IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Indigenous Tourism Association of Canada v. Canadian Broadcasting Corporation,*

2022 BCSC 2030

Date: 20221123

Docket: S215339

Registry: Vancouver

Between:

Indigenous Tourism Association of Canada and Keith Henry

Plaintiffs

And

Canadian Broadcasting Corporation, Jorge Barrera, and Charlie Sark

Defendants

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiffs:	B. Morley L. Zeleschuk
Counsel for the Defendants, Canadian Broadcasting Corporation and Jorge Barrera:	M. Vesely
The Defendant, Charlie Sark:	No appearance
Place and Date of Trial:	Vancouver, B.C. July 28, 2022

Place and Date of Judgment: Vancouver, B.C.

November 23, 2022

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Introduction

[1] The plaintiffs, Indigenous Tourism Association of Canada (“ITAC”), and its Chief Executive Officer, Keith Henry, bring the underlying action in defamation against the Canadian Broadcasting Corporation (“CBC”) and one of its reporters, Jorge Barrera. The claim arises from an article published on CBC’s news website (the “Article”) and a video that aired on CBC’s television programme “The National” (the “Video”, and collectively with the Article, the “Publications”). The Publications concerned ITAC’s allocation and distribution of COVID-19 stimulus funding to Indigenous tourism operators across Canada. The Publications were part of a broader series of investigative reporting by CBC titled “The Big Spend” that tracked billions of dollars in federal government spending over the course of the COVID-19 pandemic.

[2] CBC and Mr. Barrera apply to have the plaintiffs’ claim dismissed under s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*]. They assert that this action is unmeritorious and brought in an improper attempt to silence the defendants’ reporting on matters of public interest. The defendant, Charlie Sark, is a member of the Lennox Island Indian Band who submitted a complaint about ITAC to Indigenous Services Canada (“ISC”) and was quoted in the Publications. Mr. Sark was served with this application but did not participate.

[3] For the reasons that follow, I find that the application should be allowed and the action dismissed.

Factual Background

[4] ITAC is a federally incorporated not-for-profit corporation that promotes and develops authentic Indigenous tourism experiences. ITAC is headquartered in Vancouver with over 1000 members representing Indigenous-owned tourism businesses from across the country. Mr. Henry was instrumental in ITAC’s formation and is the current CEO of ITAC, having held that position since 2015.

[5] The plaintiffs allege that they were defamed by the Publications, which were published by CBC on its news website, www.cbc.ca/news, and broadcast on “The National”. Mr. Barrera authored the Article and co-wrote and narrated the Video.

ITAC’s Allocation and Distribution of Stimulus Funding

[6] The onset of the COVID-19 pandemic in March 2020 and resulting travel restrictions had immediate and significant impact on ITAC’s members. In April 2020, ITAC made a submission to the federal government that outlined a COVID-19 response strategy and sought stimulus funding for Indigenous tourism operators. ITAC’s request was for $20 million in stimulus funding.

[7] At the same time, ITAC determined that it would repurpose existing resources to provide an initial round of stimulus funding to assist its members. ITAC realigned $500,000 from its 2020 budget for this purpose. ITAC also set up an application process which aimed to assist businesses by prioritizing those perceived to be hardest hit and thus most in need of assistance—e.g. businesses that were “export-ready” and relied on international tourism and foreign markets.

[8] In May 2020, Indigenous Services Canada (“ISC”) advised ITAC that it would be providing $1 million in stimulus funding. These funds were combined with the $500,000 ITAC repurposed from its 2020 budget, and distributed by ITAC to applicants in an initial stage of funding. ITAC used the application process established in April 2020 to distribute these funds. ITAC says that it approved approximately 95 applications worth approximately $1.35 million in this stage of funding.

[9] On June 16, 2020, the federal government announced that it would be contributing $16 million in response to ITAC’s request for funding to assist Indigenous tourism operators (the “Federal Stimulus”).

[10] ITAC then entered into negotiations with ISC about the logistics of distributing the Federal Stimulus, including issues around the approval process and to what extent ITAC would be permitted to charge administration costs to ISC. An internal ITAC memorandum authored by Mr. Henry, discussed in further detail below, also suggest that complaints regarding how ITAC had distributed the initial round of stimulus funding impacted ISC’s confidence in ITAC and caused delay in distribution of the Federal Stimulus.

[11] These negotiations were protracted, lasting throughout the summer of 2020. ITAC’s ability to charge administration fees seems to have been a significant issue in the negotiations and on August 14, 2020, Mr. Henry wrote to the Assistant Deputy Minister of Indigenous Services Canada advising ISC that ITAC would no longer proceed to distribute the Federal Stimulus unless ISC was prepared to agree to “more reasonable and fair terms”.

[12] ISC and ITAC subsequently reached agreement on a statement of work for distribution of the Federal Stimulus that included an administration fee for ITAC. ITAC received the Federal Stimulus in September 2020 and distributed the entire amount to Indigenous tourism businesses across Canada between September and December 2020.

ITAC’s CEO Compensation

[13] In late 2019 and early 2020, ITAC was in the process of transitioning Mr. Henry from performing his CEO duties as an independent contractor to doing so as an employee. ITAC had a consulting firm, Chemistry Consulting, prepare a report to assist in determining fair compensation for the CEO role. Negotiations with Mr. Henry ensued, with a view to having him become an employee of ITAC and receive a salary and benefits commensurate to the role and his performance to date.

[14] Tara Saunders, who was the Secretary of ITAC’s board at the relevant time, says that ITAC’s Executive Committee discussed providing Mr. Henry with a signing incentive in early 2020 and that to the best of her recollection, the amount was $25,000.

[15] However, towards the end of the negotiations regarding Mr. Henry's compensation, Brady Smith, ITAC's Chief Strategy Officer, became involved to assist in finalizing the contract. On June 7, 2020, Mr. Henry emailed Mr. Smith and requested a $10,000 "signing incentive", as follows:

My only outstanding item was signing incentive. I was trying to get ITAC to support a performance measure for my existing work of $10K for the success. I suggested prior but was not supported when I got this 6 month extension. Don't want to muddy the waters but perhaps you can raise this as a recommendation for performance bonus for existing success of raising an additional $2.4 million or a signing incentive?

[Emphasis added.]

[16] Despite Ms. Saunders' evidence and Mr. Henry's email to Mr. Smith, the issue of a signing incentive does not appear to have been taken up by ITAC's board of directors. An internal ITAC memorandum dated June 9, 2020 appears to have been circulated in advance of a June 10, 2020 ITAC board meeting at which Mr. Henry's compensation was to be discussed. The June 9th memorandum contemplated ITAC paying Mr. Henry an annual base salary of $250,000, along with medical and dental benefits and a $1,500 monthly allowance. The memorandum did not mention paying Mr. Henry a signing incentive or performance bonus. The meeting minutes from the June 10, 2020 board meeting were not in evidence.

[17] Mr. Henry's compensation was also discussed in a June 10, 2020, email from Kevin Eshkawkogan, one of ITAC's board members, to ITAC's board of directors, but that email again made no mention of a signing incentive or bonus payment. Mr. Eshkawkogan did, however, raise the issue of the optics of giving Mr. Henry a raise during the challenging times created by the pandemic, writing "We also need to be cognizant of the public optics of giving a raise during these challenging times while businesses are closing and we don't have enough resources to go around" (emphasis added).

[18] The payment of a signing incentive to Mr. Henry was then raised by Ms. Saunders in a June 12, 2020 email to ITAC's board of directors. In that email, she called a follow-up meeting to the one held earlier in the week to discuss Mr. Henry's contract—the June 10th meeting—and raised payment of a signing incentive to Mr. Henry as a "new point" for the June 12th meeting. Ms. Saunders expressly linked the signing incentive to ITAC's receipt of the Federal Stimulus:

There are two new points that we have been asked to discuss and approve, especially in the wake of the new $16 mil announcement.

The two proposed contract amendments are as follows:

1. Keith will formally begin as a formal employee of ITAC on September 1st, 2020
2. Specific to the $16 million dollars raised for ITAC this week, Keith will receive a signing incentive of $25,000, payable by the end of June.

[Emphasis added.]

[19] Ms. Saunders' recollection is that this email was dictated to her by Mr. Eshkawkogan as a "proposed resolution" for the June 15th meeting. Ms. Saunders' evidence is that in writing the email, she did not intend to suggest that Mr. Henry's signing incentive would be paid out of the Federal Stimulus, but rather that the words "specific to the $16 million" were meant to highlight that Mr. Henry "had just scored a major win for our members at a time when they were suffering". Ms. Saunders' evidence was that the proposed signing incentive was not contingent on the Federal Stimulus and that Mr. Henry had otherwise done an excellent job for ITAC and "exceeded what he was supposed to achieve that year".

[20] On June 15, 2020, ITAC's board of directors unanimously approved the $25,000 as a signing incentive for Mr. Henry (the "Bonus"). It is undisputed that the Bonus was paid by ITAC to Mr. Henry, and that the Bonus was not paid from the Federal Stimulus.

CBC's Investigative Reporting

[21] The genesis for the Publications was a tip received by Mr. Barrera in September 2020 that included a redacted complaint dated June 24, 2020, that had been filed with ISC, along with supporting documents (the "Complaint"). Mr. Barrera subsequently learned that the Complaint was submitted by Charlie Sark. The Complaint raised allegations that ITAC's distribution of funds was not objective or equitable in that some ITAC board members had received stimulus funds for their personal businesses or organizations they worked with while many received nothing. The Complaint also raised concerns about Mr. Henry having requested and received the Bonus during the pandemic, at a time when many Indigenous tourism businesses were suffering.

[22] Mr. Barrera took initial steps to investigate and substantiate the matters raised in the Complaint. Mr. Barrera contacted ISC, who confirmed it was reviewing the Complaint. He also discovered that the Ontario Indigenous Tourism Association ("ITO") had issues with ITAC's management of stimulus funds, and contacted ITO's CEO (and ITAC board member), Mr. Eshkawkogan, about ITO's concerns. Finally, Mr. Barrera spoke with Mr. Sark and reviewed additional information he provided suggesting that some businesses may have received stimulus funding from ITAC twice.

[23] In October 2020, Mr. Barrera pitched the idea for an investigation into and potential story about the issues raised in the Complaint as part of "The Big Spend" series to CBC News Investigations' Executive Producer. Mr. Barrera was given permission to investigate further. Mr. Barrera's investigation continued in late October and into November 2020, during which time he reviewed additional information from the CBC News Investigations team that tracked stimulus funding that ITAC provided to organizations and businesses, among other information. In late November and early December 2020, Mr. Barrera conducted various interviews with operators of Indigenous tourism businesses to gain information about their experiences during the pandemic.

[24] Mr. Barrera also contacted ITAC, specifically seeking information about how the Federal Stimulus had assisted Indigenous tourism businesses, the regional breakdown, and the list of businesses who received funding. Mr. Barrera also requested an interview with ITAC. ITAC promptly responded to Mr. Barrera's inquiries and confirmed that Mr. Henry would be available for an interview.

[25] On November 27, 2020, three days in advance of the interview, Mr. Barrera emailed ITAC and provided the following information about what he intended to cover with Mr. Henry:

We understand there were concerns raised during the first round of ITAC's COVID-19 relief efforts, and a subsequent complaint that was filed to Indigenous Services Canada.

Complementary to discussing ITAC's second round of funding, we would like to walk through these concerns and the complaint with Mr. Henry. We have interviewed Indigenous tourism business operators in person about their experience to date, and would like to share their experience with ITAC.

Overall, we would like to better understand ITAC's perspective and how the agency plans to address these concerns moving forward.

[Emphasis added.]

[26] Mr. Barrera interviewed Mr. Henry on November 30, 2020. Mr. Henry was asked questions about ITAC's management and allocation of stimulus funds, and the timing and amount of the Bonus. Mr. Henry responded and provided his perspective on the issues raised. In particular, Mr. Henry specifically advised Mr. Barrera that the Bonus was not paid out of the Stimulus Funds.

[27] After the interview, Mr. Barrera followed-up with ITAC regarding his source for payment of the Bonus. Mr. Henry noted that the Complaint alleged Mr. Henry requested it on the day the Federal Stimulus was announced, and that the following day, Ms. Saunders sent her email advising that Mr. Henry would be receiving a signing incentive of $25,000 "specific to the [Federal Stimulus] raised for ITAC this week".

[28] In response, ITAC explained the timing of the Bonus in a manner that was consistent with the documents Mr. Barrera had obtained previously along with the Complaint. On December 3rd, 2020, Nicole Amiel wrote the following to Mr. Barrera:

The long-awaited announcement of the successful funding request for directed financial support of Indigenous tourism businesses from the federal government was the final impetus/win needed (the game clincher) that lead to the board supporting Keith's signing incentive and overall contract in June but it was not paid from the $16M line of funding.

[Emphasis added.]

[29] Later that day, Ms. Amiel sent a further email to Mr. Barrera in which she relayed a further explanation for the Bonus provided by Mr. Smith:

Lastly, the signing incentive was in no way tied to the [Federal Stimulus]; the email from [Ms. Saunders] was clearly out of context; Keith's remuneration as CEO inclusive of signing incentive is and has been contingent on Keith's ability to manage a national organization and to advocate and raise funds both governmental and private.

[30] Ms. Amiel followed-up with Mr. Barrera by email on December 4, 2020, inquiring about whether the additional explanation from Mr. Smith "was helpful and provided enough evidence of the

[Bonus] being separate from the [Federal Stimulus]" and offered to find additional documentation if needed. Mr. Barrera responded with thanks, but noted "the fact remains [the Bonus] was not part of the June 10 meeting on the CEO's new employment arrangement".

[31] Mr. Barrera received and reviewed additional documentation and information, including further information from ITAC regarding its administration and distribution of stimulus funds. In light of the concerns raised by ITO about ITAC's distribution of stimulus funds, Mr. Barrera also sought to interview a representative of ITO. ITO declined an interview, but provided a statement in which it expressed the view that "ITAC did a poor job of fairly distributing the funding it received", that "Ontario businesses were largely left behind and left for last", and that "ITAC's conduct has been damaging to the Ontario Indigenous tourism industry, ITO and its staff, and the national industry as a whole".

[32] Finally, Mr. Barrera sought out a counterpoint to ITO and Mr. Sarks' criticisms of ITAC. Mr. Barrera asked ITAC to recommend a business owner who felt they had benefitted from ITAC's management of the stimulus funds who he could interview. ITAC recommended that Mr. Barrera interview Joe Urie, owner and operator of Jasper Tour Company, which he did. Mr. Urie's perspective was featured in the Publications.

The Publications

[33] As noted above, the Publications formed part of CBC's "The Big Spend" investigative reporting series. CBC published over 20 articles and videos as part of that series canvassing the distribution of federal government funds across a wide variety of industries. Like the Publications, many of the stories that formed part of "The Big Spend" concerned management and allocation of public COVID-19 stimulus funds.

[34] The Article was written and edited for publication by Mr. Barrera in early December 2020, with assistance from producer Kimberly Ivany. Mr. Barrera also co-wrote the script for the Video along with Ms. Ivany. The Publications were edited and vetted by senior CBC editors prior to publication. The Article was published on www.cbc.ca/news early in the morning on December 8, 2020, and the Video aired on "The National" later that same day.

[35] The Article was titled "Indigenous tourism group paid CEO $25K bonus days after it was tasked to distribute COVID-19 relief funds" and branded as part of CBC's "The Big Spend" series. Immediately following the title, the Article provides Mr. Henry's position: "Indigenous Tourism CEO says bonus was part of employment package planned in advance of stimulus". The plaintiffs concede that this language is accurate, but say that the way in which that statement is juxtaposed with the title suggests that Mr. Henry's statement is disingenuous. For their part, CBC and Mr. Henry take issue with the implication in Mr. Henry's statement that the Bonus was planned in advance, which they say is not consistent with the documents reviewed by Mr. Barrera in the course of his investigations.

[36] Regardless, after reporting on the federal stimulus funding, its allocation through ITAC, and the delays that resulted from concerns expressed to ISC by ITO and by way of the Complaint, the

Article includes Mr. Urie's positive perspective. The following quote is also attributed to Mr. Urie: "The $25,000 in federal relief funds administered through ITAC was a lifesaver, said Urie".

[37] The Article then deals with the Bonus. Under a subheading "ITAC CEO requested bonus days before announcement", CBC reported the timing around the payment of the Bonus and the connection with the Federal Stimulus as set out in Ms. Saunders' December 12, 2020 email correspondence with Mr. Barrera:

The morning after the $16 million was announced, ITAC's secretary Tara Saunders sent an email calling for a June 15 board meeting to approve a bonus for Henry.

"Specific to the $16 million dollars raised for ITAC this week, Keith will receive a signing incentive of $25,000 payable at the end of June," said the June 12 email from Saunders.

The board approved the money in the June 15 meeting.

ITAC said in a statement the $25,000 did not come from the stimulus funds.

Henry told CBC News the bonus was part of a planned new employment agreement and was based on the recommendation of an outside consultant.

…

In an emailed statement to CBC News, Smith said the $25,000 was a "signing incentive" connected to Henry's "ability to manage a national organization ... and raise funds both government and private."

The board approved a new employment package for Henry the day before the $16-million announcement on June 11, which set his salary at $250,000 a year, plus $25,000 in benefits, according to the publicly available board minutes. The minutes make no mention of any discussion of a $25,000 "signing incentive" or bonus for Henry.

[38] As to Mr. Sark, the Article noted that he filed a formal complaint against ITAC that included concerns over the Bonus and that it "didn't sit right" with him. The following quote was also attributed to Mr. Sark:

"I recall the prime minister of Canada standing up early in the pandemic when stimulus packages were being considered throughout the economy and stating that ... the government would ensure that no corporate CEO or executive benefited personally from the stimulus funding," said Sark.

[39] The Article then goes on to report on ITO's perception of regional disparities in distribution of relief funding. The dispute between ITAC and ITO/PEI representatives over regional disparities in the allocation of the initial round of funding and the high number of ITAC board members who received funding was noted, along with ITO's view that that distribution was "lopsided". The Article then set out ITAC and Mr. Henry's response to ITO's criticisms:

Henry said ITAC board members had no say over who received funds.

"It was blind status to them. They had no idea when these applications were going to go through," said Henry in an interview with CBC News.

"It was based on the criteria we set out from the very beginning."

The regional disparities continued after the $16 million in funding rolled out, according to the ITO board.

In the first three of six phases of stimulus funding launched by ITAC, only 20 Ontario Indigenous businesses received approval, according to a letter sent by ITO's board to CBC News.

[40] The Article concluded by providing ITAC's explanation for the delay in distribution of the Federal Stimulus and closed with a quote from Mr. Henry regarding the significant efforts ITAC put into distribution of the stimulus funds:

According to numbers provided by ITAC, a total of 678 Indigenous businesses received grants out of about 830 applications. British Columbia topped the list with 152 successful applications, followed by Ontario with 122 and Quebec with 117.

Henry said delays were caused by the volume of required work coupled with the complaints. He said Indigenous Services Canada officials continued to ask questions into September, slowing the distribution of the COVID-19 funds.

Henry said 90 per cent of Ontario applicants eventually received funding.

"This is a very significant volume of work for basically the handful of staff that we have," said Henry.

"I'm not really sure I understand why the narrative is anything other than: there's a pandemic and we're trying desperately to save our business in any way we can."

[41] The Video largely parallels the Article, in both tone and content. Neither party addressed the contents of the Video in any meaningful way in their written or oral submissions. As such, for the purpose of this application I have viewed the Video and will consider the Publications jointly, with reference to the language used in the Article unless otherwise indicated.

Legal Framework

[42] The *PPPA* is modelled on and very similar to its Ontario counterpart legislation, ss. 137.1–137.5 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. As Justice Goepel explained in *Hobbs v. Warner*, 2021 BCCA 290 at para. 6, the *PPPA* is a legislative response to strategic lawsuits against public participation, namely claims initiated against individuals or organizations that take positions on issues of public interest with the intention of silencing or otherwise deterring those persons from participating in public affairs: see also *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 2 [*Pointes*].

[43] Section 4 of the *PPPA* sets out the test for the Court to apply in considering whether to dismiss an action for defamation:

> (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.

[44] Section 4 of the *PPPA* acts as a "gatekeeper" to "prevent defamation lawsuits from continuing where the impugned words arise out of an expression related to matters of public interest": *Peterson v. Deck*, 2021 BCSC 1670 at para. 27. As set out in *Pointes* at para. 18, the legislation creates a multi-step process to determine whether an action should proceed:

a) the applicant (defendant) must demonstrate on a balance of probabilities that (s. 4(1)):

i. the proceeding arises from an expression made by the applicant; and

ii. the expression relates to a matter of public interest;

b) if these criteria are met, the onus then shifts to the respondent (plaintiff) to show that the action should not be dismissed by satisfying the court that (s. 4(2)(a)):

i. there are grounds to believe the proceeding has substantial merit; and

ii. the defendant has no valid defence to the proceeding; and

c) if the proceeding has substantial merit and the defendant has no valid defence to the proceeding, the court must then weigh the public interest in allowing meritorious lawsuits to proceed against the public interest in protecting expression on matters of public interest (s. 4(2)(b)).

[45] The final stage of the analysis under s. 4(2)(b) of the *PPPA* requires weighing the public interest in allowing meritorious lawsuits to proceed against the public interest in protecting expression on matters of public interest: *Pointes* at para. 18. This weighing exercise is substantively different than balancing; one consideration must outweigh the other: *Galloway v. A.B.*, 2021 BCSC 2344, at para. 61, citing *Pointes* at paras. 65–66.

[46] The burden on the plaintiff at this stage in the context of a defamation claim was explained in *Galloway* as follows:

[62] As a prerequisite to the "weighing" under s. 4(2)(b), the plaintiff must first show: (i) the existence of harm; and (ii) causation, namely, that the harm was suffered as a result of the defendant's expression: *Pointes*, at para. 68. No definitive determination of harm or causation is required at this stage. Instead, the plaintiff must simply provide evidence for the hearing judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link: *Bent*, at para. 154 (citing *Pointes*, at para. 71).

[63] In defamation actions, general damages are presumed, and this alone is sufficient to constitute harm: *Hobbs*, at paras. 81 and 84. However, the magnitude of the harm will be important in assessing whether the harm is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *Bent*, at para. 144. Reputational harm is eminently relevant to the harm inquiry under s. 4(2)(b): *Bent*, at para. 146. Thus, not only must monetary harm be considered in determining whether the harm is sufficiently serious, but also reputational harm and intangibles such as shame, disgrace and embarrassment: *Bent*, at paras. 148-149.

[64] Once the existence of harm is established, the next question is whether the harm was suffered as a result of the defendant's expression: *Bent*, at paras. 150-151. In *Pointes*, Côté J. explained, at para. 72:

> [72] I add that, naturally, evidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm (C.A. reasons, at para. 92). Causation is not, however, an all-or-nothing proposition, in the sense that while the causal chain between the defendant's expression and the harm suffered by the plaintiff may be weaker for some elements of the harm suffered, it might nonetheless be strong for other elements. This is a case-by-case inquiry undertaken by the motion judge.

[65] Provided harm has been established and shown to be causally related to the expression, s. 4(2)(b) then requires that the harm and the corresponding public interest in permitting the proceeding to continue be weighed against the public interest in protecting the expression: *Pointes*, at para. 73. Côté J. explained, at paras. 74-75 [*italics* in original]:

> [74] . . . Under [s. 4(2)(b)] . . . ., the legislature expressly makes the public interest relevant to specific goals: permitting the proceeding to continue and protecting the impugned expression. Therefore, not just *any matter* of public interest will be relevant. Instead, the quality of the expression, and the *motivation* behind it, are relevant here.
>
> [75] Indeed, "a statement that contains deliberate falsehoods [or] gratuitous personal attacks . . . 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, [or] vitriol" [citation omitted].

[47] The weighing exercise under s. 4(2)(b) is the “core” or “fundamental crux of the analysis”: *Pointes* at paras. 18, 62. This section aims to optimize the balance between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest: *Pointes* at para. 18. It functions as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions: *Pointes* at para. 62.

Analysis

Section 4(1): Expression on a Matter of Public Interest

[48] The parties agree that CBC published the Publications and that they relate to a matter of public interest, namely the distribution of federal government COVID-19 funds by a not-for-profit corporation. CBC and Mr. Henry have thus met their onus at the first step of the test under s. 4(1) of the Act.

Section 4(2)(a): Substantial Merit & Validity of Defences

[49] At the second stage of the test, the burden shifts to the plaintiffs to establish that there are grounds to believe the claim has substantial merit, and the defendants have no valid defences. The “grounds to believe” standard embodied in s. 4(2)(a) requires that there be a basis in the record and the law for a finding that the underlying proceeding has substantial merit and that there is no valid defence: *Galloway* at para. 50. A basis in the record will exist if there is a single basis that is legally tenable and reasonably capable of belief to support a finding of substantial merit and the absence of a defence: *Galloway* at para. 54; see also *Bent v. Platnick*, 2020 SCC 23 at para. 88.

[50] *Pointes* is instructive as to the approach to be taken by the court when weighing and assessing the evidence on an application under s. 4 of the Act. Given the early stage in the litigation process at which such applications are brought, and by consequence, the limited evidentiary record and corresponding procedural limitations, the judge hearing the application should:

[52] . . . engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced. This might also include a preliminary assessment of credibility -- indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. …

Does the Plaintiffs' Claim Have Substantial Merit?

[51] The "substantial merit" standard requires that the claim have a real prospect of success. This standard is less stringent than a strong *prima facie* case, or the test for summary judgment, but is more demanding than a claim having "some chance" or a "reasonable prospect" of success: *Galloway* at para. 52, citing *Pointes* at para. 50. As Justice Côté explained in *Pointes*:

[49] . . . for an underlying proceeding to have "substantial merit", it must have a real prospect of success - in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law - taking into account the stage of the proceeding - for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

[52] The evidentiary basis for the claim thus must be assessed when applying the substantial merit standard. A claim that has been merely "nudged" over the line of having some chance of success will not be sufficient: *Galloway* at para. 53. A real prospect of success means that the plaintiff's success is more than a possibility; it requires that the claim have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weight more in favour of the plaintiff: *Pointes* at para. 50. Put differently, neither frivolous lawsuits, nor those with only technical validity, will be sufficient to survive: *2504027 Ontario Inc. o/a S-Trip! v. Canadian Broadcasting Corporation (CBC) et al.*, 2021 ONSC 3471 at para. 31 [*S-Trip*].

[53] Importantly, this is not a final adjudication of the plaintiffs' claim on the merits, but rather an assessment of the likelihood of success: *Pointes* at para. 37; *Simpson v. Rebel News Network Ltd.*, 2022 BCSC 1160 at para. 52.

[54] The plaintiffs' claim is for defamation. A defamatory statement is "one which has the tendency to injure the reputation of the person to whom it refers; which tends, that is to say lower him in the estimation of right-thinking member of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or "dis-esteem"": *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 67, LeBel J. concurring [*WIC Radio*], citing *Vander Zalm v. Times Publishers*, 109 D.L.R. (3d) 531 at 535, 1980 CanLII 389 (B.C.C.A.).

[55] For their defamation claim to succeed, the plaintiffs must prove three things: (a) that the words were published, meaning that they were communicated to at least one person other than the plaintiff; (b) that the words complained of referred to the plaintiff; and (c) that the impugned words were defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person: *Bent* at para. 92; *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28. If these elements are established on a balance of probabilities, the falsity of the impugned statements and damage to the plaintiff are presumed: *Simpson* at para. 57.

[56] It is not disputed that the Publications were published by broadcast by airing on the CBC Television programme "The National" and on CBC's news website www.cbc.ca/news, or that the Publications refer to the plaintiffs. The issue that arises here is whether the inferences to be drawn from the words used in the Publications would tend to lower the plaintiffs' reputations in the eyes of a

reasonable person. To determine this issue, I must "consider the meanings that as a matter of law are capable of arising and that, as a matter of fact, did arise in the minds of reasonable persons", from the Publications: *S-Trip!* at para. 37; *Pan v. Gao*, 2020 BCCA 58 at para. 11.

[57] The plaintiffs agreed in oral argument that the language used in the Publications is accurate. However, they say that the inferences to be drawn from the sentence structure and the manner and order in which words and sentences were used in the Publications—namely the editorial choices made by CBC and Mr. Barrera—lead the reader to conclude that that ITAC and Mr. Henry's statements were disingenuous, that they were corrupt, and engaged in improper activities.

[58] More specifically, the plaintiffs' application response pleads that the Publications were defamatory by leaving the "natural and ordinary inferential meanings of and concerning [the plaintiffs] to the average, ordinary viewer as a matter of impression" that:

a) ITAC improperly and inefficiently distributed government stimulus funding;

b) ITAC inappropriately favoured certain constituents and jurisdictions when distributing government stimulus funding;

c) ITAC improperly paid a bonus to Mr. Henry out of government stimulus funds; and

d) Mr. Henry accepted an improper payment from ITAC which was paid as a result of government stimulus funding.

[59] At various points in their submissions, the plaintiffs went further and asserted that the Publications gave rise to inferences that the plaintiffs committed criminal offences—theft and fraud—by way of payment of the Bonus to Mr. Henry. For example, the plaintiffs assert that the natural and ordinary meaning of the language used in the Publications implies that they "deceitfully used their positions of authority to misappropriate and defraud worthy recipients of the [Federal Stimulus]" and left the impression of Mr. Henry as "the Indigenous business leader that defrauded worthy Indigenous businesses of government funding" (emphasis added).

[60] The defendants say that the plaintiffs cannot meet their burden of showing that there is substantial merit to their claim because the words complained of are incapable, as a matter of law, of giving rise to any of the alleged defamatory meanings when the Publications are read or understood fairly and as a whole. I disagree. I am satisfied that there is a real prospect that the Publications could be understood by a reasonable person to imply some of the meanings alleged by the plaintiffs, namely that ITAC improperly and inefficiently distributed government stimulus funding and favoured certain members over others in its distribution of funds. For example, the statement in the Article that ISC was reviewing "several complaints" about the Bonus and "how [ITAC] distributed stimulus funds" followed by the statement from ISC that it "takes allegations and complaints regarding the misuse of public funds very seriously" is illustrative of the potential for a reasonable person to infer from the Article that ITAC acted improperly or inefficiently in its distribution of stimulus funds.

[61] I also find that there is a real prospect that the Publications could reasonably be understood to imply—or at least raise a question as to whether—the Bonus payment was improperly paid by ITAC and accepted by Mr. Henry. While the Article clearly included a statement that the Bonus did not come

from the Federal Stimulus, the way in which the timing of the decision to pay the Bonus was reported, and the quote attributed to Mr. Sark in which he said he recalled the prime minister saying that government would "ensure that no corporate CEO or executive benefitted personally from the stimulus funding" could be understood by a reasonable person to imply that the Bonus was improper in the circumstances.

[62] As such, I agree with the plaintiffs that the statements about ITAC's distribution of stimulus funds and payment of the Bonus, particularly when considered within the context of the Publications as a whole, would tend to lower the plaintiffs' reputations in the minds of a reasonable reader or viewer.

[63] Having so concluded, it is unnecessary for me to determine for the purpose of this application whether the inferences reasonably drawn from the Publications rise to the level of imputing illegal conduct to ITAC or Mr. Henry. However, I note in this regard that the Publications do not make any express reference to theft, fraud or corruption, nor does the language used appear to rise to the level of that which has been found in other instances to connote illegal, if not specifically criminal, behaviour, such as being called "fraudulent", a "rip-off", "crooked", or being accused of corruption by taking secret commissions: see e.g. *Wilson v. Switlo*, 2011 BCSC 1287 at para. 143.

[64] Regardless, I am satisfied that when considered as a whole, the underlying claim has a prospect of success that tends to weight more in favour of the plaintiffs. They have established a basis in the record and the law, factoring in the early stage of this proceeding, for me to conclude that the Publications may give rise to some of the alleged defamatory inferences. In the result, I find that the plaintiffs have demonstrated that the claim has substantial merit, thereby discharging their burden at this stage of the test.

Are the Defendants' Defences Valid?

[65] At this stage of the analysis, the defendant first puts the defences it intends to raise "in play", then the plaintiff must show that there are grounds to believe that none of those defences are valid: *Pointes* at para. 56-57; *Galloway* at para. 56. The relevant question is whether or not the defences put in play are legally tenable or supported by evidence that is reasonably capable of belief: *Pointes*, at para. 59. The onus is on the plaintiff to show that a reasonable trier could reject all of the defences put in play by the defendant. A defence that could go either way is a defence that a reasonable trier could reject: *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corp*., 2021 ONCA 26 at paras. 56-57; *S-Trip*! at para. 34.

[66] As Côté, J. made clear in *Pointes*, if there is any defence that is valid, then the plaintiff has not met its burden and the claim should be dismissed (*Pointes* at paras. 58-59, as cited in *Galloway* at para. 57):

[58] The word *no* is absolute, and the corollary is that if there is *any* defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. As with the substantial merit prong, the motion judge here must make a determination of validity on a limited record at an early stage in the litigation process -- accordingly, this context should be taken into account in assessing whether a defence is valid. The motion judge must therefore be able to engage in a limited assessment of the evidence in determining the validity of the defence.

[Italicized emphasis in original. Underlined emphasis added.]

See also *S-Trip!* at para. 32.

[67] For the purposes of this application, CBC and Mr. Barrera raise two defences that they assert are dispositive under s. 4(2)(a)(ii) of the Act: fair comment and responsible communication on a matter of public interest. In their submission, both of these defences are factually and legally available to them such that the plaintiffs cannot meet their burden at this stage of the test.

Fair Comment

[68] The plaintiffs say that CBC's defence of fair comment is bound to fail because the Publications are not recognizable as comments, are not based in fact, and were actuated by malice. In their submission, the Publications imply that as a matter of fact, the defendants improperly distributed stimulus funding and that ITAC improperly paid and Mr. Henry improperly received, a bonus from the Federal Stimulus.

[69] In this context, "comment" includes a "deduction, inference, conclusion, criticism, judgment remark or observation which is generally incapable of proof": *WIC Radio* at para. 26. What is comment and what is fact must be determined from the perspective of a reasonable reader or viewer, with the notion of "comment" being generously interpreted: *WIC Radio* at paras. 27, 30.

[70] The test for a defence of fair comment requires the defendant to show that the comment was: (a) on a matter of public interest; (b) based on fact; (c) can include inferences of fact, but must be recognizable as comment; (d) one that a person could honestly make on the proved facts; and (e) was not actuated by malice: *Grant* at para. 31; see also *WIC Radio* at para. 28; *Simpson* at para. 60; *S-Trip!* at para. 46.

[71] The ultimate determinant of whether words are comment or fact is how they would strike the ordinary, reasonable reader: *Neufeld v. Hansman*, 2021 BCCA 222 at para. 27. The test was more recently summarized by Adair, J. in *Galloway* as follows:

[359] A properly disclosed or sufficiently indicated (or so notorious as to be already understood by the audience) factual foundation is an important objective limit to the fair comment defence: *WIC*, at para. 34. The facts must be sufficiently stated or otherwise known to readers so that they are able to make up their own minds on the merits of the comments and opinions expressed: *Neufeld*, at para. 28. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available: *WIC*, at para. 31. On the other hand, a single fact, proved to be substantially true, can provide a sufficient foundation for a fair comment defence: see *Simpson v. Mair and WIC Radio Ltd*., 2004 BCSC 754, at paras. 56-60.

[72] The first element of the test—comment on a matter of public interest—is conceded by the plaintiffs. I am also satisfied that the facts set out in the Publications are supported by the evidence before me such that the alleged comments are based on fact. Indeed, the plaintiffs do not say otherwise and conceded in oral argument that the language used in the Publications is accurate. The plaintiffs'

claim centers on the allegedly defamatory inferences they say arise from the manner in which the Publications reported the underlying facts.

[73] The plaintiffs say that the inferences to be drawn from the Publications takes them outside the confines of fair comment as neither of the Publications as a whole, or any of the statements contained therein, are recognizable as comment. This is one instance in which the plaintiffs say the Video differs from the Article. At approximately 42 seconds of the Video, the visual is Mr. Henry walking down a hallway at ITAC's offices and Mr. Barrera's voiceover says:

ITAC got to work. Their first order of business: a $25,000 bonus for CEO Keith Henry. He says the money was part of a new employment deal—and fair. … For some, Henry's and ITAC's work was a lifesaver. … But others saw problems. …

[74] The issue at this stage of the analysis is therefore whether, taken as a whole, the statements in the Publications about ITAC's distribution of stimulus funds and payment of the Bonus are recognizable as comment, and the allegedly defamatory inferences arising from those statements are ones that a person could honestly make on the proved facts. The plaintiffs say that the innuendo to be drawn from the Article takes it outside the confines of fair comment as neither of the Publications as a whole, or any of the statements contained therein, are recognizable as comment.

[75] I disagree. In my view, the statements in the Article and the Video that could be construed by a reasonable person as giving rise to the allegedly defamatory inferences raised by the plaintiffs are recognizable as comment. For example, John Jenkins and Josh White's criticisms are clearly recognizable as comment: Mr. Jenkins' criticism of the timing of stimulus payments is expressly framed as him talking about his experience not having been great, and Mr. White's reaction to the Bonus is similarly framed as "increasing <u>his distaste</u> for [ITAC]" (emphasis added). Mr. Sark's view on the Bonus is also clearly recognizable as comment: "The [Bonus] <u>didn't sit right with Charlie Sark</u> from Lennox Island First Nation, a founding ITAC member whose mother sat on the board" (emphasis added). In the Video, the voiceover states that "<u>others</u> found problems", which in my view renders the statement recognizable as comment. The Video does not affirmatively state that the Bonus was improper or problematic, but rather notes that others had such a view or had expressed comment to that effect.

[76] I am also of the view that the defamatory inferences alleged by the plaintiff to arise from these comments are ones that a person could honestly make on the established facts. As the defendants note, others—specifically ITO and Mr. Sark—drew essentially the same inferences and voiced the same concerns about ITAC's distribution of stimulus funds and the Bonus before the Publications were published. ITO's concerns were also repeated in its written response to Mr. Barrera's request for an interview. Moreover, the plaintiffs were themselves aware that criticisms had been levied about ITAC for these issues as early as June 2020 when ISC raised them in its June 10 and 12, 2020 calls with Mr. Henry, which he reported to ITAC's executive committee in his June 14th letter.

[77] Finally, and as noted above, a defence of fair comment will be defeated if the plaintiff establishes that the defendant acted with express malice or reckless disregard for the truth: *Grant* at

para. 31; *Mawhinney v. Stewart*, 2022 BCSC 1243, at para. 51. To demonstrate malice, the plaintiff must show that the defendant published the statement (*Neufeld* at para. 41):

a) knowing it to be false;

b) with reckless indifference as to whether it was true or false;

c) for the dominant purpose of injuring the plaintiff because of spite or animosity; or

d) for some other dominant purpose which is improper or indirect.

[78] The plaintiffs assert that the defendants acted with malice by making the publications with reckless disregard for the truth, which they say arises from their failure to use information provided by the plaintiffs that they say rebutted the inaccurate information in the Publications. I disagree. The evidence does not establish that the defendants acted with malice or reckless disregard for the truth in making the Publications. The defendants had no prior knowledge of the plaintiffs; rather, they were prompted to investigate the matter because of a tip they received, and did so as part of the "The Big Spend" series that covered the distribution of pandemic stimulus funding across the country. Importantly, the defendants were aware of additional information concerning allegations against Mr. Henry that were unrelated to ITAC's distribution of the stimulus funds and chose not to pursue or publish that information.

[79] I agree with the defendants that the facts reported were either uncontroverted or supported by numerous documents, and that Mr. Barrera conducted extensive research for the Publications, obtaining and reviewing a significant body of information over a period of months. There is simply no suggestion in the record before me that CBC or Mr. Barrera published the Article or the Video knowing the statements contained therein were false, or with reckless disregard for whether they were true or false. To the contrary, the record demonstrates the significant efforts of CBC and Mr. Barrera over the course of their investigations to ensure that the Publications were thoroughly researched and accurately reported.

[80] Nor does Mr. Barrera appear to have approached the Publications from a pre-determined point of view or with disregard for the plaintiffs' version of events. To the contrary, he asked the plaintiffs for their perspectives on the opinions expressed in the Publications and reported their responses, including in particular ITAC and Mr. Henry's assurances that the Bonus was not paid from the Federal Stimulus. Mr. Barrera also asked ITAC to recommend a business owner who had benefitted from its distribution of the stimulus funds, interviewed that person (Mr. Urie), and included his positive perspective in the Publications.

[81] As such, I am not satisfied that on the record before me, that the statements made in the Publications which the plaintiffs allege gave rise to defamatory inferences were actuated by malice. In the result, I find that the defence of fair comment is valid.

[82] In light of this conclusion, I also find that the plaintiffs have failed to meet their burden under s. 4(2)(a)(ii) of the Act to show that there are no valid defences. In the result, this action must be dismissed.

Responsible Communication on a Matter of Public Interest

[83] My finding that the defence of fair comment is valid is sufficient to dispose of this application. However, I will nonetheless briefly consider the second defence raised by CBC and Mr. Barrera: responsible communication on a matter of public interest.

[84] The plaintiffs say that CBC's defence of responsible communication is bound to fail because their side of the story was not fairly sought or accurately reported. In their submission, CBC did not disclose the "true" topic of the interview until after it had begun and failed to accurately include the plaintiffs' viewpoints in the Publications. They also assert that Mr. Henry was "shocked" and "blindsided" when the interview started and Mr. Barrera's first question was about the Bonus. I do not accept these assertions.

[85] Mr. Barrera advised Ms. O'Driscoll in advance of the interview that he intended to canvass concerns raised about ITAC's distribution of settlement funds and a "complaint that was filed to Indigenous Services Canada". Mr. Henry appears to have been aware long prior to the interview that ISC had received complaints about ITAC's administration and allocation of stimulus funds as the evidence shows that ISC raised the issue with him directly on conference calls held June 10 and 12, 2020. Mr. Henry's knowledge of the seriousness of the complaints is also evident in his subsequent conduct as, shortly thereafter, on June 14, 2020, he wrote a letter to ITAC's executive committee, reporting as follows:

… However, during [the June 10, 2020 call] ITAC was advised of new concerns regarding the administration and delivery of the Stimulus Grant funding where the following was communicated with ITAC:

- It was stated on the call ITO has raised serious concerns to Indigenous Services Canada in Ontario that ITAC is not supporting their Ontario Stimulus Development Grants (141 applied from Ontario of about 600 overall across Canada).
- It was stated Indigenous Services Canada (ISC) Ontario has now brought concerns forward to Indigenous Services Canada in Ottawa that ITAC received additional funding from this program.

…

- In addition, ITAC was advised the concerns about the overall ITAC administration of the project raised by Indigenous Tourism Ontario was also supported by PEI and BC representatives.

[86] Mr. Henry went on to report on the June 12, 2020 call, advising ITAC's executive committee that despite the June 11th announcement of the $16M stimulus funding, ISC "made it clear that there were concerns such as fairness to regional Stimulus Development Grants, concerns about the ITAC Stimulus Grant application process, and a lack of confidence in the review process". He also noted ISC's "key messages" to the effect that ITAC's second phase of stimulus grants would be put on hold subject to further review in light of "allegations that ITAC is not funding projects fairly, funding

potential non-Indigenous owners, and the process is flawed". Mr. Henry closed his correspondence by noting that ITAC would be meeting the next day to continue to try to resolve "this serious situation".

[87] In response to Mr. Henry's letter, Brenda Holder, the Chair of ITAC's board of directors, wrote that the concerns raised were "extremely worrying" to her and that she was "shocked and very disappointed to read about the serious allegations of BC, Ontario and PEI". Ms. Holder also directed the board "to refrain from responding to [Mr. Henry's] email and to refrain from discussions amongst one another until myself and my Vice-Chair can have discussions with our ITAC Lawyer and further conversations with our President and CEO".

[88] As to the Bonus, this was raised in Mr. Sark's formal complaint to ISC which had been filed months earlier, on June 24, 2020. It is difficult to conceive that by late November, Mr. Henry had not received a copy of the Complaint and remained unaware of the allegations raised therein, including as to the Bonus. Counsel for Mr. Henry did not submit otherwise and the evidentiary record before me does not indicate when he first became aware of the Complaint. In the circumstances, for the purpose of the present application, I do not accept that Mr. Barrera failed to disclose the "true" topic of the interview, or that Mr. Henry was "shocked" or "blindsided" by the subjects raised therein.

[89] Moreover, the plaintiffs' submission that the responsible communication defence is invalid is undermined by their concession that the content of the Publications is accurate and their inability to point to any material inaccuracies in the Article or Video. While the plaintiffs asserted that there are no supporting facts in the record for the subtitle "ITAC CEO requested bonus days before announcement", they did not strenuously press the point, likely because the impugned statement is supported in the evidence, namely Mr. Henry's June 7, 2020 email to Mr. Smith in which he requested a $10,000 signing incentive.

[90] The focus of the plaintiffs' submissions was on the defamatory inferences they say will be drawn by the reader or viewer, and they take issue with the organization of and sentence structure used in the Article. For example, the plaintiffs contend that by putting the words "…, said Henry" and the end of a sentence instead of saying "Henry said…" at the beginning of a sentence leads the reader to infer that Mr. Henry is being dishonest. I do not agree. When the Article is considered as a whole, I see no material difference in the inferences to be drawn from the words used depending on the distinction raised by the plaintiffs.

[91] I agree with CBC and Mr. Barrera's characterization of the plaintiffs' complaint as being, in effect, that they wished different editorial choices had been made in terms of what was included or emphasized in the Article. The scope of editorial licence is broad. As the Supreme Court of Canada noted in *Grant*, citing the UK House of Lords in *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44, assessing responsible journalism is not an invitation for courts to micro-manage the editorial process of medical organizations:

[73] The House of Lords reversed the judgment of the Court of Appeal and held that the responsible journalism defence applied. It criticized the lower courts for applying the *Reynolds* factors restrictively as "a series of hurdles to be negotiated by a publisher" (para. 33, *per* Lord Bingham), rather than as an illustrative guide to what might constitute responsible journalism on the facts of a given case. Given that the defence was meant to foster free expression and a free press, its requirements

should not be pitched so high as to make its availability all but illusory. The House of Lords also emphasized that the assessment of responsible journalism is not an invitation for courts to micro-manage the editorial practices of media organizations. Rather, a degree of deference should be shown to the editorial judgment of the players, particularly professional editors and journalists. For instance, a court should be slow to conclude that the inclusion of a particular defamatory statement was "unnecessary" and therefore outside the scope of the defence. As Lord Hoffmann put it:

> The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, ex hypothesi, in the public interest, too risky and would discourage investigative reporting. [para. 51]

The House of Lords also made clear that the defence is available to "anyone who publishes material of public interest in any medium", not just journalists or media companies: *Jameel*, at para. 54, *per* Lord Hoffmann; *Seaga v. Harper*, [2008] UKPC 9, [2008] 1 All E.R. 965.

[92] Regardless, the decision about what to include in a publication may involve a variety of considerations, and provided the statements made are accurate, editorial choices should be granted generous scope: *Grant* at para. 118; *Kam v. CBC,* 2021 ONSC 1304 at para. 92. This also addresses the plaintiffs' complaint that Mr. Barrera did not include certain information in the Article. CBC and Mr. Barrera are entitled to report on the matters in issue as they see fit and are not obliged to include information they consider to be extraneous to the story they seek to report on because ITAC or Mr. Henry wish them to do so. The plaintiffs point to no authority to the contrary. Moreover, I find that CBC and Mr. Barrera's restraint in not including additional information about Mr. Henry of which they were aware that would have portrayed him in a negative light but was extraneous to the issues discussed in the Publications, also supports the likelihood of success of the defence of responsible communication.

[93] As such, I find that the record before me shows that CBC and Mr. Barrera conducted a fair, thorough and diligent investigation, and that the Publications were diligently researched and are supported by documentary evidence, much of which was derived from or known to the plaintiffs. CBC and Mr. Barrera sought out the plaintiffs' perspectives and included their responses prominently in the Publications. They also provided the opportunity for ITAC to put them in touch with someone who could provide a countervailing positive point of view (Mr. Urie), interviewed him, and featured his response prominently in the Publications as well.

[94] In the result, I find that the plaintiffs have not met their burden of showing that there are grounds to believe that the defence of responsible communication is not valid.

Section 4(2)(b): Public Interest

[95] Given my conclusion that the plaintiffs have failed to meet their burden under s. 4(2)(a)(ii), the action must be dismissed, and it is therefore unnecessary to consider s. 4(2)(b): *Mawhinney* at para. 63. However, in the event that I am incorrect in that regard, and given that s. 4(2)(b) has been recognized

as the “core” or “crux” of s. 4 of the Act (*Galloway* at para. 59; *Pointes* at paras. 18, 62), I offer the following observations.

[96] As noted above, the weighing of interests that occurs under s. 4(2)(b) is substantively different than balancing; one consideration must outweigh the other: *Galloway* at para. 61, citing *Pointes* at paras. 65-66. As a pre-requisite to the weighing exercise, the plaintiff must first show two things: (a) the existence of harm; and (b) that the harm was suffered as a result of the defendant’s expression: *Pointes* at para. 68; *Bent* at para. 142. A definitive determination of harm or causation is not required; rather, the plaintiff must simply provide evidence for the hearing judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link: *Galloway* at para. 62, citing *Bent* at para. 154.

[97] The steps in the s. 4(2)(b) analysis in the context of a defamation claim were summarized by Goepel J.A. in *Hobbs*:

[20] General damages are presumed in defamation actions, and this alone is sufficient to constitute harm: *Pointes* at para. 71. However, the magnitude of harm is important in assessing whether the harm is sufficiently serious such that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *Pointes* at para. 70. General damages in the nominal sense will ordinarily not be sufficient for this purpose: *Bent* at para. 144.

[21] In *Bent*, the Court also noted that general damages are presumed in defamation actions. In addition, reputational harm is eminently relevant to the harm enquiry. Reputation is one of the most valuable assets a person can possess and is an attribute that must be protected by society’s laws: *Bent* at para. 146.

[22] Once harm has been established, the next question depends on whether that harm was suffered as a result of the defendant’s expression. The plaintiff must show that they have a legitimate justification for bringing a lawsuit—namely, seeking to remedy legitimate harm—to alleviate the apprehension that they are using the litigation as the tool to quell expression and silence the defendant: *Bent* at para. 150.

[23] Once the harm has been shown to be causally related to the expression, s. 4(2)(b) requires that the harm and corresponding public interest in permitting the proceeding to continue be weighed against the public interest in protecting the expression. At this stage of the process, public interest becomes critical to the analysis: *Pointes* at para. 73.

[98] In defamation actions, general damages are presumed, and this alone is sufficient to constitute harm: *Hobbs* at paras. 81, 84. However, the magnitude of the harm is important in assessing whether the harm is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *Bent*, at para. 144.

[99] Evidence of a causal link between the expression and the harm is particularly important where there may be other potential causes for the harm. As Côté, J. explained in *Pointes*:

[72] I add that, naturally, evidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant's expression that may have

caused the plaintiff harm (C.A. reasons, at para. 92). Causation is not, however, an all-or-nothing proposition, in the sense that while the causal chain between the defendant's expression and the harm suffered by the plaintiff may be weaker for *some* elements of the harm suffered, it might nonetheless be strong for *other* elements. This is a case-by-case inquiry undertaken by the motion judge.

[Emphasis in original.]

[100] The particular allegations of harm made by the plaintiffs are relevant to the analysis. The plaintiffs allege two primary forms of harm caused by the Publications: diminished federal government funding for ITAC compared to what was requested and received previously, and reputational harm to both ITAC and Mr. Henry, including online attacks against Mr. Henry.

[101] With respect to the decrease in ITAC's funding, this is a case where—as Côté, J cautioned in *Pointes*—there are sources other than the defendants' expression that may have caused the harm alleged. As noted above, ISC was aware of ITO and others' criticisms of ITAC's distribution of stimulus funds independent of the Publications. Indeed, ISC indicated to Mr. Henry in June 2020 that ITO "has now brought concerns forward to [ISC] in Ottawa that ITAC received additional funding from this program", and expressed concerns about ITAC's application process and lack of confidence in its review process. As a result of these concerns, ITAC's distribution of the Federal Stimulus was put on hold pending further review by ISC. ISC thus appears to have been aware of—and indeed acted on—the concerns it had regarding ITAC's administration of stimulus funding prior to and independent of the Publications. ISC also received the June 24, 2020 Complaint.

[102] The plaintiffs' position also fails to acknowledge that there are other factors that could have caused or contributed to the decrease in federal funding allocated to ITAC in 2021 and 2022: for example, efficiencies of scale to be gained by administration of stimulus funding through federal government agencies rather than ITAC. As Mr. Henry testified, in its 2021 budget, the federal government subsequently created a new Tourism Relief Fund, administered through government agencies rather than ITAC. In addition and notably in this regard, one of the issues that led to protracted negotiations between ITAC and ISC in the summer of 2020 was ITAC's insistence on charging administration costs to cover costs associated with its distribution of the Federal Stimulus.

[103] In the circumstances, I find that the causal link between the Publications and the decrease in ITAC's federal government funding is weak, at best. The evidence is not sufficient at this stage of the proceeding for me to draw the necessary inference that ITAC's reduced funding was caused by the Publications. ISC had independent and pre-existing knowledge of the issues addressed in the Publications and there is no evidence, apart from speculation on the part of Mr. Henry, to establish a likelihood that ISC's decisions about the amount of funding to allocate in supporting Indigenous tourism businesses in 2021 and onwards, or how those funds would be administered, caused by the Publications.

[104] Reputation is one of the most valuable assets a person can possess and as such, reputational harm is "eminently relevant" to the harm inquiry under s. 4(2)(b): *Galloway*, at para. 643; *Bent*, at para. 146. Intangible and subjective elements (for example, humiliation, shame, disgrace and embarrassment,

negative effects on mental-health and family relationships) also factor into the assessment of harm suffered by a plaintiff bringing a defamation claim: *Galloway*, at para. 635.

[105] Mr. Henry and ITAC both allege reputation harm. Mr. Henry's evidence is that he also faced anger from Indigenous and non-Indigenous people following publication of the Article and Video. The worst of this was through social media (Facebook and Twitter) where he testified that "there were trolls tagging me all over". He also received phone calls accusing him of being a "thief" or a "crook", and his family members were asked about the Publications and one expressed concern that he would be going to jail.

[106] In my view, the evidence supports a causal link between the Publications and the reputational harm alleged by ITAC and Mr. Henry. However, this is not a case where ITAC or Mr. Henry's reputations were unblemished prior to publication of the Video and the Article. ITAC was already subject to criticisms from ITO and its British Columbia and PEI counterparts, which criticisms were also known to ISC. The Complaint—which expressed concern about both ITAC's distribution of funding and the Bonus—had also been filed with ISC and was known within the relevant community. The defendants were thus not the first to raise concerns about the issues raised in the Publications. Though their expression unarguably reached the broadest audience, they were "one of many voices conveying a similar message": *Simpson* at para. 87.

[107] Nonetheless, this does not negate the reputational harm suffered by the plaintiffs as a result of the Publications, which harm must be weighed against the public interest in protecting CBC and Mr. Barrera's freedom of expression. At this stage of the analysis, both the quality of the expression and the motivation behind it are relevant: *Pointes*, at para. 74. The focus is on the actual expression complained of, not the subject matter of the expression generally: *Neufeld* at para. 61.

[108] The accuracy of the expression is also relevant. As the Court noted in *Pointes*:

[75] Indeed, "a statement that contains deliberate falsehoods, [or] gratuitous personal attacks . . . 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, [or] vitriol" (C.A. reasons, at para. 94, citing *Able Translations Ltd. v. Express International Translations Inc*., 2016 ONSC 6785, 410 D.L.R. (4th) 380, at paras. 82-84 and 96-103, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568).

[76] While judges should be wary of the inquiry descending into a moralistic taste test, this Court recognized as early as *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, that not all expression is created equal: "While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b)" (p. 760).

[Emphasis added.]

[109] In my view, there is a strong public interest in protecting the expression in issue here, namely accurate investigative reporting by CBC on a matter of significant public interest, namely the

distribution of a significant sum of public pandemic stimulus funding. This is particularly the case where the accuracy of the expression is not in issue and, as I concluded above, there is no improper motivation underlying the Publications that is conceded to be of public interest.

[110] Further and as I found above, the Publications were thoroughly researched, accurately reported, and not actuated by malice such that the defendants have valid defences of both fair comment and responsible communication on a matter of public interest. This case is not akin to *Simpson*, where the expression in issue was found to be "deeply problematic" in terms of both quality and the apparent motivation behind it: *Simpson* at para. 91.

[111] Considering the circumstances as a whole and focussing on the actual expression (inferences) complained of, I am of the view that that protection of the defendants' expression weighs at the high end of the spectrum in this case. This is particularly the case where—as here—the expression is *Charter*-protected and arises from a matter that the plaintiffs conceded was of public interest. As such, I find that the public interest in protecting the defendants' freedom of expression outweighs the public interest in permitting the underlying proceeding to continue.

[112] In the result, even if the plaintiffs had met their burden under s. 4(2)(a) of the Act, I would nonetheless have concluded under s. 4(2)(b) that the public interest weighs in favour of dismissal of the plaintiffs' claim.

Conclusion

[113] CBC and Mr. Barrera's application to dismiss the plaintiffs' action under s. 4 of the Act is allowed. The plaintiffs' claim is dismissed.

[114] If the parties are unable to agree on costs, leave is granted to appear before me to make further brief submissions, which are to be preceded by the exchange of written submissions between the parties on a mutually agreeable schedule.

"Hughes J."