IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Simán v. Eisenbrandt,*

2023 BCSC 379

Date: 20230314

Docket: S198230

Registry: Vancouver

Between:

Ricardo Simán

Plaintiff

And

Matthew J. Eisenbrandt

Defendant

Before: The Honourable Mr. Justice Stephens

Reasons for Judgment

Counsel for the Plaintiff:	R.D. McConchie
Counsel for the Defendant:	D.W. Burnett, KC
Place and Dates of Hearing:	Vancouver, B.C. September 12-14, 2023
Place and Date of Judgment:	Vancouver, B.C. March 14, 2023

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Part I – Introduction

[1] This is a defamation action brought by the plaintiff, Ricardo Simán. The defendant, Matthew Eisenbrandt, brings an application for dismissal of this action against him pursuant to s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*].

[2] For the following reasons, I find that the defendant's application is allowed and the plaintiff's action is dismissed.

Part II – Background

[3] The plaintiff lives in San Salvador, El Salvador, and is an executive of a retail store business, which operates in El Salvador and in other countries in Central America.

[4] The defendant applicant has worked for over 20 years on human rights matters. He is the past Legal Director of the Canadian Centre for International Justice, and before that, Legal Director for the Center for Justice & Accountability in the United States. He has a law degree, but does not currently practice law. He currently works in the area of transnational investigations in British Columbia.

[5] In January 2017, the defendant published a book entitled *Assassination of a Saint*: *The Plot to Murder Óscar Romero and the Quest to Bring his Killers to Justice*, which concerned the assassination of an archbishop in El Salvador in March 1980. The defendant describes this assassination as "one of the most notorious human rights violations in the history of El Salvador".

[6] His book was written approximately 24 years after the United Nations released a report in March 1993 entitled, *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, excerpts of which were filed on this application. That report addressed and made findings about, among other things, the assassination. The plaintiff's name was not mentioned in that report.

[7] The book was also written approximately 13 years after the conclusion of a legal proceeding in California related to the assassination: *Doe v. Rafael Saravia*, 348 F Supp 2d 1112 (Cal Dist Ct 2004). The defendant was part of the legal team for the plaintiff in that proceeding. The plaintiff in this proceeding, Mr. Simán, was not a defendant in *Doe v. Rafael Saravia*.

[8] *Assassination of a Saint*, which runs 226 pages, contains a chapter five entitled "A Bed to Drop Dead In: The Search for Álvaro Savaria and the Death Squad Financiers". Page 63 of

chapter five contains a passage referencing a document ("Loose Sheets") tendered in evidence in *Doe v. Rafael Saravia*, which mentions the plaintiff's name within a list of names. In a paragraph that discusses the Saravia Diary, there is a passage which includes endnote 10:

> … Its pages, and the loose sheets captured within it, are filled with recognizable Salvadoran names. … [T]hey include men like Ricardo Simán, the president of a major department store chain;[10]…

[9] Endnote 10 of chapter five says:

> 10. Saravia Diary. A witness told the Truth Commission that Simán was a death squad financier. Testimony of confidential source to the Truth Commission, "Report on the Death Squads in the Files of the El Salvador Truth Commission," n.d., in author's possession.

[10] The defendant deposes that endnote 10 refers to an unpublished document written in Spanish that he obtained from multiple contacts in El Salvador in 2003 or 2004. The document, referred to as the "Informe", is entitled "Report on the Death Squads in the Files of the El Salvador Truth Commission" and attributes the statement in endnote 10 to a confidential source known as "FC2". The defendant does not suggest the Informe document is in fact a Truth Commission document or was prepared by the Truth Commission, and he does not know who specifically wrote the document. However, the defendant deposes that prior to releasing the book, he obtained a sworn declaration (which he personally typed and observed the witness sign) from a person "reaffirming the evidence the witness gave to the Truth Commission". That declaration has not been produced in the action, and is not before the Court on this application. The defendant further deposes that the witness "confirmed in the declaration that the section of the Informe headed 'FC2' was a summary of the witness' testimony to the Truth Commission in late 1992 or early 1993" and "reaffirmed the essentials of that Truth Commission testimony".

[11] The defendant won a human rights book award for this book, and on March 20, 2018, appeared at Duke University to accept the award and gave a speech. It was recorded and placed on YouTube on March 29, 2018. In his speech, the defendant refers to El Salvador "oligarchs" and, momentarily, one of the Loose Sheets appears on screen showing the plaintiff's name.

Defamation Action

[12] The notice of civil claim in this action was filed on July 23, 2019. A response to civil claim was filed on July 16, 2020, and a reply was filed on August 4, 2020. An amended response to civil claim was filed on November 4, 2021.

[13] Pursuant to the *PPPA*:

> **5** (1) Subject to subsection (2) [regarding an application for an injunction], if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.

[14] A discovery of the defendant had previously been scheduled for November 9 and 10, 2021, but did not proceed due to the filing of this application on November 5, 2021.

[15] *1704604 Ontario Ltd. v. Pointes Protection* Association, 2020 SCC 22 [*Pointes*], refers to the fact that applications pursuant to s. 4—although referring to the substantially identical Ontario provision—are brought at an early stage in legal proceedings. For this reason, the Court cautions against making final credibility findings by conducting a deep dive into factual issues: *Pointes* at para. 52. In this case no discoveries have been conducted (although there have been cross examinations on affidavits), and both parties have declined to produce certain documents although requested: the defendant has declined to produce a declaration from his confidential source of the Informe document (discussed below) to which endnote 10 relates, and the plaintiff has not produced documents relating to a lawsuit he has commenced in El Salvador nor his analysis of the Informe document.

Alleged Defamatory Statements

[16] The notice of civil claim alleges two distinct defamatory statements:

a) words contained in *Assassination of a Saint* pleaded at Part 1, para. 8 (“Book Statements”); and

b) certain statements made and images of the Loose Sheet displayed at the defendant’s March 20, 2018, speech at Duke University and posted on YouTube on March 29, 2018, pleaded in Part 1, para. 12 (“Speech Statements and Images”).

[17] The Book Statements and the Speech Statements and Images complained of, as pleaded in the notice of civil claim, are appended as Appendix “A”.

[18] The plaintiff Mr. Simán pleads that the Book Statements convey the following inferential meanings to the ordinary, average reader as a matter of impression:

> 9. In the context of the Book as a whole, the words complained of in the preceding paragraph of this notice of civil claim convey the following inferential meanings to the ordinary, average reader as a matter of impression:
>
> (a) The Plaintiff conspired to assassinate Archbishop Oscar Romero; and
>
> (b) The Plaintiff financed death squads.

Each of those meanings is false, malicious and defamatory of and concerning the Plaintiff.

[19] The plaintiff pleads that in the context of the speech as a whole, the Speech Statements and Images convey the following inferential meaning of and concerning the plaintiff to the ordinary, average person as a matter of impression:

> 13. In the context of the March 20 2018 Speech as a whole, the March 20/29 2018 Words and Images convey the following inferential meaning of and concerning the Plaintiff to the ordinary, average person as a matter of impression:
>
> (a) The Plaintiff is an oligarch who conspired with other oligarchs to assassinate Archbishop Romero; or
>
> (b) Alternatively, there are reasonable and probable grounds to [believe] that the Plaintiff is an oligarch who conspired with other oligarchs to assassinate Archbishop Romero.
>
> Each of those meanings is false, malicious and defamatory of and concerning the Plaintiff.

[20] The plaintiff has deposed in response to this application that "the truth is I have never financed death squads" and the "truth is that I had no involvement in the assassination of Archbishop Oscar Romero or the killing or assassination of anyone else".

Part III – The Legislation and the Law

[21] Section 4 of the *PPA* provides:

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

[22] The substantially identical Ontario provision was addressed in *Pointes* and *Bent v. Platnick,* 2020 SCC 23. In addition, s. 4 of *the PPPA* has been addressed by the Court of Appeal in *Neufeld v. Hansman*, 2021 BCCA 222, appeal to SCC heard on 11 October 2022; and *Hobbs v.*

Warner, 2021 BCCA 290, leave to appeal to SCC ref'd, 39922 (28 April 2022).

[23] This legislation "is meant to function 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. 16.

[24] As stated in *Neufeld*, there are four steps to the analysis:

> [7] In *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 [*Pointes SCC*] and *Bent v. Platnick,* 2020 SCC 23 [*Bent SCC*], the Supreme Court confirmed there are four steps to the analysis. First, the defendant has the burden of establishing that the proceeding against them arises from an expression that relates to a matter of public interest. Once the defendant establishes that point, the burden shifts to the plaintiff for the next three steps. The plaintiff faces dismissal of their action unless they satisfy the motion judge of the following: first, that there are grounds to believe the action has substantial merit; second, that there are grounds to believe the defendant has no valid defence to the action; and third, that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression. The Supreme Court in *Pointes* described the last step as the core of the analysis, allowing the court to scrutinize "what is really going on" in the particular case before them and to open-endedly engage with the overarching public interest implications that the statute, and anti-SLAPP legislation generally, seeks to address.

Part IV – The Threshold Burden Analysis

Threshold Burden on the Moving Party: s. 4(1)

[25] As set out in *Pointes*, but adapted to the *PPPA*:

> [31] … [Section 4(1)] places a threshold burden on the [applicant] to show on a balance of probabilities (i) that the underlying proceeding does, in fact, arise from its expression, regardless of the nature of the proceeding, and (ii) that such expression relates to a matter of public interest, defined broadly. To the extent that this burden is met by the [applicant], then [s. 4(2)] will be triggered and the burden will shift to the [respondent] to show that its underlying proceeding should not be dismissed.

[26] The plaintiff submits that the impugned words do not relate to a matter of public interest and that the threshold burden has not been met.

[27] However, I find the underlying proceeding, being a claim for defamation, does in fact arise from expression in relation to the defendant's communications in a book and at an award ceremony: *PPPA*, s. 1; *Pointes* at paras. 23–25.

[28] In addition, I find the expression relates to a matter of public interest defined broadly, being the assassination of an archbishop in El Salvador—a matter that was the subject of, among other things, a report of a Commission on the Truth for El Salvador in 1993. The defendant's expression relates to a matter that "some segment of the community would for good or for ill have a

genuine interest in" and "may be legitimately concerned about what is going on": *Levant v. Stirling*, 2022 ONSC 3608 at para. 35, citing *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 104.

Part V – Merits-Based Hurdle: s. 4(2)(a)

[29] Here, the plaintiff must satisfy the Court both that there are grounds to believe the proceeding has substantial merit; and that the applicant has no valid defence in the proceeding: ss. 4(2)(a)(i)–(ii).

[30] The words "grounds to believe" requires that there be a basis in the record and the law—taking into account the stage of litigation at which a s. 4 application is brought—for finding that the underlying proceeding has substantial merit and that there is no valid defence: *Pointes* at para. 39. The "substantial merit" and "no valid defence" tests are "constituent parts of an overall assessment of the prospect of success of the underlying claim": *Pointes* at para. 59; *Bent* at para. 101.

[31] Although the limited record at this stage does not allow for the ultimate adjudication of the issues in the action, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record: *Pointes* at para. 38. The words "grounds to believe" requires something more than suspicion but less than proof on a balance of probabilities: *Pointes* at paras. 39–40; *Cheema v. Young*, 2021 BCSC 461 at para. 15.

[32] This assessment must be made from the judge's perspective and is thus subjective: *Pointes* at para. 41.

Substantial Merit: s. 4(2)(a)(i)

[33] The words "substantial merit" means the proceeding "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": *Pointes* at para. 49.

[34] The application judge "should 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": *Pointes* at para. 52.

[35] "Substantial merit" calls for an assessment of the evidentiary basis for the claim, which is why the claim must be supported by evidence that is reasonably capable of belief. A claim that has been merely "nudged" over the line of having some chance of success will not be sufficient: *Galloway v. A.B.*, 2021 BCSC 2344 at para. 53, citing *Pointes* at para. 50. *Pointes* instructs:

> [50] … A real prospect of success means that the plaintiff's success is more than a

> possibility; it requires more than an arguable case. As I said in the preceding paragraph, a real prospect of success requires that the claim have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. For a judge undertaking this inquiry, it is critical to recall that a [*PPPA* application] is not a determinative adjudication of the merits of the proceeding and, rather than having to be established on a balance of probabilities, substantial merit is instead tempered by a "grounds to believe" burden.

[36] However, according to *Galloway*:

> [54] … any basis in the record and the law will be sufficient. By definition, 'a basis' will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. See *Bent*, at para. 88.
>
> [Emphasis in original.]

[37] The plaintiff's burden is to "satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success": *Pointes* at paras. 54, 62; *Galloway* at para. 393.

Position of the Parties

[38] The defendant contends that neither the Book Statements nor the Speech Statements and Images are defamatory. The defendant submits the Book Statements "indicated that the plaintiff's name appeared in pages captured with the 'Saravia Diary'", which was a true or substantially true account of evidence and testimony given in the U.S. legal proceedings that were the subject of the book; and submitted that the endnote in the Book Statements stated a "witness told the Truth Commission that Simán was a death squad financier", which was a true or substantially true account of testimony given to the Truth Commission. The defendant contends that the Book Statements do not bear the exaggerated meanings alleged in the notice of civil claim: Amended Response to Civil Claim at Part 1, para. 4. He submits that the endnote is not defamatory since a reasonable person would understand it conveyed that the plaintiff was investigated, not that he was guilty of actually financing death squads.

[39] The defendant further contends that the plaintiff has failed to demonstrate that any person in British Columbia has actually read the Book Statements, and therefore there are no grounds to believe publication has occurred.

[40] As to the Speech Statement and Images, the defendant contends that the words and images of the speech complained of, in their context, do not bear the exaggerated meanings alleged in the notice of civil claim: Amended Response to Civil Claim at Part 1, para. 8.

[41] The defendant does not rely on a limitations defence for the purposes of this application.

[42] The plaintiff contends he meets the substantial merit hurdle. He submits that to the average, ordinary reader, the book conveys the serious defamatory imputation that he was implicated in financing notorious El Salvador death squads and the assassination of Archbishop Romero. He further contends that he has proven, to the point realistically required on such a preliminary application, publication of the book in British Columbia.

Legal Principles

Defamatory Statements

[43] To make out a case the impugned statements are *prima facie* defamatory, the plaintiff must demonstrate: (i) that the impugned words were defamatory, in the sense they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (ii) that the words in fact referred to the plaintiff; and (iii) that the words were published, meaning that they were communicated to at least one person other than the plaintiff: *Grant* at para. 28; *Hobbs* at para. 86; *Galloway* at para. 319.

[44] *Taseko Mines Limited v. Western Canada Wilderness Committee*, 2017 BCCA 431 at para. 45 set out the definition of a defamatory statement:

> [45] In *Color Your World*, Abella J.A. (as she then was) adopted the following definition of defamation:
>
> > 14 … A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society.

[45] As stated in *Galloway*:

> [320] Any imputation that may tend to lower a plaintiff in the estimation of right-thinking members of society generally, or to expose him or her to hatred, contempt or ridicule, is defamatory. In determining the meaning of a publication and whether it is defamatory, the court may take into consideration all of the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented. See *Botiuk v. Toronto Free Press Publications Ltd.*, 1995 CanLII 60 (SCC), [1995] 3 S.C.R. 3, at para. 62.

[46] *Weaver v. Corcoran*, 2017 BCCA 160, explains:

> [68] Words that tend to lower the plaintiff's reputation in the eyes of a reasonable person are defamatory: *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28. … The central question is whether the meaning conveyed by the impugned words genuinely threatened the plaintiff's actual reputation: [citations omitted].

[47] The law of defamation does not require proof that anyone in fact thought less of a plaintiff as a consequence of the defamation; the test is an objective one: *Galloway* at para. 324, citing *Kerr v. Conlogue*, 65 B.C.L.R. (2d) 70 at 79–80, 1992 CanLII 924 (S.C.).

[48] Expressions alleging, even by implication or insinuation, criminal conduct are extremely serious and damaging to a person's reputation and are defamatory: *Galloway* at para. 326, citing *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181 at para. 63; *Hobbs* at para. 84. In *Mann*, Justice Masuhara held:

> [73] Allegations of criminal activity are extremely serious and damaging to a person's reputation: *Manno v. Henry,* 2008 BCSC 738 at para. 79 [*Manno*]. It is defamatory to accuse an individual by implication or insinuation of committing a criminal act or omission, including offences relating to misappropriation of funds: *Pressler v. Lethbridge*, 1997 CanLII 2131 (BC SC), [1998] B.C.J. No. 1195 (Q.L.) (S.C.), rev'd on other grounds 2000 BCCA 639 [*Pressler*]; *Hansen v. Tilley*, 2009 BCSC 360, aff'd 2010 BCCA 482 [*Hansen*]. This includes the insinuation that the individual is suspected of such misconduct: *Macdonald v. Mail Printing Co.* (1901), 2 O.L.R. 278 (D.C.) at 282-83, cited in *Pressler* at para. 49.

Common Sense Approach

[49] Courts apply an objective, common sense approach in determining whether the meaning of a publication or statement is defamatory, and avoid seizing upon the worst possible meaning: *Galloway* at para. 328; *Weaver* at para. 69; *Lawson v. Baines*, 2012 BCCA 117 at para. 57 [*Lawson* CA], citing *Hodgson v. Canadian Newspapers Co.*, 39 O.R. (3d) 235 at 253, 1998 CanLII 14820 (S.C.), rev'd on other grounds, 49 O.R. (3d) 161, 2000 CanLII 14715 (C.A.). Likewise, the "least harsh interpretation" of the words is not assumed; "a court must not strain to interpret words in a mild or inoffensive sense in order to relieve a defendant from liability": *Level One Construction Ltd. v. Burnham*, 2019 BCCA 407 at para. 46.

[50] When determining meaning, or whether words are defamatory, the court is guided by the test of reasonableness; it will not "strain to give a particular meaning to published words, or stretch them beyond their fair meaning"; they should be "judged by their general tenor" and the "language will not be tortured to make certain that which is not certain. It is not the ingeniously possible interpretation, but the plainly normal construction that is preferred": *Galloway* at para. 332, citing *Pan v. Gao*, 2020 BCCA 58 at para. 61.

[51] The alleged defamatory meaning:

> … must be one which would be understood by reference to an ordinary and reasonable person, and not a meaning by someone who may be naturally inclined to attribute the best or worst meaning to words published about the plaintiff. The impugned words must be construed in their natural, normal, ordinary, plain, usual, fair, obvious, and commonly accepted sense.

See *Taseko* at para. 42.

[52] When considering the fundamental question of what is the meaning that the words convey to an ordinary person, it is possible that words "can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well-founded": *Galloway* at para. 329, citing *Lewis v. Daily Telegraph Ltd.* (1962), [1963] 2 All. E.R. 151 (H.L.).

[53] Thus, "simply using the word 'alleges' or saying that a person is 'suspected' of criminal conduct will not necessarily transform a defamatory statement into one that is not defamatory. The court will still have to consider whether, in context, the statement carries a defamatory meaning.": *Galloway* at para. 330, citing *Manno v. Henry*, 2008 BCSC 738 at paras. 72–73.

[54] This Court has held that the words of Lord Reid in *Lewis* at 154–155 are instructive in this connection:

> What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them and that is also regarded as part of their natural and ordinary meaning.
>
> ….
>
> In this case it is, I think, sufficient to put the test this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning that they would put on the words in question … .
>
> What the ordinary man not avid for scandal, would read into the words complained of must be a matter of impression.

And this part of Lord Devlin's speech at 172–73:

> The real point, I think, that [plaintiff's counsel] makes is that whether the libel is looked at as a statement or as a rumour, there is no difference between saying that a man is suspected of fraud and saying that he is guilty of it. It is undoubtedly defamatory, he submits, to say of a man that he is suspected of fraud, but it is defamatory only because it suggests that he is guilty of fraud: so there is no distinction between the two. This is to me an attractive way of putting the point. On analysis I think that the reason for its attraction is that as a maxim for practical application, though not as a proposition of law, it is about three-quarters true. When

> imputation is made in a general way, the ordinary man is not likely to distinguish between hints and allegations, suspicion and guilt. It is the broad effect that counts and it is no use submitting to a judge that he ought to dissect the statement before he submits it to the jury. But if on the other hand the distinction clearly emerges from the words used it cannot be ignored. If it is said of a man - "I do not believe that he is guilty of fraud but I cannot deny that he has given grounds for suspicion," it seems to me to be wrong to say that in no circumstances can they be justified except by the speaker proving the truth of that which is expressly said he did not believe. It must depend on whether the impression conveyed by the speaker is one of frankness or one of insinuation.
>
> …
>
> It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to take his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man; a rule cannot be made about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well-founded.

See *Manno* at paras. 72–73; *Grassi v. WIC Radio Ltd.*, 2000 BCSC 185 at paras. 25–28, rev'd on other grounds, 2001 BCCA 376.

[55] Thus, a statement that "merely reports on accusations and inquiries made by others and … clearly states that such accusations and inquiries are just that: accusations and inquiries", can render the reporting of allegations not defamatory: *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 7957 at paras. 127, 128, 139 [*Catalyst*]. Such qualifications are relevant to whether a reasonable person can "understand the difference between allegations and proof of guilt", and assist such a person to not "infer guilt of fraud merely because an inquiry is on foot": *Catalyst* at para. 139, citing *Lewis* at 260.

Inferential Meanings

[56] The plaintiff pleads that the Book Statements and Speech Statements and Images have an inferential defamatory meaning: Notice of Civil Claim at Part 1, paras. 9, 13.

[57] In assessing the plaintiff's claim to defamation, I have considered the words pleaded, but also considered the "meaning of the words" as they are "generally … understood in the context of all of the circumstances and the publication as a whole": *Taseko* at para. 44; *Galloway* at para. 338.

[58] An inferential meaning is "the impression an ordinary, reasonable person would infer from

the allegedly defamatory material": *Taseko* at paras. 42–43. An inferentially defamatory meaning excludes any specialized knowledge that the recipient may have. The court is not limited to meanings offered by the parties, but the meaning offered by the plaintiff is to be treated as the most injurious meaning the words are capable of conveying: *Taseko* at para. 43.

[59] In *Lawson* CA—quoted in *Taseko* at para. 46—the Court of Appeal elaborated on defamatory inferential meaning as follows:

> [23] The meaning of the remainder of the words complained of was determined by the trial judge, based upon the inferential meaning or impression left by the words complained of. Reliance on this means of proof requires that the meaning is that which the ordinary person, without special knowledge, will infer from the words complained of and this meaning must be determined objectively. Evidence concerning what the reasonable and ordinary meaning of the words is, or the sense in which they might be understood, or of facts giving rise to the inferences to be drawn from the words is inadmissible if this means of proof is relied upon: see *Hodgson v. Canadian Newspapers Co.* (1988), O.R. (3d) 235 (Gen. Div.), varied on appeal as to damages (2000), 2000 CanLII 14715 (ON CA), 49 O.R. (3d) 161 (C.A.), leave to appeal dismissed [2000] S.C.C.A. No. 465 at para. 37, and the authorities referred to therein.

[60] When a specific meaning is pleaded, as here, a defamation claim will not be successful unless that pleaded meaning, or a meaning that is substantially the same, has been proven: *Lawson v. Baines*, 2011 BCSC 326 at para. 35 [*Lawson* SC], aff'd *Lawson* CA; Raymond E. Brown, *Brown on Defamation*, 2d ed., vol. 3 (Toronto: Thomson Reuters Canada, 1999) (loose-leaf updated to 2023 at 19:14; *Casses v. Canadian Broadcasting Corporation*, 2015 BCSC 2150 at paras. 388-389.

[61] Further, in determining the impressions about the content of the alleged defamatory words, I have examined those words from the perspective of a reasonable reader who is "reasonably thoughtful and informed, rather than someone with an overly fragile sensibility" and with "a degree of common sense" attributed to viewers: *Taseko* at para. 45, citing *Canadian Broadcasting Corporation et al. v. Color Your World Corp.*, 38 O.R. (3d) 97 at paras. 14–15, 1998 CanLII 1983 (C.A.) [*Color Your World*]. A reasonable reader is a person "not avid for scandal": *Catalyst* at para. 137, citing *Lewis* at 258–260.

[62] The basic test to apply when discerning whether an "inferential" meaning is defamatory "is based on the natural and ordinary meaning that a reasonable person would infer from the entirety of the publication": *Taseko* at para. 47.

[63] In the context of a *PPPA* application, I am not making a final determination of whether any statement made by the defendant is in fact defamatory: *Marks v. Allen*, 2022 BCSC 2024 at para. 16, citing *Bent* at para. 4. The test is whether the plaintiff has met his burden to show

"grounds to believe there is substantial merit to the claim": s. 4(2)(a)(i). This requires me to, at the very least, "make a determination of whether the words complained of are reasonably capable of bearing a defamatory meaning": *Galloway* at paras. 336–337.

Publication, the Repetition Rule, and Reportage

[64] Publication is an essential element of the tort of defamation: *Grant* at para. 28. The plaintiff must establish that the defendant conveyed the defamatory statement to a third party: *Crookes v. Newton*, 2011 SCC 47 at para. 16 [*Newton*].

[65] Generally, "a person is responsible only for that person's own defamatory publications, and not for their repetition by others": *Galloway* at para. 345. However, where a defendant republishes or repeats statements, they are directly responsible to the plaintiff.

[66] The reporting of defamatory statements is "barred by the 'repetition rule' … which holds that someone who repeats a defamatory statement is no less liable than the person who originated it": *Galloway* at para. 346, citing *Grant* at para. 76. The rule "holds that repeating a libel has the same legal consequences as originating it": *Grant* at para. 119. It is also "especially important to the defence of justification. That rule holds that a defendant cannot defend a defamation action on the basis that he or she has simply repeated what someone else has said": *Holden v. Hanlon*, 2019 BCSC 622 at para. 171. Accordingly, "it is not open to a defendant who republishes a defamatory allegation to assert that it is true that the allegation was made; rather, he is in the same position as the originator of the allegation and must prove its truth": *Holden* at para. 172.

[67] Further, a defendant who has reported another person's defamatory allegation about a plaintiff cannot succeed in a plea of justification merely by proving that the allegation was made: *Galloway* at para. 363.

[68] However, *Grant* holds that "the repetition rule does not apply to fairly reported statements whose public interest lies in the fact that they were made rather than in their truth or falsity": para. 120. *Grant* at para. 120 explains that this "exception to the repetition rule is known as reportage", and is a consideration that is also relevant to the separate but related issue as to whether there exists a defence of "responsible communication of matters of public interest":

> If a dispute is itself a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made.

See also *Grant* at paras. 98, 110.

[69] Thus, in some cases where statements of fact are at issue, while repeating a defamatory statement can itself be *prima facie* defamatory, it can in certain circumstances give rise to a "responsible communication defence" if it passes the *Grant* test: *Galloway* at para. 364. I will return to that defence, relied on by the defendant, below.

Analysis

[70] The defendant addressed the alleged defamatory words of page 63 and endnote 10 of the Book Statements at times separately in his written and oral submissions. The Book Statements relate to different subject matters—page 63 relating to the Loose Sheets (which also arise in the Speech Statements and Images), and endnote 10 relating to the statement of a confidential source—and, if considered as its separate components, could give rise to different considerations and defences.

[71] However, the Book Statements (containing portions of the book at pages 6, 7, 8, 63 and endnote 10 on page 191: see Appendix "A") are pleaded by the plaintiff as one defamatory allegation: Notice of Civil Claim at Part 1, paras. 8–9. Accordingly, in my reasons, I analyze the Book Statements as a whole for purposes of assessing the plaintiff's burden under s. 4(2).

Book Statements

[72] I find for the purposes of this application that the plaintiff has established that there are grounds to believe that the part of the defamation action that concerns the Book Statements has substantial merit for the purposes of s. 4(2)(a)(i). In considering the Book Statements, I will address page 63 (and pages 6, 7 and 8) and then endnote 10.

Page 63 (and Pages 6, 7, 8)

[73] The Book Statements on page 63 refer to "best evidence", said to be a diary, that it and the sheets captured in it are filled with recognizable Salvadoran names, including the plaintiff. However, the documents are referred to as evidence and contain this qualification: "<u>If true</u>, this could implicate them, even if indirectly, in the Romero assassination" (emphasis added). Page 63 further expresses uncertainty as to the meaning of the diary documents, stating the inclusion of names in the diary is not conclusive proof and likening the diary to "informational goulash", which lacks the ability to conclusively answer questions raised by the information in its pages.

[74] Taken in insolation, without considering endnote 10, I find that a reasonable reader would not infer a defamatory meaning from the words alleged by the plaintiff on page 63 (and pages 6, 7

and 8) of the book. I find that an ordinary, average reader would not infer that (a) the plaintiff conspired to assassinate Archbishop Romero; and (b) the plaintiff financed death squads.

[75] The words "[i]f true" on page 63 significantly qualify any impression left on a reasonable reader: namely, that no assertion is made that allegations based on the diary are true. There are other cautionary words used; a reasonable reader would understand page 63 to be relaying that there is a mystery about the meaning of the Loose Sheets. The references on page 63 are akin to a statement that there is an investigation of the role of persons whose names appear on the Loose Sheets, including the plaintiff, as to whether there has been misconduct, but is not a statement by the defendant that the plaintiff has in fact engaged in misconduct. The former meaning is not capable, as a matter of law, of lowering the reputation of the plaintiff in the eyes of an ordinary person: *Catalyst* at para. 138.

[76] Further, read in isolation and in their context, the Book Statements on page 63 would not lead to an inference that the plaintiff conspired to assassinate Archbishop Romero or financed death squads, or a substantially similar meaning (*Lawson* SC at para. 35), as contended by the plaintiff.

Endnote 10 (page 191)

[77] However, endnote 10 has a different complexion. Endnote 10 is of and concerning the plaintiff and communicates that a "… witness told the Truth Commission that Simán was a death squad financier" and cites to a confidential source to the Truth Commission and a "Report on the Death Squads in the Files of the El Salvador Truth Commission".

[78] The defendant argues that the "statement in the book regarding evidence given by one witness to a Truth Commission is nothing more than that." He submits a "reader with any common sense would understand the difference between that and a conclusion or assertion of guilt", and relies on *Catalyst*.

[79] However, unlike in *Catalyst*, where the impugned publication also contained a caution that these were merely accusations and just accusations (*Catalyst* at paras. 127–128, 139), there are no such cautionary words in endnote 10 or in the context of the book. The endnote does not state that no findings were made against the plaintiff by the Truth Commission, or that the plaintiff's name was not mentioned by the Truth Commission in its report.

[80] The defendant contends that endnote 10 is at the end of a long book and is, essentially, only in an endnote. There is undoubtedly a juxtaposition between the seriousness of the alleged insinuation contained in endnote 10 and its location as an endnote. I make no finding on this

application that a defamatory insinuation has been established by the plaintiff on a balance of probabilities. But, I find there are grounds to believe on this application that the allegation that endnote 10 is *prima facie* defamatory has substantial merit.

[81] The defendant also contends that there are words on page 63 of the book which communicate uncertainty about the suspicions as to who was involved and in what capacity. Page 63 includes this passage following the reference to endnote 10:

> … But their inclusion in the diary does not tell us precisely what contributions they made. Did they provide financing for the death squad? Did they have meetings with D'Aubuisson? Were they part of his ostensibly political organization, FAN? The description of the Saravia Diary as "informational goulash" was correct at least in its ability to conclusively answer those questions.

[82] But, this passage on page 63 casts uncertainty on the diary's ability to provide answers to the questions raised in the book, whereas endnote 10 concerns not the diary but the Informe document and a confidential source.

[83] An imputation of guilt in isolation can be avoided by reading the words in the context of the publication; since a "passage torn from context might be considered defamatory, but its sting may be taken away by another part of that publication": *Grassi* at para. 27; *Holden* at para. 157.

[84] However, read in the context of the publication as a whole, and without considering the validity of any defences, I find there are grounds to believe that the defamatory sting in endnote 10 alleged by the plaintiff has substantial merit.

[85] I find that the Book Statements, including endnote 10, are "reasonably capable of bearing" the inferential meaning alleged by the plaintiff.

[86] Insinuating that a person financed death squads, or assisted in the assassination of another person, would be a very serious allegation. I find that there are grounds to believe that there is substantial merit to the allegation that the statement in endnote 10 would "[tend] to injure the reputation" of the plaintiff in the estimation of a right-thinking member of society generally, and cause the plaintiff to be regarded with feelings of dislike or disesteem: *Taseko* at para. 45, citing *Color Your World* at para. 14.

[87] Endnote 10 is placed in the context of a chapter and in a book relating to the assassination of Archbishop Romero. I find that there are grounds to believe that there is substantial merit to the allegation that the Book Statements (considering endnote 10) bear the inferential meaning that the plaintiff financed death squads and that the plaintiff conspired to

assassinate Archbishop Romero or a substantially similar meaning.

[88] For the purposes of s. 4(2)(a)(i), the plaintiff need not establish on this application a demonstrated likelihood of success and need only show a prospect of success that tends to weigh more in favour of the plaintiff: *Pointes* at para. 49. Subject to the consideration of the validity of any defences discussed below, I am satisfied that, solely because of endnote 10, there are grounds to believe that the Book Statements portion of the defamation claim has substantial merit.

[89] The defendant has deposed that he was: "never asserting any findings of guilt against [the plaintiff]. I was simply asserting that a witness had spoken of him to the Truth Commission and that a well known document contains his name". However, the intention of the author and publisher of a statement alleged to be defamatory is not relevant on the issue of meaning: *Galloway* at para. 334, citing *Lawson* SC at para. 39.

[90] I find for the purposes of this application that with respect to the Book Statements, particularly endnote 10, there are grounds to believe that the proceeding has substantial merit pursuant to s. 4(2)(a)(i). This finding is subject to a consideration of the validity of defences as required by s. 4(2)(a)(ii).

Publication

[91] In order to "prove the publication element of defamation, a plaintiff must establish that the defendant has, by any act, conveyed defamatory meaning to a single third party who has received it": *Newton* at para. 16 [emphasis omitted]; *Galloway* at para. 344. The tort of defamation crystallizes in one jurisdiction once distribution of the statements occurs in that jurisdiction: *Breeden v. Black*, 2012 SCC 19 at para. 20; *Haaretz.com v. Goldhar*, 2018 SCC 28 at para. 36; *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18 at paras. 3, 37-40, aff'g 2010 ONCA 416, aff'g 2009 CanLII 7168, [2009] O.J. No. 733 (S.C.).

[92] The defendant contends the second way the Book Statements also fail the substantial merit test is by the plaintiff's failure to prove publication in this jurisdiction, relying on *Crookes v. Yahoo*, 2008 BCCA 165, and *Newton*. The defendant contends there is no evidence of publication of the book, nor evidence of a single reader of endnote 10, in British Columbia.

[93] *Crookes* was an appeal from the dismissal of a libel action on a motion to strike for want of jurisdiction, and *Newton* concerned an appeal from a defamation action on its merits. Here, I am dealing with an application under s. 4 of the *PPPA*, where the plaintiff must demonstrate there are grounds to believe the action has substantial merit. To the extent publication is a necessary part of a defamation action, there must therefore be substantial grounds to believe that the alleged

statements have been published: *Galloway* at para. 476. I need not apply a presumption to be able to infer there is some evidence that forms a basis of a ground to believe that the allegation of publication has substantial merit: *Newton* at para. 109, Deschamps J. concurring; see e.g. *Chow* at para. 85.

[94] I find there is some evidence in the evidentiary record to find on this application there are substantial grounds to believe that the book has been published in Canada, including British Columbia. For example, the evidentiary record contains a Vancouver Island book review of the book dated December 20, 2018; appearances in Vancouver with respect to the book; and evidence concerning a Vancouver book launch for the book on April 3, 2017. The book is also available for purchase on Indigo, Amazon, and Google Books in Canada. The total sales worldwide up to November 2, 2021, was approximately 2,300 copies.

[95] In addition, there is evidence that the book is in circulation in the Toronto Public Library. In the case of libelous material printed in a book that is circulated in a library, it is possible to draw an inference of publication: *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18 at para. 34.

[96] I find there are grounds to believe that Book Statements including endnote 10 in the book have been read in Canada, including British Columbia. I find the evidence that I have referred to for publication constitute grounds to believe that a person who obtained the book in British Columbia would actually read its contents including the Book Statements with its endnote 10. I make this finding for the purposes of this application only, and not as if there were a trial on the merits.

Speech Statement and Images

[97] Analyzing the other component of the defamation action distinctly, I find that the plaintiff has failed to establish that there are grounds to believe that the part of the defamation action that concerns the Speech Statement and Images has substantial merit pursuant to s. 4(2)(a)(i).

[98] The Speech Statement states “I’ve already [talked a lot about] oligarchs … and there was evidence that some of them had financed and supported Roberto D’Aubuisson’s death squad over the years”. Later, the defendant points to an image of the Loose Sheets on which the plaintiff’s name appears and describes other parts of the page. He states the “list on the left”—in which the plaintiff’s name appears—is mostly a list of prominent oligarchs in El Salvador. The connection between oligarchs, the plaintiff, and the financing and supporting of a death squad is tenuous. There is no accusation that the plaintiff did in fact finance the assassination, and I find it cannot be reasonably inferred from these words and images.

[99] Again, a reasonable reader is one that uses common sense and is thoughtful, informed,

and not avid for scandal. That reader would not infer from the defendant's words in the speech, combined with the communication in the image of the Loose Sheets, that the plaintiff is an oligarch who conspired with other oligarchs to assassinate Archbishop Romero, or that there are reasonable and probable grounds to believe this, or that the words and image have substantially the same meaning.

[100] The plaintiff has not established that there are grounds to believe that the validity of the Speech Statement and Images has substantial merit for the purposes of s. 4(2)(a)(i), which is dispositive against the plaintiff for this aspect of the defamation action.

No Valid Defence: s. 4(2)(a)(ii)

[101] I have found that the plaintiff has met his burden to establish substantial merit to the Book Statements defamation allegation (but not the Speech Statement and Images). However, in order to meet his statutory burden on the merits-based hurdle on this application for the Book Statements allegation, the plaintiff must also establish there are grounds to believe the defendant has no valid defence to the Book Statements.

Legal Principles

[102] Specifically, the "no valid defence" prong requires the plaintiff, who bears the statutory burden, to show that there are grounds to believe that the defences have no real prospect of success: *Pointes* at para. 60.

[103] It is not up to the plaintiff to anticipate every defence that may be raised by the defendant. Rather, the defendant must first "put in play" the defences it intends to rely on: *Pointes* at paras. 56–57. Once done, the plaintiff must establish that none of the defences put in play are valid. This means that the plaintiff bears the burden to show there are grounds to believe that all of the defendant's defences have no real prospect of success—that is, do not tend to weigh more in the defendant's favour: *Bent* at para. 103; *Catalyst* at para. 74.

[104] Like the substantial merit test, this assessment is conducted both from a legal and factual perspective. On this application, the Court must engage in a limited assessment of the evidence to consider whether the defences are legally tenable and supported by evidence reasonably capable of belief: *Pointes* at paras. 50, 52, 58–59, 105–112; *Bent* at paras. 117, 125, 131, 188. The Court must defer ultimate assessments of credibility and other questions requiring a "deep dive" into the evidence to a later stage, where pleadings are more fully developed and judicial inquiry powers are broader: *Pointes* at para. 52. Section 4(2)(a)(ii) does not allow for an adjudication of the merits of the underlying proceeding: *Pointes* at para. 52.

[105] At this stage, in order for the plaintiff to satisfy his burden under s. 4(2)(a)(ii), I do not need to find conclusively that there is no valid defence:

> [505] … Rather, [the plaintiff] will meet his burden provided [the applications judge is] satisfied there is a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the defence(s) the [defendant] has put in play do not tend to weigh more in the [defendant]'s favour (see *Bent*, at para. 103).

See *Galloway* at para. 505.

[106] "A determination that a defence 'could go either way' in the sense that a reasonable trier could accept it or reject it, is a finding that a reasonable trier could reject the defence": *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26 at para. 56 [*Subway*], citing *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 at para. 15. Accordingly, "[w]here a trier could reasonably conclude that the defendants did not conduct a sufficiently diligent investigation … a trier could reasonably conclude that the defence of responsible communication would not succeed": *Subway* at para. 57, citing *Hamlin v. Kavanagh*, 2019 ONSC 5552 at para. 45. I disagree with the defendant's submission that this way of characterizing the no valid defence test is inconsistent with *Pointes* and *Bent*, including para. 221 of *Bent*.

Analysis

Responsible Communication Defence

[107] The defendant relies on the defence of responsible communication on matters of public interest for endnote 10 of the Book Statements. The test for this defence is:

a) The publication must be on a matter of public interest; and

b) The defendant must show that the publication was responsible, in that he was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

See *Galloway* at para. 364, citing *Grant* at para. 98.

[108] This defence seeks to balance "two values vital to Canadian society—freedom of expression on the one hand, and the protection of individuals' reputations on the other": *Grant* at para. 41. Prior to *Grant*, defamation law inadequately protected statements on matters of public interest if they could not be proven to be true: *Grant* at para. 65. However, such statements are necessary to promote the twin rationales of freedom of expression under the *Canadian Charter of*

Rights and Freedoms: democratic discourse and truth-finding: *Grant* at paras. 52, 65. The defence thus requires courts to achieve an appropriate balance between encouraging statements on matters of public interest and protecting individual reputation, privacy, and dignity: *Grant* at para. 52; Peter A. Downard, *The Law of Libel in Canada*, 5th ed (LexisNexis, 2022) at 10.01.

[109] For an expression on an issue of public interest that is not proven to be true, the defendant may nevertheless be protected from liability in defamation if the expression was responsibly made: *Grant* at para. 98. The Court in *Grant* intentionally did not limit the availability of the defence to journalists, noting instead that "the new defence is 'available to anyone who publishes material of public interest in any medium'": para. 96, citing *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44.

[110] The law does not demand perfection in the responsible communication defence or insist on "court-established certainty": *Grant* at para. 53. At the same time, "[f]reedom does not negate responsibility": *Grant* at para. 53.

[111] In determining whether a defamatory communication on a matter of public interest was responsibly made, *Grant* at para. 126 (summarized in *Galloway* at para. 365) identifies eight relevant factors:

a) the seriousness of the allegation;

b) the public importance of the matter;

c) the urgency of the matter;

d) the status and reliability of the source;

e) whether the plaintiff's side of the story was sought and accurately reported;

f) whether inclusion of the impugned statement was justifiable;

g) whether the impugned statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and

h) any other circumstances relevant to whether the defendant communicated responsibly.

[112] When determining responsibility in this defence, the trier of fact "must consider the broad thrust of the publication as a whole rather than minutely parsing individual statements": *Galloway* at

para. 367, citing *Quan v. Cusson*, 2009 SCC 62 at para. 30.

[113] The plaintiff's position is that the impugned words in the book were not communicated responsibly. The plaintiff submits that the defendant was well aware that the Truth Commission adopted the practice of not including a statement in its report without two sources for it, and yet the defendant departed from this practice in endnote 10. The plaintiff submits that the defendant is a lawyer and should be held to a high standard of responsible communication. He further submits the defendant has undermined the Truth Commission's work and gone outside the "guardrails" of the Truth Commission's methodology by naming the plaintiff.

[114] The plaintiff further submits that it appears that FC2 merely repeats the names from the Loose Sheets in the same order of named persons in the Informe document, and also contends that FC2 had a political bias .

[115] I find that the plaintiff has failed to meet his onus to demonstrate that the defence of responsible communication does not tend to weigh more in the defendant's favour. I find that there is no basis in the record and the law that the defendant has no valid defence.

[116] As to the first element of this defence, I find that endnote 10 relates to a matter of public interest. I refer to my discussion of the public interest in the threshold burden analysis, which is relevant to the same consideration in the responsible communication defence: *Pointes* at para. 27; *Catalyst* at para. 182.

[117] As to the second element of the defence—whether the publication was responsible—I begin by rejecting the plaintiff's submission that this defence is inapplicable since the defendant did not adhere to the Truth Commission's practice of not naming persons without two sources. *Grant* at para. 53 holds that the responsible communication defence does not insist on court-established certainty, nor does it "[place] a burden on a [defendant] to interview every individual who might conceivably have something to offer on the subject being written on" (*Levant v. DeMelle*, 2022 ONCA 79 at para. 35). The defence does not require perfection, nor do standards adopted by judicial or quasi-judicial tribunals—or here, the Truth Commission—for acceptance of evidence as the basis of a finding set the standard for responsible publication.

[118] I also reject the plaintiff's submission that the standard of diligence for this defence should in effect be higher for the defendant since he is a lawyer. I do not accept that persons trained as lawyers, who may be involved in open discourse in the public interest, should be deprived of a defence to a defamation action in circumstances where this defence would be available to a person not trained in the law in the same circumstances.

[119] Turning to the other non-exhaustive *Grant* factors, while there are considerations militating in either direction, on the whole, I find that the plaintiff has not established on this application that there is a basis in the record and law to support a finding that the defence of responsible communication has no real prospect of success and is not a valid defence.

[120] *Seriousness of Allegation*. The alleged insinuation recorded in endnote 10 about the plaintiff engages a serious matter.

[121] *Public Interest of the Matter*. Discourse about Archbishop Romero's assassination is, in my view, a matter of public importance. This is particularly evident given that, among other things, a United Nations' Truth Commission was formed to investigate this matter.

[122] *Urgency.* There was no urgency to the publication of book. It was published 24 years after the conclusion of the Truth Commission and approximately 37 years after the assassination. There was no urgency that precluded or rendered impracticable the defendant's ability to contact the plaintiff for his comment on endnote 10 before it was published.

[123] *The Status and Reliability of the Source*. The source FC2 is confidential. *Grant* states at para. 115 that it may be responsible to rely on a confidential source depending on the circumstances. Here, the defendant deposes he is "concern[ed] about the safety of the witness FC2 who has shown great courage in providing the Truth Commission and me personally vital evidence about the death squads in El Salvador". In addition, the defendant deposes that he took steps to confirm the status and reliability of the source: he obtained the Informe document, met with FC2 in El Salvador to confirm the summary of the source's evidence in it (although was not present when the source read the document), and obtained a sworn declaration from FC2.

[124] *Plaintiff's Side of the Story*. The plaintiff's side of the story was not sought by the defendant nor reported, which militates against the strength of the defence. The defendant argued there would have been no point to have done so, since the plaintiff has no knowledge of the testimony before the Truth Commission. However, the plaintiff would have been in a position to comment on the underlying statement.

[125] *Is Inclusion Justifiable.* The inclusion of the statement in endnote 10 was justifiable as being relevant to the defendant's discussion of the subject matter in chapter five of the book. This factor grants generous scope to considerations of editorial choice: *Indigenous Tourism Association of Canada v. Canadian Broadcasting Corporation*, 2022 BCSC 2030 at paras. 91–92; *Grant* at para. 118.

[126] *Reportage.* The defendant submits that endnote 10's public interest lies in the fact the statement in it was made, rather that its truth. The repetition rule, relied on by the plaintiff, does not apply to fairly reported statements whose public interest lies in the fact they were made rather than in their truth or falsity—an exception known as "reportage": *Grant* at paras. 120–121. If the existence of a dispute itself is a matter of public interest and the allegations are fairly reported, the publisher should incur no liability even if some of the statements made may be defamatory and untrue, provided: "(1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability; (2) the report indicates, expressly or implicitly, that its truth has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made": *Grant* at para. 120.

[127] Where a defendant claims, in essence, the dominant public interest lies in reporting what was said in the context of a dispute, it is relevant to consider whether it was reportage having regard to these four criteria. Whether the statement is reportage is not dispositive of whether the defendant engaged in responsible communication; the ultimate question is whether publication was responsible in the circumstances: *Grant* at para. 121.

[128] Here, on my preliminary review, three of the criteria would tend to lead to the conclusion the impugned statements were reportage: (1) endnote 10 did attribute the statement to a source, although FC2 was not identified; (2) endnote 10 does not indicate, expressly or implicitly, that the evidence of FC2 was verified to be true or found to be true by the Truth Commission; and; (4) the report does provide the context in which the statement was made. However, on the other hand, (3) the report did not set out both sides of the dispute.

[129] Taking all of the above into consideration, I find that the evidence before me demonstrates that the defendant did act with some diligence and responsibility in trying to verify the allegation, having regard to the circumstances, prior to making this communication in endnote 10 of the book.

[130] The defendant took steps to verify the accuracy of the source of information prior to publication, including meeting with the source and verifying the statement as it relates to FC2. These efforts to investigate the facts before the statement was published are relevant to the defence: *Galloway* at para. 613.

[131] This Court has held that "uncritical acceptance of one version of events is the very opposite of the diligence required to support a defence of responsible communication": *Galloway* at para. 613. However, the evidence before me is not consistent with the defendant having an uncritical acceptance of the witness's account, given the steps he took to meet with the witness

about the Informe document. I find for the purposes of this application that the defendant did not act with a reckless disregard for, or indifference to, the truth—and in regard to the plaintiff submission that the defendant acted recklessly (and the plaintiff's pleading of malice on the part of the defendant), I reject that submission.

[132] The plaintiff bears the statutory burden on this application to establish the defence has no real prospect of success—that is, it does not tend to weigh more in the defendant's favour. Having regard to the record, and being mindful of the caution that the Court not engage in a deep dive on the evidence at this point, I conclude that the plaintiff has not met his burden. He has not demonstrated there is a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the responsible communication defence does not tend to weigh more in the defendant's favour. The plaintiff has not demonstrated to the requisite standard on this application that the defence of responsible communication on matters of public interest (which the defendant has put in play against the plaintiff's allegations concerning endnote 10 and the Book Statements) has no real prospect of success.

[133] The plaintiff has thus failed to meet his burden to show that the defendant "has no valid defence" in the proceeding for the purposes of s. 4(2)(a)(ii).

Other Defences Put in Play

[134] I have considered the requisite factors in s. 4(2)(a)(i) (whether the proceeding has substantial merit), and the responsible communication defence with respect to the Book Statements for purposes of s. 4(2)(a)(ii), and found that the plaintiff has not satisfied his statutory merits-based burden on this application pursuant to s. 4(2)(a). It is therefore unnecessary for me to consider the defendant's further defences, including that of justification, fair reporting qualified privilege and fair comment as they relate to the Book Statements and the Speech Statements and Images: *Pointes* at para. 112; *2504027 Ontario Inc. o/a S-Trip! v. Canadian Broadcasting Corporation (CBC) et al.*, 2021 ONSC 3471 at para. 62.

Part VI – The Public Interest Hurdle Analysis

[135] I have found that the plaintiff has failed to satisfied his statutory burden on the merits-based hurdle pursuant to s. 4(2)(a) for both the Book Statements and the Speech Statements and Images.

[136] The plaintiff's failure to meet s. 4(2)(a) is dispositive. As a consequence, the underlying proceeding will be dismissed (*Pointes* at para. 33), and it is unnecessary for the Court on this application to go on to consider the public interest hurdle pursuant to s. 4(2)(b).

Part VII – Conclusion and Order and Costs

[137] I have found that the defendant applicant has met his threshold burden in s. 4(1) and that the plaintiff respondent has not discharged his statutory burden pursuant to s. 4(2)(a).

[138] In such circumstances, the *PPPA* is specific and mandatory: s. 4(2) requires that the court "make a dismissal order".

[139] Accordingly, the application is allowed, and the action is dismissed.

[140] Section 7(1) of the *PPPA* provides that "[i]f the court makes a dismissal order under section 4, the applicant is entitled to costs on the application and in the proceeding, assessed as costs on a full indemnity basis unless the court considers that assessment inappropriate in the circumstances."

[141] The plaintiff has failed to discharge his statutory burden pursuant to s. 4(2)(a) on this application, leading to a dismissal order, in part on the basis of the defendant's evidence about his dealings with a confidential source (supporting a defence of responsible communication) that was not apparent on the face of the book. Further, this s. 4 application was brought only several days prior to a previously scheduled oral discovery of the defendant by the plaintiff. In addition, *PPPA* applications should be brought early in the proceedings: see generally *Levant v. Day*, 2019 ONCA 244 at para. 29, leave to appeal to SCC ref'd, 38658 (31 October 2019).

[142] In the circumstances, I find that an award of full indemnity costs throughout to the defendant would be inappropriate for the purposes of s. 7(1): *Hobbs* at paras. 103–104. I instead order that the plaintiff pay the defendant ordinary costs at Scale B of this application and the action.

[143] In his Notice of Application filed November 5, 2021 for a dismissal order, the defendant also sought "damages pursuant to the [*PPPA*]". I do not find that this action was commenced by the plaintiff respondent in bad faith or for an improper purpose. I decline to order damages against the plaintiff respondent pursuant to s. 8 of the *PPPA*.

"Stephens J."

Appendix "A" – Alleged Defamatory Statements

Due to certain minor discrepancies between the words pleaded in the notice of civil claim and corresponding portions of the evidentiary record, the text in angle brackets reflects the alleged defamatory expressions as they appear in the evidentiary record.

Any superscripts in brackets refer to footnotes in the book, which are not reproduced in this Appendix.

Pleading Reference	**Pleaded**	**Meaning alleged**
Notice of Civil Claim, Part 1, paras. 8, 9	8. … *Saravia Diary. A witness told the Truth Commission that Simán was a death squad financier. Testimony of confidential source to the Truth Commission, "Report on the Death Squads in the <F>iles of the El Salvador Truth Commission," n.d., in author's possession.* (Page 191: Notes to Chapter 5, Footnote 10) *… there is circumstantial evidence that some wealthy Salvadorans provided direct*	9. In the context of the Book as a whole, the words complained of in the preceding paragraph of this notice of civil claim convey the following inferential meanings to the ordinary, average reader as a matter of impression: (a) The Plaintiff conspired to assassinate Archbishop Oscar Romero; and (b) The Plaintiff financed death squads. Each of those meanings is false, malicious and defamatory of and

	support to D'Aub<u>isson's and other paramilitary groups. If true, this could implicate them, even if indirectly, in the Romero assassination. (Page 63: Chapter 5) *… Under the jurisdictional rules, we can't sue anyone without strong U.S. connections, so we will examine those Salvadorans who still own businesses and homes in U.S. cities.* (Page 63: Chapter 5) *Our best evidence … is the Saravia Diary seized at Finca San Luis in May 1980, two months after the assassination. Its pages, and the loose sheets captured with it, are filled with recognizable Salvadoran names. In addition to Alfonso Salaverr<í>a, they include men like Ricardo Simán, the president of a major department store chain; [footnote 10]; Francisco Guirola, a D'Aub[u]isson*	concerning the Plaintiff.

	confidant detained in Texas while carrying suitcases stuffed with nearly $6 million in cash;[11] *and Orlando Llovera, a man later arrested for running a kidnapping ring*.[12] *But their inclusion in the diary does not tell us precisely what contributions they made. Did they provide financing for the death squad? Did they have meetings with D'Aub<u>isson? Were they part of his ostensibly political organization, FAN?* (Page 63: Chapter 5) *Over a month after Romero died, the archbishop's murder remained unsolved.* (Page 6: Chapter 1) *… On May 7, a singular event should have cracked the case wide open. … Colonel Adolfo Majano, learned that a group of current and former military officers, all right-wing extremists, were planning a coup d'état. They would be meeting that day at a rural estate known as*	

	Finca San Luis. … he ordered an army unit loyal to him to arrest the group … the raid was a success. (Page 6: Chapter 1) *Not only did they detai<n> the coup plotters but they also seized weapons and numerous documents …* (Pages 6-7: Chapter 1) *Among the papers were several that might have solved Archbishop Romero's murder. The most damning of all <the> records was a daily planner, … <which> came to be known as the Saravia Diary. The pages contained the names of suspected extremists and murderers alongside lists of weapons, expenses, and appointments but often without further details.* (Page 7: Chapter 1) *Several loose pieces of stationary were captured along with the Saravia Diary. … One sheet contains*	

	a list of some of the most prominent and wealthy people in El Salvador .[7] *… The second piece of stationery … has different handwriting and lists a series of payments. … The third piece of stationary … with the same handwriting as the first, carries the title "Equipo – Operaci<ó>n Pi<ñ>a" (Equipment - Operation Pineapple). It bears the same logo and catalogs the following items:* *1 Starlight* *1.257 Roberts* *4 automatics* *Grenades* *1 driver* *1 shooter* *4 security* (Page 7: Chapter 1) *Colonel Majano gave a copy of these notes to every*	

	member of the ruling junta and they all reached the same conclusion: Operaci<ó>n Pi<ñ>a is the assassination of Archbishop Romero. (Page 8: Chapter 1)	
Notice of Civil Claim, Part 1, paras. 12, 13	12. … … *Why did this* [the assassination of Archbishop Romero] *happen?* … *Number <1>: In El Salvador, at that time, <…> still today and in the past, there was massive economic inequality.* *There was an extreme concentration of wealth and land in the hands of an oligarchy, and that's how they were referred to.* *And this oligarchy made their money at the time largely through coffee.*	13. In the context of the March 20 2018 Speech as a whole, the March 20/29 2018 Words and Images convey the following inferential meaning of and concerning the Plaintiff to the ordinary, average person as a matter of impression: (a) The Plaintiff is an oligarch who conspired with other oligarchs to assassinate Archbishop Romero; or (b) Alternatively, there are reasonable and probable grounds to belief that the Plaintiff is an oligarch who conspired with other oligarchs to assassinate Archbishop Romero.

	There was a label that was attached to them called <the 14 families,> to give an idea of what a small handful of families it was. … *… We had to file the case … Saravia was our only named defendant … but there was a lot of evidence, I've already <talked a lot about oligarchs> … and there was evidence that some of them had financed and supported Robert D'Aubuisson's death squad over the years …* *… This was going to be the first trial ever for Romero's assassination …* *… but we wanted to work our way up the chain to get at <the> people who had real power. So we wanted to be able to investigate the oligarchs as well, <s>o what we did was, we put a little place holder … <you> see that we named Does 1 through 10<, a>nd*	Each of those meanings is false, malicious and defamatory of and concerning the Plaintiff.

	so these were the people that we hoped would be either military figures or members of the oligarchy who financed and supported D'Aubuisson … *… To show you <what,> some of the evidence that we had … we actually had quite a bit … we were not starting our investigation from scratch.* *… Just by way of example, this is what <it's> called the Saravia Diary, <and it> was seized in May 1980 <so> just a couple of months after Romero was killed.* [At this point in the speech, the Defendant points to an image, projected on a large screen visible to his audience, of a page from a coil-bound notebook bearing handwriting including the name "*Saravia*"] *And it had evidence*	

	against Saravia himself, D'Aubuisson, and the oligarchs *… This is the most famous page from that …* [At this point in the speech, the Defendant points to an image, projected on a large screen visible to his audience, of a handwritten list of 11 names including "*Ricardo Sim<á>n*" which appears on the left side of the screen] *But it <is> actually three individual pieces of paper that <…> got copied together.* *Along the top, the sideways part, is basically a ledger of death squad expenses.* *… this is throughout the book, it will say we spent 15 dollars today on food, we*	

	spent … *This is throughout <…> the diary …* *This list on the left is mostly a list of some of the most prominent oligarchs in El Salvador.* [At this point in the Defendant's speech, the left side of the screen continues to display the image of a handwritten list of 11 names including "*Ricardo Sim<á>n*"] *And on the right is what many people think is a description of Romero's assassination …* *… it says one 257 Roberts, which is a precision rifle …* *It's cut off there, but it <is> known as operation pina.* *… in El Salvador, death squad*	

	assassinations were usually carried out in a hail of machine gun fire. They didn't require a sharp shooter and one precision rifle, <w>hereas Romero's did.	