Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

EZRA LEVANT

APPLICANT
(Appellant)

and

KHURRUM AWAN

RESPONDENT
(Respondent)

MEMORANDUM OF ARGUMENT OF THE APPLICANT EZRA LEVANT

(Pursuant to Section 40 of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

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NOTICE OF APPLICATION
OF THE APPLICANT EZRA LEVANT

(Pursuant to Section 40 of the *Supreme Court Act*
and Rule 25 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Applicant, Ezra Levant, hereby applies for:

(a) an order granting leave to appeal to this Court, pursuant to subsection 40(1) of the *Supreme Court Act* from a judgment of the Ontario Court of Appeal, dated December 22, 2016, dismissing an appeal from the Ontario Superior Court of Justice;

(b) such further or other orders that this Court may deem appropriate.

AND TAKE FURTHER NOTICE that this Application for leave to appeal is made on the following grounds:

(a) Should a finding of malice no longer be able to defeat a valid defence of fair comment in defamation cases in Canada? Should malice only be considered when determining whether a person could honestly hold the opinion expressed by the defendant, similar to how courts in the U.K. and New Zealand apply the "honest opinion" defence?

(b) Is it correct in law for a trial judge to find malice against a defendant where there is no finding of actual malice by the defendant toward the plaintiff himself? Can a defendant's malice or ill will against someone other than the plaintiff be transferred to a plaintiff for purposes of finding malice?

(c) When considering the defence of fair comment in the context of a blog post, if a defendant describes a plaintiff as a "liar," is that an expression of opinion or comment, and not a statement of fact? Should a court take into account the full context of publication when making that determination?

(d) Should aggravated damages be abolished in defamation cases, in accordance with the recommendation of Ontario's Law Reform Commission?

DATED AT TORONTO, this 21st day of February, 2017

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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to

appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

APPLICANT'S MEMORANDUM OF ARGUMENT

PART I - ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

Overview

1. Ezra Levant ("Levant") seeks leave to appeal to this Court from the decision of the Ontario Court of Appeal. The Court of Appeal upheld a decision of the Ontario Superior Court of Justice, awarding Khurrum Awan ("Awan"), the plaintiff at trial, general and aggravated damages for defamation arising from online blog posts published by Levant.

2. This case concerns serious issues of free speech and freedom of expression in Canada. If the judgments in the courts below stand, they will have the effect of chilling discussion on important matters of public interest, particularly political speech, and undermine the important principles governing the defence of fair comment, as set out by this Court in *WIC Radio Ltd. v. Simpson* (*"WIC Radio"*).

3. As this Court noted in *WIC Radio,* courts should avoid "an overly solicitous regard for personal reputation" to avoid the risk of chilling "freewheeling debate on matters of public interest":

> When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.[1](emphasis in original)

4. The trial judge and Court of Appeal made critical errors on three important issues of defamation law, and the defence of fair comment in particular:

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[1] *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 (CanLII) at para. 15, http://canlii.ca/t/1z46d,

(a) They incorrectly found that the defendant was motivated by malice or animosity against a third party, which malice or animosity was transferred to the plaintiff. They further found that the animosity Levant felt toward the third party defeated a valid defence of fair comment regarding Levant's opinion that the plaintiff was an "anti-Semite," published on his personal blog. The unreasonable and incorrect decisions in the courts below on this issue illustrate why a finding of malice should not be permitted to defeat a fair comment defence, and should only be relevant to a court when considering whether a person could honestly express the opinion in question, based on proved facts. That is the approach that courts in the U.K. and New Zealand take when applying the "honest opinion" or fair comment defence and Canada should do the same;

(b) They incorrectly found that when the defendant referred to the plaintiff as a "liar" on his personal blog, it was a statement of fact and not an expression of opinion. The courts below failed to take into account the full context of publication when making this assessment, resulting in an unduly restrictive interpretation of what constitutes comment or opinion, contrary to the important rights of freedom of expression enshrined in the *Charter*;

(c) They improperly awarded aggravated damages, resulting in "double counting" of damages for the plaintiff. Aggravated damages are not appropriate in defamation cases.

5. The above-noted errors by the Courts below are a matter of public importance because, if they are not corrected, they will have a significant impact on the scope of the defence of fair comment and the ability of Canadians to express their honestly held opinions on important matters of public interest.

Background to Human Rights Complaints

6. On October 23, 2006, Maclean's magazine published an article titled, "The Future Belongs to Islam," which was an excerpt from a book by Mark Steyn titled *America Alone* (the "Article"). The sub-headline summarized the central theme of the Article: "The Muslim world has youth, numbers and global ambitions. The West is growing old and enfeebled, and lacks the will to rebuff those who would supplant it. It's the end of the world as we've known it."

7. Awan was a law student at the time and was offended by the Article. He and three other law students decided to take action. The students contacted various Muslim organizations for support, and ultimately decided to work with the Canadian Islamic Congress ("CIC").

8. Awan had prior involvement with the CIC. He had served as its Youth Chapter President, written papers, and testified before government committees on behalf of the CIC. He had also received a scholarship from the CIC, in exchange for performing 150 hours of community service for the CIC

9. The four law students, including Awan, arranged to meet with senior editors at Maclean's on March 30, 2007 to discuss their objections to the Article. In attendance along with the students were Julian Porter, Q.C., counsel for Maclean's, Ken Whyte, Editor-in-Chief, and Mark Stevenson, Deputy Editor.

10. At the meeting, the students outlined their concerns with the Article, requested that Maclean's make a "substantial donation" to a charity related to race relations, and publish a rebuttal article of equal prominence and length as the original Article by a credible, well-known, and prominent Muslim.

11. The Editor-in-Chief Whyte ("Whyte") disagreed with the students' characterization of the Article and told them that Maclean's had already published numerous letters regarding the Article. The meeting ended abruptly when Whyte stated that he would rather go bankrupt than publish an article by an author of the students' choice.

12. In late April, the students did not feel their concerns had been addressed and they launched a series of human rights complaints. This decision was controversial and resulted in significant criticism of the students in the media. Many commentators believed that the Article was well-

suited to public dialogue and if the students were concerned about its contents, they should have entered that dialogue.

13. The complaint to the Ontario Human Rights Commission was prepared by Awan and alleged that the Article defamed and discriminated against Muslims. Virtually identical complaints were filed shortly after with the Canadian Human Rights Commission and the BCHRT, by Dr. Mohamed Elmasry, who was the president of the CIC (the students were not formally complainants in those two complaints). The CIC and Dr. Elmasry were known for espousing anti-Semitic views.[2] In particular, Dr. Elmasry made a televised statement in 2004 suggesting that all adult Israelis were valid targets of violence.

14. On December 4, 2007, the CIC issued a press release announcing the human rights complaints. On the same date, counsel for the students and Dr. Elmasry in the Ontario and B.C. human rights complaints spoke at a press conference about the failed attempt to resolve the issue with Maclean's. He said that the students were seeking equal space to respond to what they perceived as an Islamophobic article.

15. On December 5, 2007, in response to press release and press conference, Whyte released a statement indicating that Maclean's was willing to consider a reasonable request for a response by the law students, but did not consider their proposal for an article written by an author of their choice to be a reasonable request at the meeting in March.

16. On December 7, 2007, the students and CIC responded by issuing a press release stating that the law students had asked Maclean's to publish a "balanced response from a mutually acceptable author" and that Whyte's account of what they requested was "a complete fabrication."

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[2] See articles by Dr. Elmasry and transcript of TV appearance, Application Record, Tab 6

17. In the following months, Awan co-authored six press releases, letters-to-the-editor, or op-ed pieces for newspapers that discussed the meeting at Maclean's. These articles repeatedly stated that the students proposed that Maclean's publish a rebuttal article by a *mutually agreeable author*, and that they only filed human rights complaints after the magazine rejected this proposal.

B.C. Human Rights Tribunal Hearing

18. Both the Ontario and Canadian Human Rights Commissions decided against proceeding with the complaints. The BCHRT held a hearing, but it dismissed the complaint.

19. The BCHRT hearing took place from June 2 to 6, 2008. The witnesses who testified for the complainants were Awan, one of the complainants (Dr. Habib), and three expert witnesses. Dr. Elmasry, who was also a complainant, did not testify.

20. Like the Article itself, the BCHRT hearing and human rights complaints themselves garnered significant media attention and were highly controversial. Many commentators criticized the complaints and BCHRT hearing as an attempt to stifle free speech.[3]

21. Levant attended the first two days of the BCHRT hearing. He "live blogged" the hearing by reporting on the proceedings and injecting his own running commentary and colourful analysis into his blog posts. The nine Levant blog posts in question at trial, along with dozens of others he posted from the hearing (almost 100 in total), included numerous opinions and commentary by Levant about what he witnessed in the courtroom, in addition to other events related to the human rights complaints.

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[3] Application Record, Tab 7, various media articles and editorials

22. Levant is known as an outspoken political commentator with strong and sometimes controversial views. At the time of the hearing, Levant was also known to be a harsh critic of human rights commissions. His magazine, the Western Standard, had been the subject of two complaints under Alberta human rights legislation, both of which were ultimately dismissed.[4]

23. During Awan's testimony at the BCHRT hearing on June 3, 2008, he directly contradicted the version of events of what occurred at the Maclean's meeting that he and the other law students had been proclaiming in their press releases, letters, and op-ed pieces over the previous six months. Under cross-examination at the BCHRT hearing, Awan acknowledged that the law students never made an offer of a "mutually agreeable author" at the Maclean's meeting.[5] This acknowledgment was a complete reversal of what Awan and the other students had been stating publicly about the meeting for six months – that they had requested Maclean's publish a rebuttal to the Article by a "mutually agreeable author."

24. Levant was astonished to hear this testimony. Since he was aware of the various letters and op-ed articles written by Awan and the other law students that explicitly stated that a mutually agreeable author had been offered by them at the Maclean's meeting, Levant concluded that Awan must have been lying about what was offered at the Maclean's meeting when he co-wrote those letters and op-ed articles. It was a logical and reasonable inference to make under the circumstances. As a result, he expressed his opinion in his blog posts that Awan lied.

Trial and Appeal Decisions

25. With respect to Levant's reference to Awan as a "liar" in his blog posts, the trial judge concluded the following, which was upheld by the Court of Appeal:

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[4] Application Record, Tab 4, Court of Appeal Reasons, para. 30
[5] Application Record, Tab 8, excerpt of transcript of testimony of Khurrum Awan at BCHRT hearing, pp. 331-332

> [T]he reasonable reader of this blog post would regard the use of the words "liar" and "lie" as statements of fact. Quite simply, they are stated as fact. They are stated as fact in a purported report of an ongoing hearing. Those words are not recognizable as comment in the blog post, readily distinguishable from facts, as would be required to assert that they are comment. Further, while the use of "opinion-like" words such as "in my view" or "I come to the conclusion that" are not determinative, it is relevant that there are no such words in this blog post.

26. The trial judge further found that Levant's defence of fair comment with respect to calling Awan a "liar" failed because she found that Levant was motivated by express malice against Dr. Elmasry, and that he viewed the respondent and Dr. Elmasry "for all intents and purposes, as one and the same."

27. The trial judge awarded $50,000.00 in general damages to Awan, plus another $30,000.00 for aggravated damages. The trial judge cited the following factors to justify an increased award of aggravated damages:

a) the respondent's injury was increased because of the malice;

b) the repetition of the word "liar" in the headlines of the blogs and the fact that the headlines would show up in Internet searches by potential employers;

c) the references to lying in later blogs and including hyperlinks in the eighth blog back to the others;

d) the failure to correct errors; and

e) the fact that Levant was a lawyer himself made him more aware of the serious ramifications of his allegations on the professional reputation of the respondent.

28. The Court of Appeal upheld the trial decision, but disagreed on the trial judge's characterization that the blog post that referred to Awan as an "anti-Semite" was a defamatory statement of fact, which was not proven true at trial. The Court of Appeal found that the trial judge erred in that finding and held that the reference to "anti-Semites at the Canadian Islamic Congress" was an opinion and subject to the fair comment defence, however the Court of Appeal agreed that the defence was defeated by malice.

29. The Court of Appeal upheld the aggravated damages award, even though it acknowledged that there was overlap between the factors the trial judge considered under both general and aggravated damages, and there was a risk of double recovery by Awan. Justice Feldman's reasons state:

> I agree that some of the listed factors were also the factors that founded the award of general damages, such as calling the respondent a liar, and doing so in the headlines, and the effect on his job prospects because of Internet dissemination. However, some overlap was contemplated by Cory J. in Hill. The trial judge made no error by awarding $80,000 to fully compensate the respondent for the damages she found that he suffered from the malicious conduct of the appellant, whether the amount included for aggravated damages is viewed separately or as part of the general damages award.

PART II - STATEMENT OF QUESTIONS IN ISSUE

30. This Application for Leave to Appeal gives rise to the following questions:

(a) Should a finding of malice no longer be able to defeat a valid defence of fair comment in defamation cases in Canada? Should malice only be considered when determining whether a person could hold the opinion expressed by the defendant, similar to how courts in the U.K. and New Zealand apply the "honest opinion" defence?

(b) Is it correct in law for a trial judge to find malice against a defendant where there is no finding of actual malice by the defendant toward the plaintiff himself? Can a defendant's malice or ill will against someone other than the plaintiff be transferred to a plaintiff for purposes of finding malice?

(c) When considering the defence of fair comment in the context of a blog post, if a defendant describes a plaintiff as a "liar," is that an expression of opinion or comment, and not a statement of fact? Should a court take into account the full context of publication when making that determination?

(d) Should aggravated damages be abolished in defamation cases, in accordance with the recommendation of Ontario's Law Reform Commission?

PART III - ARGUMENT

31. The SCC stated in *WIC* Radio, "we live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones." Professor Brown notes in his leading Canadian text, *Brown on Defamation*:

> The basis of our public life is that the crank, the enthusiast, may say what he or she honestly thinks as much as the reasonable person who sits on a jury. A comment may be framed in the strongest terms. A story teller may add a little touch of the piquant pen. He or she may resort to ridicule, sarcasm, and invective. There is no cause to complain merely because the commentator is foolish, obstinate, biased, prejudiced, or wrong, or the comment are vitriolic, vehement, rude, severe, pungent, extravagant, extreme, embarrassing, exaggerated, or even fantastic, or they are expressed in colourful language, or the tone is cynical, or unnecessarily discourteous. A court generally will not consider whether the commentary is well founded or reasonable . . . The opinion expressed may be considered completely wrong headed by every other person acquainted with the facts and circumstances.[6]

32. Or as Justice Binnie put it in *WIC Radio,* "w[e] live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones."[7]

33. In *Slim v. Daily Telegraph Ltd.*, Lord Denning M.R. stated: "[T]he right of fair comment is one of the essential elements which go to make up our freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements."[8]

34. In the same decision, Lord Diplock noted:

> It would be an evil day for free speech in this country if this kind of controversy on a matter of public though local interest were discouraged by the fear that every word written to be read in haste should be subjected in a court of law to minute linguistic analysis of the kind to which these letters have been subjected on this appeal.[9]

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[6] *Brown on Defamation*, Ch. 15, pp 15-75 to 77
[7] *WIC Radio*, *supra* at para. 4
[8] *Slim v. Daily Telegraph Ltd.*, [1968] 2 Q.B. 157 at 170 (C.A.)
[9] *Slim, supra* at 179

35. Similarly, it would be an evil day for free speech in Canada if individuals like Levant are not allowed to express their honestly held opinions about controversial issues of significant public interest, but instead are subjected to excruciating linguistic analysis, like Levant's blog posts were subjected to by the trial judge.

Fair Comment Defence

36. In *WIC Radio,* the SCC outlined the following elements of the defence of fair comment, more correctly referred to as "honest opinion":

> (a) the comment must be on a matter of public interest;
>
> (b) the comment must be based on fact: " '[t]he comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made.' Brown, vol. 2, p. 15-36, and *Gatley on Libel and Slander* (10th ed. 2004), at para. 12.12. What is important is that the facts be sufficiently stated or otherwise be known to the listeners that listeners are able to make up their own minds on the merits of Mair's editorial comment."[10]
>
> (c) the comment, though it can include inferences of fact, must be recognizable as comment;
>
> (d) the comment must satisfy the following objective test: could any one person honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice.

Malice Should Not Defeat a Fair Comment Defence

37. In *WIC Radio*, this Court held that to satisfy the fair comment defence, there is a requirement to prove objective honest belief and that a defendant's subjective motive of malice can defeat a defence of fair comment. The Appellants submits that both of those elements

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[10] *WIC Radio*, supra at para. 4

impose undue restrictions on free speech in Canada and this Court should revisit those requirements of the fair comment defence.

38. In 2013, the United Kingdom reformed English defamation law by passing the *Defamation Act 2013*. Significantly, that Act simplified the defence of fair comment (now called "honest opinion") by removing any reference to malice. Instead, the Act states that "The defence [fair comment] is defeated if the claimant shows that the defendant did not hold the opinion". Under the new U.K. law, a defence of honest opinion will succeed as long as the basis of the opinion is indicated and the opinion is one that an honest person could hold, based on a fact that existed at the time. The defence of honest opinion can no longer be defeated by the plaintiff establishing that the defendant was motivated by malice. It can only be defeated if the plaintiff can show that the defendant did not hold the opinion expressed.

39. Similarly, in New Zealand, the *Defamation Act 1992* also codified the defence of "honest opinion" so that malice can no longer defeat the defence. Once a statement has been found to be an opinion, a defence of honest opinion will only fail if the opinion expressed was not the defendant's genuine opinion. The issue of malice is still relevant but only when assessing the genuineness of the opinion:

> The type of evidence used to challenge the genuineness of a defendant's opinion will probably be similar to that used to show malice at common law. Malice traditionally referred to a defendant's improper motive in publishing the defamatory material, which would defeat a defence of fair comment. The term has long been derided as imprecise and too far removed from ordinary usage.[11]

40. In *Tse Wai,* and prior to the enactment of the *Defamation Act 2013,* Lord Nicholls revised the law of English defamation by finding that a person's motive for making a comment (i.e. malice) was no longer relevant to a fair comment defence:

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[11] B. Marten, "A Fairly Genuine Comment on Honest Opinion in New Zealand" (2005), 36 V.U.W.L.R. 127

> [A] comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view he expressed. Honesty of belief is the touchstone. Actuation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not *of itself* defeat the defence. However, proof of such motivation may be evidence, sometimes compelling evidence, from which lack of genuine belief in the view expressed may be inferred."[12] (emphasis in original)

41. In its decision in *Spiller & Anor v Joseph & Ors,* the U.K. Supreme Court noted the importance of Lord Nicholls' ruling in *Tse Wai*:

> Lord Nicholls broke new ground in holding that malice in the context of fair comment had a different meaning from malice in the context of qualified privilege. In the former context, the motive for making the comment was irrelevant. All that mattered was whether or not the commentator honestly believed in the truth of his comment. This was an evolution of the view that Lord Nicholls had expressed in Reynolds at [2001] 2 AC 127, 201:
>
> > "Freedom of speech does not embrace freedom to make defamatory statements out of personal spite or without having a positive belief in their truth".
>
> The authors of Gatley, 11th ed, comment, at para 12.25:
>
> > "Formerly, it was widely believed that the idea of malice was essentially the same in fair comment [as in qualified privilege] and that the cases were essentially interchangeable. It has now been demonstrated that this is incorrect."
>
> The last sentence is a remarkable tribute to the standing of the Court of Final Appeal of Hong Kong and, more particularly, of Lord Nicholls.
>
> In holding that not even spite or ill-will constituted malice, Lord Nicholls [2001] EMLR 777, [2000] HKCFA 35, para 48 once again returned to his fourth proposition:
>
> > "Thus, the comment is one which is based on fact; it is made in circumstances where those to whom the comment is addressed can form their own view on whether or not the comment was sound; and the comment is one which can be held by an honest person."[13]

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[12] *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777, [2000] HKCFA 35, at para. 75, http://www.hklii.hk/eng/hk/cases/hkcfa/2000/35.html

[13] *Spiller & Anor v Joseph & Ors* [2010] UKSC 5, at paras. 67-69, http://www.bailii.org/uk/cases/UKSC/2010/53.html

42. In light of the defence of fair comment in the U.K. and New Zealand, the Applicant submits that this Court should revisit the issue of whether malice should play any role in defeating a defence of fair comment, if all other elements of the defence are satisfied.

43. The trial judge's findings of malice in this case illustrate how illogical the concept of malice is when assessing a defence of fair comment. Malice should only be relevant when assessing whether a person could honestly believe the opinion expressed, and should not defeat a defence of fair comment on its own.

44. As the U.K. Supreme Court noted in *Reynolds v. Times Newspapers Ltd* about the defence of fair comment "The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it."[14]

45. In reconsidering the role of malice in the fair comment defence, this Court should also adopt the requirements of the defence, as set out by the concurring judgments of Justices LeBel and Rothstein in *WIC Radio* – the defence of fair comment should only require the defendant to prove (a) that the statement constituted comment, (b) that it had a basis in true facts and (c) that it concerned a matter of public interest.

46. Furthermore, the trial judge too quickly found malice by Levant, which was upheld on appeal, without examining his honest belief when he referred to the "anti-Semites" at the CIC, including Awan. Judges should be slow to conclude that a defendant had an improper motive unless they are also satisfied that he or she did not have an honest belief in what was published.

47. In addition, the trial Judge made a finding of malice solely based on Levant's animosity and ill will toward Dr. Elmasry, who was not a party to the proceedings. The trial judge erred

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[14] *Reynolds v. Times Newspapers Ltd and Others* [1999] UKHL 45, http://www.bailii.org/uk/cases/UKHL/1999/45.html

again by concluding that Levant made a finding of malice that defeated on an unusual basis. The trial judge found that Levant transferred his animosity toward Dr. Elmasry to Awan, and such ill-will against Dr. Elmasry was Levant's dominant motive in publishing the blog posts about Awan. Neither the trial judge nor the Court of Appeal cited any legal authority to support the trial judge's finding that a defendant's ill will toward someone other than the plaintiff can be a basis to find malice against the defendant.

48. In the case of *Ironworkers Local 97 of The International Assn. of Bridge v. Campbell*, the B.C. Supreme Court rejected the argument that malice directed at a third party by the defendant in relation to defamatory words was not sufficient to make a finding of malice. The Court noted that, "The plaintiff concedes that the malice necessary to negate the defences of qualified privilege and fair comment must be directed toward the plaintiff itself."[15] In light of the conflicting case law on this issue, this Court should clarify the law of malice on this issue, particularly in the context of political speech.

References to Awan as a "Liar" Were Opinion, Not Statements of Fact

49. With respect to the third element of the defence (letter (c) above), a court must first determine whether a statement is presented as fact or as comment. A court must examine the totality of the circumstances and the context in which the remarks were made, including the language used, the medium in which it was circulated, and cautionary terms that were used, and the audience to whom it was published.[16]

50. Merely because an opinion appears in the form of a factual statement may not be critical if it is made clear from the context and understood by those to whom it was spoken, that it was meant

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[15] *Ironworkers Local 97 of The International Assn. of Bridge v. Campbell*, 1997 CanLII 1379 (BC SC), at para.46
[16] *WIC Radio, supra,* and *Brown*, at ch. 15, pps. 15-38, 15-40 and 15-87.

only as a comment on facts already stated or known. An explicit allegation of fact may be treated as comment if it would be understood by readers, not as an independent imputation, but as an inference from other facts stated or otherwise known by readers.[17]

51. Professor Brown's text states the following on the issue of inferences of fact qualifying as comments:

> Under these circumstances, the comments which are protected by the defence include not only expressions of opinion evaluating the facts upon which the comment is made, but also any deductions or conclusions in the guise of an assertion of fact which reasonably may be inferred. Inferences of fact drawn from factual material set out in the body of an article may be treated as a matter of opinion and protected by the defence of fair comment.[18]

52. Referring to someone as a "liar" is a value judgment that necessarily constitutes an opinion, not a factual statement. Unless a plaintiff admits to lying, it is virtually impossible to prove as a fact that plaintiff lied because the very definition of lying is deliberately deceiving someone by knowingly stating a falsehood. Therefore, proving that a plaintiff lied requires an understanding of what that plaintiff knows as a fact and his/her subjective intentions when making statements. No one except the plaintiff knows that information and whether there was any intention to deceive.

53. A number of cases have found that comments, inferences, or conclusions similar to Levant's assessment that Awan lied, have been held to be comment.[19]

54. A critical issue in the trial judge's reasons was her finding that Levant's descriptions of Awan as a "liar" in his blog posts were statements of fact. Unfortunately, neither the trial judge

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[17] *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60, at paras. 35-36
[18] *Brown*, ch. 15, pp. 15-43 to 44
[19] *Keays v Guardian Newspapers Ltd. & Ors* [2003] EWHC 1565 (QB). See also: *British Chiropractic Association v Singh* [2010] EWCA Civ 350; *Vellacott v Saskatoon Starphoenix Group Inc,* 2012 SKQB 359 (CanLII) http://canlii.ca/t/fssrf ; *Mitchell v Sprott* [2001] NZCA 343

nor the Court of Appeal examined the blog posts and the references to Awan as a "liar" in their proper context before making that determination. As Justice Binnie observed in *WIC,* "the cases establish that the notion of 'comment' is generously interpreted."

55. In its reasons, the Court of Appeal noted that, "calling someone a liar when discussing a matter of public interest or discourse would more likely be found to be a comment rather than a fact." Despite that statement, the Court of Appeal refused to correct the trial judge's error on that important issue because it was a finding of fact by the trial judge.

56. Reasonable readers of Levant's blog understood his comment that Awan lied was a conclusory opinion or inference, in light of what Awan and the other students had been saying about the Maclean's meeting in the media for months leading up to the BCHRT hearing. The trial judge and Court of Appeal failed to properly consider the medium that Levant used to publish his comments about the BCHRT hearing. They were published on his personal blog, which the Court of Appeal decision refers to as "an editorial blog." By their nature, personal blogs are used to primarily express opinions and be "editorial."

57. In another internet defamation case, *Baglow v. Smith,* an expert in "Internet social media, culture and communications," provided his opinions on the nature of blogs, and political blogs in particular.

> Blogs and bulletin boards are sought out by individuals looking for opinion and content not covered, or poorly covered by mainstream media . . . Dr. Elmer noted that bloggers and other online actors often hyperlink to documents, pictures and comments that "speak for themselves". Therefore, unlike mainstream media, there is much less need to provide background and summaries of the issues at hand. As a consequence discourse tends to focus more on opinion, argument, sarcasm and questions.[20]

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[20] *Baglow v. Smith,* 2015 ONSC 1175 (CanLII), at paras. 109-112

58. The *Baglow* decision also notes that Dr. Elmer's report stated that "blogger discourse tends to focus more on argument, opinion, sarcasm and questions."[21]

59. The method of publication and Levant's reputation as a provocative commentator on political issues are important factors to consider when assessing how reasonable readers of his blog would understand the comment that Awan lied. Levant is an outspoken and strong advocate for free speech. He has strong opinions on a variety of topics. He sometimes uses colourful language or even a derisive tone. Some may consider him to be offensive or rude in his comments and opinions. But his right to express those opinions and comments, however wrong-headed, outrageous, or extreme they may be must be protected under defamation law and the fair comment defence. Freedom of expression under the *Charter* must encompass a broad spectrum of opinions.

60. It was appropriate and well within the bounds of fair comment for Levant to deduce that Awan had been lying about the Maclean's meeting, prior to the hearing, whether or not Awan was lying or not, and whether or not he intended to deceive anyone about that.

61. If the trial judge's finding on this issue is not corrected, it will inhibit and chill political speech in Canada. There will be a risk that the wide latitude given to comments or opinions regarding important matters of public interest will be "whittled down by legal refinements," as Lord Denning warned in *Slim v. Daily Telegraph*. The characterization of what constitutes opinion must be given a liberal interpretation by examining the entire context of the statement, in order to avoid "an overly solicitous regard for personal reputation," as Justice Binnie cautioned in *WIC Radio*.

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[21] *Baglow, supra*, at para. 204

Aggravated Damages

62. The trial judge's award of aggravated damages was not appropriate as a separate head of damages because her award of general damages already took into account the conduct and motive of Levant, as well as aggravating circumstances. As a result, the award of aggravated damages resulted in "double counting" by the trial judge and double recovery by Awan. The trial judge failed to identity any specific evidence of increased mental distress or anxiety suffered by Awan to justify an award of aggravated damages, which is required to make such an award

63. Professor Brown makes the following comments about aggravated damages in defamation actions:

> It must be shown that the conduct of the defendant increased the injury to the reputation and feelings of the plaintiff and that the defendant acted improperly, unjustifiably and in bad faith. The conduct warranting an award of aggravated damages must reach the level of recklessness; ordinary negligence will not suffice . . aggravated damages are appropriate only where there is some emotional effect on the plaintiff caused by the defamatory publication . . Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. . . . These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct.[22]

64. There was no evidence at trial to establish that Levant's conduct increased the injury to the reputation or feelings of Awan. Awan did not provide any medical records at trial or any evidence regarding emotional effects caused by the blog posts.

65. As noted by the Court of Appeal in its reasons, the Ontario Law Reform Commission has recommended that aggravated damages be abolished, as Professor Brown notes:

> The Ontario Law Reform Commission, while not specifically referring to the law of defamation, has recommended the abolition of a separate award of aggravated

[22] *Supra, Brown* Ch. 25.3(1.1)

> damages. This recommendation should also be followed in actions for defamation, particularly in those jurisdictions which place no limitations on the award of punitive damage. A separate award of aggravated damages is a pernicious development in the law; it is absurd in theory and mischievous in practice. The award and decision of the Supreme Court in Hill v. Church of Scientology of Toronto provides the strongest possible argument in favour of the Commission's recommendations. Almost every criteria identified by the court in justification of the separate award of aggravated damages are precisely the same criteria identified by courts generally as the basis upon which a jury may make an award of general compensatory damages. In fact, in reviewing these criteria and upholding the $300,000 award of general damages, the court listed in *Hill* almost precisely the same factors that led it to approve the award of aggravated damages.[23]

66. Although the Court of Appeal noted "this potential for overlap and therefore double counting is controversial and has led some to call for the abolition of separate awards of aggravated damages in defamation actions," it did not interfere with the trial judge's award of aggravated damages because "by awarding $80,000 to fully compensate the respondent for the damages she found that he suffered from the malicious conduct of the appellant, whether the amount included for aggravated damages is viewed separately or as part of the general damages award."

67. In light of the risk of "double dipping" and fact that this Court has not addressed the issue of aggravated damages in a defamation case since the 1995 decision of *Hill v. Church of Scientology of Toronto*, it is a matter of public importance for this Court to provide guidance on the desirability and appropriateness of aggravated damages.

68. If permitted to stand, the award of aggravated damages will have a serious and detrimental impact on individuals who comment on matters of public interest and freedom of expression generally.

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[23] *Ibid*, See also *Brown v. Cole* (1998), 1998 CanLII 6471 (BC CA), 61 B.C.L.R. (3d) 1, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 614 and *Campbell v. Tremblay*, 2010 NLCA 62 (CanLII), 305 Nfld. & P.E.I.R. 1; see Ontario Law Reform Commission, *Report on Exemplary Damages* (Toronto, 1991) at pp. 27-30, 103

69. Defamation law should not be used to intimidate public opinion or restrict freedom of thought, but that will be the consequence of the trial and Court of Appeal judgments below, if they are not corrected by this Court.

PART IV - ORDER REQUESTED

70. The Applicant Levant respectfully requests an order granting him leave to appeal from the decision of the Court of Appeal to this Honourable Court.

PART V – ORDER CONCERNING COSTS

71. The Applicant respectfully requests costs on this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February, 2017.

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PART VI

TABLE OF AUTHORITIES

		Paragraph
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2.	*Baglow v. Smith,* 2015 ONSC 1175 (CanLII)	57, 58
3.	*British Chiropractic Association v Singh* [2010] EWCA Civ 350	53
4.	*Brown v. Cole* (1998), 1998 CanLII 6471 (BC CA), 61 B.C.L.R. (3d) 1, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 614	65
5.	*Campbell v. Tremblay*, 2010 NLCA 62 (CanLII). 305 Nfld. & P.E.I.R. 1	65
6.	*Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60	50
7.	*Ironworkers Local 97 of The International Assn. of Bridge v. Campbell*, 1997 CanLII 1379 (BC SC),	48
8.	*Keays v Guardian Newspapers Ltd. & Ors* [2003] EWHC 1565 (QB)	53
9.	*Mitchell v Sprott* [2001] NZCA 343, [2002] 1 NZLR 766 (CA)	53
10.	Ontario Law Reform Commission, *Report on Exemplary Damages* (Toronto, 1991)	65
11.	Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed., looseleaf (Toronto: Carswell, 2011)	31, 51, 63, 65
12.	*Reynolds v. Times Newspapers Ltd and Others* [1999] UKHL 45	44
13.	*Slim v. Daily Telegraph Ltd.*, [1968] 2 Q.B. 157 at 170 (C.A.)	33, 34, 61
14.	*Spiller & Anor v Joseph & Ors* [2010] UKSC 5, at paras. 67-69	41

15.	*Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777, [2000] HKCFA 35	40
16.	*Vellacott v Saskatoon Star Phoenix Group Inc,* 2012 SKQB 359 (CanLII)	53
17.	*WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 (CanLII)	2, 3, 32, 36, 37, 45, 49, 51, 54, 61

PART VII – STATUTUTORY PROVISIONS

***Defamation Act 2013*, 2013 Ch. 26 (United Kingdom)**

Defences

3. Honest opinion

(1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.

(2) The first condition is that the statement complained of was a statement of opinion.

(3) The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—
(a) any fact which existed at the time the statement complained of was published;
(b) anything asserted to be a fact in a privileged statement published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.
(7) For the purposes of subsection (4)(b) a statement is a "privileged statement" if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—
(a) a defence under section 4 (publication on matter of public interest);
(b) a defence under section 6 (peer-reviewed statement in scientific or academic journal);
(c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege);
(d) a defence under section 15 of that Act (other reports protected by qualified privilege).

(8) The common law defence of fair comment is abolished and, accordingly, section 6 of the Defamation Act 1952 (fair comment) is repealed.

Defamation Act 1992 **(New Zealand)**

Part 2
Defences

Honest opinion

9. Honest opinion
In proceedings for defamation, the defence known before the commencement of this Act as the defence of fair comment shall, after the commencement of this Act, be known as the defence of honest opinion.

10. Opinion must be genuine
(1) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is the author of the matter containing the opinion shall fail unless the defendant proves that the opinion expressed was the defendant's genuine opinion.

(2) In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is not the author of the matter containing the opinion shall fail unless,—

(a) where the author of the matter containing the opinion was, at the time of the publication of that matter, an employee or agent of the defendant, the defendant proves that—

(i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant; and

(ii) the defendant believed that the opinion was the genuine opinion of the author of the matter containing the opinion:

(b) where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that—

(i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and

(ii) the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.

(3) A defence of honest opinion shall not fail because the defendant was motivated by malice.

11. Defendant not required to prove truth of every statement of fact
In proceedings for defamation in respect of matter that consists partly of statements of fact and partly of statements of opinion, a defence of honest opinion shall not fail merely because the

defendant does not prove the truth of every statement of fact if the opinion is shown to be genuine opinion having regard to—

(a) those facts (being facts that are alleged or referred to in the publication containing the matter that is the subject of the proceedings) that are proved to be true, or not materially different from the truth; or

(b) any other facts that were generally known at the time of the publication and are proved to be true.

Compare: 1954 No 46 s 8

12. Honest opinion where corrupt motive attributed to plaintiff

In any proceedings for defamation in which the defendant relies on a defence of honest opinion, the fact that the matter that is the subject of the proceedings attributes a dishonourable, corrupt, or base motive to the plaintiff does not require the defendant to prove anything that the defendant would not be required to prove if the matter did not attribute any such motive.

EZRA LEVANT
Applicant
(Appellant)

-and-

KHURRUM AWAN
Respondent
(Respondent)

Court File No.

SUPREME COURT OF CANADA

PROCEEDING COMMENCED AT
TORONTO

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