CITATION: Bernier v. Kinsella et al., 2021 ONSC 7451
COURT FILE NO.: CV-20-82717
DATE: 2021/11/10

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE

RE: MAXIME BERNIER, Plaintiff (Responding Party)

AND:

WARREN KINSELLA, DAISY CONSULTING GROUP INC. and DAISY STRATEGY GROUP, Defendants (Moving Parties)

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: David Shiller, for the Defendants (Moving Parties)

André Marin and Mark Bourrie, for the Plaintiff (Responding Party)

HEARD: June 18, 2021

DECISION AND REASONS

Introduction

[1] Can Maxime Bernier sue Warren Kinsella for using insulting and degrading language to brand him as a racist, misogynist and anti-Semite in the run up to the 2019 federal election? Statements attacking a person's reputation can ordinarily be the subject of a defamation action, but that is not always the case if the impugned language concerns a matter of public interest. In this case, the answer to the question depends on whether Mr. Bernier can pass the hurdle created by Ontario's "anti SLAPP legislation". That hurdle is found in s. 137.1 of the *Courts of Justice Act.*[1]

[2] The plaintiff concedes that commenting on the opinions and positions of the leader of a political party are matters of public interest. As such, s. 137.1 is engaged. That section exists to avoid the weaponization of the courts against freedom of speech and public discourse. A plaintiff wishing to proceed with a court action in those circumstances must demonstrate that the claim crosses the statutory threshold. If it does not, the action cannot proceed, and the court is obligated to stay or dismiss it.

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[1] *Courts of Justice Act*, RSO 1990, c. C.43 as amended, s. 137.1 calls for dismissal of proceedings that may inhibit debate on matters of public interest. SLAPP is an acronym for Strategic Litigation Against Public Participation although that term is not found in the Act. These provisions are commonly referred to as "anti-SLAPP legislation".

[3] The test is rigorous. The plaintiff must first establish that "there are grounds to believe that the proceeding has substantial merit and the moving party has no valid defence in the proceeding". Secondly, the plaintiff must establish 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."[2]

[4] As I will discuss, this test is not met by the proposed proceeding and the action will therefore be dismissed. The main reasons for this conclusion are the significant likelihood of a valid defence and the failure to prove the likelihood of harm disproportionate to the importance of freedom of expression concerning the policies espoused by politicians and political parties.

Background

Maxime Bernier

[5] The Honourable Maxime Bernier is a well-known Canadian politician and as a former cabinet minister, he is a member of Her Majesty's Privy Council for Canada. He is the current leader of the People's Party of Canada (PPC), a party he founded in 2018. In his affidavit, he also describes himself as "a lawyer and a businessman".

[6] For many years Mr. Bernier was the Member of Parliament for Beauce, a riding in Quebec known for its fidelity to the Conservative Party of Canada (CPC) and to the Bernier family. Mr. Bernier's father preceded him as M.P. for Beauce and Mr. Bernier himself was the M.P. from 2006 to 2019. Under former Prime Minister Stephen Harper, between 2006 and 2015, he held various cabinet posts. Mr. Bernier served as Minister of Industry and Registrar General, Minister of Foreign Affairs, and Minister of State for Small Business, Tourism and Agriculture. He was also Chair of the National Defence Select Committee.

[7] Mr. Bernier's tenure as Foreign Affairs minister was controversial for a number of reasons. In particular, there was a much publicized incident in which he was said to have left confidential documents at the home of a woman he was dating and who was thought to have had links to a motorcycle gang.[3] More recently, he has been in the news for taking radical political positions at odds with the orthodoxy of the "mainstream" political parties. On occasion he has embraced the nickname of "Mad Max" conferred upon him by the media.

[8] In 2017, Mr. Bernier ran for the leadership of the CPC. He came a very close second to the eventual winner, Andrew Scheer. The following year, Mr. Bernier left the Conservative Party caucus which he described as "intellectually and morally corrupt" and began his efforts to organize the People's Party of Canada or PPC.

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[2] CJA, s. 137.1 (4)

[3] I mention this only because it is referred to in several of the newspaper articles exhibited in the affidavit material and because it is referred to in one of the comments described in the statement of claim.

[9] Amongst other things, the PPC is in favour of reduced immigration levels, an end to multiculturalism legislation, and in favour of unrestricted freedom of speech. The party also espouses a dramatic reduction in regulation, including the system of supply management in agriculture, withdrawal from the Paris Accord on the environment, and reduction of interprovincial trade barriers. The PPC is described in the media as a "far right populist party", "libertarian" and to the right of the CPC on the political spectrum. Mr. Bernier himself does not agree with that characterization. He deposes that he is in favour of reduced immigration levels, smaller government, reduced regulation and opposed to "extreme multiculturalism" but does not accept an ideological description.

Warren Kinsella

[10] Warren Kinsella describes himself as a political commentator, newspaper columnist, author, consultant, lawyer, president of the defendant Daisy Consulting Group Inc. and related companies. He also deposes that he is the founder of a non-profit, anti-racism group known by the acronym STAMP and a long-time activist against racism, homophobia and anti-Semitism. Mr. Bernier describes Mr. Kinsella in less flattering terms, arguing that he is best known as a promoter of "dirty tricks" and that he is no longer taken seriously in political circles in Ottawa.

[11] Mr. Kinsella was long associated with the Liberal Party of Canada (LPC) and deposes that he played significant "war room" roles in several federal and provincial election campaigns. He states that he is not now a member of any political party but has worked for many parties over the past 15 years. He describes himself as "generally known as a pundit and commentator on public affairs particularly Canadian political affairs" and employs a style which he says is "fairly seen as caustic and direct". Plaintiff's counsel would say rude, disparaging, and disrespectful embodying much of what is wrong with current political discourse.

[12] Mr. Kinsella deposes that he is currently a national opinion columnist with Postmedia and that his opinion pieces have also been published by other newspapers. Besides articles written for newspapers, Mr. Kinsella writes daily on his own website, "warrenkinsella.com" and has been active on Twitter since 2008 where he has tens of thousands of followers. He describes Daisy as involved with public relations, government relations and media relations, but having as its main activity public advocacy campaigns. He deposes that Daisy has been involved in "multiple campaigns opposing racism, anti-Semitism, homophobia, Islamophobia, misogyny and other manifestations of intolerance."

Project Cactus

[13] In 2019, prior to the writ being dropped for the federal election held that year, Mr. Kinsella began to publish comments branding Mr. Bernier as a racist. For at least part of that time, Mr. Kinsella or Daisy was hired by an individual or individuals who were associated with the CPC. This episode, referred to as "Project Cactus" in the materials, is at the heart of this dispute.

[14] Mr. Bernier deposes that "Project Cactus was part of a Conservative Party dirty tricks campaign that cost me the seat in Parliament that I held for thirteen years." He further deposes

that a decision in favour of the applicant "could be seen as giving judicial approval to sleazy politics and dirty tricks."

[15] Mr. Bernier asserts that Mr. Kinsella was clandestinely hired by the CPC to "staunch the flow of Conservative support to my party" through "lies, innuendo and facts taken out of context." For his part, Mr. Kinsella does not concede any official involvement by the CPC, but he admits that he was paid by CPC sympathizers. He deposes that "for a six-week period" "a lawyer who was a member of the CPC paid Daisy to supplement work Daisy was already doing about the PPC." Mr. Kinsella, however, denies that all of his commentary was paid commentary or part of Project Cactus.

[16] It does not much matter for present purposes whether Mr. Kinsella and his organization were officially hired by the CPC or simply by individuals close to the party. The important point is that, for at least some of the period during which the impugned messages were published, Mr. Kinsella or his company was employed by partisans of the CPC to publicly attack Mr. Bernier and the nascent PPC. This activity ceased before the point at which it would have been captured by Election Canada rules. What role this background should play in the s. 137.1 analysis is another question.

[17] Neither the PPC nor the CPC are parties to this court action. That is important because the question at bar is whether Mr. Bernier, in his personal capacity, can sue the Daisy defendants controlled by Mr. Kinsella and Mr. Kinsella in his personal capacity. Although in his affidavit, Mr. Bernier complains that the CPC was responsible for dirty tricks, such as running another Maxime Bernier against him in the Beauce, it is not clear what (even if true) that could have to do with proceeding with a defamation action against Mr. Kinsella.[4]

The Defamatory Publications

[18] The statement of claim sets out the publications which give rise to the claim for defamation. There is no doubt that much of the language in the posts is rude, inflammatory, insulting and disparaging. The statement of claim recites various statements made, authorized or repeated by the defendants on Twitter, blog posts or web sites and in some cases verbally to staff of Daisy.[5]

[19] For purposes of this decision, it is not necessary to detail every incident described in the statement of claim. In general, the theme of the publications is that Maxime Bernier and the CPC that he was organizing at the time promote "racism, anti-Semitism, white supremacy, anti-immigration and anti-refugee sentiments". A few examples will provide the flavour and tone of the messaging.

[4] The other Maxime Bernier was the candidate of the Rhinoceros Party in Beauce in the 2019 election after the events in question.
[5] There is a clandestine recording made by a former Daisy staff member.

[20] According to paragraph 20 of the Statement of Claim, there were a number of tweets on the STAMPtogether Twitter account posted between May 22, 2019 and June 16, 2019. Three examples from that paragraph are as follows:

> "**May 22, 2019** *@Maxime #PPC is failing, not least because of its constant promotion of #racism, #antisemitism, and anti-#lgbt rhetoric. So why pay attention? Because the @peoplespca spewing hate emboldens other extremists to come out of the woodwork. #cdnpoli"*
>
> **"May 30, 2019** *Not even Donald Trump is advocating what @MaximeBernier wants for immigration. Trump cites Canada as an example for the US, while Bernier advocates reduction in immigration while using #racist dog whistles. Is Bernier more extreme than Trump? #cdnpoli #PPC"*
>
> **June 16, 2019** *The #PPC is the only party in Canada whose messaging consists of a constant stream of #racist conspiracy theories and #antiSemitic tropes, like the frequently-repeated "globalist" slur #cdnpoli@LukeTQuinlan"*

[21] Paragraph 24 of the statement of claim reads as follows:

> "24. Whether in furtherance of his retainer with the CPC or arising from his own personal animus towards Maxime, Kinsella through or in conjunction with the Daisy Group, engaged in a sustained campaign to savage Maxime's reputation by accusing Maxime of being, *inter alia*, a racist, bigot and/or Gauleiter, a regional Nazi boss during Hitler's rise to power and until the fall of the Third Reich."

[22] Paragraph 26 of the statement of claim sets out a number of "defamatory statements" posted to Mr. Kinsella's web site, which the statement of claim refers to as the "War Room". The impugned statements as described in the claim are extracts from those postings. They include entries stating that Maxime Bernier is a racist and a bigot and equating him with Donald Trump and with David Duke, a prominent American "alt-right" figure and one-time leader of the Ku Klux Klan. A few examples from that paragraph of the pleading are as follows:

a. "On or about February 23, 2019, Kinsella posted a blog article entitled "*Is Maxime Bernier a Racist?"* to the War Room, in which Kinsella stated that "*Max Bernier-because of the words he chooses, and those with whom he chooses to associate himself is now undisputedly piloting the same dark waters previously charted by the likes of Donald Trump and David Duke"*; Kinsella further stated that Bernier *"is a telegenic bigot who panders to the worst of people"* and that *"[b]y his words, and by his deeds, we all know who Maxime Bernier is" ...*

c. "On or about May 10, 2019, Kinsella posted a reply on Twitter to a post by Maxime. In his reply, Kinsella stated, referring to Maxime, *"You're a bigot". ...*

d. "During a meeting at Daisy Group offices on or about May 16, 2019, stated to his staffers in reference to Maxime, *"We actually have a white supremacist trying to become prime minister of Canada. I've run campaigns depicting Preston Manning,*

Stockwell Day, Kim Campbell, depicting them as racists. None of them were. But I was successful at depicting them as racists. This guy actually is a racist. Okay? So it's low hanging fruit." ...

e. "On or about June 4, 2019, Kinsella posted a blog entitled "*Actually, Maxime, there is only one federal party leader who sounds like a white supremacist who hates women." ...*

p. On or about November 25, 2019, Kinsella posted a blog article to the War Room, in which he stated that *"I have proudly been exposing and opposing racism for more than 30 years. As a political assistant in 1990, I documented known racists joining Preston Manning's Reform Party. In 1993, I documented Kim Campbell's inadequate response to the presence of actual neo-Nazi's in the Canadian Airborne Regiment. In 2000, as a political advisor, I documented the presence of known racists in Stockwell Day's Canadian Alliance. After lots of research, I concluded none of the leaders were in any way racist. However, their parties had a problem in those days, which was well-known. But the extremism found in the People's Party is far worse, and far more pervasive, than anything I experienced before. We were, and we are, very proud to shine a light on the extremism found in the People's Party of Canada"*

[23] Other comments identified in paragraph 26 as defamatory statements include comments posted to the War Room by others, but allegedly republished or published with the approval of Mr. Kinsella. Those comments include identifying Mr. Bernier as "an underpowered intellectual wanna-be who has callously seized upon garbage ideas", identifying him as a "former biker groupie" who came within a hair of leading the CPC, and a "dimwitted somewhat moronic version of Farage and his UKIP". It is not, however, the insults about Mr. Bernier's intelligence or the reference to "bikers" which are said to be defamatory, but only the implications of racism and bigotry.

[24] Paragraph 28 of the claim is the paragraph that identifies the defamatory meaning to be given to the impugned statements. That paragraph states that "in their natural and ordinary meaning, or by virtue of the surrounding circumstances which give the words a defamatory meaning, or by innuendo" meant the following:

a. "that Maxime is a racist;

b. that Maxime is an anti-Semite;

c. that Maxime is a Holocaust denier;

d. that Maxime is homophobic;

e. that Maxime is a white supremacist;

f. that Maxime hates women;

g. that Maxime is a bigot;

h. that Maxime is a member of a racist organization;

i. that Maxime knowingly associates with racist persons or organizations;

j. that Maxime is a Nazi, literally a member of a Nazi organization and/or a member of a neo-Nazi group;

k. that Maxime is associated and/or a friend with, or equivalent to David Duke (a notorious American neo-Nazi, white supremacist, anti-Semite, and former member of the Ku Klux Klan) and/or Paul Fromme;

l. that Maxime is a member of, or associated with, the Ku Klux Klan; and,

m. that Maxime incites hate, racism, homophobia, misogyny and bigotry."

[25] Although I have not reproduced all of the statements listed in the statement of claim as "defamatory statements", it seems to be an exaggeration to say that any of the comments accuse Mr. Bernier of being an actual member of a neo-Nazi group or having formal affiliation with the Ku Klux Klan. It is not necessary to debate that. There is no doubt that the posts state that Mr. Bernier is a racist, is anti-Semitic and is a bigot and that he knowingly associates with people who hold those views including neo-Nazis and white supremacists.

[26] In the context of the leader of a political party, those allegations would tend to harm the reputation of Mr. Bernier in the minds of most Canadians if they were believed. If the allegations are false, then this is precisely the kind of statement that meets the dictionary definition of defamation. While that definition may be a gross simplification of a complex area of law, it is generally understood to be defamation if a person makes a false written or oral statement to a third party that damages the reputation of another.[6]

[27] At the pleadings stage, defamation is actionable if it meets the rules of pleading applicable to such actions. In this case, however, the plaintiff must also contend with s. 137.1.

The Issue and the Legal Test

Defamation Law in Ontario

[28] The leading case from the Supreme Court articulating the modern law of defamation in Ontario and (subject to specific statutory differences in other provinces) throughout most of Canada is *Grant v. Torstar.*[7] In that case (without considering the impact of yet to be enacted anti-SLAPP legislation) the Supreme Court recognized that there is already a difficult balance inherent

[6] *Black's Law Dictionary, Tenth Edition,* 2014 ThomsonReuters @ p. 506
[7] See *Grant v. Torstar Corp*., 2009 SCC 61, [2009] 3 S.C.R. 640

in defamation law. Available defences seek to protect freedom of speech, but also permit individuals to protect their reputations.

[29] The reasons of the former Chief Justice of Canada in *Pointes* began as follows:

> 1 Freedom of expression is guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. It is essential to the functioning of our democracy, to seeking the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization.
>
> 2 But freedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other's reputation. However, if the defences available to a publisher are too narrowly defined, the result may be "libel chill", undermining freedom of expression and of the press.
>
> 3 Two conflicting values are at stake — on the one hand freedom of expression and on the other the protection of reputation. While freedom of expression is a fundamental freedom protected by s. 2(*b*) of the *Charter*, courts have long recognized that protection of reputation is also worthy of legal recognition. The challenge of courts has been to strike an appropriate balance between them in articulating the common law of defamation. …

[30] In the common law provinces, a case for defamation is made out and the defendant will be presumptively liable in damages if the plaintiff can prove three facts. Firstly, the plaintiff must show that the impugned words were defamatory because they would tend to lower the plaintiff's reputation in the eyes of a reasonable person. Secondly, the plaintiff must show that the words referred to the plaintiff. Thirdly, the plaintiff must prove that the words were communicated to at least one person other than the plaintiff. While defamatory meaning may be obvious from the words themselves, the court may also "take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented."[8]

[31] If these elements are established on a balance of probabilities, then, at least in libel cases, falsity and damages are presumed although a plaintiff may seek special aggravated or punitive damages in some cases. Liability is strict insofar as it is not necessary to prove intention, but proof of malice may either vitiate certain defences or justify additional damages.[9]

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[8] See *Botiuk v. Toronto Free Press Publications Ltd*., [1995] 3 S.C.R. 3 @ para. 62

[9] See *Grant v. Torstar Corp*., supra, para. 29

[32] Most of the nuanced and complicated issues in defamation actions relate to the defences of which there are seven recognized in law. The important point is that once the plaintiff has proven the elements of libel, the onus shifts to the defendant. A defendant which is unable to establish at least one of those defences will be liable. Amongst the most common defences are justification (truth), responsible communication on matters of public interest and fair comment.[10] In each case the defendant must prove that the particular defence applies.

[33] It is this framework of presumptions and shifting onuses, along with the traditional reliance on trial by jury, which makes defamation law complex. For example, it is central to defamation that the impugned statements are false. Yet in our law the falsehood of a defamatory statement which is published is presumed and truth must be raised as a defence. In Ontario, as in most of Canada, if the words spoken or published are an attack on a person's reputation, they are presumed to be false. Truth or other justification is an absolute defence, but the onus is on the defendant to prove that the words are true. The defence of fair comment on the other hand is a more nuanced defence. Comment cannot be fair if it is motivated by malice, but where malice is alleged, the onus of proving malice lies with the plaintiff.

[34] This brief outline is germane to assessing the strength of the plaintiff's case and the potential success of the available defences, but it is not the test to be applied on this motion. This motion is not a determination of the merits of the defamation action. The motion engages a screening function in s. 137.1 of the *Courts of Justice Act.*

The anti-SLAPP screening mechanism

[35] There is a great deal of rhetoric in the affidavit of Mr. Bernier and in his factum calling upon the court to "curb dirty political tricks" and not to condone scurrilous attacks on the reputation of political leaders. That is not the jurisdiction engaged by this motion. The question at this juncture is not whether the language used by Mr. Kinsella should be encouraged or condoned, but whether or not a defamation action against these defendants is an appropriate vehicle for this plaintiff to seek relief. To proceed, the plaintiff must demonstrate that the action clears the statutory hurdle in s. 137.1.[11]

[36] S. 137.1 of the *Courts of Justice Act* was part of a package of statute amendments passed in 2015 in order to protect freedom of expression and discourse on matters of public interest. As mentioned in the introduction, the purpose of the legislation was to inhibit the use of "libel chill" to shut down debate on matters of public interest. Section 137.1 (1) reads as follows:

> **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;

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[10] See *Canadian Tort Law*, Linden, Feldthusen et. al., Eleventh Edition, 2018 LexisNexis, C. 16, para 16.10, p. 747

[11] Ordinarily the onus is on the defendant to show that the matter is a matter of public interest and then shifts to the plaintiff but in this case the public interest requirement is conceded.

(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. [12]

[37] The legislative amendments were intended to provide a mechanism which is, in the words of the Court of Appeal in the 2018 *Pointes* decision, to "weed out litigation of doubtful merit which unduly discourages and seeks to restrict free and open expression on matters of public interest."[13] On the other hand a case that appears to have merit should be allowed to proceed if the plaintiff appears likely to have suffered significant harm which outweighs the importance of encouraging debate and free expression.

[38] *Pointes* is the leading case on the application of these provisions. The case was appealed to the Supreme Court of Canada where it was upheld in 2020. In doing so, the Supreme Court of Canada gave specific guidance to judges concerning the analytical framework for applying the statutory test. [14] At the first stage (which is conceded in the case at bar), the moving party must persuade the court that the impugned expression relates to a matter of public interest. At that point the burden switches to the plaintiff and the action will not be permitted to continue unless the plaintiff puts sufficient evidence before the court to clear both parts of the statutory test.

[39] It is critical to understand the structure of the legislation. Once it is determined that the proceeding arises from an expression that relates to a matter of public interest, the court is required to dismiss or stay the action unless it meets the saving provision in s. 137.1 (4). This is a statutory screening mechanism and not a determinative adjudication of the merits of the proposed defamation action.[15] The plaintiff must demonstrate that this is not an action that the legislation requires be summarily screened out. S. 137 (4) reads as follows:

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

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

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

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

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[12] S.O. 2015, c. 23, s. 137.1 (1)
[13] *1704604 Ontario Ltd. v. Pointes Protection Association,* 2018 ONCA 685
[14] *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22, 449 D.L.R. (4th) 1 (SCC)
[15] See *Bent v. Platnick,* 2020SCC 23 @ para. 4

[40] The test requires the plaintiff to demonstrate, as a first step, that the case is one that seems to have substantial merit and no valid defence. If that test is met, the court moves to the balancing exercise which the Supreme Court describes as the fundamental crux of the analysis. At that second state, the plaintiff must demonstrate that the harm to his or her reputation is such that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.

[41] At step one of this test, even if the case appears to have substantial merit, the plaintiff will not meet the test unless he or she can also show it is reasonably possible a trier could determine that none of the available defences will succeed. Conversely, if it appears reasonably possible that one of more of the defences will succeed, the motion must be granted, and the action halted. [16] This assessment requires an evidentiary basis, but it does not require certainty.

[42] In *Pointes*, the Supreme Court observed that the burden of proof on this motion is more than on a motion to strike pleadings, but less than a motion for summary judgment. The operative words of the statute are "grounds to believe" and must be interpreted in light of the nascent stage of the litigation when such motions will typically be brought.

[43] Paragraphs 38 and 39 of the decision read as follows:

> "[38] Section 137.1(4)(a) may therefore be interpreted by distinguishing a motion made under s. 137.1 from a motion to strike and a motion for summary judgment, both of which are tools that remain available to parties notwithstanding the existence of s. 137.1. The very fact that the legislature created s. 137.1 as a mechanism indicates that a s. 137.1 motion was meant to fulfil a different purpose than these other motions. While a summary judgment motion allows parties to file a more extensive record and a motion to strike is adjudicated solely on the pleadings, s. 137.1 contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that lends itself to the inquiry mandated under s. 137.1(4)(a). Thus, although the limited record at this stage does not allow for the ultimate adjudication of the issues, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record (the extent of such consideration will be explored further in the next section).
>
> [39] Accordingly, I conclude that "grounds to believe" requires that there be a basis in the record and the law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence."

Analysis

A word of caution

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[16] *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 OR (3d) 211 @ para. 33

[44] There is much media interest in this matter. It is necessary to be abundantly clear about the very narrow task I am asked to undertake in deciding the single question of whether or not the plaintiff meets the onus under s. 137 (4). As I indicated earlier, I will not be determining the questions that will be determined by the ultimate triers of fact and law if the action is permitted to continue. Still less will I be making a finding as to whether Mr. Bernier is or is not a racist or any of the other epithets thrown at him. Nothing I have to say in what follows should be taken as such a conclusion or as a finding of fact. My role is simply to apply the statutory test to the action as pleaded and to the evidence put before me.

[45] As a further precaution, so that there could be no illusion of the court meddling in politics and because I had this matter under reserve when the 2021 election was called, I delayed releasing this decision. It would have been inappropriate to release it during the election.

The strength of the case

[46] Mr. Bernier has no difficulty in demonstrating that a substantial number of the words published were defamatory, referred to him and are the work of Mr. Kinsella. There may be quibbles as to whether all of the publications are defamatory of Mr. Bernier and whether all of them may be attributed to Mr. Kinsella, but I accept for purposes of the motion that there is a substantial number of publications in which Mr. Kinsella identifies Mr. Bernier as a racist, misogynist or anti-Semite and in some instances, compares his views to those of neo-Nazis and the Ku Klux Klan.

[47] Context is important in defamation actions and there are situations in which the defamatory remarks are made in a context where they have no reasonable credibility as a statement of fact.[17] Satire is an example there may be other situations in which mere insults do not constitute defamation. It is not necessary to determine that each and every one of the impugned statements bear a defamatory meaning. There can be little doubt that some of the material in Mr. Kinsella's publications are *prima facie* defamatory.

[48] Comparing Mr. Bernier to a Nazi or a Klansman, calling him a racist, anti-Semitic, misogynistic or any similar epithet would tend to lower his reputation. I need not dwell upon the comparisons with Donald Trump, Nigel Farage or David Duke and as I mentioned earlier, the suggestions that Mr. Bernier is dimwitted, a telegenic idiot or other epithets used against him are not pleaded as having defamatory meaning. The focus of the litigation is on the "sting" to the plaintiff's reputation and in this case that focus is on bigotry and racism. The claim for defamation is legally tenable and supported by evidence that is reasonably capable of belief.[18]

The availability of defences

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[17] Peter A Downward, *The Law of Libel in Canada, 4th Edition,* 2018 LexisNexis Canada Inc. @ paras. 3.56 and 3.57

[18] See *Lemire v. Burley,*2021 ONSC 5036 @ para. 86

[49] The bar for establishing defamation is reasonably low. The challenge for a plaintiff is to overcome potential defences and in the case of a s. 137.1 motion, to show that there is no reasonable prospect of any of the defences succeeding.

[50] In my view, the plaintiff runs a significant risk that his action will succumb to one of the defences of justification or fair comment. A statement that a person is racist or a misogynist is a generalization or conclusion that is not itself either true or false. In such cases, the question is not whether the generalization is itself true, but whether it is a statement that can be justified by proof of specific instances that support it.[19] The test is whether a reasonable person could reach the conclusion expressed based on the underlying facts if those underlying facts are true.

[51] Mr. Bernier declares in his affidavit that he is not a racist. He clearly explains his position and that of the PPC on immigration. It is worth quoting.

> **My Views on Immigration**
>
> 15. I support an ideal of Canada in which all Canadians defend concepts of equal rights for women and minorities, democracy, the rule of law as it exists now in Canada – made by democratically-elected legislatures and adhering to the Civil Code in Quebec and Common Law in the rest of Canada.
>
> 16. I believe these are fundamental Canadian values that are enshrined in this country's Constitution.
>
> 17. I believe newcomers to Canada should accept and abide by these values.
>
> 18. I have advocated for immigration based on Canada's economic needs.
>
> 19. Just after the registration of the People's Party of Canada, its leadership drafted and published his party's policy paper on immigration. My party's position is that immigration should be economically beneficial to Canadians and to the country as a whole. Only 26 per cent of all the immigrants and refugees who come to Canada have skills and qualifications that fulfill Canada's economic needs. Immigrants generally have lower wages than non-immigrants, pay on average about half the income taxes as other Canadians and need about the same amount of government services as other Canadians. Advocates of a wide-open immigration policy often claim that immigrants make up for Canada's low birth rate, but the average age of immigrants is only slightly lower than other Canadians. Elderly immigrants who arrive in Canada under family reunification programs add to the cost of immigration. Since 41 per cent of immigrants to Canada settle in the Montreal, Toronto and Vancouver areas, there is at least a partial causal link to increasing the

[19] See *Fridman's The Law of Tort in Canada,* Chaimberlain, Pitel et. al., Fourth Edition, 2020 Thomson Reuters, C. 24, pp 780 - 781

size of these cities through immigration and the housing shortages that have driven up home prices to the point where they are unaffordable for most people.

20. My party's plan is to return to the long-established Canadian policy of setting immigration targets in relation to the country's labour needs and accept refugees who are in real danger. (Exhibit I) The PPC would end family reunification, make birth tourism illegal, and increase the resources of domestic policing agencies to do comprehensive background checks on immigrants. (Exhibit G)

21. I understand these policies are not embraced by most of my political opponents, many members of the media, immigration consultants and others with a vested interest in keeping numbers high, and some academics. This, however, is no reason to shut down all debate on immigration, or to label people who oppose Canada's recent high immigration numbers as bigots or racists.

22. During the 2015 federal election, the Conservative Party of Canada promised to establish something called the Barbaric Cultural Practices Hotline, something the People's Party of Canada did not endorse nor advocate.

[52] This is a good example of precisely the kind of discourse and discussion that the legislation is designed to protect. Reasonable people might differ as to whether this policy has racist overtones or would, in practice, discriminate against racialized individuals or other minority groups. Branding the policy as racist might seem unfair to some, but it would be open to reasonable debate. In fact, it was this policy of reducing immigration and steering immigrants away from Canada's major cities that was one of the reasons that the media characterized the PPC as far right and drew Mr. Kinsella to compare Mr. Bernier's views to those of Donald Trump.

[53] Similarly, Mr. Bernier's opposition to what he describes as "extreme multiculturalism" would seem to some to be anti-immigrant and discriminatory. In his affidavit, he explains that position as follows:

24. I believe newcomers to Canada should endeavor to become part of the social and economic communities in Canada. I am opposed to the idea of immigrants to Canada settling in communities that are socially and politically isolated from the Canadian mainstream. Immigrants who live in isolation from the rest of Canada do not get to experience all the benefits of Canada's freedom and prosperity. Canada loses the benefit of the potential growth of a national population that embraces Charter values.

25. I have called the idea of a Canada made up of isolated ethnic communities "extreme multiculturalism" and I am opposed to that.

26. I am not opposed to immigration, just to the current rate. In fact, my party's position, which I endorse, calls for Canada's acceptance of 150,000 immigrants

every year, which I believe the country has the capacity to house, provide language training when needed, and integrate into the social mainstream and the economy. I have never suggested this figure should have any kind of racial quotas, exclude anyone of any race or religion, or give preference to people of European heritage. (Exhibit F)

27. During the party-building process, I was interviewed by Janice Dickson, who was then a reporter with the Canadian Press news service. In that interview, I made it clear that I believe racists have no place in the People's Party of Canada. I have rejected racism my entire life. (Exhibit H)

[54] Whether this explanation set out in the affidavit carries racist overtones or does not is hardly the point. I accept that the plaintiff is able to articulate his position and to declare that he is not a racist. From the point of view of a defamation action, however, that is not the point. The pertinent issue is whether or not there was a basis in truth for the conclusions drawn by Mr. Kinsella at the time they were published.

[55] Mr. Kinsella's affidavit contains the following:

25. Much like Mr. Trump, Mr. Bernier denies that he or his policies are racist. However, as shown in the media reports and opinion pieces listed and summarized below, from August 2018 until after the federal election in October 2019, there were repeated incidents regarding Mr. Bernier and the PPC that could indeed fairly be described as racist, or showing willful indifference to the presence of racists in the ranks of the PPC. Since the party's creation, media coverage of the PPC and Mr. Bernier has documented dozens of examples of racist activity, policies and views held by the PPC and Mr. Bernier.

[56] There are numerous examples attached to the Kinsella affidavit. On the issue of extreme multiculturalism, for example, Mr. Bernier made various comments on his Twitter account including comments suggesting that were many immigrants who "live among us who reject basic western values such as freedom, equality, tolerance and openness" and "who want to live apart in their ghetto". He criticized "Trudeau's extreme multiculturalism and cult of diversity" which will "divide us into little tribes" and he criticized "cultural balkanization". In fairness, his main criticism was spending government money to promote multiculturalism and he was criticizing Prime Minister Trudeau for declaring that "diversity is our strength". His comments, however, drew heavy criticism in the media. Mr. Kinsella's comments were not unique in labelling these remarks as inflammatory, xenophobic, and unacceptably racist.

[57] Respected mainstream journalists in the Globe & Mail, Washington Post and a host of other publications characterized Mr. Bernier's comments as "pure Trumpism", as "stoking racist and xenophobic tensions", and shamelessly seizing on "the rhetoric of anti-immigrant white supremacist groups in Canada that have succeeded in confusing facts about refugees, migrants and immigration".

[58] The Kinsella affidavit attaches many examples of statements made by Mr. Bernier along these same lines. Mr. Bernier espoused the view that immigrants moving to major cities were a primary cause of high housing prices, that many people were fed up with "political correctness and diversity nonsense" and was critical of resolutions opposing Islamophobia. In response to a report in the National Post about motion M-103 in the House of Commons, Mr. Bernier tweeted the following:

> "M-103 was only a motion, they said.
> But here is the "strategy". You're afraid of Islamist terrorism?, Sharia law?
> Traditionalist Muslim teaching about beating wives and killing gays? You're a racist and an Islamophobe! And Liberals will prevent you from expressing your fear".

[59] As also listed at great length in the Kinsella affidavit, there were numerous media reports about white supremacist groups flocking to support Mr. Bernier or the PPC. There were articles in the National Post and the Globe & Mail investigating infiltration of the PPC by white supremacist and anti-immigrant groups. Mr. Bernier was frequently criticized for failing to distance himself or the party from such groups and for failing to acknowledge or accept that members of the party executive or PPC candidates had expressed racist or anti-Semitic or anti-Islamic views.

[60] Mr. Kinsella also attests that in some circles the use of the term "anti-globalist" is believed to be anti-Semitic because some far-right groups use "globalist" as a synonym for a worldwide Jewish conspiracy involving George Soros. Mr. Bernier is aware of this criticism because he attests that he rejects this meaning of "globalist". The only point to be made about this is that Mr. Bernier's opposition to globalization and his continued use of the term "globalist" is a basis for Mr. Kinsella regarding Mr. Bernier as anti-Semitic.

[61] It is perhaps unfortunate that Mr. Kinsella's dialogue at the time was not as carefully articulated as his affidavit in support of this motion. Setting aside parts of the affidavit which may be regarded as simply Mr. Kinsella's opinions, however, there can be little doubt that there were many comments, incidents and media reports that could fairly lead to the characterization of Mr. Bernier and the nascent PPC as ether far right, anti-immigrant and racist or at least as accepting support from those quarters to build the new party.

[62] In addition to the material available at the time when Mr. Kinsella published his comments and his opinions that Mr. Bernier holds racist views, the defendant also proffers the affidavit of Matthew Conway. Mr. Conway is a political consultant and was a communications consultant in the office of Andrew Scheer when he was leader of the Opposition in 2018. Mr. Conway deposes that he overheard Mr. Bernier make two remarks he considered to be racist. In paragraph eight of his affidavit, he deposes that Mr. Bernier as a shadow minister made a comment about Jagmeet Singh, the leader of the New Democratic Party. The comment made in French was taken as a disparaging remark about Mr. Singh's turban and how it would affect his chances of being elected: "Il ne se fera jamais élire avec ce torchon sur sa tete."

[63] Mr. Bernier does not deny making this remark. In fact, his affidavit is quite precise. It reads as follows:

> 144. Mr. Kinsella's filings on this motion contain an affidavit from a former Conservative Party of Canada staff member, Matthew Conway, who claims I made a racist comment. This is the only eyewitness account of me supposedly saying something racist ever offered by Mr. Kinsella, and it comes from someone connected to the party that paid Kinsella for "Project Cactus" and stands to benefit if Mr. Kinsella is vindicated. It is the only eyewitness claim of me making a racist statement that Kinsella has included in his motion material.

[64] I reiterate that I am not determining whether Mr. Kinsella's opinions that Mr. Bernier is a racist are accurate or justified. I am not even making a finding that Mr. Conway's affidavit is accurate. The only point here is that there is evidence which could support a defence of justification. My only task is to consider if the defence of justification must fail or if it could succeed.

[65] For purposes of this motion, it is not necessary to conclude that the defence of justification or fair comment will succeed. It is only necessary to conclude that those defences have a reasonable chance of success. It seems to me that they do. In an anti-SLAPP motion, the plaintiff has to demonstrate that the defences are not available.

[66] Mr. Bernier argues that Mr. Kinsella was motivated by malice and as such, the defence of fair comment is not available. It is plausible that accepting funding directly or indirectly from the CPC to amplify criticism of Mr. Bernier could constitute legal malice. It is plausible that notwithstanding Mr. Kinsella's characterization of his "pep talk" to staff at Daisy as simply his usual method of operating, that his exhortation to "let your hatred of Maxime Bernier wash over you" would preclude reliance on the defence of fair comment. The evidence in support of express malice is not in any way conclusive, but even if malice can be attributed to Mr. Kinsella, malice does not matter for the defence of justification. [20] There is sufficient evidence in the moving parties' affidavits that a trier of fact could conclude that the defence of justification is available.

[67] I conclude that despite the clearly defamatory nature of the publication, the case for defamation is one that may well be countered by an available defence. If that is correct, then the plaintiff does not pass the first hurdle and the action should be dismissed as falling within the prohibition in s. 137.1.

The issue of harm

[68] Even if I am in error in this analysis, however, the plaintiff fails the balancing test. To be successful on the motion, the plaintiff must show that he suffered or will suffer harm and that the public importance of pursuing the defamation action outweighs the public importance of weeding out actions targeted by the legislation.

[69] Counsel for Mr. Kinsella concedes that spreading malicious falsehoods about the leader of a political party is not something that should be condoned and would not be the kind of discourse

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[20] I note that Mr. Bernier alleges ongoing malice by Mr. Kinsella towards him and also towards his counsel during the conduct of this litigation.

the legislation was intended to protect. That is not this case. This is not a case of "false news" with no foundation in fact. Mr. Kinsella was basing his comments on actual positions taken by Mr. Bernier and on actual events. His language may have been distasteful and he may well have taken his rhetoric to extremes that would normally be defamatory, but even if that is so and even if there is no real prospect of a successful defence, this only gets the plaintiff to the balancing test in s. 137.1 (4) (b).

[70] At that point the plaintiff must show the motion judge a causal connection between the defamation and actual harm that is disproportionate to the harm the statutory provision is intended to protect against. That is muting of free speech on issues of public interest.

[71] Mr. Bernier cannot demonstrate any harm flowing from Mr. Kinsella's publications. Although he alleges that he lost his seat because of "dirty tricks" launched by the CPC and considers the hiring of the Daisy Group to be one of those tricks, there is no evidence by which it can be concluded Mr. Kinsella's efforts caused that harm. In cross examination, Mr. Bernier conceded that it is unlikely that more than a handful of his constituents know who Mr. Kinsella is or read comments written in English on his blog or even in the National Post. In any event, proving cause and effect would be virtually impossible.

[72] Mr. Bernier's real target appears to be the CPC. He deposes that Project Cactus, which he defines as the party paying Mr. Kinsella to blacken his name, was part of a series of dirty tricks including running the other Maxime Bernier in his seat and planting candidates in the PPC who then renounced their candidacy voicing objection to PPC policies and positions. There is no evidence in the material to support these allegations against the CPC, but if the party was behind those measures then anything Mr. Kinsella had to say could not have influenced the voters in Beauce by comparison.

[73] There is another factor. As the evidence shows, widespread characterization of Mr. Bernier and the PPC as racist and xenophobic or at least as pandering to those elements of the political spectrum was rife in the media. Comparisons with Donald Trump, Nigel Farage or Marine LePen were widespread. Mr. Kinsella may have approached his task with particular caustic enthusiasm, but, at worst, Mr Kinsella's postings can be seen as a drop of vitriol in a sea of criticism.

[74] Prior to the first of the Kinsella references to Mr. Bernier and the PPC, the "maverick politician" "anti-immigrant stance", and the "far right PPC" had already been the focus of much critical comment and even scorn in the mainstream English language press. As the court stated in *Pointes, "*evidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm".[21] In defamation actions, harm can be presumed, but that presumption does not apply in a motion under s. 137.1.

Conclusion

[21] *Pointes, supra*, @ para. 72

[75] In conclusion, pursuant to s. 137.1 of the *Courts of Justice Act*, this proposed defamation action must be dismissed. The plaintiff cannot demonstrate that his action falls within the exceptions in s. 137.1 (4).

[76] If counsel have not made an agreement concerning the costs of this motion or are unable to do so within the next 30 days, I may be spoken to on costs.

Mr. Justice C. MacLeod

Date: November 10, 2021

CITATION: Bernier v. Kinsella et al., 2021 ONSC 7451
COURT FILE NO.: CV-20-82717
DATE: 2021/11/10

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: MAXIME BERNIER, Plaintiff (Responding Party)

AND:

WARREN KINSELLA, DAISY CONSULTING GROUP INC. and DAISY STRATEGY GROUP, Defendants (Moving Parties)

BEFORE: Regional Senior Justice Calum MacLeod

COUNSEL: David Shiller, for the Defendants (Moving Parties)

André Marin and Mark Bourrie, for the Plaintiff (Responding Party)

DECISION AND REASONS

Regional Senior Justice C. MacLeod

Released: November 10, 2021