CITATION: Ke v. Cooper, et al., 2024 ONSC 5532
COURT FILE NO.: CV-23-00700576-0000
DATE: 20241017

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WENBIN (VINCENT) KE, Plaintiff

AND:

SAM COOPER, ANDREW RUSSELL, COLN D'MELLO, SONIA VERMA, and GLOBAL NEWS (CORUS ENTERTAINMENT), Defendants

BEFORE: Akazaki J.

COUNSEL: Jonathan C. Lisus, Xin Lu (Crystal) Li, and Niklas Holmberg, for the Plaintiff

Brendan Hughes, for the Defendants

HEARD: August 15, 2024

REASONS FOR DECISION

OVERVIEW

[1] Vincent Ke brought this libel suit to restore his reputation, after *Global News* published and broadcast stories that CSIS agents identified him as the Ontario MPP involved in a Chinese government scheme to run election interference in Canada. As a result of the publication, Mr. Ke lost his place with the governing party in the Ontario Legislature. He denied any involvement in the alleged scheme. Canadian libel law presumes the stories were false. Assuming the court upholds the presumption, voters in Mr. Ke's riding who thought they had elected a member of the Progressive Conservative party would also have been deprived of their democratic choice. A verdict or judgment for damages in his favour could lay down a path for him to regain his place in caucus and the trust of voters.

[2] To rebut the presumption, the defendants assert that they can show the reporting was responsible or that the retelling of an allegation can be justified. It was common ground that the defendants might never be able to prove that their story was true, because they will not reveal the anonymous sources or require them to testify at a trial.

[3] *Global News* seeks to dismiss the suit on the ground that it is a Strategic Lawsuit Against Public Participation (SLAPP), prohibited by s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. It argues that allowing the suit to go forward casts a chill over its freedom to keep the electorate informed – that it is obviously the kind of litigation the legislators intended to discourage.

[4] This anti-SLAPP motion exposes a long-running tension between elected officials and the press. Ontario enacted its anti-SLAPP law under s. 137.1 after years of deliberation among stakeholders and legal scholars about curbing the ability of the powerful and wealthy to use the courts to silence individuals and community groups. Like libel law, s. 137.1 entails a series of steps with shifting burdens. It presumes that suits arising from expressions of matters of public interest should be prevented. It allows plaintiffs to rebut that presumption through a robust merits analysis. Although s. 137.1 is not limited to defamation, defamation law lies at the core of most anti-SLAPP motions. The statute then requires the court to engage in a weighing of the public's interests of being informed, with the need to allow a forum for the wrongly implicated to restore their good name: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, at paras. 16-18.

[5] The weight of no one issue is likely decide the outcome of the motion unless there is clearly no public interest in the publication. In this motion, four of the statute's issues are in play, to varying degrees:

1. Legislative purpose
2. Presumptive dismissal
3. Dual merits analysis
4. Balancing of public interests

[6] The legislative purpose makes this case an unlikely fit for an anti-SLAPP motion. Mr. Ke's action is a personal one. There is no evidence that it has the backing, financial or otherwise, of the governing party from which he was ousted or from any other entity.

[7] Section 137.1 sets an initial low threshold for blocking libel suits where the reporting entails issues of public interest. Mr. Ke conceded that the identification of an Ontario MPP as being involved in a Chinese election interference network would be of public interest.

[8] That impediment can be lifted if there are grounds to believe the proceeding has merit, if every affirmative defence put forward could fail, and if the harm to the victim of the defamation invokes a strong public interest in protecting his reputation, outweighing the freedom of the press. The case has merit, and the defence conceded the story was libellous. There are also grounds to believe that both defences raised could fail.

[9] The first defence, that Sam Cooper and his editorial superiors at *Global News* exercised responsible journalism, could fail if the trial court were to find that *Global News* implicated Mr. Ke in a scandal without some verification beyond the CSIS agents' leaks. *Global News*' counsel acknowledged that CSIS agents approached the media because of their frustration that the federal government was not taking the issue of Chinese interference seriously enough. A trial court could reasonably find that the report misrepresented the source as impartial, although the leakers from CSIS and the diaspora sources Mr. Cooper consulted each had different political motives. CSIS itself later distanced itself from the leaks. Mr. Ke's counsel also submitted that *Global News* outed Mr. Ke, but not a former

party leader and a former Prime Minister, because the others were powerful, and Mr. Ke was not. And because he and the other identified politicians were Chinese.

[10] The second defence of justification (truth) could also fail. The agents are unlikely to provide proof of Mr. Ke's involvement in the scheme and refused to provide it to Mr. Cooper when he asked for it. The defendants submitted that they could still establish truth of a lesser fact, namely the reporting of the allegations in the way they commonly publish someone's or some entity's position on a disputed matter.

[11] The first potential problem with that subsidiary defence is that the broadcasts and publications in this case went beyond the reporting of someone else's allegations. Through words and images, *Global News* lent its credibility to the libel as a stand-alone story, before there was a story to tell. The second potential difficulty this defence could encounter is that a leak is not an allegation, in the form of a position taken by an individual or organization in a debate or controversy. Nor is intelligence proof. Indeed, intelligence can include false information planted by the hostile state or non-state actor. In the absence of evidence, an unsanctioned leak by CSIS agents is a piece of raw, and potentially mischievous, data. By deciding to run the story without an attributable source and without verification outside the leakers' orbit, a trial court could hold that *Global News* presented the intelligence as fact.

[12] Once the court finds grounds to believe the defendants could have no valid defence, it must weigh the public interest in protecting an individual from the harmful defamation, against the interest in the protection of the freedom of expression. Keeping alive the only viable means to seek vindication is as fundamental to democracy as the public interest in disseminating the information, even if the information turns out to be untrue: *Pointes Protection Association*, at para. 81. In this instance, the vindication right could outweigh the public interest in the information, because the process of obtaining information and publishing it is only as valuable to the public as the efforts made to verify its truth. Publication alone, without verification efforts engendering trust in the reporting, can expose democratic institutions to manipulation.

[13] For the detailed reasons that follow, I find that this action is not a SLAPP and dismiss the motion.

BACKGROUND AND FACTS

The Plaintiff, Vincent Ke

[14] Wenbin Ke, known to most of his constituents as Vincent, is now the independent MPP for Don Valley North, after stepping down as Ontario's Parliamentary Assistant to the Minister of Public and Business Service Delivery and as a member of the Progressive-Conservative caucus. An immigrant from the People's Republic of China, Mr. Ke's training was as an electronics engineer. In June 2018, he became the first Ontario PC MPP from mainland China.

China's Detention of the Two Michaels

[15] In December 2018, China detained Canadians Michael Spavor and Michael Kovrig. The evidence filed in the motion treated as a given that the Chinese government used them as bargaining chips to compel Canada to breach its extradition treaty with the United States and release Huawei executive Meng Wanzhou. Some of the public reaction to the detention of the Two Michaels proved how xenophobia can still permeate Canadian society and institutions. The evidence filed by *Global News* included an editorial piece published by the *National Post* on September 6, 2019, questioning Mr. Ke's loyalty to Canada, because he had participated in a community event organized by the Chinese Consulate in Toronto. Despite diplomatic tensions, Canada is not at war with China. Consular activities supporting Chinese residents and business interests in Canada are not axiomatically against Canadian interests.

[16] The diplomatic tension over the detainees spurred media coverage of China's attempts to influence Canadian political affairs. The sources feeding information to news outlets and connecting the Two Michaels situation to the election interference came from the inner ranks of CSIS. The motion record contained various articles from other publishers based on similar leaks by CSIS agents, although only *Global News*' pieces identified Mr. Ke as the Ontario MPP involved in the interference scheme.

[17] *Global News* also identified Han Dong, a federal Liberal MP, as a provider of strategic advice to Chinese consular officials after having received their support during his nomination as a candidate for the federal Don Valley North riding. Dong also sued the defendants in this case and resisted their anti-SLAPP motion. As Perell J. stated in *Dong v. Global News*, 2024 ONSC 3532, at paras. 1-2, the intimation that a Canadian politician of Chinese origin could be a traitor to Canada, endangering the "Two Michaels," was a very newsworthy story. However, as he also concluded in para. 92 of that decision, the geopolitical backdrop required news outlets such as *Global News* to exercise the highest level of diligence before it could avail itself of the responsible communication defence.

Mr. Cooper's Meetings with CSIS Agents

[18] The defendants submitted and produced evidence through Mr. Cooper's affidavit and notes that CSIS agents, frustrated that the federal government was not taking the threat from China seriously enough, started to leak secret information to news media. Mr. Cooper was an investigative reporter at *Global News.* The agent told him that the CSIS team on the case had been "frustrated with what they saw as a lack of appropriate action by the government in response to clearly documented and ongoing attempts at foreign interference by China." According to a later piece authored by a CSIS agent and published by the *Globe and Mail* on March 17, 2023, also filed by the defendants, the agents viewed themselves as whistle-blowers risking prosecution by speaking to the press.

[19] CSIS is not a party to the action. It is unlikely that it will intervene to explain the conduct of its agents or to reveal the evidence supporting the agents' leaks. The evidence showed that Mr. Cooper and his editors at *Global News* knew that the agents were hoping, by going to the media, to influence national politics by embarrassing their political masters. A court

can conclude the reporter had to meet with them. But the question in this action is whether he and his publishers were responsible or justified in publishing the information identifying Mr. Ke.

[20] In 2020, someone claiming to be a CSIS officer approached Mr. Cooper. She stated that she was authorized by her agency to share information with Mr. Cooper about threats to his personal safety arising from his investigative reporting. (Three years later, on June 23, 2023, he would be formally warned by two RCMP national security officers of such a threat. It was not clear from Mr. Cooper's affidavit whether these were the same threats.) The CSIS officer then used the opportunity to volunteer unsanctioned information about Chinese infiltration of Canadian politics.

[21] In 2022, another CSIS officer, whom Mr. Cooper knew from prior dealings, met with Mr. Cooper at a restaurant and shared with Mr. Cooper the frustration among her colleagues with the inaction on the part of the federal government in dealing with the threat from China to the integrity of Canadian elections. This second source told Mr. Cooper that U.S. intelligence into the activities of politician Michael Chan (now Deputy Mayor of Markham) led CSIS to investigate Mr. Chan and persons associated with him. The plaintiff, Vincent Ke, was among these associates. The agent told Mr. Cooper that CSIS believed that Mr. Ke and one of his political staffers, Christina Liu, were involved in transferring funds from the Chinese Consulate in Toronto to one Chengyi Wei and a pro-Beijing advocacy group, Confederation of Toronto Chinese Canadian Organizations.

[22] According to the second source, CSIS was facing pressure from its American counterpart that Public Safety Minister Bill Blair was taking too long to act on the Chinese threat. In addition to Mr. Ke and Ms. Liu, Mr. Chan's network involved Patrick Brown (now Mayor of Brampton) and Senator Victor Oh (now retired). CSIS had also "listened in" on a telephone call between former Prime Minister Jean Chrétien and a Chinese consulate official over the arrest of Huawei director Meng Wanzhou. Mr. Cooper's notes stated that the official told Mr. Chrétien: "You will use your influence to fix it."

[23] Later in 2022, a third CSIS officer contacted Mr. Cooper and met with him to share a classified draft report of the Intelligence Assessment Secretariat, a division of the Privy Council Office, intended for the Prime Minister and Cabinet. The draft set out CSIS's finding that the consulate clandestinely funded an election interference network consisting of 11 federal MPs and campaign staff, as well as one Ontario MPP. Mr. Cooper met with the third CSIS officer again, who allowed Mr. Cooper to review other draft intelligence reports and memoranda concerning CSIS's ongoing investigations. None of these documents stated that Mr. Ke or his staff were involved in the scheme.

[24] The volume of material filed by the defendants to convince the court of the importance of the story only emphasized the fact that nothing pointed the finger at Mr. Ke. This is important, because the omission meant CSIS did not consider its intelligence on Mr. Ke to be sufficiently credible or reliable to include it. The articles I will reproduce in the next section appeared to leave the contrary impression.

[25] Mr. Cooper's affidavit and cross-examination evidence stated that, at this point, he was still pursuing corroboration of the information about Mr. Ke that he had received from these confidential CSIS sources. In September 2022, he contacted a CSIS source he knew previously and obtained verbal confirmation about CSIS's information on Mr. Ke. However, despite his requests, no one would provide Mr. Cooper the evidence. The admission of this fact appeared at q. 291 of Cooper's cross-examination transcript:

> Q. I take it you and I can agree, sir, that there is not a document put forward by CSIS, the agency, which says that it was monitoring or surveilling Mr. Ke. You have not seen such a document, right?
>
> A. Right, I have not.

[26] Asked whether the sources ever allowed him to view documents such as phone taps or intercepts showing Mr. Ke and Ms. Liu's receipt of funds from the Chinese consulate, Mr. Cooper stated, at qq. 339-40, that the third source refused on the ground that such documents were "too sensitive":

> Q. My question to you was, did you ask for documentary proof that a sitting Member of Parliament passed money as part of an interference scheme? Did you ask for documentary proof?
>
> A. Yes, I did ask for documentary proof.
>
> Q. And you were told that you weren't going to get it, right?
>
> A. I was told that some documentation is too sensitive, some documentation may be accessible, and other sources in the diaspora and other sources in the intelligence community possibly can be found for corroboration.

[27] The source thus provided a lead for Mr. Cooper to investigate Mr. Ke but no basis to assess whether the information was reliable. Mr. Ke's counsel argued that in the case of the higher-profile politicians, Mr. Cooper and *Global News* chose not to rely on the informant's information.

[28] Mr. Cooper did have various sources within the Chinese diaspora community, but this did not produce sufficient proof of Mr. Ke's involvement to publish the story. At q. 350, Mr. Cooper testified that the story required a "broader mosaic" of sources:

> Q. You needed much better information than this before you could publish a story or broadcast a story, correct?
>
> A. I wouldn't say "much better." I would say I needed much more time, I needed to talk to many more people, I needed to gain, as we've heard people call it in the Hogue Commission, a much broader mosaic, that is many different sources of information, to gain any sort of foundation to start to bring this information to an editor.

[29] However, Mr. Cooper's affidavit alluded to corroboration of the second CSIS agent's identification of Mr. Ke among the reporter's "Diaspora Sources." As evidence, he filed an email from May 19, 2023, advising of the diaspora source's "understanding of the transfer of funds from the Chinese Consulate in Toronto involving Ke and Christina Liu." The email stated:

> Yes, I agree. No doubt about it. … Please investigate Christina Liu. … I heard that Christina got $200,000 from the Chinese Consulate in Ontario and distributed it among the candidates, including Vincent Ke. (evidence attached)."

[30] The exhibited email did not attach the "evidence" of Ke's involvement. However, it continued to allege that Christina "is totally corrupt and suspected by many as a Chinese agent. Please write some stories about her."

[31] The email from the unknown diaspora source did not, in fact, corroborate the second agent's information. Taken at face value, it alleged that the Chinese Consulate could have helped one of Mr. Ke's staff to fund Mr. Ke's campaign. If true, that could have been a story of interest to Mr. Cooper and *Global News*'s audience. However, as corroboration, all that the email demonstrated was that the story implicating Mr. Ke as an active participant in Chinese election interference was still based on a rumour circulating among political exiles. I find it hard to see this piece of evidence as proof of Mr. Cooper's assertion in para. 3 of his March 27, 2024, affidavit that in his practice he "tested, scrutinized, critically evaluated" the CSIS sources. Confirmation from a biased source, even if the political motive was different, could turn out not to be reliable.

[32] Asked whether he could publish a story once enough people told him the same thing, Mr. Cooper demurred at q. 352:

> A. I'm not going to agree that's the threshold. That's a starting point, that if enough people from different places are saying something happened, then that's a basic sort of truth-finding or credibility-finding sort of method.

[33] I appreciate Mr. Cooper's honest belief that, after speaking with four separate CSIS agents, he had reason to investigate Mr. Ke further. Where I foresee a flaw is, considering the defendants' theory that the CSIS agents were separate and independent sources from which one could triangulate sufficient reliability, even to meet Mr. Cooper's stated editorial standards, that they could all have been referring to the same information. If, for example, Mr. Ke's name appeared in CSIS working materials because he was a Chinese citizen in the Legislature and became a prime suspect by a crude form of frequentist probability based on his dual nationality, his name could appear simply because of that fact without any further grounds. The three or four sources would have been no more reliable than one. This is akin to the "multi-degree hearsay" described in *Dong*, at para. 96 of four sources reviewing the same intelligence data.

[34] As Mr. Cooper stated at q. 518, documentary proof is the "holy grail." I appreciate that a wire transfer, a cheque stub, or a photograph taken by an eyewitness watching the subject

collect a brown paper bag, is hard to obtain. However, mainstream news outlets compete for readership based on a covenant to publish only news that is fit to print. On a s. 137.1 motion, a granular assessment of the quality of the evidence available to the publisher extends beyond the court's task. As remarked by Côté J. in *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 126, the assessment of the evidence in an anti-SLAPP motion should not be considered the same as trial findings. Where there is no dispute over the defamatory meaning of the publication, the factual matrix for the application of s. 137.1 will entail a preliminary, but not conclusive, assessment of the availability of defences and the public interest considerations.

[35] Against the foregoing backdrop of Mr. Cooper's interaction with the confidential informants, I turn to the *Global News* stories that form the foundation of Mr. Ke's libel suit.

The Global News Stories Identifying Ke as Beijing's Man at Queen's Park

[36] The reports at issue in this action were set out in the notice required by the *Libel and Slander Act*, R.S.O. 1990, c. L.12, s. 5, and in para. 13 of the statement of claim. The notice extracted and hyperlinked the salient segments from the publications authored by Mr. Cooper and published by *Global News* on March 10 and 13, 2023. The first of these was titled "Ontario legislature member is part of alleged Beijing 2019 election-interference network: sources" published online on March 10, 2023. The excerpted text in the pleading reads:

> **MARCH 10, 2023**[1]
>
> **Article**
>
> An election interference network directed by China's Toronto consulate allegedly involved a sitting member of the Ontario legislature, according to sources with knowledge of the investigation into Beijing's covert efforts during the 2019 federal election.
>
> Those sources assert that Vincent Ke, a Progressive Conservative member in Premier Doug Ford's government since 2018, served as a financial intermediary in Chinese Communist Party (CCP) interference schemes described in two separate Privy Council Office intelligence reports reviewed by *Global News*.
>
> According to those same sources, Ke received around $50,000, part of a larger disbursement from the Chinese Consulate in Toronto in

[1] The date headings for the two publications are my insertions. The sub-headings distinguishing the article and the video appear in the statement of claim.

the $250,000 range that was channeled through a series of intermediaries.

[…]

One of the documents that refer to the funding schemes is a January 2022 Privy Council Office (PCO) report, which asserts that the CCP's Toronto-area network included 11 or more 2019 federal candidates, 13 or more aides, and an Ontario MPP.

[…]

The 2022 PCO memo cited in the story maintains that China's Toronto consulate directed a substantial, covert disbursement into a network comprised of at least 11 federal election candidates and numerous Beijing operatives who worked as their campaign staffers.

"A large clandestine transfer of funds earmarked for the federal election from the PRC Consulate in Toronto was transferred to an elected provincial government official via a staff member of a 2019 federal candidate," the report states.

It did not mention the official's name or where they served and did not specify how much money was involved.

Filling in some of the gaps from the memo, sources provided more details about the alleged scheme for the *Global News* article: they said the consulate transferred around $250,000 to a pro-Beijing grassroots group, and these funds went to the staff member in question.

[…]

Several sources, including a senior intelligence official with a detailed awareness of these CSIS investigations, said Ke is the provincial official.

[…]

Another PCO document that sources say was provided to the Prime Minister's Office four months after the 2019 federal election advanced similar intelligence about the financing. "Community leaders facilitate the clandestine transfer of funds and recruit potential targets," the 2020 memo asserted, without identifying any recipients.

In the covert funding scheme, those same sources allege, the consulate disbursed around $250,000 through a Toronto-based

> businessman, Wei Chengyi — and a pro-Beijing community group called the Confederation of Toronto Chinese-Canadian Organizations — through an aide to a federal candidate running for the 2019 contest. In turn, the aide allegedly provided about $50,000 of that sum to Ke.
>
> […]
>
> The alleged transactions renew questions among some national security experts about loopholes in the Canadian electoral system that permit sophisticated interference networks from countries such as China, Iran and Russia to influence outcomes.
>
> **Video:**
>
> Vincent Ke became the first immigrant from mainland China to be elected Ontario Conservative MPP … but intelligence sources say the MPP was also a part of an alleged foreign interference network to advance Beijing's political agenda.
>
> During the 2019 federal election campaign, sources say the Chinese Consulate transferred around $250,000 through a network that involved at least 11 federal election candidates, campaign staffers and other politicians both Liberal and Conservative, including Liberal MP Han Dong, who has denied the allegations.
>
> The funds were allegedly sent first through a businessman, Wei Chengyi, then sources say the money flowed to a federal candidate staff member and to Ke, who received about $50,000.
>
> The allegations stem from interviews with Canadian intelligence sources, including a senior official with detailed awareness of the CSIS investigations.

[37] The broadcast video contained an animated graphic of which the defendants' counsel acknowledged *Global News*' art department was the author. This graphic was not reproduced in any of the cited secret reports and was a product of the publisher's staff. The graphic shows Mr. Ke in the middle of the financial distribution network. One minute into the video, Mr. Ke and his picture appear on an orange line with red markers tracing funds from the "Chinese Consulate in Toronto" to eleven individuals, ten of whom are unlabeled, and one of whom bears the picture and name of Han Dong. If one pauses the video at the point where Mr. Ke's picture appears, the following caption is written:

> Ontario legislature member is part of alleged Beijing 2019 election-interference network… An update now on a *Global News* investigation into allegations of foreign interference in Canada's 2019 federal election. Intelligence… [Emphasis added.]

[38] A full trial record will be required to determine the significance of this graphic and the timing of the caption. For the limited purposes of this motion, it is possible to conclude that the explanatory nature of this graphic extended beyond simply quoting a source's identification of Mr. Ke as the mystery individual. It seems instead to have reflected *Global News'* conclusion based on its own investigation (i.e., not just that of CSIS). At the very least, a trial judge or jury might find a reasonable person would construe the graphic as distillation of reportage and editorial content.

[39] The statement of claim also pleaded the following article, from March 13, 2023, titled "Vincent Ke resigns from Ontario PC caucus amid 2019 election interference allegations," also published online:

MARCH 13, 2023

Second Article:

> … two sources with knowledge of the Canadian Security election-interference network assert that Ke received around $50,000, as part of a larger disbursement – roughly $250,000.
>
> Those sources also say that the amount allegedly originated with the Chinese Consulate in Toronto, which transferred the money through a series of proxies that included a pro-Beijing grassroots group and the staff member to a parliamentarian before supposedly reaching Ke.

Fallout from the News Reports

[40] If the CSIS informants' motive was to push the federal government to take the issue of Chinese interference in Canada's elections more seriously, the media leaks had that effect. Whether there was any direct nexus with the diplomatic crisis over the "Two Michaels" incident and Ms. Meng was not clear from the record. That incident came after the alleged interference. Mr. Ke's allegation that anti-Chinese racism motivated the informants, or the defendants was also based on the circumstantial evidence that the media only outed the Chinese-Canadian politicians. I make no findings on these matters, except to point out that it is open to Mr. Ke at trial to bring evidence to undermine *Global News*' responsible communication defence by establishing that he was a casualty of selective reporting based on his dual nationality.

[41] In March 2023, the federal government appointed the Rt. Hon. David Johnston as the Individual Special Rapporteur on Foreign Interference. The preliminary report stated that it was apparent from "limited intelligence" that the Chinese government intended for funds to be sent to Liberal and Conservative federal candidates through a community organization, political staff, and "(possibly unwittingly) a Progressive Conservative Party of Ontario MPP." The report also expressed doubt whether there was any money involved.

[42] In March and April 2024, the federal government convened the Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions, headed by the Hon. Justice Marie-Josée Hogue of the Québec Court of Appeal. Mr. Ke's counsel pointed out, and defence counsel conceded, that Mr. Ke was not called to testify at the Inquiry and the Inquiry did not implicate Mr. Ke in the election interference scheme.

[43] The story of China's involvement in Canadian politics is bound to continue. The *Global News* story about Mr. Ke, however, is likely to become archival. Even if he was Beijing's man in Queen's Park, he committed no crime in doing so and would therefore face no prosecution from which he could seek acquittal. The only remnant of the publications would be the sting of being branded as disloyal and politically corrupt.

[44] In a supplementary affidavit, Mr. Cooper submitted several briefing reports to the Prime Minister's Office exhibited at the Inquiry. These included a redacted report from CSIS about the leaks to *Global News* and the *Globe and Mail*, stating: "**CSIS takes these leaks extremely seriously.** They present a direct threat to the integrity of our operations." (Bold fonts in original.) This briefing report was published after the two publications cited in the libel notice and in this action. Therefore, it could be unfair to consider its relevance to the defence of responsible communication raised by Mr. Cooper and *Global News*. However, it could be relevant to the justification defence because it shows that CSIS as an institution at least publicly maintained the position that its role was to inform the government of its intelligence findings, and not the media. The question of media reporting of unauthorized and unlawful leaks will have to be left with the jury or trial judge.

[45] I will now turn to the four issues arising from the defendants' publications, in the context of the factual background.

ISSUES ON THE ANTI-SLAPP MOTION

[46] This motion is governed by s. 137.1 of the *Courts of Justice Act*. The operative parts consist of four subsections. I will not proceed through the subsections individually, because the issues as framed by the parties and emerging from the evidence are better analyzed in the following order:

1. Legislative purpose
2. Presumptive dismissal
3. Dual merits analysis
4. Balancing of public interests

1. Legislative Purpose

[47] Ontario's anti-SLAPP law is not a stand-alone act. Rather, the legislature shoehorned the provisions into the *Courts of Justice Act*, the statute governing the processes of the courts. Nevertheless, s.137.1 operates as a complete code, with its own interpretive preamble:

> **Dismissal of proceeding that limits debate**
>
> **Purposes**
>
> **137.1** (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[48] The preamble provides interpretive context to s.137.1. The modern principle of statutory construction underlying Canadian jurisprudence requires courts to examine the aims of legislation, to prevent inappropriate or incongruous use: *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 50.

[49] The reference to "individuals" in s. 137.1(1)(a) is notable, because the exclusion of other legal persons implies that the anti-SLAPP provisions do not protect corporations such as *Global News*. The Supreme Court interpreted "individuals" to mean "individuals or organizations," albeit without providing a rationale for the expansive meaning: *Pointes Protection Association*, at paras. 1-2. I need not direct my mind further to this specific semantic issue, because counsel for Mr. Ke did not raise it.

[50] Regardless of whether "individuals" includes "organizations," the purpose of s. 137.1 is to prevent litigation from being used as a means of silencing views and limiting public debate, either by exposing individuals or organizations without deep pockets to damages awards or to significant legal expenses. The costs provisions in ss. 137.1(7) and (8) make it clear that a successful defendant should be fully indemnified for legal costs and face no costs jeopardy for bringing the motion. These provisions are consistent with an intent that the statute protect those with less power and resources from litigation by the powerful and the rich.

[51] The legislative history of North American anti-SLAPP legislation includes its emergence because of attempts by vested interests to silence groups or citizens speaking out about

environmental and other emerging concerns: Uniform Law Conference of Canada, *Strategic Lawsuits Against Public Participation (SLAPPs) Report* (ULCC, 2008), at para. 5. Mr. Ke's ouster from the PC caucus because of the *Global News* article proved who was the more powerful between the parties to this case. Although some come to politics with money or corporate connections, Canadian politicians come from all walks of life. Defence counsel did not draw my attention to any evidence that Mr. Ke is a man of means trying to outspend *Global News* or its parent corporation.

[52] An imbalance of power or wealth is not the sole consideration under s. 137.1(1). The other three clauses require the court to consider participation in public debates, the discouragement of litigation used to stifle expression of views, and the reduction of the risk of hampering "participation by the public" in debates. These provisions can be applied differently to each case, depending on the parties and the facts. In the context of this libel action, there are three public stakeholders in this process: the news outlet with a vital role in reporting its investigations to the Canadian readership and viewership, the MPP identified in the reporting, and the constituents who elected the MPP. The presence of these *three* stakeholder groups means that the news outlet and its public audience are not the only ones whose participation in public debate need court protection. Mr. Ke's ability to represent his constituents and to participate in the province's public discourse also depends on his access to this court's process.

[53] There is also a non-stakeholder actor in the piece: the CSIS agents who leaked their information to the media. CSIS is not a protected entity under s. 137.1(1). Mr. Ke is not seeking to expose the CSIS agents who named him to Mr. Cooper as the Ontario MPP involved in the funding of the interference scheme. That could, indeed, cause a chilling effect on the journalistic activity of gathering information from confidential sources. Until passage of the *Journalistic Sources Protection Act*, S.C. 2017, c. 22 (the "*JSPA*"), the absence of statutory protection meant that the common law's weighing of competing interests governed: in *R. v. Vice Media Canada Inc*., 2018 SCC 53, [2018] 3 S.C.R. 374, at para. 6. The *JSPA* continues to employ a balancing of interests: see Noah S. Wernikowski, "(Un)Protected Sources, (Un)Protected Democracy: A Critical Analysis of Journalistic Source Protection Law" (2022) 5:1 *Lakehead LJ* 22 at p. 39.

[54] Since Mr. Ke's suit does not seek identification of the confidential sources, the use of these sources is only relevant to the verification element of the defence of responsible communication by the publisher. It is not a factor in the interpretive guide contained in the preamble.

[55] The effect of the preamble is that this libel suit does not appear to be the kind of strategic suit s. 137.1 was intended to stop. The interpretive context is not determinative, because the court must still apply the remaining procedural sections in accordance with their plain legal meaning. The preamble does detract from the defence argument that this is a suit intended to stop *Global News* or other media outlets from publishing stories about Mr. Ke. Instead of silencing the defendants, Mr. Ke clearly seeks to have the dispute play out in a public court of law.

2. Presumptive Dismissal

[56] After the preamble setting out the legislative purpose, s. 137.1(2) defines "expression" generally to include all forms of communication. There is no dispute that the *Global News* story falls within the definition.

[57] Subsection 137.1(3) is the first operative provision:

> 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.

[58] At this stage, the threshold for an expression that *relates* to a matter of public interest is very low. For example, it includes online reviews of products and services, on the basis that some segment of society might find the information useful: *Canadian Thermo Windows Inc. v. Seignior*, 2021 ONSC 6555, at para 89. The issue need not be a matter of national security.

[59] Based on the case law, Mr. Ke's counsel did not seriously contest this part of the anti-SLAPP motion. During argument, I canvassed whether there was a law against the Chinese government's scheme, or against Mr. Ke's alleged involvement in it. The fact that the conduct might have been lawful did not exclude it from public interest, for the purpose of this subsection. I agree with Perell J.'s comments in *Dong*, at para. 1, that the public interest in the subject of the Chinese Consulate's operation of an election interference scheme was "of the highest order," at least from a Canadian perspective. Certainly, within the context of the Two Michaels diplomatic row, Canadians would have wanted to know about Ke if he were an infiltrator recruited by China. I therefore conclude that the suit is presumptively eligible for early dismissal under subsection 137.1(3).

[60] The plaintiff must then show why the action should not be dismissed at this early stage, under s. 137.1(4). There are two issues that emerge from this subsection.

3. Dual Merits Analysis

[61] The first issue under s. 137.1(4), clause (a), prohibits a judge from dismissing the proceeding if:

> (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.

[62] The two parts of the above test do not require a mini trial. If there are *grounds* to believe that there is merit to the proceeding and no valid defence, the plaintiff has made out the

first rebuttal of the court's imperative to dismiss the case. The threshold for finding grounds to believe the above is very low. It is enough that the record discloses any basis to support a finding of substantial merit and absence of a valid defence: *Bent*, at para. 88.

Substantial Merit

[63] *Global News* did not contest the fact that Mr. Ke had a *prima facie* libel case, in that libel law presumes the publication to be false and that the identification of Mr. Ke as being used by the Chinese government in Queen's Park would have been defamatory. A defamatory publication is one that tends to lower an individual in the estimation of ordinary persons, identifies the plaintiff, and is communicated to at least one person other than the plaintiff: *Grant v. Torstar Corp*., 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28. Therefore, there are grounds to believe the case has substantial merit.

[64] The main issue at the hearing of the motion was the second part of s. 137.1(4)(a): whether there were grounds to believe *Global News* had a valid defence. The defences raised were responsible communication and justification of a lesser truth. If the record provides grounds to believe that both defences could fail at trial, the motion proceeds to the next step. I will therefore address these defences.

Defence of Responsible Communication

[65] The defence of responsible communication has become loosely synonymous with responsible reporting, although the defence is not limited solely to journalism. It was not traditionally a part of defamation law. Because of the common law presumption of falsehood and the high onus of the defence of justification (a.k.a. truth as a defence), "libel chill" was a public policy concern for the courts long before anti-SLAPP legislation. In 2009, the Supreme Court in *Grant*, at paras. 99-126, recognized the "responsible communication" defence and formulated the conditions in which it could apply:

> A. The publication is on a matter of public interest, and
>
> B. The publisher was diligent in trying to verify the allegation, having regard to:
>
> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
>
> (d) the status and reliability of the source;
>
> (e) whether the plaintiff's side of the story was sought and accurately reported;
>
> (f) whether the inclusion of the defamatory statement was justifiable;

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

(h) any other relevant circumstances.

[66] The findings to be made on this anti-SLAPP motion should not be construed as prejudging the merits of the case at trial: *Bent*, at para. 158. Instead of sifting through the evidence and submissions on each point as if I were the trial judge, I propose to address this defence holistically, to determine whether there are grounds to believe it could fail at trial. Some points are important, and others, neutral.

[67] On the public importance of identifying Mr. Ke, his counsel submitted there was no importance in doing so. Mr. Ke was not even called to testify at the Hogue Commission's public hearings. The news cycle has moved on and has left Mr. Ke's political career behind in a cloud of uncertainty. Much of the evidence and submissions of the *Global News* defendants on this point consisted of the importance of bringing this story to Canadians. The defendants also cited publications by other outlets, such as *Globe and Mail* and *National Post*, covering the election interference scandal. Mr. Ke countered this argument by pointing out that none of the other publishers identified him as the Chinese government's operative at Queen's Park.

[68] If for no reason other than to bring awareness to the naïve quality of Canadian democracy in having no laws against foreign election interference – a view evidently shared by senior members of CSIS – the overall coverage was serving, and continues to have served, the public interest in the best traditions of investigative journalism. However, the question in this action is not the Chinese government's influence in Canada. Rather, the concern is the identification of Mr. Ke as a collaborator in one of the schemes. If Mr. Ke was indeed involved in moving money for the Chinese Consulate, Canadians have the right to know. One must guard against judging the public importance of the story on an *ex-post* argument that nothing came of it apart from the harm to the plaintiff. At the time of the reporting, *Global News* had a duty to its readers and viewers to publish the news, provided it met the verification requirements. I therefore conclude that the public importance factor could be weighed by the trial court in the defence's favour.

[69] In *Vice Media*, at para. 110, Abella J. stated:

> A strong, independent and responsible press ensures that the public's opinions about its democratic choices are based on accurate and reliable information. This is not a democratic luxury — there can be no democracy without it.

These statements encapsulate the modern idea that political journalism is a foundation of the people's ability to choose and evaluate their leaders. However, I read from these reasons that the news media is only as strong and independent as it is responsible. Membership in the Fourth Estate does not confer a heraldic badge. Its privilege has to be earned. An unchecked freedom to report facts from unattributable sources can have a negative impact

on the democratic process. In either case, the media's utility to a democracy is only as valid as its pursuit and verification of the truth of its reports. The CSIS agents who dropped the names of politicians into a broader narrative to influence the federal government did so at the risk of harming elected participants in our democratic institutions.

[70] The evidence filed by *Global News* on this motion opens the door for the defendants to prove that Mr. Cooper and his editors were diligent in verifying the story through multiple CSIS agents. However, it is also open for Mr. Ke to argue at trial, and for the court to conclude, that the defendants ought to have realized that multiple informants may be no more reliable than a single informant.

[71] What solidifies the grounds to believe the defence of responsible communication could fail is the paucity of evidence that Mr. Cooper and his superiors considered the partiality of the sources' leaks, in the face of an apparent campaign to apply pressure to the government to take the CSIS brief on Chinese election interference more seriously. Motive and interest are critical factors in assessing credibility and reliability. Evidently, as Mr. Ke's counsel stressed at the hearing, some of what the informants passed on seemed too far-fetched for Mr. Cooper and *Global News* to publish. They spared the more established politicians, coincidentally the ones who were not of Chinese ethnicity, of being outed as colluding in China's interference in Canadian public affairs.

[72] A trial court could conclude that the blending of official CSIS reports and the retelling of the intelligence leak about Mr. Ke falsely applied the agency's imprimatur to data for which the agency refused to vouch. When considering the evidence from Mr. Cooper, his interview notes, and the overall development of the story on Parliament Hill, the evidence could call into question the editorial decision to make Mr. Ke the story when the more tangible and unlawful interference with democratic process came from within the ranks of the intelligence agency. A decision to turn a blind eye to this known source of bias could be considered irresponsible within the analytical framework in *Grant*.

[73] At trial, Mr. Ke can make the case that the reporting was racially or ethnically biased or tapped into anti-Chinese xenophobia. Counsel for *Global News* argued that the allegation on the basis that it is groundless, and that Mr. Cooper is an award-winning reporter and author of the highest calibre. The dispute on this point appears to be sufficiently framed by the facts that a trial court could find it relevant to the defence of responsible communication. Mr. Cooper's notes did contain references to politicians who were not ethnically Chinese but whose names were omitted from the published reports. A finding that *Global News* reported half a story, based on this type of bias, could very well undermine the defence.

[74] Counsel for Mr. Ke pointed this detail out as reflecting unconscious bias in the uneven treatment of the persons identified by the confidential informants. In the scrum at the legislature, Mr. Ke went further and accused the report as being motivated by racism. The court cannot ignore the fact that the overall reporting of the election interference controversy required a high level of sensitivity to prevent geopolitical and diplomatic conflicts from stoking racism and intolerance. *Global News* filed evidence of many such media reports from several outlets. The fact that *Global News* identified Mr. Ke but other

news outlets did not, could be relevant to the responsible communication defence. However, it could simply mean that *Global News* was the only outlet to report on the information from the informants in the face of a potential libel suit. Apart from the articles published elsewhere, there was no affidavit evidence from other reporters or editorial staff about the information leaked to them. The practices of the other news outlets could be relevant to the availability of the defence.

[75] For the purposes of the motion, I need only point to the alignment of the parties and the evidence they adduced as giving rise to serious issues to be explored in a public trial. The evidence that *Global News* filed allowed me to opine that responsible communication is a defence with potential weaknesses.

Defence of Justification

[76] *Global News* did not provide proof of the truth of the report that Mr. Ke was a Chinese government operative or collaborator. To succeed in such a defence of justification, *Global News* must adduce evidence that Mr. Ke was such a foreign government actor: *Grant*, at para. 33. The fact that the proof is in the hands of CSIS, an organization whose personnel are not compellable witnesses because the defendants are not obliged to disclose their names, means that the traditional defence of justification is unlikely to be available at trial.

[77] *Global News* did not claim its ability to prove Mr. Ke's involvement in the foreign election interference scheme. Instead, it submitted that there is a place in the defence of justification for reporting of allegations, and that the reasonable reader or audience member understands the difference between allegations and the reporting of facts as true. The law of defamation carves out this defence as part of the defence of justification: *The Catalyst Capital Group Inc. v. West Face Capital Inc*., 2023 ONCA 381, at paras. 45-47. As the Court of Appeal stated in para. 47, unless the media were permitted to report allegations, it would never be permissible to report that a person was under investigation for a crime such as fraud.

[78] By using phrases such as "allegedly involved" and "sources assert," *Global News* put forward the defence of "lesser truth," that *Global News* was not asserting the fact, but that someone was alleging it. I agree with counsel for *Global News* that this defence could succeed at trial. However, publishers have licence to walk this tightrope because the average skeptical reader would consider an allegation to be a claim or assertion without proof, and the defamed party can challenge the utterer to prove it. The strength of this defence depends on the adequacy of the qualifications to the republished allegation: *Simán v. Eisenbrandt*, 2023 BCSC 379, at para 55.

[79] There are grounds to believe that the defence of justification of the "lesser truth" could fail, for two reasons.

[80] First, the stories and associated video content do not appear to take significant efforts to qualify the identification of Mr. Ke as a foreign operative as an allegation. Rather, the words and images reflect more of an attempt at an exposé based on Mr. Cooper's investigative reporting and not simply the retelling of an allegation.

[81] The stories by Mr. Cooper, including the headline and graphic enhancements provided by *Global News*, could be interpreted to mean that Mr. Cooper had uncovered Mr. Ke's involvement and that the CSIS agents had confirmed it. A reasonably informed person could consider CSIS's leak to be verification of Mr. Cooper's story, when in fact, the record is clear that the agents approached Mr. Cooper with the story and not the other way around. The fact that the defence of justification of the lesser truth could succeed is insufficient.

[82] Second, the publication of information leaked by CSIS, either officially or by unauthorized agents, is not really an allegation in the sense of a factual position to be supported by evidence in a dispute or public issue. A reporter can publish the fact that police have arrested or charged an individual, because the public can appreciate that it is only a provisional allegation that can later be withdrawn or defended. The information from within CSIS effectively originates from an opaque box, and neither Mr. Ke nor anyone else can challenge it. Moreover, if the information turns out to be wrong, CSIS is not mandated to withdraw it and is not in the business of correcting the information. Thus, the reporting of an assertion by members of the national intelligence service carries with it a weight of reliability and *incontestability* as a source, and not as an alleger of a mere position.

[83] In *Catalyst Capital Group*, at para. 45, the Court of Appeal pointed out that the law of defamation presumes that a reasonably thoughtful and informed reader understands the difference between allegations and proof of guilt. I am not certain that this statement applies to the difference between intelligence and proof. Without holding definitively how this standard is to be applied, it is possible to read the *Global News* reporting of the CSIS agents' identification of Mr. Ke as authoritative and not simply allegations. The references to classified reports appear to be making the *Global News* case that Mr. Ke was involved in the scheme. What was missing from the piece is that none of these documents identified Mr. Ke.

[84] Had CSIS identified Mr. Ke in its mandated reports to the Privy Council or to the Prime Minister, or to any other relevant government authority, the communication itself would likely have been covered by a form of privilege, and perhaps *Global News* could have been justified in reporting the story if a leaked report came into Mr. Cooper's hands. That could be akin to reporting that the police had charged an individual with a crime, or that a party filed an action in court. In the case of CSIS, even if its reported content is secret, there is ultimately public accountability because the relevant authority would be answerable if the reporting was wrong and irresponsible.

[85] CSIS distanced itself from the leaks and reported to the government that it considered the leaks as compromising its operations. I am in no position to assess the *bona fides* of this position. The defendants filed an op-ed piece from the *Globe and Mail* by an anonymous "national security official," titled "Why I blew the whistle on Chinese interference in Canada's elections." The article noted that the author faced "possible prosecution" for having leaked classified documents. I presume the "possible prosecution" was based on breach of s. 4 of the *Security of Information Act*, R.S.C. 1985, c. O-5.

[86] Taken at face value, without the benefit of a trial, the CSIS officers' agenda in exposing the network of operatives was to draw attention to government inaction. It is possible they

were also very concerned about the politicians they were investigating. Had the specific politicians been the emphasis, however, the agents could have provided Mr. Cooper with tangible proof. Absent such proof, the sources could not count on the media outlets publicly outing the politicians. As it happened only *Global News* identified individual politicians.

[87] It is not certain how this type of evidence could be presented as part of the defence at the trial. On one hand, the self-identification of the leakers as whistle blowers could show that Mr. Cooper and *Global News* were right to rely on their information, because the informants took personal risks to meet secretly with Mr. Cooper. On the other hand, the fact that no briefing memorandum from CSIS to the government identified Mr. Ke as part of the interference network could mean that the entity capable of making the allegation or assertion (even if only to the Prime Minister or to Cabinet) did not consider the information reliable enough to inform those government officials. One would have thought it important to report to the government's leadership that moles were acting for a foreign state. The lack of names in the reports could be evidence that there was nothing to allege or assert about Mr. Ke.

Conclusion about the Defences

[88] For the anti-SLAPP motion, all the respondent needs to show is that there are grounds to believe the defence could fail. I find that there are reasonable grounds to believe there could be no defence to the libel claim. The analysis then proceeds to the next step, the balancing of public interests.

4. Balancing of Public Interests

[89] The final part of the anti-SLAPP analysis appears in clause 137.1(4)(b). The plaintiff needs to satisfy the court that:

> 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.

[90] There can be no doubt that Mr. Ke has suffered serious personal harm because of the publications. However, close reading of the above statutory provision makes it clear that the plaintiff's personal interest is not the primary focus. Rather, the public interest to be weighed against the freedom of expression is the seriousness of the public interest in allowing the plaintiff to have his or her day in court. The public interest in allowing the claim to continue has been described in terms of the legislative intent that the statute not block valid libel suits: *Pointes Protection Association*, at para. 48. Mr. Ke's suit meets this requirement because it is not an attempt to strong-arm a media outlet to bury a story or to prevent future stories. He is a politician, and he has sought out a life of public scrutiny. If he wins at trial, he will likely issue a press release or hold a press conference outside the courthouse. Until the court issues an injunction after an adjudication of the merits, this

proceeding and the public trial are more likely to promote interest in the *Global News* article than to cause the defendants to delete it from their website.

[91] As a cause of action in private law, the tort of defamation recognizes the victim's personal interest in being allowed to sue the defamer. Defamation has survived the protection of free expression under s. 2(b) of the *Charter*, partly because the constitutional freedom does not directly enter the sphere of private law and partly because reputation is tied to the *Charter* values concerning the worth and dignity of individuals: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 2. Clause 137.1(4)(b) requires the court to go further into this weighing exercise, because the anti-SLAPP law engages the public interest in receiving information about matters concerning the public's participation in Canadian society, beyond the privacy of the individual.

[92] What tips the case further in Mr. Ke's favour is the public interest in ensuring that the outcome of *his* election is not skewed by a leak of information that no one is likely to be able to verify.

[93] In the case of a news story about an MPP, the voters in Mr. Ke's riding certainly have such an interest. Where a responsible reporter and news outlet has received reliable information about a politician whose office depends on public trust, there is a clear public interest in protecting the right to publish, even if the report turns out to be wrong. Libel law also recognizes the importance of retractions and apologies in mitigating harm. Where the publication cannot be, and perhaps has not ever been, substantiated, even by some evidence, the public's right to know the truth about their elected representative must be distinguished from the harm caused by misinformation or disinformation.

[94] Because of the presumption of falsehood that libel law attaches to defamatory statements, the absence of tangible proof could very well result in Mr. Ke's success at trial without confirming whether he had any involvement in the interference scheme. Exoneration could entail proving a negative, through circumstantial evidence, and it will be up to Mr. Ke and his lawyers to decide on trial strategy.

[95] In this case, the public interest in permitting the proceeding to continue outweighs the public interest in protecting the publishers' right to name Mr. Ke as a collaborator in the election interference scheme based on the information leaked to them.

COSTS

[96] The costs of a dismissed anti-SLAPP motion are governed by s. 137.1(8):

> Costs if motion to dismiss denied
>
> 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.

[97] The weight of the case law on this point states that the legislature encourages parties to bring these types of motions. To exercise judicial discretion under s. 137.1(8) lightly would be contrary to legislative intent: *Niu v. Cao*, 2020 ONSC 6257, at para. 6.

[98] Mr. Ke's counsel reminded me that these motions tend to be very expensive to contest. Since the purpose of s. 137.1 is to protect individuals from being silenced by powerful or deep-pocketed litigants, Mr. Ke's submission was that it was inappropriate for a media conglomerate to bring the motion. In *Dong*, the court exercised its discretion to award costs to the plaintiff on the basis that the action was not "strategic litigation" and that the motion itself "resembles an abusive anti-SLAPP." That determination is not binding on me, but the court must be conscious of the need to avoid inconsistent results. I do not go so far as to consider *Global News*'s motion an abuse of process. I appreciate that part of the news media's historical imperative is to push back against libel suits. Subsection 137.1(8) does not require that the motion be deemed abusive. I did not see any grounds for doubting the *bona fides* of the motion.

[99] Nevertheless, what tips the balance in favour of Mr. Ke, and what leads me to agree with the cost's outcome in *Dong,* is the fact that to deny him costs of a very expensive opening hearing could deprive him of the ability to his day in court and to preserve the very public debate the statute was intended to uphold.

[100] That said, the rebuttal of the presumption against costs does not translate into a reversal of fortunes by awarding costs on a full indemnity basis as a mirror to s. 137.1(7). For there to be such an automatic reversal, the legislation had to state it expressly. Every failed anti-SLAPP motion logically implies the action was not a SLAPP. To award a higher scale of costs simply because the motion is dismissed would require the costs provisions to have been worded differently. I read the concluding clause of s. 137.1(8) to mean that the respondent is entitled to the ordinary costs award under s. 131. In the circumstances, I will invite submissions on the scale and amount of costs if they cannot be settled.

CONCLUSION

[101] I therefore dismiss the defendants' motion, with costs to the plaintiff.

[102] I encourage the parties to settle the scale and amount of costs. It there is no agreement on the costs, the plaintiff may submit a costs outline within 20 days of the release of this decision, followed by the defendants' submission of no longer than three pages, within 20 days thereafter.

Akazaki J.
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Akazaki J.

Date: October 17, 2024