**CROSS COUNTRY CHECK-UP**
**CMLA VIRTUAL CONFERENCE**
**November 6, 2020**

*Cases Referred to by Jurisdiction*

| Jurisdiction | Topic | Category | Case Name and Citation | Facts | Summary of the Decision |
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| **AB** | Defamation | ***Elkow v Sana*** 2020 ABCA 350 | A disgruntled mother of four children engaged in a campaign of harassment and defamation against a school principal, including leaflets, complaints to community members and supervisors, various letters, etc. | The judge on a summary judgment motion awarded general damages of $150,000, aggravated damages of $100,000 and punitive damages of $10,000. The damages component of the decision was appealed. Appeal unsuccessful on the general damages. Appeal successful on the issue of aggravated and punitive damages. | 1. The award of aggravated damages is only justified where damages were increased beyond what is covered by general damages by the identified aggravating conduct.<br>2. Punitive damages are inappropriate if the general damages and costs award are sufficient deterrence. |
| **AB** | Publication Ban/Sealing Order | ***John Doe v Edmonton Public School District No. 7*** 2019 ABQB 952 | This stems from an application for judicial review of a decision of the Office of the Information and Privacy Commissioner review a FOIP request. The applicant started the legal action under a pseudonym "John Doe" and sought a publication ban and sealing order on the court file. The applicant indicated that, since media had reported on this case, he had started to receive online harassment and conditional threats of bodily harm. | The publication ban and sealing order were denied. The plaintiff was not entitled to commence a court action under a pseudonym without a court order (which would not have been granted). | 1. Parties cannot start court actions using psedonyms without a court order: *Amyotrophic Lateral Sclerosis Society of Essex County v Windsor City*, 2019 ONCA 349<br>2. The *Dagenais/Mentuck* test is not met by simply pointing to anonymous mean or angry comments online. This does not engage the "administration of justice." The Court commented that "Online comments are an ordinary part of public digital discourse… politicians, professors, journalists and others whose profession |

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| | | | | | brings them into public view are regularly the subject of negative or contrary online comments. It is not infrequent that such comments veer into invective. |
| **BC** | Anti-SLAPP Defamation | ***Galloway v. A.B.,*** 2020 BCCA 106<br><br>*Decided pre SCC Cases | Appeal from an order directing production of documents relevant to allegations of physical and sexual assault made against a UBC professor. The professor sued in defamation and the defendants applied to dismiss under section 4 of the *Protection of Public Participation Act*. | Appeal dismissed. The court held that in the circumstances the documents were relevant and the prejudice to A.B. in their disclosure outweighed the interests of the respondent. Also stated that Section 4(2)(b) of the *PPPA* contemplates that an action, even one with merit and no defences, may be dismissed where the public interest in protecting the form of expression outweighs the public interest in the proceeding continuing. | Confirms the court's authority to make document disclosure orders as part of the process leading to the hearing and disposition of a dismissal application under s. 4 of the *PPPA*. |
| **BC** | Defamation | ***Weaver v. Ball*** 2020 BCCA 119 | Plaintiff successful at trial. Trial Judge applied the language from Weaver v. Corcoran (BCCA) and found that the publication did not genuinely threaten the plaintiff's actual reputation. | Appeal allowed. The BCCA held that the trial judge erred in giving undue weight to subjective factors going to the Article's credibility; the appellant's subjective reaction to the Article; and the public nature of the debate around climate science in concluding that the Article was not defamatory. These factors may be relevant to the defence of fair comment or to damages but were wrongly considered as proof that the Article was not defamatory. | 1. Defamatory meaning must be determined objectively, as an ordinary reasonable person without special knowledge;<br><br>2. Weaver v Corcoran did not establish a higher threshold for defamation. |

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| | | | | The BCCA also watered down Weaver v Corcoran and said that the wording from Weaver v Corcoran did not establish a higher threshold for proving that words are defamatory as compared to the classic test, nor did it suggest that actual harm had to be proven. Matter remitted to the trial court to consider whether there was publication, the applicability of fair comment, and damages, given that the trial judge found no defamation occurred. | |
| **BC** | Defamation | ***Level One Construction Ltd. v. Burnham*** 2019 BCCA 407 | Respondent contacted CBC who broadcast a story about a dispute between the appellants and the respondent that arose from a home renovation contract. The respondent stated that after she signed a contract with the appellants, they gave her a new estimate that doubled the price for the same work. The appellants argued that the trial judge erred in finding that the impugned statements were not defamatory and, in her alternate conclusion, that the defence of fair comment applied. | Appeal allowed, new trial ordered. While the trial judge correctly concluded that the statements were reasonably capable of having a defamatory meaning, she applied the wrong legal test in determining that they did not bear such a meaning. Instead of viewing the impugned statements objectively and applying the standard of a reasonable member of the public, she erred and applied the "least harsh interpretation". The trial judge also erred in concluding that the respondent's statements were protected by the defence of fair comment. In order to rely on the defence of fair comment, the commentator must not omit to state material facts. Here, the analysis of fair comment ignored | Classic test again applied. Defamatory meaning based on a reasonable interpretation of meaning. Failure to disclose key facts undermines ability to rely upon fair comment. |

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| | | | | two material facts omitted from the published statements: the appellants' second estimate was for a different scope of work and the respondent was aware of that fact. | |
| **BC** | Defamation | ***Pan v. Gao*** *2020 BCCA 58* | Defendant published ten related articles on the Internet via a social platform used by Chinese-speaking readers. The articles targeted the plaintiff, an immigrant to Canada from China, and accused him of various disreputable things, including misrepresenting his income in order to obtain the Canada child tax benefit (CTB); leaving China with a large tax bill unpaid; having been in partnership in China with a suspected criminal; and being a "seasoned liar" and "hideous character." Trial judge found most of the articles not to be defamatory or comment as opposed to fact. awarded $1.00 in damages for the defamatory comments. | Appeal allowed in part. Trial judge had erred in drawing adverse inference in connection with CTB and in taking judicial notice of how ordinary Canadians view the tax system and the media of China. Evidence was required on these points. She had also erred in ruling that defence of fair comment applied to the "seasoned liar" statement. This was a statement of fact and was clearly defamatory. Other opinions were such that an honest person could hold them, so that the defence of fair comment applied to them. Question of damages for all statements found to be defamatory remitted to Supreme Court of British Columbia for determination | 1. Threshold for taking judicial notice varies based on whether the "fact" is mere background or one the "dispositive end of the spectrum" paras 62-63.<br>2. Calling someone a "liar" is a statement of fact and just as actionable today as it was in 1812. |
| **BC** | Defamation | ***Seikhon v. Dhillon,*** 2020 BCCA 185 | At trial ordered to pay $75,000.00 in general damages, $40,000.00 in aggravated damages and $110,000.00 in special costs. The respondent obtained an order from the trial | Regarding the order for security for trial costs, appellant had displayed a pattern of conduct throughout the litigation that caused prejudice to respondents through delay and cost. The order by the chambers | Confirms three part test set out in *Aikenhead v. Jenkins,* 2002 BCCA 234 for a security order – para 22. |

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| | | | court that the respondent post security of $15,000.00 for appeal costs and $35,000.00 for trial costs. Appellant applied to vary the security order. | judge, represented a reasonable balance of the interests of justice. | |
| **BC** | Defamation | ***Deline v. Vancouver Talmud Torah Association,*** 2020 BCSC 251 | | Application to amend to add a claim of defamation to an existing action. | Pleadings did not disclose reasonable cause of action in defamation. Application to amend dismissed. |
| **BC** | Defamation | | Zhao v Corus Entertainment Inc, 2020 BCSC 1533 https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1533/2020bcsc1533.html | The plaintiff advertised a proposal to entice prospective foreign buyers of Vancouver real estate to enter into partnership with him with a view to avoiding to having to pay the newly introduced foreign buyers tax. | A helpful decision on fair comment, in particular discussion of whether a certain conduct by a defendant is illegal is comment. |
| **BC** | Privacy | ***Taylor v. Peoples Trust*** 2020 BCCA 246 | The plaintiffs' personal data was compromised in a data breach suffered by the defendant. On an application to certify a class proceeding, the judge found, inter alia, that breach of privacy and intrusion upon seclusion are not torts recognized in the law of British Columbia, but considered that the plaintiffs could pursue those claims under federal common law. No appeal was taken on this point. | The court remarked "It is, in some ways, unfortunate that no appeal has been taken. In my view, the time may well have come for this Court to revisit its jurisprudence on the tort of breach of privacy". In obiter the court noted that the thread of cases in this Court that hold that there is no tort of breach of privacy, in short, is a very thin one. There has been little analysis in the cases, and, in all of them, the appellants failed for multiple reasons… Today, personal data has assumed a critical role in people's | The tort of breach of Privacy may be coming to BC sometime soon. |

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| | | | | lives, and a failure to recognize at least some limited tort of breach of privacy may be seen by some to be anachronistic. For that reason, this Court may well wish to reconsider (to the extent that its existing jurisprudence has already ruled upon) the issue of whether a common law tort of breach of privacy exists in British Columbia. | |
| **BC** | Privacy/ Defamation (BCSC) | ***Lu v. Shen,*** 2020 BCSC 490 | Two women who barely knew one another, and who have rarely met the other in person, sued one another for defamation, breach of privacy and intentional infliction of mental distress. Their claims are the product of a verbal war they waged in social media for over a decade. Both parties self-represented. The statements hurled back and forth referred to the other using terms like "homeless dog", "bitch", "slut", "garbage", "scum" etc. | The court ordered the plaintiff and defendant to refrain from directly or indirectly making, publishing, disseminating or broadcasting any words in any public forum or social media, including Canadameet.com and Ourdream.com, either against or of and concerning one another, or family members. The court awarded damages of $5,000.00 each, damages of $4,000.00 and $3,500.00 respectively for breach of privacy and dismissed the mental distress claims. Neither awarded costs. Net result a $500.00 difference between the awards.<br><br>Good summary of basic pleading principles and rules applied in a defamation action – paras 41-59. | 1. While the court cannot presume publication on the internet, it is open to the court to draw an inference from the other available evidence that it was - para 182.<br>2. Although damages are presumed once a cause of action for defamation is established, there is no corresponding presumption that damages must be substantial, nor is there a minimum floor for damages in defamation.<br><br>3. Privacy is a tort actionable per se. Right to privacy included the right to be left alone and shielded from unwanted contact by or from another person. |

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| **NB** | Publication Ban/Sealing Order | ***Her Majesty the Queen v. Matthew Raymond*** F/CR/17/2018 (August 14, 2020) | Mr. Raymond was facing trial on four counts of murder including the killing of two police officers. His defence counsel brought a Motion for the appointed Trial Justice to recuse himself and in that context filed extensive Affidavits outlining outrageous conduct by the assigned Trial Judge during and in respect to pretrial procedures / matters. In the face of this, prior to the recusal hearing, the Justice concerned requested of the Chief Justice that he be relieved from presiding over the trial, and a new Justice appointed, on the basis that dealing with the allegations alleged could be seen as constituting a distraction or bias.<br><br>The Chief Justice granted the Judge's request but then, on her own Motion, not hearing any argument, she sealed the Court file containing the Affidavits at issue and imposed a publication ban on their content on the basis that as a new trial Judge had been appointed, the issue of the impropriety of the initially assigned Trial Justice was now moot. The Justice would have no opportunity to meaningfully | Pursuant to an Application brought by the CBC, Global and CTV, heard by the Chief Justice in open Court, she orally rescinded, in its entirety, her previous written decision imposing the sealing order / publication ban. The Chief Justice accepted that the sealing order / publication ban were issued contrary to the Dagenais/Mentuck test, that mootness was not the test and might be seen to have brought the administration of justice into disrepute insofar as on its face, the order appears to favour a Justice of her Court over other citizens who can be on the receiving end of all manner of allegations and statements of claims, etc., which may be published.<br><br>* Written reasons to be released any day. | Mootness no basis for sealing Court files. |

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| | | | dispute the allegations. | | |
| **NS** | Cyber-Bullying | ***Candelora v. Feser*** 2020 NSSC 177<br>June 5, 2020 | In an earlier judgment, *Candelora v. Feser*, 2019 NSSC 370, the Defendants were found to have cyber-bullied the Plaintiff on a civil, private Application brought pursuant to the *Intimate Images and Cyber-protection Act*, S.N.S. 2017, c. 7. | In this decision, significant damages and costs were awarded as against the Defendants. The *Act* authorizes a victim to prosecute an Application for cyber-bullying. The process dependent on a pattern of harassment, may well prove cheaper and quicker than defamation proceedings.<br><br>The Judge having no precedent to rely upon gave a significant damage award. | Proceeding under this *Act*, if the facts permit, has advantages of speed, and costs over traditional defamation actions. In NS, damages under this *Act* will be set by the presiding Justice and not a jury as occurs in defamation trials. |
| **NS** | Open Court | ***Eastern Infrastructure Inc. (re),*** 2020 NSSC 220 | A nonparty to a bankruptcy sought to attend, but not to participate in the examination of the bankrupts' principle. The bankrupt objected. | The Registrar in Bankruptcy rejected early authority to the effect that nonparties should be excluded from the process based upon the open Court principle. | Bankruptcy proceedings are subject to the open Court principle. |
| **NS** | Unsealing | ***Canadian Broadcasting Corporation et al. v. The Queen in Right of Canada and The Queen in Right of Nova Scotia –***<br>July 16, 2020 | Mr. Wortman murdered 22 people, including an RCMP officer, over the course of one night and half of the following day. Some 25 search warrants and production orders were issued – all sealed in their entirety. Eight media organizations applied to have the warrants / orders unsealed. The Court rejected the procedure followed in respect to the Oland murder dealing with | | There are now two very distinct processes which have been employed by Courts in different provinces in respect to applications to unsealing ITO's / search warrants / production orders. One permits the Applicant / Media counsel to see the unredacted material and make argument in a closed Court before the Judge |

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| | | | sealed warrants put in place in NB. In this case, the Judge, and the Crown, questioned the ITO Affiants *in camera*. Her Honour determined that in respect to the first six ITO's / warrants / returns / orders reviewed, certain passages in the ITO's were to be redacted "permanently", and others to be redacted "temporarily" with the remaining group, a so-called "phase 3" redaction possibly lifted after restricted cross-examination by media counsel of the Affiants in respect to those particular redactions only. Her Honour has now heard oral submissions with respect to when the "temporary" redactions" should be lifted, what "phase 3" redactions should be lifted and whether notice to redacted individuals / businesses referred to in the warrants / ITO's should be given notice of the proceeding and offered an opportunity to make submissions in respect to their continued confidentiality. A decision is expected November 19 on these issues. The Applicant Media have served Notice for Judicial Review with the Directions hearing scheduled | | upon that counsel having undertaken to keep confidential, even from his clients, redacted material until the same is released by Order of the Court (*Oland*, model). The other model seens Applicants / Media's counsel, being able to cross-examine an affiant but not allowed to see or learn the contents of materials redacted until such time as the Court orders them unredacted. |

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| | | | for November 3. | | |
| **NS** | Unsealing Warrants | ***R. v. Verrilli*** 2020 NSCA 64 (October 15, 2020) | Search Warrants were executed, items seized, but no charges laid. The person subject to the searches applied to access to the search warrant ITO's. | The Court of Appeal determined that the Dagenais/Mentuck test applied placing the burden upon the Crown to justify continuation of the sealing Orders. The burden is on the party wishing to limit that access. This applies not during the initial application as well as during any hearing to vary or terminate a sealing order. | There is no burden upon an Applicant seeking to unseal ITO's. |
| **ON** | Copyright & Privacy | ***Wiseau Studio LLC et al v Harper et al,*** 2020 ONSC 2504 | In 2003, the plaintiffs, Tommy Wiseau and Wiseau Studio LLC, released a feature film, *The Room*, which became a cult classic for being notoriously awful. The defendants made a documentary about Wiseau and the making of *The Room.* They approached Wiseau and tried to obtain a license from him, but he demanded large sums of money and editorial control over the documentary. Wiseau further attempted to derail the documentary, sending e-mails to distributors, alleging copyright infringement and demanding the film not be shown. As a result, screenings of the documentary across North America, Europe and Australia were cancelled. Nevertheless, the defendants | **Copyright claims**<br>The Court dismissed the copyright claims under the fair dealing exception. Justice Schabas found that that the use of seven minutes of footage without a licensing agreement was fair as it was for the purpose of critiquing, reviewing and providing information about the film and its creator. He also dismissed the plaintiff's claim that the documentary's use of clips breached Wiseau's moral rights, finding that it was not a "hit piece" and did not prejudice Wiseaus's honour or reputation.<br><br>**Privacy claims**<br>The court dismissed three privacy claims: misappropriation of personality, passing off, and intrusion upon seclusion. The court | This decision provides a useful framework for documentary filmmakers considering using copyrighted materials. In this case, the filmmakers successfully relied on the fair dealing exception and were able to maintain editorial independence as a result.<br>It also highlights the importance of freedom of expression where it intersects with the developing area of privacy torts, such as, intrusion upon seclusion and misappropriation of personality. |

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| | | | were able to secure a distributor for the documentary. They intended to release at the same time as *The Disaster Artist*, a Hollywood film about *The Room*, which was released in 2017.<br>Just before the film was set to be released, Wiseau obtained a temporary injunction without notice, preventing the defendants from showing the film. The injunction was lifted in November 2017, as the motions judge found the plaintiffs misled the court on the initial application. | reasoned that Wiseau's image was not used for commercial gain, and the inclusion of publicly accessible information about him in the film was not "highly offensive" given Wiseau's status as a public figure.<br><br>**Damages**<br>The court awarded the defendants $550,000 USD in compensatory damages relating to the injunction sought by Wiseau that prevented the documentary from being released. The court awarded an additional $200,000 CAD in punitive damages for Wiseau's behaviour throughout the negotiations and court proceedings. | |
| **ON** | Defamation | ***Chopak v Patrick***, 2020 ONSC 5431 | The plaintiff, Stacey Chopak brought a defamation action against the defendant, Edward Patrick in the Small Claims Court. The defamation claim related to two statements posted online – one post on LinkedIn and one "press release" on the International Order of the Companions of the Quaich website.<br>Initially, Patrick had sued Chopak for libel in 2011, after a newspaper article was published in which Chopak was quoted as suggesting that Patrick had stolen valuable artwork. The | Justice Paul Schabas allowed the appeal of the Small Claims Court decision in part, reducing damages to $5,000 and costs to $1,000.<br>Justice Schabas found that the trial judge made errors of law regarding, among other things, the test for determining defamatory meanings, the defence of fair comment, and the existence of malice.<br>Specifically, Justice Schabas found that the statements about Chopak having an "axe to grind" and being a "rat" were expressions of opinion to which the defence of fair comment applied.<br>Accordingly, damages were | *Chopak* provides useful guidance on the application of the defence of fair comment in defamation actions and on the quantum of damages when defamation occurs on the Internet.<br>Justice Schabas quoted *Pichler v. Meadows*, 2016 ONSC 5344 at para 37, which states: "The factors of the mode and extent of publication can be particularly significant considerations in assessing damages in internet |

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| | | | libel suit settled and Chopak agreed to sign a mutual release and apology.<br>Subsequently, Patrick published statements online about the settled lawsuit, including statements which referred to Chopak as a liar, a "rat" and having an "axe to grind." The trial judge found the statements were defamatory, rejecting the defence of justification and fair comment, as Patrick admitted that Chopak had never stated that she had lied.<br>The trial judge awarded Chopak the maximum amount allowable in Small Claims Court, $25,000, plus costs of $3,750. Patrick appealed. | reduced. | defamation actions. In certain cases, however, the nature of the communication is such that it should not be automatically assumed that it has reached a wide audience."<br>The court distinguished this case from previous cases in which hundreds of defamatory statements amounted to a "vicious campaign of libel." Here, the Court held that damages should reflect that the article was read by a small number of people and there was no evidence of any actual damage to the plaintiff's reputation. Accordingly, a modest award of damages was appropriate. |
| **ON** | Defamation Jurisdiction | ***Sikhs for Justice v The Republic of India,***<br>2020 ONSC 2628 | Sikhs for Justice (SFJ), a non-profit organization brought an action against the Republic of India, along with various media allies, including ANI Media Private Ltd., alleging that they were engaged in a campaign of defamation against SFJ, citing three ANI articles. SFJ alleged that thousands of individuals in | The Ontario Superior Court of Justice dismissed this defamation action. The court held that the Republic of India had not been served and "as a sovereign state, cannot be compelled to participate in this Ontario action" and is immune from any Ontario judgment under the *State Immunity Act*.<br>Two of the media outlets said to | This decision provides a useful precedent in future cases against foreign media outlets facing defamation claims in Ontario applying the *Van Breda* framework. |

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| | | | Ontario had seen or heard the defamatory words (including those in the ANI article), thereby damaging SFJ's reputation in Ontario. The Defendant, ANI Media moved for an order dismissing or staying the action, on the grounds that the Ontario Superior Court of Justice lacked jurisdiction. | have been involved in the alleged smear campaign were not named in this action.<br>The presumptive connecting factor of the alleged defamation in Ontario was that the ANI article was accessed and downloaded by two individuals connected to SFJ in Ontario. However, the court found that the nature of the claims against the defendant, ANI Media were such that it would not be reasonably foreseeable that the company would be sued in Ontario. The court concluded that there was a risk of jurisdictional overreach for the Superior Court to assume jurisdiction over these claims. | |
| **ON** | Publication Ban/Sealing Order | ***GS and KS v Metroland Media Group et al,*** 2020 ONSC 5227 | Parents had two young children and there was ongoing litigation, in which the mother alleged the father was violent and provided information regarding his mental health. The father committed suicide inside his car, which burst into flames while parked outside the courthouse. This was a violent, high profile incident. The mother brought a motion for an order sealing the file in its entirety publication ban and initialization of contents of file, citing the well-being of her children as being in the public interest. | The Mother sought a broad publication ban and sealing order relating to all information in or pertaining to the court file, and an order for the initialization of the names of the parties and the children.<br>The court ordered a partial publication ban, limiting dissemination of identifying information relating to the children and the mother.<br>However, the refused to order a sealing order and broad publication ban regarding the father's identifiable information and allegations against him. The court | In this case, Justice Breithaupt Smith found that a broad publication ban and sealing order was *not* necessary or proportionate, and would undermine the court's credibility and reputation in the eyes of the public. The deleterious effect on constitutionally protected freedoms of expression and the press outweighed any potential benefit to court-involved children generally or to these children specifically. |

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| | | | | reasoned that the mother could not have exclusive control over the dissemination of previously publicly accessible documents detailing the father's mental health diagnosis and the abuse the mother alleged to have suffered. It would not be in the public interest find that details, which would have been equally damaging to the children before the father died, should be hidden from public view given that the father's suicide attracted media attention. The Court noted that this case was unique on its facts, as no other case cited revolved around such a dramatic and violent public event. | |
| **ON** | Publication Ban/Sealing Order | ***R v Evans***, 2020 ONCJ 428 | A Justice of the Peace made a discretionary non-identification order pursuant to s. 486.4 of the *Criminal Code*, which allows the Court to make an order directing that any information that could identify the victim or a witness shall not be published in relation to enumerate sexual offences. A third party, the CBC, on behalf of the complainant, Jessica Donald, brought an application to lift a ban on publication of her identity, as the complainant no longer sought the shelter of the statutory non-identification order. | The CBC was successful in its application to lift the publication ban on the identity of the complainant.<br>The issue in this case was whether Crown consent to the revocation is a necessary precondition to altering an existing 486.4 order. In this case, the Crown took no position on whether the non-identification order ought to be revoked.<br>The court reasoned that these provisions are intended to protect the privacy of complainants and witnesses, with the Crown often acting as a conduit for their interests. The Court cited *R v Adams*, a 1995 Supreme Court | Justice Latimer articulated a useful interpretation of *Adams,* concluding that consent from the Crown is not mandatory to lift a s.486.4 ban on a complainant or witness's identity where the complainant seeks to lift the ban. |

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| | | | | decision in which, the Crown was strongly opposed to lifting the publication ban on the identity of a sexual assault complainant and there was no evidence regarding the complainant's perspective.<br>In this case, the Court concluded that *Adams* did not stand for the proposition that Crown consent is a threshold requirement to consider revocation of an existing s. 486.4 order.<br>The Court held: "In the absence of a reasoned evidentiary basis for Crown opposition, their silence on this issue does not prohibit me from accepting the complainant's position, as advanced by CBC counsel, and revoking the current order as it relates to Ms. Donald." | |
| **PEI** | Defamation | ***Ayangma v. The Saltwire Network Inc.***<br>2020 PECA 1 | The Plaintiff sued in defamation. Court of Appeal determined that the fact the defamatory material remained able to be seen online does not mean that the limitation period starts anew each day. | The Court canvased law across Canada and explicitly rejected the 2019 decision in *AARC v. CBC*.<br><br>* Leave to Appeal to the Supreme Court of Canada remains outstanding. | Republication does not occur each day that defamatory material remains viewable online. |
| **PEI** | Free Expression | ***Paula Racki v. Kyle Racki* Hfx. No. 485326**<br><br>*case to the argued November 5, 2020 | Kyle Racki published a self-help book advising the reader as to how Mr. Racki overcame challenges in his life, marital problems, faith issues, dead end job, so that the reader might become as happy and successful | -- | The decision will address the scope of "implied" confidentiality in the context of a freedom of expression argument. |

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| | | | as he is now. Included in the book is a sentence and footnote describing Ms. Racki's attempted suicides, personality defect and medical conditions. Ms. Racki has sued, not claiming the publication is defamatory of her, but rather that despite there being no agreement to this effect, this personal information would be understood to be confidential and the Defendant has breached confidentiality and intruded upon / interfered with the Plaintiff's right to privacy, etc. The Defendant pleads s. 2(b) of the *Charter* and that her demons and actions were part of "his story too". | | |
| **QC** | Defamation jurisdiction | ***Conille c. Directora de Cadena de Notificias (CDN)*** 2020 QCCS 737 | Plaintiff was the representative of a Québec company in Dominican Republic. He filed a defamation suite against Defendants who he accused having made defamatory comments to the effect that he was the owner, with a woman whom he pretended to be his wife, of a spa in a condo unit in Dominican Republic from which a young woman jumped out and died, that the establishment was in fact a Gentleman's club where criminal activities such as | The Court decided that Québec Court had since the injury was incurred in Québec when he was fired from his job. However, non-pecuniary injury was not incurred in Montreal because Plaintiff did not reside there.<br>The Court then applied the *forum non conveniens* analysis, cited the recent Supreme Court of Canada decision *Haaretz v. Goldhar*, 2018 SCC 28 on fairness and efficiency and decided to decline jurisdiction. | Application of *Haaretz v. Goldhar*, 2018 SCC 28 on fairness and efficiency in analyzing the *forum non conveniens* doctrine. |

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| | | | prostitution took place.<br>Plaintiff resides in Dominican Republic, but has a bank account in Québec where his employer deposits his salary.<br>Plaintiff claimed that Québec courts had jurisdiction whereas Defendants claimed that the file should be transferred to a Dominican Republic court. | | |
| **QC** | Free Expression | ***Yvan Godbout c. Procureur général du Québec,*** 2020 QCCS 2967 | Yvan Godbout is the author of the horror novel *Hansel and Gretel*. He was charged with making of child pornography under 163.1 Cr. C. and was in jeopardy of to minimum of 1 year, maximum of 14 years of prison sentence.<br>Yvan Godbout challenged the constitutionality of subsections 163.1(1)c), (2), (3), (4), (4.1) and (6), invoking violation of Sections 2b), 7 and 11d) of the Charter. He claimed that as a fiction author who does not advocate nor counsel child pornography, he shouldn't have his freedom of speech restricted by criminal charges. | The Judge concluded that on one hand, 163.1(1)c) does not contain "advocate" or "counsel"; on the other hand, 163.1(6)b) specifies "does not pose un undue risk of harm" as a cumulative condition to the defence of legitimate purpose. Although 163.1(6)b) is constitutionally valid on its own, the combined effect with 163.1(1)c) is deficient since some pornographic works such as that of Godbout that could be considered to cause an undue risk would be charged criminally despite the defense. Autobiographical works of sexual violence victims and public institutions such as libraries and bookstores could also be caught. | The combined effect of 163.1(1)c) and 163.1(6)b) is unconstitutional.<br>The "dominant characteristic" in 163.1(1)c) refers to the literary work as a whole, not just the passages in question. |
| **QC** | Injunction prohibiting publication | ***CIUSSS du Centre-Sud-de-l'Île de Montréal v. La Presse (2018) Inc. & al.,*** 500-17-113280-203, | The Youth Protection Services filed an injunction prohibiting La Presse and one of its journalists from publishing a story: a 6-year-old child died of a violent death in July 2020 and her mother was | The Court dismissed the application for interlocutory injunction on the ground that the Youth Protection Services did not demonstrate irreparable harm to the minor and that the evidence did not support | The Court dismissed La Presse's argument invoking *Canadian Liberty Net* on the ground that the case did not involve defamatory or hate speech. |

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| | | September 2, 2020 | accused of second-degree murder and was later incarcerated. The Youth Protection Services would have been informed of the situation of the family that also involved another minor. The official reason of the Youth Protection Services' injunction was to protect the other minor. | the claim of the Youth Protection Services. Also, the balance of inconvenience tipped in favor of publication. The Youth Protection Services is currently appealing the decision. | |
| **QC** | Injunction prohibiting publication | | **R c. Paquet** 540-01-076004-160 October 5, 2020 | The father was condemned for solicitation of juvenile prostitution. During the hearing of the sentence, he asked for a publication ban on information which could allow the identification of his children, including his own name. | Succeeded in limiting the ban to the children's names. |
| **QC** | Injunction prohibiting publication | | **R c. Labrecque** 750-01-049529-165 November 8, 2019 | The father was accused of the murder of the mother. A publication ban was asked in the name of the father in order to protect the children's privacy and well-being (including mental health). | The judge agreed that it would not be the publicity of the trial but the crime in itself which affected the children's well-being and even if there was a risk (meaning in the D/M test), the balance favoured the publicity. |
| **QC** | Protection of journalistic sources and journalistic material | ***CBC/Radio-Canada c. Arsenault,*** 2020 QCCS 2898 | Michel Arsenault, a former gymnastics coach charged with sexual assault and assault, filed an *O'Connor* motion to obtain unaltered full interviews conducted by Radio-Canada with confidential and non- | On appeal before the Superior Court, Justice Bourque found that the motion judge erred in rejecting all arguments and concluded that:<br>- disclosing the identity of confidential sources to the Court constitutes disclosure;<br>- the *Mills* regime should apply | see *Summary of decision* |

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| | | | confidential sources who appeared in a story aired about his alleged verbal, physical and sexual abuse towards underaged female gymnasts.<br>Radio-Canada contested the motion on three grounds:<br>- 39.1 Canada Evidence Act for journalistic sources;<br>- Vice Media for non-confidential sources;<br>- Procedural argument – given the sexual nature of the charges laid against Arsenault, the O'Connor motion is inappropriate. Sections 278.1 and ff. of Criminal Code/*Mills* regime should apply.<br>The Court of Quebec rejected all of the arguments. Radio-Canada appealed under 39.1(10) regarding confidential sources and sought a writ of certiorari regarding non-confidential sources. | given that there is a reasonable expectation of privacy, within the meaning of Art. 278.1 Cr. C., to the record sought; Droit<br>- Arsenault did not meet the burden of proof required under section 39.1 of the Journalistic Sources Protection Act;<br>- the *Vice Media* test should apply to requests for journalistic material even when they are presented by an individual;<br>a chilling effect would result from the disclosure of the interviews with the sources, confidential or not; | |
| **QC** | Free Expression | *Ward v. Commission des droits de la personne et des droits de la jeunesse (Gabriel & al.)*, 2019 QCCA 2042 | Jeremy Gabrie is a public figure born with congenital deformities arising from Treacher Collins syndrome. He and his parents filed a discrimination complaint to the Québec Human Rights Commission for remarks on the handicap of Jeremy Gabriel that Mike Ward, a Québec stand-up comedian, made in his shows between 2010 and | The majority found that artistic expression has a limit, of which the right to dignity and honor of an individual and Mike Ward violated such right of Jeremy Gabriel. It also confirmed the conclusion of the Commission that Mike Ward's remarks were studied, planned and repeated during a long period of time and that he could not have ignored the | The protection of freedom of speech in the context of a discrimination complaint. |

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| | | | 2013 and also in a video clip published on Mike Ward's website. The Commission found the remarks discriminatory under Section 10 of the *Charter of Human Rights and Freedom*, C-12 and awarded Jeremy Gabriel $35,000 in compensatory and punitive damages and $7 000 to his mother.<br>Mike Ward appealed the decision to the Court of Appeal of Québec who partially confirmed the decision of the Commission. | consequences of such on Jeremy Gabriel. However, it infirmed the Commission's decision to award damages to Jeremy Gabriel's mother.<br>The dissident judge, Justice Savard, considered that the Commission erred, namely, in considering that Mike Ward's remarks were not protected by his right to freedom of speech since they violated Jeremy Gabriel's right to dignity and were discriminatory. Rather, it should have been a balancing exercise. Justice Savard would infirm the Commission's decision. | |
| **SCC** | Anti-SLAPP | ***1704604 Ontario Ltd v Pointes Protection Association,*** 2020 SCC 22 | After the plaintiff land developer's appeal to the Ontario Municipal Board ("OMB") failed, meaning that it could not go ahead with its proposed subdivision development, it sued a non-profit environmental group (the "PPA") and several of its members who opposed the plaintiff's application. The plaintiff's action claimed $6 million in damages, alleging that testimony given by the president of the PPA before the OMB breached a settlement agreement in a related judicial review proceeding commenced by the PPA. The settlement agreement restricts the defendants' expression as it relates to its view that a previous decision of the regional | In a unanimous decision, the SCC affirmed that the moving party's "Threshold Burden" under s. 137.1(3) is to be interpreted broadly. This involves a two-part analysis: (1) does the underlying proceeding arise from an expression by the moving party; and (2) does the expression relate to a matter of public interest? Like the courts below, the SCC had little trouble holding that the defendants in this case had met their burden.<br>Under the "Merits-Based Hurdle" at s. 137.1(4)(a), the SCC held that the standard is more demanding than that on a motion to strike, but not so high as to require that it be shown that the action is "likely to succeed." To establish "grounds to believe" that the claim has "substantial merit" under s. 137.1(4)(a)(i), the proceeding must have a | Like the Court of Appeal, the Supreme Court used this breach of contract case to provide general guidance on the interpretation and application of each of the elements of s. 137.1 of the *Courts of Justice Act*. However, relatively little is to be learned from the actual application of this guidance to the facts of this case, in particular, as it is relatively clear-cut.<br>Each of the elements of the Threshold Burden under s. 137.1(3) – i.e. whether the proceeding "arises from" "expression" that "relates to a matter of public interest" – should be interpreted "broadly and |

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| | | | conservation authority was "illegal or invalid" or contrary to applicable legislation, and to judicial review of that decision. The impugned testimony before the OMB agreement opposed the proposed development on the grounds that it would be ecologically and environmentally damaging to surrounding wetlands.<br>The motion was one of the first, if not the first, brought under the legislation. It was dismissed at first instance, but the Court of Appeal reversed this decision and dismissed the plaintiff's action. | "real prospect of success" that "tends to weigh more in favour of the plaintiff." Therefore, the plaintiff must show that there are grounds to believe that each of the defences put in play have no real prospect of success.<br>The Court held that the plaintiff had not established that there were grounds to believe that its breach of contract action had substantial merit because it depended on an interpretation of the settlement agreement that "does not flow from [its] plain language […] or from the factual matrix surrounding it."<br>The final step of the analysis, the "Public Interest Hurdle" at s. 137.1(4)(b) was held to be the "crux" or the "heart" of the test, where the motion judge can "scrutinize what is really going on in a particular case." The plaintiff must "show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is *a result* of the expression […], and that the corresponding public interest in allowing the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation."<br>On the evidence, the Court found that the harm likely suffered and | liberally" or "expansively". This step does not involve a qualitative assessment of the expression in issue. Few motions should fail at this step.<br>In providing guidance on the Merits-Based Hurdle, the SCC has clarified that the plaintiff must show that it has "more than an arguable case", which appeared to be the standard the Court of Appeal had settled on in at least one or two of its 2019 decisions.<br>The requirement to establish "grounds to believe" that the defendants have "no valid defence" under s. 137.1(4)(a)(ii) should be viewed as "mirroring" the query on substantial merit under s. 137.1(4)(a)(i). These provisions are "nested" and together entail an "overall assessment of the prospect of success of the underlying claim."<br>The motion judge should engage in limited weighing of the evidence and defer ultimate assessments of |

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| | | | | the corresponding public interest in the proceeding continuing were at the "very low end" of the spectrum, while the public interest in protecting the association's expression relating to environmental matters and encouraging truthful and open testimony fell at "the higher end of the spectrum". Accordingly, it was clear that the plaintiff had not met its burden. | credibility and other "deep dive" questions to a later stage – though, at the same time, motion evidence is not to be taken at face value. The stage of the proceeding must be kept in mind when assessing the merits of the underlying claim.<br>The test under s. 137.1(4) is a subjective one, depending on the motion judge's determination and assessment of the evidence. The Court of Appeal was incorrect to insert a theoretical "reasonable trier" into the analysis.<br>While agreeing with the ONCA that the Public Interest Hurdle is the heart of the analysis, the SCC distanced itself from the lower court's increasing invocation of or focus on four "indicia" or "hallmarks" of a SLAPP in the weighing exercise, holding that this stage "is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a |

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| | | | | | SLAPP." The legislative text governs. |
| **SCC** | Anti-SLAPP | ***Bent v Platnick,*** 2020 SCC 23 | The plaintiff, Dr. Howard Platnick, is frequently hired by insurance companies to review other medical specialists' assessments of persons injured in motor vehicle accidents and to prepare a final report assessing level of impairment. The defendant, Maia Bent, is a lawyer and at the relevant time, was the president-elect of the Ontario Trial Lawyers Association (OTLA), comprised of legal professionals who act for motor vehicle accident victims. After two insurance coverage disputes in which she was involved, the defendant sent an e-mail to the membership list of the OTLA, in which she stated that Dr. Platnick had "altered" doctors' reports and "changed" a doctor's decision on level of impairment. The e-mail was leaked and published in a magazine article. The plaintiff brought an action against Ms. Bent and her law firm for libel for $16.3-million, claiming that he had been dropped by several insurance companies. The defendants brought a motion under s. 137.1 of the *Courts of Justice Act* to | In a 5-4 ruling, the Supreme Court allowed the plaintiff doctor to continue his $16.3-million defamation suit against the defendant lawyer.<br>The majority held that there are grounds to believe that the plaintiff's defamation claim has substantial merit and that the defendants have "no valid defence." The majority's holding that the plaintiff had met his burden with respect to Ms. Bent's justification defence depended at least in part on its decision granting the plaintiff's motion to adduce fresh evidence. Both the motion judge and the Court of Appeal had dismissed motions to adduce fresh evidence brought by the plaintiff. In particular, the majority allowed the addition of an affidavit from the doctor whose impairment assessment Ms. Bent alleged Dr. Platnick had "changed" in which she disputed this allegation. It held that "there is *a* basis in the evidentiary record to support a finding that the allegation that 'Dr. Platnick changed [a] doctor's decision' is not substantially true."<br>In addition, the majority held that there was a basis for finding that | The sharp divide between the majority and dissent in this decision shows that litigants and their lawyers will continue to have difficulty predicting how elements of the Merits-Based and Public Interest Hurdles will be assessed in many cases.<br>While unanimous on the general framework in *Pointes*, the court was in stark disagreement on fundamental points of fact and law in *Platnick*.<br>Especially given that it was a 5-4 divide, it is difficult to identify what can be usefully taken away from the decision. That said, it makes it clear that the application of the s. 137.1 test will continue to be subject to significant judicial discretion.<br>The majority's qualified privilege analysis arguably narrows the defence importantly, but its emphasis that a s. 137.1 motion is not a final adjudication of the merits |

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| | | | dismiss the action, which was granted. The plaintiff successfully appealed this decision to the Court of Appeal. | Ms. Bent's email exceeded the occasion to which a defence of qualified privilege might attach including because, in its view, she could have expressed her concerns about alterations to medical reports by insurers without naming Dr. Platnick specifically.<br>The majority found that the plaintiff had established that he had likely suffered serious harm both because he tendered evidence of significant monetary harm as a result of having been "blacklisted" by insurance companies, and because Ms. Bent's email called his professional reputation into question. The majority also found there was sufficient causal link between the publication and the plaintiff's harm. This finding was also informed, in part, by fresh evidence adduced for the first time at the SCC.<br>The majority held that allowing Dr. Platnick's action to proceed would not deter others from speaking out against unfair and unbiased practices in the insurance industry, but from "unnecessarily singling out an individual in a way that is extraneous or peripheral to the public interest." It held that Ms. Bent's email's references to Dr. Platnick – constituting a "personal attack" made without investigating | and the dissent's pointed criticism of its reasoning may blunt that effect.<br>The majority also emphasized the role of reputational harm – and especially where the plaintiff's professional reputation is in issue – in the Public Interest Hurdle analysis, departing from the Court of Appeal's holding in *Pointes* that the harm element "will be measured primarily by the monetary damages suffered or likely to be suffered by the plaintiff." |

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| | | | | her allegations – were of low public interest value, offsetting the fact that it pertained to the administration of justice. In the final analysis, the public interest in protecting her expression fell somewhere in the middle of the spectrum.<br>The dissent would have dismissed the action on the basis that there were grounds to believe the defendant had a valid defence of qualified privilege. It strongly disagreed with the majority on its finding that the occasion had been exceeded because Ms. Bent's email had named Dr. Platnick specifically, noting that generic accounts of misconduct are not defamatory and therefore do not require or engage the defence of qualified privilege.<br>At the public interest balancing stage of the test, the dissent held, in part, that the bulk of the harm allegedly suffered was a result of the leak of Ms. Bent's email by an unknown person for which Ms. Bent could not be held liable in the circumstances.<br>The dissent would have dismissed the plaintiff's motion to adduce fresh evidence. | |
| **SK** | Defamation | ***Houseman v Harrison*** 2020 SKQB 36 | Two disgruntled former employees of the plaintiff created fake profiles and | The defamation action was successful. Damages were assessed at: $50,000 (general damages), | The case is mostly notable for the extent of the damages. The general |

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| | | | provided negative reviews of the dentist on Rademds.com and Google review, pretending to be former patients. | $140,000 (special damages), $30,000 (aggravated damages) and $20,000 (punitive damages). The total is $250,000. | damages were significantly impacted by the attack on the defendant's professional reputation. The special damages were calculated on a comparison of the number of patients for a one year period while the publication was available and then after when it was no longer available. The aggravated damages were awarded because of the malicious nature of the campaign. |
| **SK** | Privacy | ***Leo v Global Transportation Hub Authority*** 2020 SKCA 91 | A reporter sought a number of documents through FOIP requests. The privacy commissioner recommended release of the information by the government. The government refused. The reporter brought the issue to court, where the court refused to order production of many of the documents for numerous reasons, including that disclosure of the information could reasonably be expected to disclose information that could prejudice the economic interest of the Government of Saskatchewan or a government institution. The "economic interest" analysis was appealed | The appeal had mixed success. Ultimately, the Court found that the issue of the economic interest exemption (and other exemptions) had to be considered first by the Privacy Commissioner. Thus, it could not be assessed by the Court of Appeal. However, the Court provided a number of helpful comments in relation to the economic interest exemption under FOIP. | Paragraph 55 – "Individuals or entities doing business with a government institution are required to take the access to information regime… as a given." The fact that clients backed out of deals or expressed reluctance to enter into agreements with the GTH because of FOIP does not engage the economic interest exemption. |

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| | | | to the Court of Appeal. | | |