr. Warner argues that the plaintiffs have failed to provide any proof of harm or a causal link between the alleged harm and his communications with authorities. Even if the court finds evidence of harm and an inferential causal link, he submits that the plaintiffs' potential losses are insufficient to outweigh the very high public interest in protecting expressions to authorities about potential crimes.

The Balancing of Interests

[201] I find the balancing of interests favours the defendant here. The plaintiffs have failed to satisfy me that the harm likely to have been, or to be suffered by them, as a

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result of Mr. Warner's expressions, is serious enough that the public interest engaged in allowing them to proceed with this claim outweighs the public interest in protecting Mr. Warner's freedom of expression.

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[202] Harm to the plaintiffs in this context can include both monetary and non-monetary harm. The preservation of one's good reputation has inherent value beyond monetary value of the claim. The plaintiffs' evidence of harm comes solely from the affidavit of Mr. Hobbs at paragraphs 73 through 82. He deposes to reputational damage to all three plaintiffs, to "millions" in lost revenues, loss of a potential sale of Vanbex in the millions of dollars, loss of 13 employees due to resignations and layoffs, reduction in earnings and personal stress.

[203] The plaintiffs are not required to present a full damages brief, but what Mr. Hobbs has presented regarding the plaintiffs' alleged monetary losses arises only slightly above the level of the bare assertions criticized by the Ontario Court of Appeal. I agree with the defendant that much of Mr. Hobbs' evidence regarding the alleged monetary losses suffered by the plaintiffs is unsourced and unexplained and is so broadly estimated so as to be largely unhelpful for the court to measure, even at this preliminary level, any damages suffered. Non-monetary harm, such as loss of reputation, does have value and I do take that into account in assessing the plaintiffs' allegations of harm here. However, even accepting that the plaintiffs have established some amount of general monetary loss, some reputational harm and personal losses, the real issue here, and where the plaintiffs' argument falters, is on the issue of causation.

[204] All of the plaintiffs' alleged losses are said to arise after, and as a result of, the CF Action (and its resulting publicity), which all occurred in the spring of 2019. None of the alleged losses identified by Mr. Hobbs are said to have occurred because other parties heard or read about Mr. Warner's actual 2017/2018 expressions to law enforcement agencies. Rather, the plaintiffs allege that Mr. Warner's expressions caused the criminal investigation and resulting CF Action, which in turn have caused their losses.

[205] The evidence falls short of establishing that Mr. Warner's communications to authorities were a cause, or even a contributing cause, of the criminal investigation that led to the CF Action and the plaintiffs' alleged losses arising from its commencement and the publicity surrounding it. In other words, there is no proof of a causal link between Mr. Warner's expressions and these alleged losses. As the Court identified in *Pointes Protection*, evidence of the causal connection "will be particularly important when the motion material reveals sources apart from the defendant's expression that could well have caused the plaintiff's damages": para. 92.

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[206] To the contrary, the evidence tendered on this application shows that Mr. Warner's expressions to authorities were not the cause, or even a contributing cause, of the criminal investigation, nor the CF Action. Corporal Laton's evidence is quite clear on this point. He deposes:

> 7. I am informed by Adrian Greer, counsel for the Director, that the defendants argue that the criminal investigation was negligent and implied that it arose from a tip by a former employee of Vanbex, Mr. Kipling Warner.
> 8. The defendants are mistaken about the source of the criminal investigation. The criminal investigation arose from a tip I received from the British Columbia Securities Commission (the "Securities Commission") in or around April 2018.
> 9. On or around April 20, 2018 I received a call from a senior investigator at the Securities Commission. As a result of that tip, the RCMP's attention was drawn to certain attendees at a financial conference that was then scheduled to be held in Richmond, British Columbia. Without compromising the Criminal Investigation, Vanbex was one of the attendees that was scrutinized, and the RCMP identified concerns with Vanbex's business that led to the Criminal Investigation.
> 10. As a result of the Criminal Investigation the RCMP has conducted several witness interviews and utilized other investigatory techniques. Attached hereto and marked as Exhibit "A" is a redacted copy of a witness statement obtained on December 19, 2018 from a former senior employee at Vanbex (not Mr. Warner).

[207] However, even if I were to give Corporal Laton's evidence little to no weight, in recognition of the fact the plaintiffs have been denied the opportunity to test this evidence through cross-examination, I would still conclude that the plaintiffs have failed to establish any causal link here. The chronology of events leading up to the

investigation that led to the CF Action and the allegations in the CF Action show that Mr. Warner could not have been the cause, or even a contributing cause, of the criminal investigation and CF Action.

[208] Mr. Warner worked for Vanbex for only two months in 2016. He had no further business dealings with the plaintiffs after that. He sent the Police Tip in April 2017, a BCSC tip sometime between the fall of 2017 and early 2018 and was interviewed by the BCSC and RCMP in 2018.

[209] The CF Action pleadings, transcript and reasons for judgment of Justice Myers set out the Director's allegations arising from the criminal investigation against Mr. Hobbs and Ms. Cheng. These allegations, based on information gathered by law enforcement officials, bear no similarities to Mr. Warner's expressions to authorities.

[210] In short, the Director alleges that in September and October 2017, Vanbex (conducting business as Etherparty) launched a crypto-currency coin called the "FUEL" token and sold it to the public through an ICO, which generated in excess of $30 million, paid by investors largely in bitcoin. The Director alleges that Mr. Hobbs and Ms. Cheng then converted these funds to their own personal use in order to purchase various assets, including high-end real estate and vehicles. The Director alleges that Mr. Hobbs and Ms. Cheng engaged in fraudulent and other criminal acts involving the marketing and sale of the FUEL tokens (the "front-end" of the alleged wrongs) and involving the syphoning of cash from the company to their own personal benefit (the "back-end" of the alleged wrongs).

[211] The Director's allegations with respect to the "front end" wrongs are said to have occurred in the fall of 2017, long after Mr. Warner left Vanbex. The allegations with respect to the "back-end" wrongs involve the RCMP learning of a series of transactions in which bitcoin was converted by Etherparty into US currency through a US crypto-currency company called Cumberland Mining and Minerals LLC and then money was transferred by Etherparty to Mr. Hobbs and Ms. Cheng. These alleged transactions and occurrences are said to have occurred during the August through December 2017 timeframe, again long after Mr. Warner left Vanbex.

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[212] The Director alleges that Mr. Hobbs and Ms. Cheng engaged in a number of suspicious transactions commencing in December 2017 and continuing on through into 2019, including the purchase of expensive real estate for cash, the purchase of luxury vehicles and the borrowing of funds against one of their real properties and registering a mortgage against it. The Director also alleges that Mr. Hobbs was involved in high-stakes gambling. The interim preservation order was sought by the Director just weeks after millions of dollars from the mortgage on one of the expensive real properties was transferred into Mr. Hobbs' personal bank account. Again, all of these alleged transactions occurred well after Mr. Warner left Vanbex.

[213] It must be highlighted here again that none of the Director's allegations based on the criminal investigation have been tested or proven and are vigorously denied by the plaintiffs.

[214] The plaintiffs rely heavily on the Director's use of the phrase "shell company" in its pleadings, as it is a phrase that Mr. Warner used in his expressions to authorities. Specifically, the "shell company" pleading reads:

> 12. Beginning in 2017, Mr. Hobbs and Ms. Cheng represented to the public that they operated a Vancouver-based cryptocurrency firm. The firm was interchangeably called Vanbex and Etherparty. In actual fact, Vanbex and its subsidiaries are shell companies which had only ever had two clients and developed no useable products.

[215] The timeframe of the above pleading begins in 2017, after Mr. Warner left Vanbex and before Etherparty was even established, and continues as of the date of the pleadings, March 14, 2019. Mr. Warner could not have been the source of such an allegation because he only worked at Vanbex in 2016 for two months and did not have information about either company after his departure. In any event, his information to police says nothing about Vanbex or its subsidiaries only having two clients.

[216] Even if one could infer that the lawyer who drafted the CF Action pleadings picked up the phrase "shell company" from what Mr. Warner said to investigators, this does not mean that Mr. Warner's communications were the cause, or even a

contributing cause, of the criminal investigation and resulting CF Action. A drafting lawyer's choice of words, whatever the source, from one sentence in one paragraph in the pleadings, says nothing about the source of the underlying criminal investigation and CF Action.

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[217] The plaintiffs also rely upon the mistake made by both Mr. Warner and Corporal Johnson about Mr. Hobbs' criminal record. Again, even if one could infer that Corporal Johnson picked up this mistake from Mr. Warner, this does not mean that Mr. Warner's communications to authorities were the cause, or even a contributing cause, of the criminal investigation and the resulting CF Action.

[218] Mr. Hobbs deposes that he has a "honest belief" that Mr. Warner's expressions to authorities are responsible for the criminal investigation into Vanbex and the CF Action. This is one of those discrete areas of Mr. Hobbs' evidence where, viewed in the entirety of the record, I think a reasonable trier could not accept the evidence. He does not explain why he holds this honest belief, making it rather unhelpful, but more importantly, it runs counter to all of the evidence on this application and it fails to account for the obvious dissimilarity between the information in the Police Tip and information Mr. Warner gave authorities (or even possibly could have given authorities) and the Director's allegations against Mr. Hobbs and Ms. Cheng in the CF Action. The Director's allegations relate to Etherparty, the ICO and the plaintiffs' sudden and suspicious spending. Mr. Warner was one of the witnesses who gave what information he had to authorities in their investigation of Mr. Hobbs and Ms. Cheng and their companies. He was not in a position to give them any information regarding the events relied upon by the Director, nor is there any evidence to suggest that he gave them any such information.

[219] The only evidence tendered by the plaintiffs of alleged harm arises after the commencement of the CF Action. The broad publication of information about the Director's allegations, including the plaintiffs' alleged failure to launch the Etherparty product and their alleged fraudulent acts regarding misappropriation of investors'

funds generated by the ICO is the obvious and compelling source of an explanation for any and all alleged monetary, personal or reputational harms alleged by the plaintiffs.

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[220] The evidence is, therefore, insufficient to draw a causal connection between the challenged expressions and the alleged harms. Even if there were some evidence of harm that could be said to be attributable to Mr. Warner's expressions, perhaps in the sense that one of his "tips" about his suspicions may have put Vanbex on the "radar" of law enforcement, the harm suffered or likely to be suffered by the plaintiffs as a result of the defendant's expressions is, in the circumstances of this case, not serious enough that the public interest engaged in allowing the plaintiffs to proceed with their claim outweighs the public's interest in protecting Mr. Warner's freedom of expression.

[221] The public interest in protecting expressions to law enforcement agencies to assist with the detection and prevention of crime carries significant weight. In this regard, I agree with the defendant's submission at paragraph 188 of his written submissions:

> 188. …The maintenance of the rule of law and the safety of our communities depends on the willingness of Canadian citizens to report suspected crimes to law enforcement agencies. Those who abuse power and the public trust, profit from violence and suffering, and steal from their neighbours through fraud would reap the benefit if law-abiding citizens felt unsure about whether they should report suspicions about crime to law enforcement. If providing a tip to the police can lead to a long and expensive defamation action that could bankrupt most Canadians, people could shy away from providing tips to the police, or even just hesitate – which could be enough to allow criminals to escape detection, or worse, it could allow criminals to commit heinous crimes that could have been prevented.

[222] That said, I do think that, in this case, the quality of Mr. Warner's expressions slightly diminish the very high public interest in defending expressions to law enforcement officials generally. Mr. Warner's expressions to law enforcement here were quite generalized suspicions, reliant only on knowledge that he gained about the plaintiffs over a short period of time and reliant on some publicly available

information about Mr. Hobbs. The expressions omitted information, such as that one of Mr. Hobbs' convictions was overturned on appeal and a new trial ordered. While I accept Mr. Warner's motivations came, in part, from his sense of moral obligation, the circumstances suggest that Mr. Warner was particularly and personally motivated when it came to Vanbex and/or Mr. Hobbs.

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[223] Overall, while I conclude that the quality of Mr. Warner's expressions slightly diminishes the significantly high public interest in protecting reports by citizens to law enforcement, I find the public interest in protecting them still quite high. High enough that the public interest in their protection significantly outweighs any harm that could be found to have been, or be, suffered by the plaintiffs as a result of those expressions. The public interest is, on balance, not served by allowing this action to proceed to an adjudication on the full merits.

[224] It follows that the defendant's application under s. 4 of the *PPPA* is granted and this action is dismissed.

COSTS AND DAMAGES

[225] As the successful party, Mr. Warner seeks full indemnity costs under s. 7 of the *PPPA*. He also seeks $250,000.00 in damages under s. 8.

Costs

[226] Section 7 of the *PPPA* provides:

> **7** (1) If the court makes a dismissal order under section 4, the applicant is entitled to costs on the application and in the proceeding, assessed as costs on a full indemnity basis unless the court considers that assessment inappropriate in the circumstances.
>
> (2) If, on an application for a dismissal order under section 4, the court does not dismiss the proceeding, the respondent is not entitled to costs on that application unless the court considers it appropriate in the circumstances.

[227] This provision is identical in substance to s. 137.1(7) of the *CJA*. The Ontario Court of Appeal considered this provision in *Rabidoux*, and guidance can be taken from this decision.

[228] The Court held that the costs provision does two things. First, it creates a starting point, full indemnity costs, for the court's determination of costs when a defendant has been successful in having the action dismissed. Such a starting point is intended to serve as a strong deterrent to SLAPP suits and to encourage defendants to seek the quick termination of that kind of litigation. Second, the provision confirms that the court retains the discretion on the matter of costs: *Rabidoux* at paras. 60-62.

[229] The Court went on to provide guidance in the exercise of that discretion and held that an application judge should consider factors that guide the exercise of discretion with respect to costs in other civil proceedings, as well as other factors, such as any determinations made regarding the merits of the case, any findings made as to the motivations of the parties and the manner in which the parties have conducted the proceedings: *Rabidoux* at paras. 63 and 67.

[230] When I consider these factors, I see no reason to depart from the starting point in this case. Full indemnity costs will serve the purpose intended of providing a strong deterrent to this type of litigation.

Damages

[231] Section 8 of the *PPPA* gives the court discretion to award damages it considers appropriate against a plaintiff if it finds the plaintiff brought the proceedings in bad faith or for an improper purpose. Section 8 provides:

> **Award for damages**
>
> **8** On an application for a dismissal order under section 4, the court may, on its own motion or on application by the applicant, award the damages it considers appropriate against a respondent if it finds that the respondent brought the proceeding in bad faith or for an improper purpose.

[232] Once again, the Ontario Court of Appeal considered the same provision in its legislation in *United Soils*. In that case, the Court observed that damages under the *CJA* will not follow in every case where the action is dismissed and held that the intent behind the damages provision is to "separate out a subset of SLAPP cases

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which go beyond simply reflecting an effort to limit expression and include active efforts to intimidate or inflict harm on the defendant”: paras. 34, 35 and 37.

[233] The Court made two other observations. First, it held that it is not necessary for a defendant to adduce medical evidence to support a claim for damages. While it might be helpful in determining quantum, the Court held that in certain cases it may be presumed that damages will arise from the use of a SLAPP suit: para. 36.

[234] Second, the Court found that the section is not so broad as to encompass punitive damage awards. Rather, it held that the thrust of the section is to “provide compensation for harm done directly to the defendant arising from the impact of the instituted proceeding”: para. 38. The Court went on to note that the section is not intended to provide the court with wide-ranging authority to sanction the conduct of the plaintiff through a damages award, such as an award for punitive damages, as any need to sanction the conduct of the plaintiff is already addressed through the presumptive award of full indemnity costs.

[235] Mr. Warner asserts that the plaintiffs brought this action in bad faith, as a “smoke screen” to deflect attention from the criminal investigation and CF Action and to cause him harm. He argues that no reasonable person could have actually believed that he caused the criminal investigation and CF Action and that suing him could have had any impact on the continuation or outcome of the criminal investigation and CF Action. He says that the plaintiffs are aware that they have been wrongly targeting him as the source of their current legal problems and alleged monetary and non-monetary losses. To continue with their defamation action in the face of clear evidence of his lack of involvement in the CF Action demonstrates that this action has been continued in bad faith, causing him harm.

[236] In support of his assertions, Mr. Warner points to a number of documents. First, he points to Vanbex’s news releases following the commencement of the CF Action, where the plaintiffs blame Mr. Warner for the CF Action and they link readers to the Notice of Civil Claim in the within action. Second, he seeks to adduce print outs from portions of a large number of online chat logs and tweets from Twitter

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accounts purporting to belong to Vanbex, Mr. Hobbs and/or Ms. Cheng. No objection is taken to the admissibility of the former, but the plaintiffs object to the admissibility of the latter.

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[237] The plaintiffs object to the admissibility of the online chat logs and Twitter account entries on the basis of hearsay. They emphasize that none of the entries have been authenticated and many of them seem to be made by unknown third parties. Alternatively, if found to be admissible, the plaintiffs argue that they should be given little to no weight, as they were never put to Mr. Hobbs in cross-examination, in violation of the rule in *Browne v. Dunn* (1983), 6 R. 67 (H.L.).

[238] The plaintiffs' objection to the admissibility of the online chat logs and the Twitter account entries is well-founded. Mr. Warner relies on their content for their truth, to support the inference of bad faith that he seeks. He seeks to attribute the remarks contained within those logs and accounts to Mr. Hobbs, Ms. Cheng and someone named "Jeff" who is apparently an administrator at Vanbex, as well as several unknown persons. Without some evidence authenticating or verifying that the remarks that are recorded on these documents were actually made by the people Mr. Warner attributes them to, they are inadmissible hearsay. He identifies no principled basis upon which they might be admissible.

[239] The plaintiffs further submit that the defendant's suggestion that they commenced and/or continued this litigation in bad faith, for the improper purpose of misleading and distracting the public from the Director's actual allegations against them, is nothing more than a bald assertion and should be rejected. Moreover, they emphasize that these allegations relating to bad faith were not put to Mr. Hobbs in cross-examination, contrary to the rule in *Browne v. Dunn*, and should, therefore, be given no weight.

[240] I respectfully disagree with the plaintiffs on both points.

[241] First, I am of the view that Mr. Warner's allegation that this litigation was brought for the improper purpose he identifies is not merely a bald assertion. The

content and timing of the Vanbex news releases, in the overall context of the Director's actual allegations against Mr. Hobbs and Ms. Cheng in the CF Action, is some evidence to support the inference Mr. Warner seeks. Second, I am of the view that the so-called "rule" in *Browne* v. *Dunn* is not engaged in the circumstances.

[242] The purpose of the rule is to "prevent ambush" of a witness on an essential matter. It does not require cross-examination on insignificant details: *R. v. Podolski*, 2018 BCCA 96 at para. 145.

[243] In *North America Construction v. Yukon Energy*, 2018 YKCA 6, the Court noted at para. 18 that while the principle in *Browne v. Dunn* is often referred to as a "rule", its legal application depends on the circumstances of the case. The Court went on to state that trial fairness is unaffected by a lack of cross-examination where:

> [20] … it is clear or apparent, on considering all the circumstances, which may include the pleadings and questions put to the witness in examination for discovery, that the witness or opposite party had clear, ample and effective notice of the cross-examiner's position or theory of the case. …

[244] On this particular issue (the allegation this proceeding was brought in bad faith and for the improper purpose identified by Mr. Warner), I find that the plaintiffs had ample notice of the defendant's position, both from the Notice of Application itself and from Mr. Warner's affidavits filed in support. The plaintiffs cannot argue they were ambushed by Mr. Warner's assertion that they commenced and continued this litigation for the improper purpose of "scapegoating him" when the assertions are clearly set out in the application and in his affidavit. It must be remembered that the purpose of the so-called rule in *Browne v. Dunn* is to promote fairness – fairness to the witness whose credibility is attacked, fairness to the party whose witness is impeached, and fairness to the trier of fact who, without the rule, may be deprived of important information: *R. v. Gill*, 2017 BCCA 67 at para. 25. There is no unfairness here, where the plaintiffs had ample and effective notice of the defendant's theory of this aspect of the application.

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[245] That being said, I think the evidence adduced by Mr. Warner falls short of establishing that this proceeding was brought in bad faith or for an improper purpose, as those phrases are contemplated in s. 8. While the plaintiffs' claim that Mr. Warner caused the CF Action and any harm caused by its publicity has no merit and their news releases attempt to deflect blame to him, I do not see this case falling into those small subset of SLAPP cases which go beyond simply reflecting an effort to limit expression and including active efforts to intimidate or inflict harm on the defendant.

[246] Moreover, the thrust of the section is to provide compensation for harm done directly to the defendant arising from the impact of the proceeding. Mr. Warner has not tendered any evidence to suggest he suffered harm as a result of the within action. His claim for damages in the amount of $250,000.00 is without support and far exceeds what might even typically be awarded as punitive damages, should punitive damages be available here, which they are not. As the plaintiffs emphasize, Mr. Warner has been involved in numerous other legal proceedings, most of which he instigated, and he does not depose to suffering from any stress or inconvenience as a result of being involved in this litigation. Rather, his evidence and submissions here focus solely on an award designed to punish or deter the plaintiffs, which is contrary to the Court's findings in *United Soils.*

[247] In these circumstances, I think the need to sanction the conduct of the plaintiffs has already been addressed through the award of full indemnity costs and see no basis upon which to order an award of damages under s. 8 of the *PPPA.*

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CONCLUSION

[248] The defendant's application to dismiss this action under s. 4 of the *PPPA* is granted, with costs to the defendant on the application and in the proceeding, assessed as costs on a full indemnity basis. The defendant's application for an award of damages under s. 8 is dismissed. My thanks to counsel for their thoughtful presentations.

"S.A. Donegan J."

DONEGAN J.