

COURT OF APPEAL FOR ONTARIO

CITATION: Solmar Inc. v. Hall, 2026 ONCA 367

DATE: 20260527

DOCKET: COA-25-CV-0489

Fairburn A.C.J.O., Simmons and Coroza JJ.A.

BETWEEN

Solmar Inc. and Benny Marotta

Plaintiffs (Respondents)

and

Stewart Hall

Defendant (Appellant)

Ryder Gilliland and Michael Robson, for the appellant

William C. McDowell and Derek Knoke, for the respondents

Heard: November 28, 2025

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated March 20, 2025.

**Fairburn A.C.J.O.:**

## I. OVERVIEW

[1] Stewart Hall, the appellant, is a retiree who lives in Niagara-on-the-Lake (“NOTL”). He was sued by a developer, Benny Marotta, and Solmar Inc.<sup>1</sup>, for defamation based on comments Mr. Hall posted to Facebook. Among other things, Mr. Hall accused Mr. Marotta (and Solmar) of “corrupt...business tactics”.

[2] Mr. Hall brought a motion pursuant to s. 137.1 of the *Courts of Justice Act* (“CJA”), R.S.O. 1990, c. C.43, seeking to have the defamation action dismissed. He claimed that the post was fair comment and that the action against him was strategic litigation against public participation (“SLAPP”).

[3] The motion judge dismissed the anti-SLAPP motion and allowed the defamation action to proceed. Applying the criteria set out in s. 137.1, the motion judge concluded that the Facebook post was related to a matter of public interest (s. 137.1(3)). That said, he found that the action should be allowed to proceed because: (1) there were grounds to believe that the defamation claim had substantial merit; (2) there were grounds to believe that Mr. Hall did not have a valid defence; and (3) Mr. Marotta had established that the harm suffered or likely to be suffered as a result of the impugned expression was sufficiently serious that

---

<sup>1</sup> Solmar Inc. is misnamed. Solmar is an informal marketing tradename through which Mr. Marotta markets his real estate development business. [Technically, Solmar is still named, although the motion judge talks about “Plaintiff” in the singular throughout his reasons.]

the public interest in permitting the proceeding to continue outweighed the public interest in protecting Mr. Hall's expression.

[4] The appellant now raises multiple grounds of appeal which can be collapsed into three overarching categories as follows. He contends that:

- **Meaning** – The motion judge erred in assessing the meaning of the comments by (1) taking into account subjective intention instead of considering the comments' objective meaning, and (2) ignoring the mode of publication.
- **No valid defence** – The motion judge erred in (1) assessing the "fairness" of Mr. Hall's comments, and (2) finding that there are grounds to believe that the comments were actuated by malice.
- **Balancing** – The motion judge erred in his balancing exercise. On the evidence, there was no harm to Mr. Marotta or his company and, even if there was, it was not caused by the post. In any event, any such harm is not sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression, since this case has the hallmarks of a SLAPP.

[5] The appellant also argues that the motion judge erred by making nine factual errors and by ignoring nine material facts, the combined impact of which amounts to a reversible error. Finally, he challenges the motion judge's costs award.

[6] As I will explain, although I depart from the motion judge's analysis in some respects, I would dismiss the main appeal and allow the costs appeal.

## **II. BACKGROUND**

### **NOTL and the plan to build a luxury hotel**

[7] NOTL, a popular tourist destination, is a town of approximately 19,000 people. At the heart of the town is a heritage district.

[8] Mr. Marotta is a successful developer. In October 2022, a company owned by Mr. Marotta acquired a large property in the heritage district of NOTL, which was the former site of Parliament Oak public school. The property is surrounded by single-family homes, including some designated as heritage properties.

[9] In February 2023, Mr. Marotta, through his company, brought an application to amend the town's official plan and zoning by-law to enable the demolition of the school building and develop a four-story luxury hotel. The project is a matter of local controversy.

### **Mr. Marotta gave a town councillor \$10,000 in cash**

[10] Weeks after the Parliament Oaks rezoning application was filed, Mr. Marotta met with NOTL town Councillor Gary Burroughs at Mr. Marotta's winery, Two Sisters Vineyards, for lunch. During lunch, Mr. Marotta retrieved an envelope containing \$10,000 in cash and handed it to Councillor Burroughs. He told Councillor Burroughs that it was a contribution for his campaign.

[11] Councillor Burroughs did not open the envelope until he was at home. The next day, he called Mr. Marotta to say that he could not accept the \$10,000 in cash

because it did not qualify as a legitimate political contribution under the *Municipal Elections Act*, 1996, S.O. 1996, c. 32, Sched. Mr. Marotta told Councillor Burroughs that he should give the money to his church if he could not accept it.

[12] Councillor Burroughs handed the cash to NOTL town staff.

[13] The matter was subsequently referred to the town's Integrity Commissioner, who was responsible for overseeing the conduct of elected and appointed officials. Not surprisingly, since Councillor Burroughs did not accept the money, the Commissioner determined in September 2023 that no further action would be taken.

[14] The matter was also referred to the police, who conducted their own investigation and did not lay any charges.

### **The rezoning application was approved**

[15] On June 11, 2024, NOTL town staff issued a report to Council recommending approval of the Parliament Oak rezoning application.

[16] On June 25, 2024, the NOTL Council voted on the rezoning of Parliament Oak. The application was passed by a 5-4 vote. Councillor Burroughs voted against the application.

[17] Mr. Hall did not attend the June 25 meeting.

### **Mr. Hall posts on Facebook**

[18] The next day, on June 26, 2024, Mr. Hall read news that Council approved the rezoning and took to Facebook.

[19] He posted in a community Facebook group called NOTL 4U, which, at the time, had 3,100 members, including two NOTL councillors. It is a public group page, accessible by members and non-members alike. A councillor who was not a member had previously posted on the group page.

[20] Mr. Hall, who is an active member of the Niagara Historical Society, described the zoning approval in his post as a “travesty” and accused Solmar of being “corrupt and aggressive” in its business tactics:

Solmar has a history of dipping into the cookie jar, not only in NOTL but throughout southern Ontario, most notably in Caledon. Through corrupt and aggressive business tactics Solmar has gotten their way by bullying and outlasting their political opponents with hundreds of millions of dollars in lawsuits. On the reverse side Solmar is generous to it's [sic] friends with perks and lavish gifts of all kinds.

Are we to believe Benny's gift of cash, that was refused by councillor Burroughs, was a one-off? Of the town staff who recommended approval for the Parliament Oak hotel zoning and the councillors who voted for it, how many received cash or gifts in kind from Marotta that were not reported?

Something stinks here. The approval of a large, luxury hotel surrounded on 4 sides by single family homes is a travesty. Particularly in a small town whose tourism is dependent, in part, by it's [sic] reputation as the prettiest

town in Ontario. Our town leaders should be ashamed. It is a sad day when greed for profits wins over quality of life for residents.

Google 'Caledon Solmar court case' if you would like to learn more about the way Solmar uses aggressive tactics in defeating their opponents. [Emphasis added.]

[21] In a comment below the Facebook post, one reader wrote, "Mr. Hall, those are very strong accusations, I'm sure you have proof". In his own comment, Mr. Hall tagged the skeptical reader and replied:

Everything in my post is in the public record with some opinions thrown in. Google search Solmar Caledon court case or Burroughs Marotta cash envelope or Solmar ties to Ford government. Look at some of the links in replies to this post. I have no proof that anyone other than Councilor [sic] Burroughs was offered cash but come on, do you really think he was the only one? Look at Solmar's record. They have been doing this stuff for decades. [Emphasis added.]

[22] The initial post received 33 reactions, 19 comments and was shared twice; the comment in reply received 8 likes and was not shared.

### **Press coverage of Mr. Marotta and Solmar**

[23] As Mr. Hall suggested in his Facebook post, Mr. Marotta has attracted considerable public attention over the course of his career as a developer.

[24] Even before the events in NOTL, Mr. Marotta was the subject of reporting in publications such as the Toronto Star, Toronto Life and the Globe and Mail.

[25] A great deal of the reporting related to Mr. Marotta's efforts to pursue development in Caledon and the resistance he encountered there, especially from Caledon's mayor. The reporting detailed his adversarial relationship with the Mayor of Caledon and, as the Toronto Star put it, the "acrimonious battle over Solmar Development Corp.'s proposal to build homes for 21,000" in Caledon.

[26] A feature article in Toronto Life described what happened in Caledon as "[a] bizarre tale of smear campaigns, hired thugs and small-town vengeance." The events detailed included a physical attack on the mayor's husband by an unidentified assailant. Mr. Marotta denied any involvement and launched a defamation suit, claiming that the mayor was telling people that he was behind the assault – a suit he settled out of court. The article also details his threat to sue Caledon for \$500 million if they continued to delay reviewing his development proposal.

[27] In addition, the Toronto Life article and others detailed Mr. Marotta's involvement with Jeffrey Granger. Mr. Granger, a Canada Revenue Agency audit officer, set up a "tax consulting" business on the side, despite the obvious conflict that this presented. He provided his services to Mr. Marotta's companies and other companies in the construction industry. Mr. Granger produced a falsified audit for the Mayor of Caledon that purported to show she had received cheques from another developer, evidence which he passed to law enforcement at Mr. Marotta's direction. An OPP investigation concluded that the allegations against the mayor

were entirely baseless. Mr. Granger ultimately pled guilty to fraud, breach of trust by a public officer and accepting secret commissions: *R. v. Granger*, 2014 ONCJ 408. Police determined that Mr. Granger had raked in \$1.1 million from his fraudulent consulting services, including \$525,000 from Mr. Marotta and Solmar. Mr. Marotta said that the money was paid to Mr. Granger for what he believed were legitimate tax services, and that he did not know the audit was falsified when he told Mr. Granger to take it to the police. Neither Mr. Marotta nor Solmar were charged criminally in relation to Mr. Granger's activities.

[28] A Globe and Mail article reported on allegations that Mr. Marotta had worked with a notorious political "fixer" to recruit powerful allies, including an Ontario cabinet minister, to improperly exert pressure on the Mayor of Caledon. There was also considerable media coverage relating to the \$10,000 gift that Mr. Marotta gave to Councillor Burroughs and the ensuing investigations.

### **Defamation Claim**

[29] Mr. Hall received a libel notice from Mr. Marotta's lawyers. He declined to apologize. On the advice of his lawyers, Mr. Hall took down his Facebook post and comment. In total, they were up for less than eight days.

[30] Mr. Marotta and his development company (as before, misnamed as Solmar Inc.) sued Mr. Hall for defamation, claiming damages of \$2 million.

[31] Mr. Hall, in turn, brought a motion pursuant to s. 137.1 of the CJA, seeking to have the action against him dismissed.

### III. DECISION BELOW

[32] Section 137.1 provides a preliminary screening mechanism to prevent strategic lawsuits in matters of public interest: *Hansman v. Neufeld*, 2023 SCC 14, 1 S.C.R. 51, at paras. 49-50; *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 2 S.C.R. 587, at para. 16. The objective is to quickly identify and deal with strategic lawsuits and ensure abusive litigation is stopped while allowing legitimate actions to continue: *Pointes*, at paras. 61-62; *Hamer v. Jane Doe*, 2024 ONCA 721, 501 D.L.R. (4th) 136, at para. 36.

[33] Here, Mr. Hall brought a motion to have the defamation action dismissed, claiming that his post related to a matter of public interest:

137.1(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. [Emphasis added.]

[34] Mr. Marotta conceded that the post related to a matter of public interest, namely “whether public officials have been given bribes by [Mr. Marotta] in exchange for development approvals”.

[35] Under s. 137.1(4), the onus then shifted to Mr. Marotta to show why the action should proceed to trial:

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

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

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

[36] The motion judge found that there were grounds to believe that the defamation action has substantial merit since the words referred to the plaintiffs, were published to a third party and would tend to lower the plaintiff's reputation in the eyes of reasonable people: *Bent v. Platnick*, 2020 SCC 23, 2 S.C.R. 645, at paras. 90-100. He attributed the following meaning to the expression:

[28] Any fair reading of the Defendant's Facebook messages would conclude that they convey that the Plaintiff is an aggressive and corrupt developer who has a history of bribing public officials, and that any officials who approve one of his proposed developments must have been intimidated or bribed. The message is designed to do more than to galvanize opposition to the Parliament Oak development project; it is designed to disqualify any and all development by the Plaintiff. Not only does it call the Plaintiff a criminal operator, but it "casts aspersions", as the Defendant has conceded, on any officials who might agree with him. [Emphasis added.]

[37] Mr. Hall challenges the meaning attributed to the expression and effectively whether it would tend to lower Mr. Marotta's reputation in the eyes of reasonable people.

[38] The motion judge also found that there were grounds to believe that Mr. Hall does not have a valid defence.

[39] Mr. Hall relies on the defence of fair comment, which has five elements. These were set out in *Hansman*, at para. 96, citing *Grant v. Torstar Corp.*, 2009 SCC 61, 3 S.C.R. 640:

The fair comment defence has five elements. First, the 'comment must be on a matter of public interest' (*Grant*, at para. 31). Second, it must be 'based on fact' (para. 31). Third, 'though it can include inferences of fact, [it] must be recognisable as comment' (para. 31). Fourth, it must satisfy an objective test: 'could any person honestly express that opinion on the proved facts?' (para. 31). Finally, even if the above elements are met, 'the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice' (para. 31).

[40] The motion judge concluded that there were "problems on literally every front" including "in terms of false facts, objective meaning, ulterior motive, malice and intent to injure".

[41] Finally, the motion judge concluded, that the harm suffered or likely to be suffered as a result of the impugned expression was sufficiently serious that the public interest in permitting the proceeding to continue outweighed the public

interest in protecting Mr. Hall's expression. Although there is a legitimate public interest in expression that addresses real estate development and local development applications, that interest did not weigh heavily on the ledger where the expression took the form of "serious, unsubstantiated accusations against a developer and city councillors rather than an actual critique of a development policy or plan."

#### **IV. DISCUSSION**

[42] This is an appeal from a preliminary determination on a limited record.

[43] A motion judge's determination on a s. 137.1 motion is entitled to deference on appeal absent an error in law or a palpable and overriding error of fact or mixed fact and law: *Bent*, at para. 77; *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 165 O.R. (3d) 753, at para. 42, leave to appeal refused, [2023] S.C.C.A. No. 172.

[44] It is important to remember that the burdens s. 137.1 imposes on plaintiffs are unlike those that plaintiffs are required to satisfy in the trial of an action. At the merits-based hurdle, "the plaintiff need establish only grounds to believe – 'a basis in the record and the law' – for finding that the proceeding has substantial merit or that the defendant has no valid defence to the underlying proceeding": *Mondal v. Kirkconnell*, 2023 ONCA 523, 485 D.L.R. (4th) 90, at para. 30, citing *Pointes*, at para. 29; *40 Days for Life v. Dietrich*, 2024 ONCA 599, at para. 39, leave to appeal

refused, [2024] S.C.C.A. No. 396. A determination that the asserted defences could go either way – that they could be accepted or rejected – is a finding that the defences may not succeed: *Hamer*, at para. 49.

[45] Similarly, at the public interest hurdle, “the plaintiff need not prove harm or causation; the court is tasked at this stage with drawing inferences of likelihood in respect of the existence of harm, its magnitude, and the relevant causal link”: *Mondal*, at para. 30, citing *Pointes*, at paras. 70-71; *40 Days for Life*, at para. 39.

[46] With those principles in mind, I turn to the issues raised on this appeal.

#### **A. GROUNDS TO BELIEVE SUBSTANTIAL MERIT – MEANING**

[47] A plaintiff in a defamation action is required to prove three things: (1) 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; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff: *Grant*, at para. 28.

[48] Whether the words have a defamatory meaning is to be determined from their ordinary meaning from the perspective of the reasonable reader. As this court explained, “[t]he natural and ordinary meaning of the words is to be determined according to the fair and natural meaning in which reasonable persons with the ordinary person’s general knowledge and experience of worldly affairs, would be

likely to understand them in the context in which they were used”: *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 516, at para. 10, leave to appeal refused, [2003] S.C.C.A. No. 344.

[49] Mr. Hall submits that the motion judge erred in law in assessing the meaning of the expression. He alleges that there are two discrete errors.

[50] First, Mr. Hall submits that the motion judge erred in considering Mr. Hall’s “intent”, pointing to para. 17 of the reasons, where the word “intent” is used and paras. 19, 39 and 41, where the motion judge refers to Mr. Hall’s evidence on cross-examination about what he understood the words to mean. The appellant argues that the motion judge erred by taking the appellant’s subjective intention into account, rather than focusing on the objective meaning of the words used.

[51] I would not accede to this argument.

[52] The reference to “intent” and the references to Mr. Hall’s evidence on cross-examination must be understood in context.

[53] In the section of his reasons outlining the background of the case, the motion judge referenced the “intent” of the impugned words but then, in the next sentence, went on to comment on the thrust of the expression “as a whole and in context”:

[17] I do not need to pick the Defendant’s words apart phrase by phrase to show **their intent**. Suffice it to say that, read as a whole and in context, the thrust of the initial Facebook post, together with the reply post, is that the Plaintiff and his companies have a longstanding

practice of bribing public officials and of suing all who oppose him. The two posts also convey that those public officials who support the Plaintiff's real estate projects, not only in NOTL but across southern Ontario, have either been intimidated or received bribes and are equally corrupt. [Bold and underlining added.]

[54] In his analysis section, the motion judge returned to the meaning of the expression. He found that "any fair reading" of the post and reply comment was that they convey that Mr. Marotta is a corrupt developer with a history of bribing public officials:

[28] Any fair reading of the Defendant's Facebook messages would conclude that they convey that the Plaintiff is an aggressive and corrupt developer who has a history of bribing public officials, and that any officials who approve one of his proposed developments must have been intimidated or bribed. [Emphasis added.]

[55] In the next paragraph, the motion judge rejected Mr. Hall's argument that "he was merely asking rhetorical questions or simply advising readers to do their own research" and that his comments "were not really accusatory". Such a reading was not "realistic or tenable:". Rather the "true nature" of the comments was that they were "designed to lower the Plaintiff's reputation in the eyes of the reasonable reader, and they are bound to do so" (emphasis added).

[56] Reading the reasons as a whole, the motion judge correctly applied an objective test. In referring to Mr. Hall's cross-examination and referring to "intent", the motion judge was simply pointing out that not even Mr. Hall had adopted the

meaning he was urging the court to adopt. For example, the motion judge noted, that Mr. Hall had all but conceded that he had accused Mr. Marotta of a history of wrongful conduct.

[57] Turning to Mr. Hall's second argument, he submits that the motion judge failed to give due consideration to "the conversational nature" of Facebook, which is a place for casual exchanges where expression is not always measured or precise. On appeal, he contends that an ordinary reader would understand his words to mean the following:

... Mr. Hall believed, based on what he had read in news reports, that Mr. Marotta and his companies have a history of using aggressive and corrupt practices and that therefore it was reasonable to believe, given the circumstances, that Mr. Burroughs was possibly not the only member of staff or council to have been approached or to have received gifts from Mr. Marotta.

[58] I disagree that the motion judge was not alive to the "conversational nature" of Facebook. The fact that the comments were made on social media was front and centre in this case. The motion judge expressly stated that he did not pick the words apart "phrase by phrase". In fact, he rejected a literal interpretation of the words used, instead reading the questions as veiled accusations and commenting that to do otherwise would be "to understate the intelligence of the reader". Later, in discussing the fair comment defence, the motion judge noted that "one must in

evaluating a text like the Facebook posts allow some latitude for the author to extrapolate from facts in expressing his opinion”.

[59] In conclusion, Mr. Hall has not pointed to any reversible errors. Absent an error, there is no basis to interfere with the motion judge’s finding on meaning.

## **B. GROUNDS TO BELIEVE NO VALID DEFENCE**

[60] Mr. Hall has raised only one defence: fair comment. He does not rely on the defence of justification. In other words, he does not seek to establish the truth of the allegations he made against Mr. Marotta and Solmar, but asserts that his comments were within the bounds of legitimate discourse on a matter of public interest.

[61] By way of review, the elements of this defence are: (1) the comment must be on a matter of public interest; (2) it must be based on fact; (3) although it can include inferences of fact, it must be recognizable as comment; and (4) it must satisfy an objective test: “could any person honestly express that opinion on the proved facts?” Even if those elements are met, the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. At this preliminary stage, Mr. Marotta need only demonstrate that there are grounds to believe, or a basis in the record and law rising above mere possibility, that the defence of fair comment will fail under one or more of these prongs.

[62] On appeal, Mr. Hall submits that the motion judge made two legal errors in concluding that there are reasonable grounds to believe that Mr. Hall has “no valid defence in the proceeding”. He also submits that the motion judge made related factual errors, which I will address in turn.

**(a) Fairness of Comment**

[63] First, Mr. Hall submits that although the motion judge correctly stated the five elements of the fair comment defence, he erred in considering the “fairness” of the comment at the fourth prong of the test. Applying that prong – “could any person honestly express that opinion on the proved facts?” – the “fairness” of the comment is irrelevant.

[64] Turning to the motion judge’s fair comment analysis, it appears that he dealt with prong two of the test (whether the comments were based on fact) and prong four (whether any person could honestly express that opinion on the proved facts) in tandem.

[65] The motion judge agreed with Mr. Marotta that “a fair-minded person could not honestly express the views contained in [Mr. Hall’s] Facebook post based on the Google sources that it purports to rely on” (emphasis added). The reason was that “[t]hose sources simply do not support the facts that could ground [Mr. Hall’s] published views.” He went on to conclude that the comments “were, to [Mr. Hall’s] knowledge”, entirely unfair” (italics in original; underlining added).

[66] It is well established that the fairness of a comment – its reasonableness and proportionality – is not to be considered in applying the objective test. In fact, in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, 2 S.C.R. 420, the Supreme Court advised against referring to the “fair-minded person” in assessing whether any person could honestly hold the opinion on the proved facts, at para. 28:

In my respectful view, the addition of a qualitative standard such as “fair minded” should be resisted. “Fair-mindedness” often lies in the eye of the beholder. Political partisans are constantly astonished at the sheer “unfairness” of criticisms made by their opponents. Trenchant criticism which otherwise meets the “honest belief” criterion ought not to be actionable because, in the opinion of a court, it crosses some ill-defined line of “fair-mindedness”. The trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts. [Emphasis added.]

[67] I accept that, here, the motion judge erred in slipping into such a fairness assessment instead of focusing on whether the comments were objectively incapable of belief.

[68] If an error is established, it is up to this court to consider the matter afresh: *2110120 Ontario Inc. v. Buttar*, 2023 ONCA 539, 485 D.L.R. (4th) 551, at para. 35, leave to appeal refused, [2023] S.C.C.A. No. 432; *Nanda v. McEwan*, 2020 ONCA 431, 450 D.L.R. (4th) 145, at para. 47; *Marcellin v. London (City) Police Services Board*, 2024 ONCA 468, at para. 57, leave to appeal refused, [2024] S.C.C.A. No. 350.

[69] Considering the matter afresh, I conclude that there are grounds to believe that Mr. Hall has no valid defence in the proceeding.

[70] The defence of fair comment only applies to statements of comment, as distinguished from statements of fact: *Boys v. Star Printing and Publishing Co.*, [1927] 3 D.L.R. 847 at p. 860 (Ont. C.A.). If the court concludes that the statements are ones of fact and not comment, the defence of fair comment is unavailable.

[71] The test for whether a statement is recognizable as comment is whether it would be understood by a reasonable reader as a comment rather than a statement of fact: *WIC*, at para. 27. Comment is a broad category and can include a “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof”: *WIC*, at para. 26, quoting *Ross v. New Brunswick Teachers’ Association*, 2001 NBCA 62, 238 N.B.R. (2d) 112, at para. 56.

[72] This is a low threshold; “the notion of ‘comment’ is generously interpreted”: *Hansman*, at para. 108, quoting *WIC*, at para. 30. This analysis is highly contextual. An assertion that might be taken as factual in one context may be properly construed as comment in another: *Hansman*, at para. 113; *WIC*, at para. 26.

[73] Here, the thrust of the expression is that Mr. Marotta is an aggressive and corrupt developer with a history of bribing public officials.

[74] Allegations of criminality may, depending on the context, be viewed as either allegations of fact or comment.

[75] For example, in *Hansman*, the majority and the dissent split on whether the allegation that Mr. Neufeld “tip toed ... into hate” speech would be taken as imputing criminal liability or not. The majority concluded that the comment was Mr. Hansman’s own interpretation of Mr. Neufeld’s statements and thus comment: at para. 113. In contrast, Côté J. would have found that, read in context, the hate speech allegations appeared similar to allegations of fraud, theft or other criminal conduct that have been found in other cases to be statements of fact for which a fair comment defence is not available: at para. 155.

[76] Those other cases include two decisions from this court: *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 OR (3d) 211, leave to appeal refused, [2019] S.C.C.A. No. 147, and *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, 144 O.R. (3d) 291. In *Lascaris*, this court held that there were grounds to believe that the accusation that the plaintiff “supported terrorists” was a statement of fact: at para. 34. In *Bondfield*, the court held that a statement that the plaintiff was involved in bribery and collusion could reasonably be considered a statement of fact: at para. 17.

[77] Here, Mr. Hall alleged “corrupt and aggressive” business practices and, more specifically, gifts of cash or “perks”. He said “[s]omething stinks here.” In his

reply comment, he stated that “[e]verything in my post is in the public record with some opinions thrown in.” He went on to say, “Look at Solmar’s record. They have been doing this stuff for decades”.

[78] In my view, there were grounds to believe that a reasonable trier could view the statements suggesting corruption in the form of bribery as factual assertions. If so, the fair comment defence would not succeed. The threshold for finding “grounds to believe” at this stage is low, requiring only “a basis in the record and the law” to support a finding that the fair comment defence would not “tend to weigh” in Mr. Hall’s favour, *Bent*, at para. 103. Even if it could potentially go either way, that is sufficient for Mr. Marotta and Solmar to get past s. 137.1(4)(a)(ii): *Hamer*, at para. 49.

[79] On this basis alone, there is a ground to believe that there is no valid defence.

**(b) Malice**

[80] Mr. Hall also challenges the motion judge’s finding of malice, arguing that it is tainted by factual errors. According to Mr. Hall, there is no evidence in the record to support a finding that Mr. Hall acted with malice, which requires “wrongful intent, ill-will, malevolence, evil purpose”: *United Soils v. Mohammed*, 2017 ONSC 4450, 11 C.E.L.R. (4th) 216, at paras. 51-52, *aff’d* 2019 ONCA 128, 23 C.E.L.R. (4th) 11, leave to appeal refused, [2019] S.C.C.A. No. 121.

[81] Since the motion judge's findings on malice seep into his balancing analysis and decision on costs, I will address the malice issue even though I have already concluded that there are grounds to believe there is no valid defence.

[82] Malice in law is a dominant and improper motive on the part of the defendant.

As explained in *Hansman*, at para. 115, it can take a number of different forms:

[115] A showing of malice defeats a valid fair comment defence. This can be done by demonstrating the defendant made the statement knowing it was false, with reckless indifference as to its truth, to injure the plaintiff out of spite or animosity, or for some other improper purpose. [Citations omitted.]

[83] Evidence of malice may be extrinsic (evidence other than the statements themselves) or intrinsic (found within the defamatory expressions themselves): *Hansman*, at para. 115.

[84] Here, the motion judge correctly stated the law. He provided several bases for concluding that there were grounds to believe that the fair comment defence would be defeated by malice: (1) a reckless disregard for the truth, (2) intentional dishonesty, and (3) an "ulterior motive" and desire to injure Mr. Marotta and Solmar.

[85] As I will explain, I agree that there is a basis in law and fact to find malice, although I find that there were some misunderstandings about the scope of the record in the motion judge's analysis.

## Recklessness

[86] The motion judge found:

... [Mr. Hall] showed a reckless disregard for the truth when he wrote in his follow-up post that, “Everything in my post is in the public record”. Not only had he not read the publicly available articles that he referred his readers to, but those articles did not support the accusation he made about the Plaintiff having a history of corrupt practices. He displayed little interest in checking the facts before publishing his message, despite expressly representing that he had. [Emphasis added.]

[87] Although Mr. Hall did not link to or mention any particular article by name in his post, he recommended search terms that, if entered into a search engine, would have returned up a number of articles about Mr. Marotta’s controversies. Mr. Hall attached to his motion record affidavit a selection of the articles that would have been discovered through the recommended searches, including the reporting from Toronto Life, the Toronto Star and the Globe and Mail mentioned earlier.

[88] Mr. Hall challenges the finding that he had “not read the publicly available articles that he referred his readers to.” He submits that, to the contrary, his unchallenged evidence was that he had read the articles, and that this was what prompted him to make his post.

[89] In response, Mr. Marotta says that Mr. Hall did not say under cross-examination that he read all of the articles appended to his affidavit, and that,

regardless, there is at least a basis in the record to find that Mr. Hall did not “fully read” all the articles.

[90] Respectfully, it goes too far to find that Mr. Hall “did not read the articles” referred to before he made the impugned comments.

[91] In cross-examination, Mr. Hall corrected counsel for Mr. Marotta, stating that he had Googled and read the referenced articles at the time he made the post:

Q. But at the time you wrote the post [...] you didn't have this raft of articles about Caledon at hand.

A. Oh, I've read a lot of them.

Q. At some point?

A. Yes.

Q. At some point?

A. Yes, I didn't keep them in a file, but, I mean, with Google, you don't have to keep the file. You can just Google stuff and...

Q. No, I appreciate that [...] but at the time that you wrote this article, did you go and do a Google search about Caledon?

A. Yes, I did.

Q. Okay. Can we have that produced, please?

A. Well, they're in the affidavit. Most of the articles I read are all there. [Emphasis added.]

[92] Later, Mr. Hall explained that when he made his post, he had been specifically thinking about the pieces in Toronto Life and the Globe and Mail, among others:

When I wrote that, I was just thinking of everything in general. I wasn't thinking of specifically this...a bribe to this person or that person, I was just thinking of all the stuff I had read. The stuff in Toronto Life, the stuff in The Globe, the stuff... [Emphasis added.]

[93] As detailed earlier, these were large pieces of investigative reporting that highlighted the struggle between Mr. Marotta and the Mayor of Caledon, including Mr. Marotta's efforts to discredit her.

[94] Accordingly, to unequivocally say that Mr. Hall "did not read the articles" before posting misreads the evidence. Nonetheless, standing alone, this does not undermine the motion judge's finding on recklessness.

[95] Mr. Hall also challenges the finding that "those articles did not support the accusation he made about [Mr. Marotta] having a history of corrupt practices". Mr. Hall says that the articles from the Toronto Star and Toronto Life, among others, detail corruption allegations.

[96] Mr. Marotta admits that "[w]hen the articles are read fully, the treatment of [him] is concerning" but contends that they do not support the accusations made.

[97] Here, whatever Mr. Hall may have subjectively intended to convey, the motion judge read the post as saying that Mr. Marotta is "an aggressive and corrupt

developer who has a history of bribing public officials, and that any officials who approve one of his proposed developments must have been intimidated or bribed” (emphasis added). In other words, the allegation was that the corruption took the form of bribery.

[98] It is unnecessary to detail the contents of the various articles, which I have described earlier in these reasons. It is fair to say that the articles do not place Mr. Marotta and Solmar in a favourable light. None of the articles, however, state that either Mr. Marotta or Solmar were ever charged with or convicted of bribery. And even though the articles may implicitly suggest the possibility of wrongdoing, there are no reported allegations of attempts to bribe an elected official pre-dating the incident with Councillor Burroughs. In cross-examination Mr. Hall stated that he did not even “mean to imply that [Mr. Marotta] had been bribing people for decades”, as he admitted that “[t]here is no evidence that he has ever bribed anybody”, other than, in his view, Councillor Burroughs.

[99] Accordingly, even on his own evidence, Mr. Hall made allegations that went beyond what he had read in the articles he referenced. I am not persuaded that the motion judge made a palpable and overriding error in finding, in the context of his finding on recklessness, that the articles do not support the accusation of a history of bribery.

### **Ulterior Motive and Desire to Harm**

[100] Malice may be established by showing that the defendant was primarily motivated by an indirect motive or ulterior purpose not connected with the purpose for which the defence exists: *W/C*, at para. 101. The very essence of malice is that, in making the statement, the defendant's dominant motive was to injure the plaintiff: *Halsbury's Laws of Canada*, "Defamation", (Toronto: LexisNexis Canada, 2023 Reissue), at p. 297.

[101] The motion judge found that "[m]ost importantly, the content and the timing of the Facebook posts indicates that Mr. Hall was motivated by an ulterior motive and a desire to harm [Mr. Marotta] by undermining his development approval." The motion judge went on to note that Mr. Hall had "conceded that his real purpose in publishing the Facebook posts was to thwart [Mr. Marotta's] development of Parliament Oak" by pointing to his prior dealings in Caledon and insinuating that he had a corrupt history.

[102] On appeal, Mr. Hall denies that he made any such concession. His intent, he says, was to express his disagreement with the application's approval and encourage people to do their own research. The fact he spoke out against the development he opposed does not constitute malice.

[103] In response, Mr. Marotta submits that there is an objective basis in the record to conclude that Mr. Hall wanted to thwart the Parliament Oak development.

[104] I agree that even if Mr. Hall did not concede an improper purpose, there is a basis in the record upon which the motion judge could arrive at his conclusion that Mr. Hall possessed an improper motive to injure the plaintiff. The motion judge identified that basis: the content and timing of the Facebook post. As the motion judge put it earlier in his reasons, “the tone and content of the message is, by any measure, intemperate”. Although it is a legitimate purpose to criticize a development proposal and to raise concerns about the integrity of the approval process, the post and reply comment went further than that. Mr. Hall’s comments, in the words of the motion judge, could be read as a “direct attack on [Mr. Marotta’s] character”, indicating a desire to harm him.

### **Intentional Dishonesty**

[105] The motion judge also found that Mr. Hall was “intentionally dishonest” in asserting that NOTL councillors who voted in favour of the Parliament Oak development proposal “were also guilty of corruption”. The motion judge’s basis for saying this was that in cross-examination Mr. Hall “conceded that he did not actually believe that to be the case”.

[106] Mr. Hall submits that he did not concede that he was intentionally dishonest; to the contrary, he made clear that he still thought that there was some irregularity in the process, even if he accepted that he had no evidence any councillor had accepted a bribe.

[107] In my view, the motion judge's basis for finding intentional dishonesty was misplaced.

[108] Although I accept that the flip side of the allegation that Mr. Marotta bribed NOTL councillors is that councillors received bribes, it is important to remember that this is a claim brought by Mr. Marotta and Solmar; not a claim by any NOTL councillors. In terms of malice, the question is whether there is a basis to say that Mr. Hall was actuated by malice toward Mr. Marotta or Solmar. Accordingly, even if Mr. Hall was "intentionally dishonest" in saying that those who voted in favour of the proposal "were also guilty of corruption" that is not a basis for finding malice toward Mr. Marotta and Solmar. Rather, intentional dishonesty about the councillors also being corrupt goes to malice against the councillors, who are not parties. In my view, the motion judge erred in conflating malice toward the councillors with malice toward Mr. Marotta and Solmar.

[109] Looking at the matter afresh, I do not read Mr. Hall as conceding that he was intentionally dishonest. He thought there was some real irregularity in the process even if he had no evidence of any particular councillor of having taken a bribe. In the circumstances – circumstances which included the fact that Mr. Marotta gave Councillor Burroughs \$10,000 weeks after the Parliament Oak zoning application was filed – he remained concerned. In my view, that does not amount to a basis for finding intentional dishonesty.

### **Conclusion on Malice**

[110] Although I do not endorse all of the motion judge's analysis, I am satisfied that there is a basis in fact and law to find malice.

### **C. THE WEIGHING UNDER S. 137.1(4)(B) - BALANCING**

[111] Under s. 137.1(4)(b), Mr. Marotta and Solmar were required to satisfy the motion judge that "there are grounds to believe .... that "the harm likely to be or have been suffered by [them] as a result of [Mr. Hall's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression."

[112] The Supreme Court has described this weighing as "the core of the analysis": *Hansman*, at para. 58; *Pointes*, at para. 53. Even when a plaintiff shows grounds to believe the proceeding has substantial merit and the defendant has no valid defence, "it remains vulnerable to summary dismissal as a result of the public interest weighing exercise..., which provides courts with a robust backstop to protect freedom of expression": *Hansman*, at para 58, citing *Pointes*, at para. 53.

[113] Although general damages are presumed in defamation law, the presumption cannot establish that the harm is "serious" for purposes of s. 137.1(4): *Hansman*, at para. 67.

[114] Even where the extent of harm suffered by the plaintiff is serious, there must also be some evidence that enables the judge to infer a causal link between the

defendant's expression and the harm suffered: *Hansman*, at para. 68, citing *Pointes*, at para. 71. Inferring a causal link between the defendant's expression and the harm suffered by the plaintiff becomes both more important, and more difficult where there may be multiple sources of harm.

**a. Harm**

[115] Mr. Hall submits that there is no evidence that the comments, which were online for less than eight days (a fact the motion judge failed to mention), caused Mr. Marotta and Solmar, who were already the subject of bad press, any harm, let alone any serious harm. There is ample evidence of other potential sources of harm to Mr. Marotta's reputation, including extensive reports in mainstream media about controversies in Caledon and the cash gift to Councillor Burroughs.

[116] In *Pointes*, the Supreme Court recognized that "reputation is one of the most valuable assets a person or a business can possess": at para. 69. The court explained that "harm is not limited to monetary harm, and neither type of harm is more important than the other." Furthermore, harm is not "synonymous with the damages alleged."

[117] At this stage, the motion judge was required to consider whether he could draw an inference of the likelihood of harm, and his harm assessment was to be "very preliminary": *40 Days*, at para. 65. As stressed in *Pointes*, although bald

assertions of harm are not sufficient, “no definitive determination of harm or causation is required:” at para. 71.

[118] Mr. Hall submits that the motion judge ignored “material facts”, including that Mr. Marotta admitted in cross-examination that he had no evidence that he or his companies had sustained any harm. Mr. Hall references the following exchange:

Q. ... Do you have any evidence that your companies' home sales or wine sales have been negatively impacted by Mr. Hall's Facebook post?

A. No, I don't. The problem that someone can have in a situation like this, it's a public perception, which is the worst thing that can happen to an individual or a company, based on certain accusations not founded.

[119] The motion judge did not err in ignoring this evidence. Rather, he correctly recognized that “[Mr. Marotta] need not demonstrate specific economic loss at this stage”. Instead, “his only evidentiary requirement is that he show facts in the record from which an inference about the likelihood of harm can be drawn”. The motion judge found that there were facts from which such an inference could be drawn:

... [Mr. Marotta's] development proposal will require further planning approvals and will be up for future votes at the NOTL Council. The evidence in the record suffices for me to draw an inference that the accusations levelled at [Mr. Marotta] and the aspersions cast at NOTL councillors by the Facebook posts will weigh on, and potentially influence, their thinking about future votes.

The potential loss of the Parliament Oak development (as well as the possible loss of any of any of [Mr. Marotta's

and Solmar's] other developments) because of reputational damage to [Mr. Marotta], and the stigmatization of any vote in his favour by city councillors, constitute serious harm. Being known as a corrupt developer whose supporters take bribes is bound to be a type of harm that will cause serious detriment to [Mr. Marotta] and his business. [Emphasis added.]

[120] As for the reputational harm, the motion judge found, at the outset of his reasons, that “one can reasonably assume that a significant percentage of the community will have seen or been referred to [Mr. Hall's] post”. As Mr. Hall acknowledged, NOTL is a “small town where there is a tremendous amount of gossip” and the post touched on prominent local issues.

[121] Mr. Hall submits that the finding that a significant percentage of the community will have seen or been referred to the post and follow-up comment is a palpable and overriding error. He contends that there is nothing in the record to suggest that the post was widely discussed or circulated. Instead, the evidence was that the initial post received 33 likes, 19 comments and was shared twice; the reply comment received 8 likes and was not shared.

[122] Mr. Marotta, on the other hand, submits that the inference was reasonable, given that the public Facebook group has 3,100 members, including two councillors, in a town of only 19,000, and a third councillor had previously posted in the group.

[123] In my view, the motion judge's inference does not amount to a palpable and overriding error. There was a basis in the record to ground an inference that word may have spread about the post. In addition to evidence of the number of members of the Facebook group and evidence of the interest in the Parliament Oak development, there is also evidence of how the rumour spread. For instance, in Mr. Marotta's affidavit, he stated:

I do not have social media. I first learned about the Words Complained Of from a banker who called me and told me that he had seen the Words Complained Of. He was concerned about financing my projects. Several other people called me about the Words Complained Of as well.

[124] As for the inference that the Facebook post could influence NOTL councillors in future votes, it is essential to remember that, at this stage, Mr. Marotta need only show an inference of a likelihood of harm. In this case, there had already been an investigation into the cash gift to Mr. Burroughs – one that resulted in no criminal charges against Mr. Marotta – and now he was facing allegations of serious criminality, which by implication also placed the councillors under suspicion. Those same councillors would be voting on future proposals by Mr. Marotta and Solmar. The vote on the first proposal was a close 5-4 and there was considerable public scrutiny. In those circumstances, there is a basis in the record to find a likelihood of serious harm.

[125] As for Mr. Hall's argument about other potential sources of harm to Mr. Marotta's reputation and a lack of causation, it is clear from the motion judge's reasons that he bore causation in mind, recognizing that the harm must be "*a result of the expression*" (emphasis in original). Although there were already critical things written about Mr. Marotta and Solmar, the post had the potential of affecting approvals going forward. As noted in *Pointes*, causation is not an all-or-nothing proposition: at para. 72.

**b. Public interest in protecting Mr. Hall's expression**

[126] Turning to the public interest in protecting Mr. Hall's expression for purposes of s. 137.1(b), the question is not whether the subject of the post is one of public interest (i.e., the integrity of the development process). Rather, the focus, at this stage, is the particular expression, including its "quality" and "the motivation behind it": *Pointes*, at para. 74. For example, in *Pointes*, at para. 75, citing 2018 ONCA 685, 142 OR (3d) 161, at para. 94, the SCC endorsed the following passage from this court's reasons in the appeal below:

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"....  
[Citations omitted.]

[127] Here, the motion judge found that although “community debate over the merits of a development proposal is certainly a form of expression with great value”, the problem here was “the way that subject matter has been addressed”. He noted that “[i]t is one thing to oppose a development project; it is quite another thing to engage in false narratives about the developer’s supposed long history of corruption and intimidation such that town staff and councillors fear supporting it.”

[128] He concluded that the public interest in the particular speech did not weigh heavily:

[60] There is, of course, legitimate public interest in expression that addresses real estate development and local development applications. But that interest does not weigh heavily on the ledger where the expression, as here, takes the form of serious, unsubstantiated accusations against a developer and city councillors rather than an actual critique of a development policy or plan. Where the impugned expression is composed almost entirely of gratuitous slurs, the balance inevitably tips in the Plaintiff’s favour.

[129] On appeal, Mr. Hall does not submit that his comments have public interest value for purposes of s. 137(4)(b). Instead, Mr. Hall challenges the motion judge’s treatment of SLAPP indicia.

### **c. SLAPP Indicia**

[130] The court may consider whether the hallmarks or indicia of a classic SLAPP are present in conducting the weighing under s. 137.1(4)(b). In *Marcellin*, the court spoke to this issue, at para. 111:

Conducting the weighing under s. 137.1(4)(b) is an “open-ended” exercise that requires the court “to scrutinize what is really going on in the particular case” and to consider all relevant factors: *Pointes Protection*, at paras. 79-81. Whether the hallmarks or indicia of a classic SLAPP suit are present bears on the public interest weighing exercise under s. 137.1(4)(b), including such factors as whether the plaintiff has a history of using litigation or the threat of litigation to silence critics, a financial or power imbalance that strongly favours the plaintiff, a punitive or retributory purpose animating the action, and minimal or nominal damages suffered by the plaintiff: *Pointes Protection*, at para. 78. [Emphasis added.]

[131] On appeal, Mr. Hall submits that four indicia of a SLAPP are present here:

(1) Mr. Marotta has a history of pursuing and threatening litigation (including issuing a libel notice to a local newspaper); (2) there is a clear financial and power imbalance between Mr. Hall and Mr. Marotta and Solmar; (3) there is evidence of retributory intent (an expressed intention to sue even if Mr. Hall withdrew the post); and (4) and the absence of harm. In addition, there is a clear risk of a chilling effect on speech.

[132] Fundamentally, the question for a judge on a s. 137.1 motion is “what is really going on”: *Pointes*, at para. 81. In answering that, the hallmarks or indicia of a SLAPP may be relevant although they are, by no means, meant as a checklist to be ticked off in every case. Absent a palpable and overriding error, it is not for this court to engage in a rebalancing.

[133] Here, the motion judge found: (1) an equal playing field, at least from a litigation perspective; (2) little evidence to suggest that the lawsuit was vengeful or retributory; and (3) a likelihood of serious harm. And, earlier in his reasons, the motion judge noted the concession by Mr. Marotta's counsel that Mr. Marotta is or has been engaged in other litigation.

[134] The motion judge found that "what was really going on" was that Mr. Marotta was seeking to address the tarnishing of his business reputation to preserve future objectivity among NOTL councillors in assessing his development proposals. In the motion judge's view, there was "little in the record" that pointed to the lawsuit being "vengeful and retributory".

[135] As for whether there was a power imbalance favouring Mr. Marotta and Solmar, the motion judge noted that there was "no real evidence about the disparity of wealth between the parties." On the one hand, Mr. Marotta is "a successful developer", whereas Mr. Hall "is a retiree who has owned three businesses and who resides in an affluent neighbourhood in NOTL – the very privileged residential life that he is out to protect in his Facebook attack on [Mr. Marotta]." In his view, "[n]othing in the record suggests that the two parties do not exist on an equal playing field in the litigation sense of that term."

[136] Mr. Hall submits that the motion judge committed a palpable and overriding error in finding that “there is no real evidence about the disparity of wealth between the parties” and inferring that Mr. Hall has similar wealth.

[137] I agree that, on this record, there is a basis to say that there is a clear disparity in wealth between Mr. Marotta and Solmar, on the one hand, and Mr. Hall, on the other.

[138] On Mr. Marotta’s own evidence, he is very successful. For instance, in his affidavit, he detailed successful projects in NOTL, including a 130-acre winery, a large subdivision, another townhouse community, an upscale restaurant, and a second winery that is in its final stages of development. In addition, he detailed future projects in NOTL aside from his plan to build a 129-room luxury hotel on the Parliament Oak site. And he details his successful ventures in other parts of southern Ontario and the millions he has donated to charitable causes. In cross-examination, he acknowledged that two years previously his companies sold land in Caledon for \$500 million.

[139] On the other side of the ledger, the evidence is that Mr. Hall owned three businesses, including a publishing business that published a single issue, and a corporate team-building consulting business that he runs part-time in retirement. There is nothing in the record about the third business, a jewellery business that Mr. Hall operated after completing high school.

[140] On this record, although there are no figures at this stage (no “real evidence” in the words of the motion judge), the evidence that is available at this screening stage indicates a disparity in wealth, even if the exact degree of the disparity is not known. That said, there is no evidence to suggest that Mr. Hall is without sufficient financial means for litigation purposes.

[141] In my view, even accepting the motion judge made a palpable and overriding error in finding an equal playing field, I am not persuaded there is a basis to interfere with his conclusion that “what is really going on” is that Mr. Marotta is seeking to vindicate a legitimate concern about reputational harm in the face of gratuitous personal attacks. The motion judge’s finding about the absence of bad faith is entitled to deference. And, as I have already explained, I would not interfere with the motion judge’s finding on harm. Although the motion judge did not expressly speak to other litigation in this part of his reasons, he made mention of it earlier in his reasons. Ultimately, the motion judge’s take on “what is really going on” was for him to make and I would defer to it.

#### **D. ADDITIONAL ALLEGED FACTUAL ERRORS AND OMISSIONS**

[142] Mr. Hall claims that, in the course of the motion judge’s eleven pages of reasons, he made eight factual errors and ignored at least nine “material facts”.

[143] Throughout these reasons, I have addressed alleged factual errors. Mr. Hall also points to other alleged factual errors, including the finding that he is an

“outspoken user of social media” and that he engaged in a “smear campaign”. In my view, even if these were found to be errors, neither would be either palpable or overriding.

[144] As for the omissions that I have not addressed, I am not satisfied that either individually or collectively they amount to reversible error.

[145] I would also reject the submission that “the volume of factual errors and omissions are such that the decision should be set aside”.

#### **E. CONCLUSION**

[146] In conclusion, I would dismiss the appeal from the motion judge’s determination that this matter should proceed to trial. In coming to this decision, it is important to recall that, despite the fact that the motion judge appears to have made numerous findings of fact, none of those findings are binding on the trier of fact at trial. This motion was a preliminary one, meant to be efficient, merely to determine whether the matter should be halted at this stage. There was a basis in the record and in law for this matter to proceed to the next stage.

#### **V. COSTS APPEAL**

[147] In the alternative, the appellant seeks leave to appeal costs and an order varying the decision to “no costs”.

[148] Section 137.1(8) of the *Courts of Justice Act* presumes that a successful responding party to an anti-SLAPP motion (here, Mr. Marotta) is not entitled to costs:

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

[149] In this case, the motion judge departed from the presumption on the basis of malice and ordered Mr Hall to pay the plaintiffs costs on a substantial indemnity basis in the amount of \$89,000.

[150] The appellant submits that it was “plainly wrong” for the motion judge to depart from the presumption against costs since a finding of malice is insufficient to justify the departure from the presumption, especially since this case bears many of the traditional indicia of a SLAPP suit. In addition, the motion judge’s finding of malice was unsubstantiated. Even if there were grounds to depart from the presumption, the motion judge erred in awarding substantial indemnity costs.

[151] Costs awards are highly discretionary and entitled to deference.

[152] A finding that the expression “may have been motivated by malice” is sufficient to rebut the presumption: *Teneycke v. McVety*, 2024 ONCA 927, 504 D.L.R. (4th) 313, at paras. 98-100. As I have found, there is a basis in the record to find malice, at least on the basis of recklessness and desire to harm.

[153] The motion judge awarded costs on a substantial indemnity scale but provided no reasons for awarding costs on that scale. Substantial indemnity costs are warranted where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties in the litigation: *Young v. Young*, [1993] 4 S.C.R. 3, at para. 251. They are the exception not the rule.

[154] Mr. Marotta submits that the appellant's conduct was unreasonable since he threatened to bring a s. 137.1 motion before the statement of claim was filed and he took the unreasonable position on the motion that he was just asking rhetorical questions.

[155] In my view, such conduct does not amount to "reprehensible, scandalous or outrageous" conduct sufficient to ground a substantial indemnity costs award.

[156] Accordingly, I would grant leave and substitute a costs award of \$40,000 representing costs on a partial indemnity basis.

## **VI. CONCLUSION**

[157] I would grant leave to appeal costs, set aside the costs award and substitute an award of \$40,000 on a partial indemnity scale inclusive of disbursements and HST. I would otherwise dismiss the appeal. I would order the appellant to pay the respondent costs of the appeal on a partial indemnity scale in the amount \$12,500 inclusive of disbursements and HST. Although the parties agreed to costs in the amount of \$25,000, the appeal had some merit and, indeed, the appellant identified

some errors and succeeded on his costs appeal. In my view, while the appeal is dismissed, the appellant's position should be reflected in the costs award.

Released: "May 27, 2026 JMF"

"Fairburn A.C.J.O."

"I agree. Janet Simmons J.A."

"I agree. Coroza J.A."