FORM 10 (RULES 22(1)(a) AND 36(4))

Court of Appeal File No. 43466

COURT OF APPEAL

ON APPEAL FROM THE ORDER OF THE HONOURABLE
MR. JUSTICE FUNT OF THE SUPREME COURT OF BRITISH COLUMBIA
PRONOUNCED THE 25TH DAY OF JANUARY, 2016

BETWEEN:

TASEKO MINES LIMITED

Appellant
(Plaintiff)

AND:

WESTERN CANADA WILDERNESS COMMITTEE also
known as WILDERNESS COMMITTEE AND SVEN BIGGS

Respondents
(Defendants)

RESPONDENTS' FACTUM

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CHRONOLOGY

Date	Event
July 3, 2010	Environmental Assessment panel report rejects original Prosperity Mine proposal for its significant adverse environmental effects (AB vol 7, p 2339).
June-August, 2011	The Appellant started the process to seek approval of a New Prosperity mine in the same location, and filed its project description with the Canadian Environmental Assessment Agency ("CEAA"). (AB vol 2, p 451)
November 2011	The Minister of the Environment announced that the New Prosperity Proposal would undergo a federal environmental assessment.
January 23, 2012 to February 22, 2012	The CEAA invited public comment.
January 26, 2012	Wilderness Committee published Articles 1 and 2 regarding the New Prosperity Proposal (AB vol. 1 pp. 3 & 8).
February 2012	Wilderness Committee published Article 3 (AB vol 1 p. 4-5), being an amended version of Article 1 following a legal letter from Taseko.
March 1, 2012	Taseko filed its notice of civil claim for defamation.
March 22, 2012	Wilderness Committee filed its Response to Civil Claim, alleging among other things that the Claim was a Strategic Lawsuit Against Public Participation (SLAPP).
March 22, 2014	Wilderness Committee published the 4th and 5th of the five articles in issue, saying it had filed its Response to Civil Claim alleging a SLAPP (AB vol. 1, pp. 12-13 and 18-19).
April 30, 2012	Taseko filed an amended Notice of Civil Claim, including allegations that the 4th and 5th articles were defamatory.
October 31, 2013	The review panel report on the New Prosperity Proposal found significant adverse environmental effects, and the Minister subsequently declined to approve the project.
January 19 to April 2, 2015	Trial.

Date	Event
January 25, 2016	Reasons for Judgment released, dismissing the action.

OPENING STATEMENT

Of five articles in issue, the first three criticized an open pit mine proposal which was a mere variation on a proposal that had previously failed an environmental assessment. The judge found the alleged defamatory meanings were not made out by the Appellant, holding they were a critique of the mine proposal, not a defamation of the Appellant's character. The judge also found the same articles, even assuming the Appellant's pleaded meanings such as "callous disregard", were protected fair comment.

The remaining two articles, published after the initial Notice of Civil Claim and Response were filed, stated that the Response asserted the Claim was a "SLAPP" attempting to silence critics. The judge found these two articles bore at least one of the pleaded defamatory meanings, but were nevertheless protected as fair comment.

The Appeal attacks on numerous factual findings by the trial judge, ranging from the meaning of the words, to the elements of fair comment, to the finding that malice had not been made out. The plaintiff must make out palpable and overriding error. The judge did not alter any legal tests for meanings or fair comment.

The Appellant also attacks an area of significant trial judge discretion, the awarding of special costs for a portion of the proceedings, where the judge found that it was unreasonable to maintain an aggressive plea of malice and punitive damages after a 2013 environmental assessment report had vindicated the Respondent's criticisms. The trial judge was perfectly entitled to make this award, and in any event was not clearly wrong.

PART 1 - STATEMENT OF FACTS

1. In 2009/2010 the Appellant proposed an open pit mine called “Prosperity Mine” in an area 125 km southwest of Williams Lake which includes Little Fish Lake, Fish Creek below it, and Fish Lake below that. The outflow of Fish Lake feeds the Chilcotin River, which in turn flows into the Fraser River.

2. The proposal was to build the open pit near Fish Lake and drain Fish Lake to use it for waste rock from mining. A Tailings Storage Facility (TSF) was to be built to contain potentially acid generating rock (PAG rock) beside the drained lake, with seepage from the TSF going into the drained lake basin and forming a pond.

> RFJ para 149, quoting Taseko’s VP Engineering Scott Jones: “The drained Fish Lake -- the deepest part of it actually became the water management pond that collected the seepage from the main embankment as well as other areas that fed to it.”
>
> Greg Smith testimony that the seepage into the drained Fish Lake basin by year 20 would have been 54% of 52 litres per second: transcript, January 23, Transcript vol 2. P. 368 lines 26-33. This works out to over 2.5 million litres per day of TSF water going into the seepage pond in the drained lake basin.

3. The waste rock being dumped in the drained lake basin was estimated by the Appellant to include 3% PAG rock from misclassification according to Taseko’s Project Description. This would add up to 6 million tonnes of PAG rock being deposited in the lake basin by the completion of mining.

> Project Description, Ex. 17 p. 58 – AB vol 7 p. 2411
>
> Scott Jones testimony, Transcript vol1, p. 278, lines 6-18

4. The Prosperity Mine proposal failed a federal environmental review, with the Review Panel in July 2010 concluding there would be significant adverse environmental effects, and identified the loss of Fish Lake as especially significant.

> 2010 Panel Report, AB vol 7, p. 2339 (Exec. Summary at pp. 2348-2353)

5. The Appellant's Prosperity Mine proposal had identified two other options (Plans 1 and 2) for the layout of the mine features. "Plan 2" did not involve draining Fish Lake, but instead locating the TSF upstream, on top of (and thereby destroying) Little Fish Lake. Taseko asserted that this option carried higher environmental risk, and the 2010 Review Panel, said in its report (as quoted in RFJ para 71):

> Mine Development Plan 2, with the tailings storage facility located upstream of Teztan Biny [Fish Lake], would in time likely result in the contamination of Teztan Biny…
>
> … While offering short term benefits, the Panel agrees with the observations made by Taseko and Environment Canada that Mine Development Plans 1 and 2 would result in greater long-term environmental risk than the preferred alternative.

6. Two of the obvious reasons why "Plan 2" was less environmentally responsible included the placement of the TSF uphill and upstream, where seepage was a much more serious issue and where a breach of the TSF would be an even greater catastrophe than in the original plan.

7. After the rejection of the Prosperity Mine proposal, the Appellant in 2011 advanced a "New Prosperity" proposal. It filed a Project Description with the environmental review agency explaining that the "New Prosperity" proposal was the configuration described as Plan 2 in the original proposal.

Project Description, AB vol. 2, p. 451

8. The defendant Wilderness Committee runs numerous environmental campaigns, relies on about 100 volunteers, accepts no corporate or government money, and receives almost all of its funding from individual donations, with 8% coming from grants. It is a not-for-profit society and registered charity.

Beth Clarke testimony, Transcript vol. 3, pp. 833-835.

9. The environmental review agency made a public call for comments on January 23, 2011. The Wilderness Committee and other groups published their concerns and

encouraged the public to comment. The first two publications in issue (Articles 1 and 2) were posted on the Wilderness Committee website on January 23, 2011. Taseko raised concerns about Article 1 in a lawyer's letter, and it was slightly amended (Article 3). Joe Foy testified that the Wilderness Committee stood behind Article 1, but that Amended Article 3 was intended to use more technically precise language to appease Taseko.

> AB vol. 10, p. 3408 (Call for comments); RFJ para. 77 articles, AB vol 1, articles at pp. 3, 4-5, 10-11, 12 & 18; legal letter p. 39.
>
> Foy testimony, transcript vol. pp. 510-514 and 521-522

10. The purpose of capturing as much TSF seepage water as possible is because of the contaminants in the TSF water. Nevertheless, Taseko knew that there would be seepage that could not be collected and admitted this in its Project Description. Taseko's own Project Description stated:

> AB vol 2, p. 563: "Water quality from the main embankment seepage flow into Upper Fish Creek may contain levels of arsenic, iron and mercury which exceed guideline levels for the protection of aquatic life; during operations seepage flows will have to be collected and pumped back into the TSF or treated and released into Middle Fish Creek to supplement flows to Fish Lake".

11. Under the New Prosperity proposal, since the TSF would be located upstream of Fish Creek and Fish Lake, the Appellant planned various means of capturing much of the TSF seepage. However, its plan estimated that unrecovered TSF seepage would flow into Fish Lake (to the tune of over 200,000 litres per day, forever) as well as two other lakes, and that there would be a significant loss of spawning habitat and loss of 10,000 spawning fish yearly.

> Project Description, AB vol. 2, pp. 488-489, 502-504
>
> Jones testimony, Transcript vol. 1, p. 251, lines 30-45

12. A key criticism from many observers was that the claim of "saving" Fish Lake was unrealistic given the seepage downstream from the TSF location upstream. The

2010 Review Panel had said that "Mine Development Plan 2" "…would in time likely result in contamination of Teztan Biny [Fish Lake]"

Ex. 17, AB vol. 7, p 2403.

13. Taseko's head Engineer, Scott Jones, even testified to the Review Panel, on April 26, 2010 (Ex. 20), that:

> "What happens to the water quality in Fish Lake, if you try and preserve that body of water with the tailings facility right up against it, is that over time the water quality in Fish Lake will become equivalent to the water quality in the pore water of the tailings facility, particularly when it's close. You might be able to delay that by moving the tailings facility farther away to Fish Creek south. You may even be able to minimize that, reduce it by mitigation measures that could be applied. But eventually the water quality will change."
>
> Ex. 20, AB. vol. 9. p.. 3004 (Mr. Jones admitted at trial that he made the statement and it was true: Transcript, vol 1, p. 271)

14. Some of the harsh criticisms came from the Sierra Club, Marilyn Baptiste in the Vancouver Su,, Peter O'Neill in the Vancouver Sun (RFJ para. 77). The Wilderness Committee was just one of many critical voices – but the only one sued by Taseko.

15. The trial judge also noted that in November, 2011, prior to the publications in issue, the Tsilhquot'in Nation had published its "10 Facts" document; this document highlighted some key issue, and included the quote above from Mr Jones' testimony in the 2010 hearings.

"Ten Facts", AB vol. 10 p. 3391.

16. The criticisms and concerns published by the defendants, prominently that toxins would flow down into and pollute Fish Lake were vindicated in the final panel report, released in October, 2013. The panel's conclusions included:

a) Seepage from the TSF would be far greater than Taseko's estimates (see panel report AB vol. 7, pp. 2416-7, quoted at RFJ para 194)

b) "The Panel concludes that the Project would result in significant adverse environmental effects on water quality in Fish Lake" (AB vol. 7 pp. 2437-2440). The panel also found greater seepage would occur from the re-located and taller TSF and that significant adverse effects on Wasp Lake were also found (p. 2441).

c) " … Fish Lake will likely not be preserved as a functioning ecosystem. As a result, the Panel concludes that the fish and fish habitat will be significantly adversely affected…This effect cannot be mitigated." (pp. 2466-8).

17. Both Mr. Foy and Mr. Biggs also testified that though they did not use language in their publications as the Appellant's pleaded meanings such as "callous disregard" all of the pleaded meanings were in fact their personal opinions.

Foy Testimony, Transcript vol. 2, pp. 539-546

Biggs Testimony, Transcript vol. 3, pp. 756-760

18. Mr. Foy and Mr. Biggs were both clear about the approach they bring to the strong views that are held on environmental issues: they do not harbour ill will towards Taseko and treat those as professional disagreements (RFJ para. 141). They were earnest people concerned for the environment. Their testimony established their fair comment defences solidly and thoroughly.

Foy Testimony, Transcript vol. 2, pp. 548-549

Biggs Testimony, Transcript vol. 3, p. 761

PART 2 - ISSUES ON APPEAL

19. Was the trial judge's finding that the plaintiff had not met its burden in proving its pleaded defamatory meanings reasonable?

20. Did the trial judge make a palpable and overriding error in his findings that all elements of fair comment were proven, or did he make a legal error in determining the factual substratum of the comments?

21. Did the judge apply "fair reporting" qualified privilege?

22. Did the judge make a palpable and overriding error in finding that the plaintiff had not met its burden of proving malice?

23. Should this Court interfere with the judge's discretion in awarding special costs for a portion of the proceedings?

24. Did the trial judge make a palpable and overriding error in finding that the alleged meanings of the words in articles 1-3 were not made out?

PART 3 - ARGUMENT

OVERVIEW

25. At trial, the Claim boiled down to the following patently non-meritorious allegations:

a) that it was actionable to refer to the original Prosperity Mine proposal as using Fish Lake as a toxic tailings dump or pond, when in fact Fish Lake was to be drained and destroyed, and used for waste rock and TSF seepage under that proposal;

b) that it was actionable to refer to the New Prosperity proposal as turning Little Fish Lake into a tailings pond when in fact Little Fish Lake was to be obliterated under a 2 km by 3 km TSF;

c) that it was actionable to say that under the New Prosperity proposal, toxins would seep down into Fish Lake, when on Taseko's own estimates, TSF seepage would reach that lake in the amount of some 200,000 litres every day, forever; and

d) that it was actionable to tell the public that the Wilderness Committee had filed a Response in court alleging the Claim was a SLAPP.

26. The Appellant is attempting to appeal numerous findings of fact. In doing so, they must meet the heavy test laid down in *Housen v. Nikolaisen*, 2002 SCC 33.

MEANING

27. In the case at bar, the Appellant relied only its pleaded inferential meanings. It pleaded aggressive and extreme meanings. When a plaintiff relies upon inferential meanings alone, that plaintiff is put to the burden of proving those inferential meanings or something very similar to them.

Lawson v. Baines, 2012 BCCA 117

28. The trial judge was in a uniquely advantageous position in a complex case involving a project with significant environmental implications and not one, but two, lengthy environmental reports (one on the original Prosperity project and one on the New Prosperity project), as well as extensive evidence as to the context, the extent to which the project and criticisms of it were publicly circulating and how they might be understood by a reasonable reader. The trial judge made a determination with which this Court should not interfere.

29. The question of meaning, once the threshold of whether they are "capable" of the alleged defamatory meaning is answered in the affirmative, is a question of fact. Questions of fact are subject to deference on appeal. In *Lawson v. Baines*, 2012 BCCA 117, this Court said:

> [48] … When a judge, instead of a jury, is acting as the finder of fact, his or her findings of fact should be afforded the same deference as those a jury would be afforded in performing that same role. …
>
> [56] I cannot accede to the appellant's contention that the standard of review from a finding that words complained of are in fact defamatory should be one of correctness, whether it is made by a judge sitting alone, or by a jury. In my view the standard remains one of reasonableness. I therefore decline to accede to the appellant's second ground of appeal.

30. The trial judge set forth the articles in issue and alleged meanings at paras. 81-87 of the Reasons, noting at para 81 the legal approach to meanings as explained by this court, namely *Lawson v. Baines*, supra.

31. The plaintiff's public proposal was relevant to the question of meaning. It is submitted that a company who puts before the public for approval a proposal that will involve significant impact on the public's environment is in an analogous position to a public person whose policies and actions are under scrutiny. Their actions or statements may be criticized without any defamation of their character.

32. In *Lund v. Black Press Group Ltd.* 2009 BCSC 937, where critical words were held to not be defamatory. The court said:

> [118] The words were critical of the plaintiff and it is plain that they were intended to be critical of his performance as the elected director for the Juan de Fuca electoral area. But in my view, the comments did not go beyond legitimate criticism of a public official in the context of a highly controversial issue. While this criticism might not be recognized as justified in the case of a private person, it is acceptable as part of the public interest right to bring criticism to bear respecting the conduct of public officials: *Langlands v. John Lang and Co*. (1916), 1 S.L.T. 168, (1916) S.C. (H.L.) 102.

33. Here, as the trial judge found, the words were a critique of the proposed project and are not defamatory of the company. The trial judge set out the factual context of the proposal and environmental review process which were in play when the articles were published. He made this observation on context and with an accurate statement of the legal test:

> [98] Based on the Wilderness Committee's name, a "reasonable and ordinary member of the public" would surmise that the Wilderness Committee would likely be a particular proponent of the environment and likely an opponent of a large open pit mine in a wilderness area. As previously noted, Justice Abella in Color Your World [*C.B.C. v. Colour Your World* (1998), 38 O.R. (3d) 97 (C.A.) at 106] describes, a reasonable and ordinary member of the public as "a person who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility. A degree of common sense must be attributed to viewers."

34. The trial judge then found that the first three articles did not bear the alleged defamatory meanings (paras. 89-118), concluding:

> [113] The reasonable and ordinary member of the public would not consider that Taseko proposed to proceed with "callous disregard" for the environment or that it knew or was indifferent to the environmental harm the project would cause. Taseko was not proposing to proceed with the construction of the New Prosperity Project without first having the New Prosperity Proposal undergo an environmental review with federal government approval subsequently granted.
>
> [114] The reasonable and ordinary member of the public would not view the New Prosperity Proposal as "an abusive second attempt" to obtain federal approval. Often, persons and

> corporations do not at first succeed and try again. The word abusive suggests some impropriety or illegality. The three articles do not suggest in any manner that Taseko was not law-abiding or that it did not have the right to propose and seek the approval from the federal government of the New Prosperity Project.
>
> [115] The reasonable and ordinary member of the public is neither a sheep nor a parrot. The easy access to a letter writing tool served to encourage engagement in public discourse but did not prevent a member of the public from expressing his or her own opinion. Before using the writing tool, he or she, as a reasonably thoughtful and informed person with a degree of common sense, would have first reflected on his or her own opinion and possibly looked at the CEAA website.
>
> [116] In the overall context, the Court finds that the reasonable and ordinary member of the public would view the statements as comment as part of a freewheeling debate that engaged jobs, the environment, the economy, and First Nations. The Court does not find that Taseko's "reputation in the eyes of a reasonable person" would tend to be lowered based on an inferential meaning or impression that Taseko had a callous disregard or knew or was indifferent to particular environmental aspects, or that Taseko's second attempt for governmental approval was abusive.
>
> [117] The Court's finding is not based on the assumption that the reasonable and ordinary member of the public would have done his or his own research before drawing an inference in forming an impression from any one of the first three articles. With respect to the pleaded impressions, the Court finds that the articles themselves do not convey the pleaded 'stings'. In other words, a reasonable person reading any of the first three articles would not think Taseko had a "callous disregard" for the environment, knew about or was indifferent to environmental harm, or was engaged in an "abusive" second attempt for approval.
>
> [118] In sum, the Court finds that each of the first three articles is not defamatory.

35. The trial judge then went on, in the event he was wrong, to apply the defence of fair comment, and found the first three articles protected on that basis as well, as discussed later in this factum.

36. Regarding meanings of the fourth and fifth of the five articles, in which the Appellant's action was described as a "SLAPP", the trial judge rejected some and accepted some of the pleaded meanings, but held that fair comment protected those articles. He said:

> [173] With respect to the pleaded impressions relating to Taseko's notice of civil claim, the two articles are defamatory, subject to an available defence. The language of the articles refers to Taseko, the words were published, and they would tend to lower Taseko's reputation in the eyes of a reasonable person. A law-abiding person does not use litigation improperly to silence critics exercising democratic rights.
>
> [174] The defence of fair comment applies. The language was clearly comment -- an opinion or view. A person could honestly express the opinion or view based on the factual context. A large mining corporation seeking governmental approval for an open pit mine had filed a notice of civil claim against an environmental organization, with the mining corporation seeking damages, including punitive damages, and injunctive relief.

37. The Appellant takes no issue with the *Colour Your World* test for meaning applied by the trial judge as above, but does take issue with two aspects of the judge's discussion of meaning.

38. At paras. 36-39 of its Factum, the Appellant challenges six factors identified by the trial judge as bearing upon the finding of meaning. Yet plainly, in determining how a reasonable person would understand the words, these factors were entirely appropriate. A reasonable person would know that the matter was in the midst of public debate, that the defendant was an environmental protection organization, and is to be expected to highlight environmental risks, while the plaintiff was a mining company promoting its proposal. All of these would provide context to the reader which bear on how the words would be understood. The judge was entirely correct in including these in his consideration of meaning.

39. At para. 39, the Appellant takes issue with the judge, at RFJ para 122, quoting the concurring reasons of LeBel, J. in the *WIC Radio v. Simpson*, decision. The

Appellant argues that meaning was not in issue before the Supreme Court of Canada and the words were obiter dicta. The Appellant argues that observations of LeBel, J. on meaning are not an accurate statement of the law.

40. First, the observations of LeBel, J. plainly are important and valid considerations to bear in mind when making a finding of what a reasonable person, in the entirety of the context and circumstances, would understand from the words. The statement "The test is not whether the words impute negative qualities to the plaintiff, but whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment", as well as LeBel, J's warning against being too quick to find defamatory meaning and his observation that the public's knowledge of the plaintiff can affect how words are understood, are all undoubtedly valid and important considerations.

41. Second, this is not a case where the judge found that there was some defamatory meaning that was negated based upon the points made by LeBel, J. It is a case where the judge properly discussed the legal principles in approaching meaning, relying principally on *Colour Your World*, as well as the relevant circumstances, and then made findings that the criticisms of environmental risk posed by the mine proposal would not to a reasonable reader convey that the Taseko had "callous disregard" or was being "abusive" in its proposal.

42. Thus, the inferential pleaded meanings which the plaintiff had the onus of making out were held not to have been proven. The judge's findings were reasonable in this regard, and as such this Court should not interfere.

43. The judge's analysis of meaning was thus based on a review of the evidence, based on the correct law, and should not be interfered with by this court. Accordingly, the appeal should be dismissed regarding the first three articles on this basis.

FAIR COMMENT

44. For the most part, the appellant's argument on fair comment is a direct attack on the judge's finding of facts, requiring palpable and overriding error to be established. In respect of one element – that the comment be based on true facts – the appellant argues that the judge made legal errors.

45. The trial judge at RFJ para. 121, cited the correct five part test for fair comment as laid down in *WIC Radio Ltd. v. Simpson*. The full passage from *WIC* is as follows:

> [28] For ease of reference, I repeat and endorse the formulation of the test for the fair comment defence set out by Dickson J., dissenting, in *Cherneskey* as follows:
>
> a) the comment must be on a matter of public interest;
>
> b) the comment must be based on fact;
>
> c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
>
> e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice. [Emphasis added; emphasis in original deleted; pp. 1099-1100.]
>
> (citing *Duncan and Neill on Defamation* (1978), at p. 62)
>
> I note, parenthetically, that *Duncan and Neill* subsequently reformulated proposition (d) to say: "[C]ould any fair-minded man honestly express that opinion on the proved facts?"; Duncan and Neill on Defamation (2nd ed. 1983), at p. 63 (emphasis added). 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.

46. In *WIC Radio*, the Supreme Court of Canada explicitly held that the law had to change to better accord with the *Charter* value of free expression, emphasized that notions of fairness have no place in a fair comment analysis, and that the law protects outrageous opinions as well as moderate ones (see paras. 4, 14-16 and 39 for example).

47. If the comment is an honestly held comment, the severity of its expression will not vitiate the defence. Even words like “kickback”, “dupe” “hoodwink”, “fleece”, “swindle”, “rip off”, “con job”, “bank caper”, “spending spree and “a jackpot” are comments rather than allegations of fact.

> *BSOIW Local 97 v. Campbell*, [1984] 4 WWR 740 (BCSC paras 11, 12, and pages 745, 749-752 and noted at 749 “Wide latitude must be given to opinion and prejudice …in political matters, which cannot be expected to take on the attributes of an afternoon tea party”

48. The sea change in *WIC Radio* was reinforced in the court’s subsequent decisions in *Grant v. Torstar Corp*., [2009] 3 SCR 640:

> [52] By contrast, the first two rationales for free expression squarely apply to communications on matters of public interest, even those which contain false imputations. The first rationale, the proper functioning of democratic governance, has profound resonance in this context. As held in *WIC Radio*, freewheeling debate on matters of public interest is to be encouraged, and must not be thwarted by “overly solicitous regard for personal reputation” (para. 2). Productive debate is dependent on the free flow of information. The vital role of the communications media in providing a vehicle for such debate is explicitly recognized in the text of s. 2(b) itself: “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.

49. In *WIC Radio*, the Supreme Court of Canada said that comment is not just a classic statement of opinion. It includes statements which may appear on their face as

statements of fact but which are in reality "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". The trial judge held that all of the stings alleged ("callous disregard" and so forth) were comment. The Appellant's factum does not challenge this finding.

50. With respect to the other elements of the test, public interest was conceded by the plaintiff (RFJ para 127). The judge found that malice was not present so as to destroy the defence based on his assessment of the testimony of the defendants (RFJ paras. 141-142). The Appellant's challenge to the malice finding is addressed later in this factum.

51. As to the remaining two elements, namely that the views could be honestly held and were based on true or privileged facts, the judge went through each and every publication in issue and, assuming each sting pleaded by the Appellant, found that the views (e.g. "callous disregard") could be honestly held by a person based on the true facts.

52. As to the first article, the judge concluded:

> [151] In the context, the Court finds that in relation to the sting, any inaccuracies are footling and immaterial. The language was recognizable as comment (comment may include "a deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof"). The comment also was one that a person could honestly express on the facts set forth in the first review panel's report of the Original Prosperity Proposal and Taseko's project description for the New Prosperity Project. As previously noted, information and facts about New Prosperity would have been easily accessible on the internet, and, in particular, on the CEAA website.

53. The factual matters (which also form some of the factual matters underpinning the later articles) were all published at the time and, the evidence established, were available and all word searchable on the internet. The Project Description is at AB vol. 2 p. 451, and the 2010 Panel Report is at AB vol. 7 p. 2339.

54. The trial judge then made similar findings regarding each and every other pleaded sting in the first article (RFJ paras 156, 161, 162, 163). The one additional factual foundation item, referenced in para. 161 of the Reasons, was Mr. Jones' quotation in the "Ten Facts" document. This was a reference to a quotation from the Environmental Assessment hearings which were all available on the CEAA website and word searchable. That quote (reproduced at para 160 of the Reasons) was at item 3 of the "Ten Facts" document (AB vol. 10 p. 3391) and came directly from the environmental hearings transcripts (also available online) which was entered as Ex. 30 at trial and authenticated by Mr. Jones in his testimony. He was taken to this specific quote:

> "What happens to the water quality in Fish Lake, if you try and preserve that body of water with the tailings facility right up against it, is that over time the water quality in Fish Lake will become equivalent to the water quality in the pore water of the tailings facility, particularly when it's close."

55. Mr. Jones admitted at trial that he made the above statement and that his statement was true. Transcript vol. 1 p. 270 line 32 to p. 271 line 39.

56. The judge noted that the authors, Mr. Foy and Mr. Biggs had read and were aware of all of the factual foundation for the first three articles, namely the Project Description, 2010 Panel report and Jones' quote from the "Ten Facts" document.

RFJ para. 130

57. The judge then turned to the second and third articles, noted the pleaded impressions and factual bases were the same, such that fair comment equally applied (paras. 156, 167 and 170).

58. The judge then turned to the later articles, 4 and 5, which were published after the Notice of Civil Claim had been filed, calling the action a "SLAPP". The trial judge found:

> [174] The defence of fair comment applies. The language was clearly comment -- an opinion or view. A person could honestly express the opinion or view based on the factual context. A large mining corporation seeking governmental approval for an open pit mine had filed a notice of civil claim against an environmental organization, with the mining corporation seeking damages, including punitive damages, and injunctive relief.

Alleged Error by the Trial Judge regarding Factual Foundation

59. The Appellant's attack on the finding that the honest belief test was met is a pure attack on a finding of fact. The judge plainly had evidence to make that finding (including for example the testimony of Mr. Foy and Mr. Biggs that they did in fact hold the views in question) and made no palpable or overriding error.

60. The Appellant alleges several errors regarding the factual foundation. First, the Appellant argues (factum para 55) that the judge erred by including facts in the 2013 Report, post-dating the publications. The judge did no such thing. The factual foundation he held supported the comments in the first three articles consisted of the original Panel Report on the original Prosperity Project, Taseko's Project Description and the quote above from Mr. Jones. All of these predated the publications and all were public material.

61. The only reference in the discussion of fair comment to the 2013 report appears in the last sentence of para. 155 of the Reasons, where the judge was describing the project, and not making findings on the factual foundation for the comments. The judge was explaining that there is no material difference between a tailings pond and TSF. He went on in para. 156 to describe the factual basis for the comment, which did not include any reference to 2013:

> [155] The layout of the New Prosperity Project shown in Appendix A to these Reasons was originally from Taseko's 2011 project proposal. Little Fish Lake (Y'anah Biny) is covered by the much larger TSF. I note that page 39 from the first panel report (for Original Prosperity) states that the destruction of Little Fish Lake would be avoided under the alternative mine plan (which became New Prosperity). However, the map at page 41 of the first panel report shows the TSF directly over Little Fish Lake. Mr. McManus, Taseko's senior vice-president, confirmed during cross-examination at trial that Little Fish Lake would be under the TSF in New Prosperity. The second review panel stated that the New Prosperity Proposal "would involve the permanent loss of Little Fish Lake and its surrounding area from the placement of a 12 km² tailings storage facility".
>
> [156] In context, the distinction between a tailings pond and a much larger TSF, which includes potentially harmful water and tailings is not material. Taseko also anticipated a large volume of seepage from the TSF, which it planned to capture and return to the TSF or treat. An honest person could be skeptical as to whether Taseko's design and efforts would be successful. The language is comment that an honest person could hold based on the first review panel's report for the Original Prosperity Proposal, and its alternative, and Taseko's project description for New Prosperity. (emphasis added)

62. The Ten Facts Document: Second, the Appellant asserts (factum paras 56-57) that the "Ten Facts" document (AB vol. 10 p. 3391) was treated by the trial judge as factual foundation on the basis of that it was privileged. In fact, the judge did not refer anywhere to that document as privileged. He only referred to one part of it – a quote from Mr. Jones – as part of the factual foundation. That quote was proven independently through the testimony of Mr. Jones (Transcript vol. 1 p. 270 line 32 to p. 271 line 39).

63. The Respondents had indeed argued at trial that the factual foundation documents were privileged and therefore did not require independent proof (*London Artists v. Littler*, per Edmund Davies, LJ) as all of it formed part of the CEAA proceedings and 2010 Panel Report and the Project Description had both been filed in the BC Supreme Court in 2011 (confirmed in Foy testimony, Jan 26, 2015 transcript, p. 68 lines 15-45 and p. 74, lines 7-24). However, the judge made no reference to that argument, presumably as it was unnecessary, given that the documents, including Taseko's own statements, were also proven at trial.

64. "Sufficiently Indicated": Third, the Appellant argues (factum, paragraphs 59-60) that the factual foundation was not "sufficiently indicated". In fact, the articles explicitly referred to Taseko's mine proposal, which was publicly available online, as well as the federal review process and the rejection of the original Prosperity Mine proposal, which was also entirely online including transcripts of the hearings. These references can be seen in the articles themselves (AB vol. 1 pp. 3, 4, 6).

65. The same Articles went even further, explicitly highlighting certain most significant of the foundation facts. From the very first article, the Respondents laid out the key facts (AB vol. 1 page 3):

a) It alerted readers to the fact there was a New Prosperity proposal undergoing a federal environmental review: "federal government announced that they were accepting public comments for an Environmental Assessment for Taseko Mines Ltd.'s New Prosperity Gold-Copper Project";

b) That the original Prosperity proposal had been rejected before: "just over a year ago, Taseko's first Prosperity Mine proposal was turned down by the same government process";

c) "Taseko's original proposal was to use Fish Lake as a tailings pond, where they would store toxic waste rock produced by mining operations" (this is the phrase that was changed to "waste rock and overburden" when Article 3 replaced Article 1 after Taseko complained, although in fact the evidence proved that under the Prosperity proposal, there would indeed be a pond of TSF seepage water as well as a certain percentage of toxic rock in the drained lake basin);

d) "During the first assessment, the company was told they needed to find an alternative to this, because it would destroy Fish Lake";

e) "Taseko's engineers offered Little Fish Lake as an alternative site for the tailings pond" (this phrase also changed in Article 3 after the complaint to "as part of an alternate site". The latter was technically more accurate but plainly even worse. The New Prosperity plan was to eliminate Little Fish Lake under a TSF covering it and much more surrounding area;

f) "Eventually the toxins from the Little Fish site would make their way down downstream to Fish Lake" (this alerted readers to the fact that Fish Lake would be downstream of the proposed TSF, and that there would be seepage that would make it to Fish Lake, as confirmed in Taseko's own proposal);

g) "[T]he review panel concluded that this 'would result in greater long term environmental risk' "

66. These key facts alone were a sufficient factual foundation for a person to hold the views in question. They were all easily proven from Taseko's own public proposal and the original proceedings.

67. As to the 4th and 5th articles, the essential factual foundation was the filed Notice of Civil Claim, and there can be no serious argument that it was not sufficiently indicated, given that those articles were explicitly about the law suit and Taseko's filed Response to Civil Claim.

68. Returning to the factual foundation for the criticisms of the mine proposal, If more detail were needed, a defendant is entitled to refer to the facts in general terms and to plead the specifics in more detail. *WIC Radio,* at para. 31, states: "[t]he comment must explicitly or implicitly indicate, <u>at least in general terms</u>, what are the facts on which the comment is being made" (emphasis added).

69. The court in *WIC Radio* also endorsed this court's decision in *Vander Zalm,* involving a cartoon of Mr. Vander Zalm picking the wings off flies, which by definition did not make any explicit reference to the factual foundation. The concurring judgment of Craig, J.A. states at p. 231:

> "…the 'true facts' need not be stated at the time of the expression of the opinion. They may be implied and specified as particulars in the defence"

70. Here, just as mandated in those decisions, the articles referred to the factual foundation as above, and further detail of the matters so referenced (such as some of the specific numbers and statements in Taseko's proposal, the original 2010 Panel Report, and the quote from Mr. Jones in the original hearings) were particularized in the defence pleadings in greater detail.

71. When addressing whether factual foundation is sufficiently indicated, it must be remembered that there may be fair comment on a play or movie or book without reproducing the work. In the *Vander Zalm* case the prior news articles were in a pre-Internet era where they were more difficult to retrieve, yet they formed the factual foundation accepted by the court.

72. More broadly, it also must be remembered that the common law of defamation explicitly protects free expression, which would be rendered illusory if subjected to a highly technical and restrictive analysis:

> …the right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements."
>
> *Slim v. Daily Telegraph Ltd.*, [1968] 2 Q.B. 157 at p. 170 (quoted in *Cherneskey*, supra and *Ross v. New Brunswick Teachers Ass'n,* [1998] N.B.J. No. 125 (Q.B.))

73. In *Reynolds v. Times Newspapers*, [1999] 4 All E.R. 609, Lord Nicholls pointed out that the connection between the factual foundation and the comments is one of relevance, not fairness (pp. 614-615):

> … the time has come to recognise that in this context the epithet 'fair' is now meaningless and misleading. Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it: see Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd*.. [1958] 1 W.L.R. 743, 747." (emphasis added)

74. Fair comment does not require that every member of the audience or even a large number of them actually know the foundation facts – only that they are referred to or sufficiently well known that readers could consult them. Theatre reviews and restaurant reviews are fair comment, not because a very large segment of the population has seen the play or eaten at the restaurant, but because they are able to do so if they wish.

75. The classic decision holding that not all the facts need to be stated or stated in full so long as they were facts reported publicly in the media, is *Kemsley v. Foot*, [1952] 1 All E.R. 501 (H.L.), which is summarized in the headnote as follows:

> "Provided there was a substratum of fact stated or indicated in the words complained of which was sufficient to form a basis for the comment it was unnecessary for all the facts on which the comment was based to be stated in order to admit the defence of fair comment; in the present case the comment was on newspapers which were widely read and known".

76. The plaintiff relies on *Mainstream Canada v. Staniford*, 2013 BCCA 341 where the Court of Appeal held that fair comment failed because the foundation facts were not referred to. That, however, was a case involving reliance on a factual foundation an item not referenced that was obscure to the point that it would take a "dedicated researcher" to find it (para. 36).

77. At para 37, the court said that two of the key foundation facts, scientific papers, "were neither notorious nor contained in the defamatory publication and, as a result, were required to be 'identified by a clear reference'." The court then specified examples of scientific papers that were not referred to in the publications (paras. 39-2).

78. In contrast, in the case at bar, the factual foundation was referenced explicitly in the publications, and also were notorious and publicly available in the plaintiff's own Project Description for New Prosperity and the 2010 Panel Report on the Prosperity proposal, and the Jones quote.

79. This is not a case of an obscure fact that would take a determined researcher to locate. The essential facts were right in the articles as quoted above, and the mine proposal and assessment materials were all easily available on the government site, even on a word searchable basis. As the judge found:

> [99] The articles were posted on the internet. A rudimentary search by a reader would have located a variety of information available on the proposed project. As previously noted, the CEAA managed an internet site for the stated purpose of facilitating public access to records relating to the project and the environmental assessments taking place and the description of scope of the project.

80. Quarreling with the factual foundation: The Appellant's fourth attack on fair comment is an argument (Appellant's factum, para. 66 and following) that there were errors or omissions of fact which undermine the comment, as though the presence of sufficient facts to hold the opinions is somehow negated by quarreling over other facts which would not alter the essential ones or the opinions.

81. The law on this point is as stated in the *WIC Radio* trial decision (styled *Simpson v. Mair and WIC Radio Ltd*., 2004 BCSC 754:

> [56] There is a further qualification on precise truth of a factual foundation. The rule is that "the commentator must get his basic facts right" (*London Artists Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.) at 198), and "The basic facts are those which go to the pith and substance of the matter...".

> [57] This passage was quoted and adopted in Ross, supra, at para. 71. As well, in Kemsley, supra, the House of Lords pointed out that, where the facts are not stated in full in the publication but are stated more fully in particulars, the failure to prove some of them does not defeat fair comment so long as those proven are a sufficient foundation for a person to hold the views in question.
>
> [58] Lord Porter said of particulars set forth in pleadings at p. 506:
>
> > Twenty facts might be given in the particulars and only one justified, yet if that one fact was sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not have of necessity defeat the respondents' plea.
>
> [59] This expression was adopted by the B.C. Court of Appeal in Vander Zalm, supra, at page 231.
>
> [60] Further, in Brown, supra, at pp, 15-50 & 15-51, it is noted that the factual foundation must be "substantially true" and not "materially misstated". In Ross, supra, the court held that the words were comment, and that the factual underpinning of them was based on facts "either stated in a communication or generally known" and proved to be "substantially true".

82. The "pith and substance" test and the "substantially true" tests mean that a plaintiff cannot defeat fair comment by simply finding some arguably relevant fact that the writer overlooked or misunderstood or could have elaborated upon more clearly. If there is an alleged error in the factual foundation it must be substantial to the point that it would alter the opinion.

83. In the present case, while there is a long list of facts pleaded, the opinions at bar in fact could be honestly held by a person based on a mere handful of the most prominent of those, being the ones highlighted specifically in the articles and the appeal can be dismissed on that basis.

84. *Brown on Defamation* notes that the factual foundation must be "substantially true" and not "material misstated" at pp. 15-50 and pp. 15-51. Similarly, in *Ross*, the court held the words were comment, and that the factual underpinning of them was based on facts "either stated in the communication or generally known" and proved to

be "substantially true" (para. 69). However, this is not to be confused with the suggestion that a person must choose a range of balanced facts to comment upon. They might pick up on a single statement by a person and so long it is substantially true the statement was made, they may comment upon it. Selectivity of facts commented upon is does not defeat the defence, only falsity of the foundation.

85. None of the essential facts supporting the comments in question are undone, nor are any of the expressed opinions affected to the point that no honest person could hold them, because the article does not detail Taseko's side of the argument by describing various mitigation measures (Appellant's factum paras. 73-81). Those merely prevented the damage and seepage from being even worse. None of them change the essential facts that the TSF would be uphill from Fish Lake, that it would have seepage, running downhill into Fish Lake despite partial capture of the seepage.

86. Honest opinion: Fifth, the Appellant briefly argues that the trial judge erred in finding that a person could honestly hold the views contained in the comments. Here, the Appellant is asking this court to simply overturn a finding by the trial judge, who applied the correct *WIC Radio* approach by asking whether any person (not necessarily a reasonable person) could hold the views on the proven facts.

87. Could a person honestly hold the view that a company had "callous disregard" for the environment when it proposed an open pit mine and a TSF which, on its own numbers, would seep into Fish Lake to the tune of 200,000 litres per forever? Of course they could. It is folly to challenge the judge's finding on that point.

88. Substratum regarding "SLAPP": the Appellant's last attack on the judgment in respect of fair comment is on the 4th and 5th articles stating the view that the action was a "SLAPP". The Appellant does not claim the substratum as described at RFJ para 174 was insufficiently stated or untrue, just that it was insufficient.

89. There was no palpable error in the finding. The facts need only be relevant to the opinion, and the opinion need only be honest, not fair. A person could undoubtedly

hold the honest view that a defamation action by a big mining company against critical environmentalists was a SLAPP, especially considering the claim includes such ludicrous allegations as a claim that calling Little Fish Lake a “tailings pond” instead being destroyed under a much larger TSF.

QUALIFIED PRIVILEGE

90. The Appellant argues, starting at paragraph 94 of its factum, that the defendants were not entitled to the branch of qualified privilege known as fair reporting. This argument is disconnected with the Reasons, which does not rely on any such defence. The only passing mention of it, appears in a passage where, having found fair comment in the final two articles:

> [174] The defence of fair comment applies. The language was clearly comment -- an opinion or view. A person could honestly express the opinion or view based on the factual context. A large mining corporation seeking governmental approval for an open pit mine had filed a notice of civil claim against an environmental organization, with the mining corporation seeking damages, including punitive damages, and injunctive relief.
>
> [175] Qualified privilege also exists with respect to commenting or reporting on documents filed with a court. The evidence does not support a finding of malice or “high-handed and careless” conduct by the Wilderness Committee (including Mr. Biggs): See Hill at paras. 154 -156.

91. That alternative defence was raised by the Respondents at trial, albeit only in respect of the last two articles, which reported on and essentially repeated their Response to Civil Claim. The judge found those articles protected by fair comment, and the passing reference to there being a qualified privilege over court documents does not appear to have led to any actual ruling, as fair comment made that unnecessary.

92. The discussion in the Appellant’s factum alleging various inaccuracies regarding the articles as though those defeated a qualified privilege defence, goes nowhere as

that defence was far more restricted in scope and ultimately unnecessary in the Reasons.

93. At para. 96 of the appellant's Factum, the appellant overstates the law by asserting that in such a report, nothing must be contained beyond the strict legal proceedings. As a matter of law, that approach is not correct, and reports may be lively and colourful: *Taylor-Wright v. CHBC-TV*, 1999 CanLII 3634 (BCSC), aff'd: 2000 BCCA 629. However, as the judgment below was not based on qualified privilege, it is unnecessary to engage in further argument on the point.

MALICE

94. The appellant directly challenges the factual finding that the appellant had not met its onus to prove malice (Appellant's factum paras. 97-119). This of course is an attempt to retry a pure question of fact.

95. On the question of malice, the burden is on the plaintiff. The New Brunswick Court of Appeal in *Ross v. New Brunswick Teachers Ass'n*, rejected malice arguments even though the defendant had admitted to hating Ross's writings and had made some "offensive and denigrating" remarks about Ross when showing a particularly savage cartoon (paras. 113-116) the court quoted Brown, *Law of Defamation in Canada* with approval:

> "It is the Defendant's primary or predominant motive in publishing the defamatory remark that is determinative. 'Incidental gratification of personal feelings is irrelevant.' …Dislike and ill will may be present but actual malice may be entirely wanting. The fact that a defendant is annoyed or dislikes the plaintiff or even contemptuous of him, and takes special delight in offending or embarrassing him, and pleasure in the effect of the publication, or that he was angry and rude, or indignant and resentful, and welcomed the opportunity to expose him, will not defeat a privilege if it is otherwise exercised for a proper purpose".

96. The proposition that there was a dominant sense of malice is far too much of a stretch. Even cases of actual resentment (*WIC Radio*) and "loathing" (*Staniford*) did not rise to the level of malice necessary to defeat fair comment.

97. In this case, there is simply no evidence that any of the defendants were motivated by malice. Their evidence was that they had a genuine interest in the issues and their motivation was to comment upon them.

98. The defendants' motives came through in their testimony. They had long been committed to protecting the environment and they did not bear any ill will towards Taseko. These were strong disagreements but not taken personally. When the complaint came in, the defendants took serious look, with the fresh eyes of Beth Clarke, at the publications and made some changes. This is evidence against malice, as is the testimony their about genuine commitment to the issues and honesty of opinions. The judge was entirely correct, and in any event was not palpably wrong in finding that the Appellant had failed to prove malice.

SPECIAL COSTS

99. The trial judge made a determination that it was unreasonable for the mining company to maintain a plea of malice in a claim for punitive damages against the non-profit environmental organization after that organization's criticisms were fundamentally vindicated by the decision of the Environmental Review Agency in late 2013. The trial judge determined that after a reasonable period following that environmental review decision, the plaintiff ought not to have continued with its claim of malice and punitive damages, as it did right through to trial.

100. An appellant challenging a trial judge's discretion on costs faces a high hurdle. In *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2016 BCCA 311 this court noted at para. 6:

> … It is said this rule [Rule 2.1(f) requiring leave for costs appeals] reflects the discretionary nature of a costs order and the deference this court must show trial judges on orders made in the exercise of

> the judge's discretion. In other words, the rule reflects the high hurdle to success that the appellant must navigate.
>
> See also Baiden v. Vancouver (City), 2010 BCCA 375 para 18: "An order for costs is a discretionary matter and must be treated with deference by an appellate court unless the trial judge failed to exercise that discretion judicially or exercised it on a wrong principle: Majewska v. Partyka, 2010 BCCA 236 (CanLII)."

101. As to the claim of defamation over the statements regarding SLAPP, the claim will fail either on the basis of fair comment or fair reporting.

102. The claim was patently non-meritorious from the start. The defendants sought extra costs on the basis that the action was a SLAPP, and still maintains that position. The trial judge did not go that route, but did find that the intimidating claim of malice and punitive damages, after the 2013 Panel vindicated the defendants' criticisms, was unreasonable to maintain such that special costs beginning a reasonable time (about 2 months) thereafter was justified.

103. At RFJ para. 187, the trial judge applied the correct test for awarding special costs as laid down by this court.

> [187] With respect to special costs, our Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414 (CanLII) set forth the test:
>
> [78] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 1994 CanLII 2570 (BC CA), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A., speaking for the Court, after an extensive review of the authorities, concluded:
>
> > ... it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in Leung v. Leung, [1993] B.C.J. No. 2909 the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general

> and all- encompassing expression of the applicable standard for the award of special costs.
>
> [79] A party who alleges serious misconduct against another in a civil lawsuit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 1995 CanLII 989 (BC CA), 17 B.C.L.R. (3d) 197 (C.A.).

104. The plea that the trial judge found it unreasonable for the Appellant to maintain, was this:

> "The Defendants have each been guilty of reprehensible, insulting, high-handed, spiteful, malicious and oppressive conduct relating to publication of the Libels which justifies the Court in granting a substantial award of punitive and exemplary damages and an award of special costs in favour of the Plaintiff, in addition to an award of general damages…".

105. The trial judge was perfectly entitled to rule on costs as he did, and he exercised his discretion on costs on the correct principles such that this court should not interfere.

PART 4 – NATURE OF ORDER SOUGHT

106. The Respondents seek an Order dismissing the appeal with costs.

All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 17th day of October, 2016.

Daniel W. Burnett, Q.C.
Counsel for the Respondents

APPENDIX: ENACTMENTS

LIST OF AUTHORITIES

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