File No.: 37453

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)

RESPONSE OF THE RESPONDENT KHURRUM AWAN

(Pursuant to Section 40(1) of the *Supreme Court Act* and Rule 27 of the *Rules of the Supreme Court of Canada*)

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TABLE OF CONTENTS

MEMORANDUM OF ARGUMENT

RESPONDENT'S MEMORANDUM OF ARGUMENT

PART I – ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

Overview

1. The only issue on an application for leave to appeal is whether the appeal raises a question of public or national importance that should be decided by the Supreme Court of Canada. This case concerns the application of settled law to an archetypal factual situation. While it touches upon issues of free speech and freedom of expression in Canada and the proper consideration of those rights in the context of defamation actions, the questions it raises have been authoritatively decided by this Court in *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420. This proposed appeal raises no new issues requiring the intervention of this Honourable Court.

2. Rather than identifying an error of law or an issue of national importance which would allow this Court to overturn the judgement of the Ontario Court of Appeal, the Applicant (**Mr. Levant**) invites the Court to revisit settled law in three out of the four questions he has identified (questions (a), (b) and (d)). In question (c) Mr. Levant asks this Court to find that both the trial judge and the Ontario Court of Appeal erred by failing to consider the "full context" of the publication when determining whether his description of the Respondent (**Mr. Awan**) as a "liar" was an expression of opinion and not a statement of fact. Upon examination of both decisions, this assertion cannot be sustained. Both courts expressly consider the "context" of the publication, but Mr. Levant is simply dissatisfied with the outcome of that consideration.

Relevant Facts

3. In October 2006, an article appeared in Maclean's magazine entitled "The Future Belongs to Islam" (**Steyn article**).[1]

4. At the time, the Respondent was a student at Osgoode Hall Law School and he was a member of a group of law students who felt the Steyn article was Islamophobic. Because of their concerns, the students met with Maclean's editor-in-chief, Ken Whyte, and his counsel, Julian Porter on March 30, 2007.[2]

5. The two crucial factual issues that arose from the Maclean's meeting were (i) whether the student group requested a "mutually agreeable" author write a counter piece to the Steyn Article and (ii) whether the students requested a $10,000 charitable donation.[3]

6. Following the Maclean's meeting, the student group launched human rights complaints.

7. An additional complaint was brought before the BC Human Rights Tribunal (**BCHRT**) by the Canadian Islamic Congress (**CIC**), and two of its members, Dr. Elmsary and Dr. Habib. A senior litigator at Lerners LLP in London by the name of Faisal Joseph represented the complainants *pro bono*.

8. Prior to the hearing, Mr. Joseph held a press conference and specifically spoke about the failed attempts by the students to resolve the issues with Maclean's and that the complainants were

[1] Reasons for Decision, para. 7, Application for leave to appeal ("ALA"), Tab 2.
[2] Reasons for Decision, paras. 9-12 and 17, ALA, Tab 2.
[3] Reasons for Decision, paras. 18-32, ALA, Tab 2.

seeking an article published with equal space to respond to what the CIC and the students considered to be an Islamophobic and unfair article by Mr. Steyn.[4]

9. In response to that press conference, Mr. Whyte issued a statement indicating that Maclean's had been willing to consider a reasonable response when he met with the student group. The student group was quite surprised to learn of the public statement by Mr. Whyte, as they did not recall any mention of an offer of a reasonable response by him during their meeting.[5]

10. As a result, they wrote several letters-to-the-editor stating that they had offered to resolve the matter by way of an article being written by a mutually acceptable author at the meeting with Maclean's and were again renewing their offer. Maclean's did not accept the offer and the matter proceeded to a hearing at the BCHRT on June 3, 2008.

11. Mr. Levant attended only the first two days of the hearing. It is his view that Dr. Elmasry is an anti-Semite and he sought, through his blog posts, to taint both Mr. Awan and the CIC with the brush of anti-Semitism by asserting that Mr. Awan was very closely associated to Dr. Elmasry and the CIC when he had no evidence to support that assumption.[6]

12. The trial evidence showed that Mr. Joseph took his instructions from Dr. Elmasry and not any of the students. Further, Mr. Joseph developed all trial strategies and did so without the input of the students.

[4] Reasons for Decision, para. 38-41, 46, 47, ALA, Tab 2.
[5] Reasons for Decision, para. 42, 43, ALA, Tab 2.
[6] Reasons for Decision, para. 83, ALA, Tab 2.

13. When the hearing took place, Mr. Joseph had two of the students, Ms. Mithoowani and Ms. Sheikh, assist him.[7]

14. Mr. Awan testified during the first two days of the hearing. For almost the entire time he was in the hearing room, he was in the witness box. Once his testimony was complete, he did not return until the end of the hearing and at that point it was simply to meet with the students to go for dinner.

15. The clear evidence of Mr. Awan, Mr. Joseph and Ms. Mithoowani was that Mr. Awan was not involved in the running of the hearing. He only testified.[8]

16. Mr. Porter attended the meeting with Maclean's and the students in 2007, and acted as counsel to Maclean's at the hearing. He suggested to Mr. Awan during cross-examination that the student group never asked for a mutually acceptable author during the meeting despite their numerous letters to the editor saying they did. Mr. Awan's response was that the students never had a chance to make that offer during the meeting.[9]

17. Following his testimony and immediately after he left the hearing room, Mr. Awan was confronted by Ms. Sheikh who told him that she had, in fact, made such an offer at the meeting. Mr. Awan candidly admitted during his trial testimony that he had no recollection of that offer being made and he realized his error only based on the advice of Ms. Sheikh.[10]

[7] Reasons for Decision, para. 61, ALA, Tab 2.
[8] Reasons for Decision, paras. 58-68, ALA, Tab 2.
[9] Reasons for Decision, para. 69, ALA, Tab 2.
[10] Reasons for Decision, para. 70, ALA, Tab 2.

18. It is the cross-examination of Mr. Awan that led Mr. Levant's first post "Khurrum Awan is a serial liar". The following six posts all had the headline, "Awan the liar".[11] Mr. Levant focused his entire attention on Mr. Awan.

19. The trial judge dealt extensively with the question of whether Mr. Levant could avail himself of the defence of justification for labelling Mr. Awan a liar or if it was fair comment to do so.

20. Mr. Levant argued that he has a reputation as one who tends to "stir controversy and make outlandish comments at times"[12] and is a "troublemaker", so no one would really believe that he was labelling Mr. Awan a liar. The trial judge found that ordinary right-thinking people would look at the statements made by Mr. Awan as being defamatory.[13]

21. The trial judge recognized that there are some forms of speech that can readily be recognized as unbelievable but found that the statements made by Mr. Levant in this case did not fit into that category.[14]

22. With respect to the first blog post entitled, "Khurrum Awan is a serial liar", the trial judge found that most of the post was factually inaccurate. The post reads as follows:

> **Khurrum Awan is a serial liar**
>
> Julian Porter himself was at the meeting where Khurrum Awan and his junior Al Sharptons tried to shake down Ken Whyte and Maclean's for cash and a cover story.
>
> Porter asked point blank if the CIC's proposed "counter-article" was to be "mutually acceptable" to Whyte or of the CIC's own choosing.
>
> After obfuscating for a few rounds, Awan acknowledged that he never in fact offered a "mutually acceptable" article -- that was simply an after-the-fact lie, a little bit of taqqiya that Awan et al. has told

[11] Reasons for Decision, para. 71, ALA, Tab 2.
[12] Reasons for Decision, para. 79, ALA, Tab 2.
[13] Reasons for Decision, para. 82, ALA, Tab 2.
[14] Reasons for Decision, paras. 88-90, ALA, Tab 2.

> the press.
>
> Awan admitted that he made no such offer of a mutually acceptable author. It was to be the CIC's own choice.

23. The trial judge had the benefit of a transcript from Mr. Awan's testimony at the hearing. First, Mr. Porter never asked Mr. Awan "point blank" if the counter-article was to be mutually acceptable to Mr. Whyte or to be of the CIC's own choosing. In fact, the CIC was never mentioned in the question. Second, Mr. Awan did not testify that the author of the counter-piece to the Steyn article was supposed to be chosen by the CIC or the students. Third, the post falsely informs the Mr. Levant's readers that it was Mr. Awan who never proposed to Maclean's that there would be a mutually acceptable author. It was the student group who made the offer. The trial judge pointed out that there were no statements by Mr. Awan personally regarding the offer of a mutually acceptable author.[15]

24. The trial judge found that a reasonable reader of the blog post would conclude that the use of the words "liar" and "lie" were statements of fact and that "quite simply, they are stated as fact … in a purported report of an ongoing hearing". Her Honour pointed to the failure of Mr. Levant to use qualifier statements such as "in my view" but also recognized that such a failure was not determinative of the issue. The trial judge also pointed to the fact that the word "liar" was in the headline and that many people simply read headlines. The headline itself would often be the only result on a Google search related to the blog posts. This reinforced Her Honour's view that the use of the word "liar" was a statement of fact.[16]

[15] Reasons for Decision, paras. 119-121, ALA, Tab 2.
[16] Reasons for Decision, paras. 123-125, ALA, Tab 2.

25. The trial judge found that Mr. Levant failed to establish that any of the student group, including Mr. Awan, had made a deliberately incorrect statement. Given the failure on the part of Mr. Levant to establish the factual underpinnings for the statement that Mr. Awan was a liar, the Trial Judge also concluded that, in the event that the statements could be seen as comment, the fair comment defence failed.[17] It necessarily followed that the use of the word "taqqiya" was defamatory as well given that it was directly related to the false allegation of a lie.[18] Furthermore, by using that term, Mr. Levant attributed specific motivations to Mr. Awan for the alleged lie.[19]

26. The second blog post is entitled, "Awan the liar, part 2":

> **Awan the liar, part 2**
>
> Now Porter is showing Awan various letters that Awan sent to Maclean's. The fool was stupid enough to put his shakedown demands in writing.
>
> And Porter is showing that Awan demanded that Maclean's submit to the CIC's choice. No "mutually acceptable" anything. That qualifier was added later by the Liar, to appear more reasonable to the Gentile press.
>
> It reminds me of Yasser Arafat, who would preach peace when speaking in English to Western journalists, and preach terrorism to his own constituency when speaking in Arabic.
>
> That's Awan: reasonable to the media; a junior Al Sharpton when dealing with Ken Whyte.
>
> No wonder Awan had trouble finding employment following his clerkship.[20]

27. The entire post is riddled with factual errors. Not one of the letters contains wording "demanding that Maclean's submit to the CIC's choice". The letters do not even refer to the CIC or the issue of who would author a proposed article. There was no reference to money in any of the letters thus no "shakedown demands in writing". Crucially, Mr. Levant had made no effort to

[17] Reasons for Decision, para. 127, ALA, Tab 2.
[18] Reasons for Decision, para. 128, ALA, Tab 2.
[19] A Muslim tactic to spread deception through fraud.
[20] Reasons for Decision, para. 137, ALA, Tab 2.

even look at the letters before posting his second blog. His failure to do so "was characteristic of the lack of fact-checking with respect to the posts complained of in this action."[21]

28. By stating, "[n]o wonder Mr. Awan had trouble finding employment following his clerkship", Mr. Levant labelled Mr. Awan incompetent, unethical, and not fit to be a lawyer.[22] The evidence showed that Mr. Awan did not have trouble finding employment following his clerkship. He was hired as an articling student at Lerners in Toronto and was about to start that job.[23]

29. The third blog post is entitled, "Awan the liar part 3". The actual post does not refer to any lies by Mr. Awan thus the title is clearly defamatory and cannot possibly be an opinion of Mr. Levant.

30. The fourth blog post is entitled, "Awan the liar, part 4". It reads as follows:

> **Awan the liar, part 4**
>
> Awan wrote a letter to a Rogers executive Brian Segal. It was part of his Sharptonian adventure in shaking down Rogers.
>
> Bad idea. It didn't work. I met Segal yesterday. He comes across as a gentleman businessman, but I get the feeling he's good with a bowie knife.
>
> Segal didn't pay a dime.
>
> But that's not why Awan's letter was so stupid.
>
> It was stupid because now we have a written track record of Awan's shakedown. It's being read back to him in court. He's being asked where the phrase "mutually agreeable" exists. It doesn't.
>
> Now Awan is trying to explain away that lie. Uh, it isn't working. I'd go with the crying strategy.

31. Again, the factual errors that were plain in the first and second blog posts are present in the fourth post. Mr. Levant references a "written track record" that did not exist.

[21] Reasons for Decision, paras. 139-140, ALA, Tab 2.
[22] Reasons for Decision, para. 138, ALA, Tab 2.
[23] Reasons for Decision, para. 141, ALA, Tab 2.

32. The fifth blog post is entitled, "Awan the liar, part 5" and only the portion where Mr. Levant calls Mr. Awan a liar once again was at issue and was found to be defamatory.

33. The sixth blog post is entitled, "Awan the liar, part 6" and the Court found several defamatory statements were contained in that post which reads, in part, as follows:

> **Awan the liar, part 6**
>
> …
>
> Let me sum up for you, dear reader, who are not here to watch a junion [sic] would-be lawyer try to explain to a court why he is a serial, malicious, money-grubbing liar.
>
> Khurrum Awan went in demanding cash and editorial control. Then he realized that doesn't look good in a liberal democracy like Canada. So he edited the truth.
>
> He amended what he said. He lied.
>
> And lied and lied and lied.
>
> And kept lying.
>
> He smeared Ken Whyte. He smeared Maclean's. He smeared Rogers. And that damn fool thought he'd get away with it. He was so brazen that he thought he'd even call himself as a witness.
>
> Julian Porter has earned his fee today.

34. Mr. Levant not only calls Mr. Awan a liar and a dishonest and deceptive person, but he explains that the reason for lying was that it did not "look good in a liberal democracy".[24] The Court concluded that Mr. Levant failed to prove this allegation at trial. Further, he made the false statement that Mr. Awan "was so brazen that he thought he'd even call himself as a witness".[25] Mr. Levant never established that Mr. Awan had any say in what witnesses would be called and, had he spoken to Mr. Joseph, he would have learned that fact.

35. The seventh blog post is entitled, "Awan the liar, part 7" and again alleges that Mr. Awan is a liar and takes the defamation a step further:

[24] Reasons for Decision, para. 151, ALA, Tab 2.
[25] Reasons for Decision, para. 149, ALA, Tab 2.

> **Awan the liar, part 7**
>
> …
>
> Porter is now reading out a written demand by the sock puppets for "substantial" monies.
>
> ***Awan is denying the documentary record.*** [emphasis added]

36. The allegation that Mr. Awan "is denying the documentary record" is a complete fabrication by Mr. Levant as the transcript clearly showed that Mr. Awan did not deny any documentary record.[26]

37. Approximately one year following the hearing, Mr. Levant posted an eighth blog entitled, "Khurrum Awan the liar, part 8". It is lengthy and contains many defamatory statements.[27]

38. Mr. Levant again calls Mr. Awan a liar and emphasizes that the reason for his lies is to further radical Islamic objectives by means of the tactic known as "taqqiya". Mr. Levant also calls Mr. Awan an anti-Semite:

> One of the reasons I enjoyed blogging from that trial was that it was the first time that the anti-Semites at the Canadian Islamic Congress had to face cross-examination for their conduct. Their anti-Semite-in-chief, Mohamed Elmasry -- who had boasted on national TV that all adult Israelis were legitimate targets for terrorist murders -- refused to take the witness stand, the coward. But bizarrely, his young protégé, a Toronto law student named Khurrum Awan, took the stand in his place.[28]

39. For the first time, he accused Mr. Awan of being in a conflict of interest:

> …
>
> P.S. At Steyn's trial last year, Awan was revealed to be a non-party, non-expert, no-standing witness. And it was more bizarre than that. Awan was not only a stand-in witness for Elmasry -- he was co-counsel for Elmasry, along with Faisal Joseph.
>
> Could you imagine: someone's lawyer (or articling student, to be more accurate), being a "witness" for his client, too? It's the definition of conflict of interest.

[26] Reasons for Decision, paras. 154-155, ALA, Tab 2.
[27] Reasons for Decision, paras. 154-155, ALA, Tab 2.
[28] Reasons for Decision, para. 155, ALA, Tab 2.

> And then take that conflict of interest to the power of two: when Awan was testifying, he was being led by Faisal Joseph, Elmasry's other lawyer (and co-counsel with Awan). And – here's the gorgeous part -- Awan testified that he was going to go to work for Joseph at his firm, as a lawyer.

40. The factual assertions to prove a conflict of interest were fatally flawed. The evidence at trial showed that Mr. Awan was not called instead of Dr. Elmasry but was called to testify about what transpired at the Maclean's meeting. Further, the trial evidence showed that it was Mr. Joseph's decision alone to call Mr. Awan as a witness. Moreover, Mr. Joseph did not hire Mr. Awan to work at his firm and had not offered Mr. Awan a job.[29]

41. It was also false to state that Mr. Awan was co-counsel. Mr. Levant relied solely on the fact that he recalled Mr. Awan sitting at the counsel table at some point in time but could not specify how much time he spent at the counsel table. The trial judge concluded, based on the evidence before her, that Mr. Awan, before the hearing commenced, might have been "briefly at the counsel table helping with photocopies."[30]

42. The factual underpinnings necessary for a fair comment defence to apply to the allegations that Mr. Awan was an anti-Semite and in a conflict of interest were absent. The sole reason for the allegation that Mr. Awan is anti-Semitic was his connection to Dr. Elmasry and the CIC. However, Mr. Levant directly accused Mr. Awan of being an anti-Semite.[31]

43. Following service of the statement of claim, Mr. Levant posted his ninth blog, which is entitled, "Mark Steyn's would-be censor sues me -- and I'm going to fight back". Mr. Levant again calls Mr. Awan a "shakedown artist" and refers to him as a friend of "the notorious anti-Semite Greg Felton". The ninth blog post also contains the following words:

[29] Reasons for Decision, para. 160, ALA, Tab 2.
[30] Reasons for Decision, paras. 161-162, ALA, Tab 2.
[31] Reasons for Decision, para. 166, ALA, Tab 2.

> Let me quote a Jew now, just because it will irritate Awan. As Justice Louis Brandeis wrote nearly 100 years ago, "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." I'm going to bring some klieg lights to trial on this one.
>
> I believe that nothing will disinfect our public square better than scrutiny and publicity of how illiberal Islamic fascists are waging war against our values. I hope that the lasting impact of this trial will be the complete and final detonation of the CIC's credibility.
>
> …
>
> …And I certainly don't want this suit to change what I say or do in my life, especially my ability to criticize radical Islam and its politically correct allies.[32]

44. Mr. Levant described Mr. Awan as a "friend of notorious anti-Semite Greg Felton." Mr. Levant called Mr. Felton to testify. His evidence revealed that he was clearly anti-Semitic and did not even know Mr. Awan.[33] Furthermore, Mr. Levant directly calls Mr. Awan an anti-Semite by alleging that he would become irate by the simple fact of Mr. Levant quoting a Jewish judge. However, Mr. Levant did not establish on the trial evidence that Mr. Awan was or is an anti-Semite.[34]

45. With respect to the phrase "illiberal Islamic fascists are waging war against our values", the trial judge concluded that Mr. Levant did not hold an honest belief that Mr. Awan was a fascist and that using that phrase was not simply "vulgar abuse or an insult" and was understood to mean to a reasonable person that Mr. Awan has extreme, intolerant views.[35]

46. The trial judge found "ample evidence" that Mr. Levant was motivated by express malice as he had strongly held animus toward Dr. Elmasry and regarded Mr. Awan and Dr. Elmasry "for all intents and purposes, as one and the same." The trial judge found that Mr. Levant's ill-will toward Dr. Elmasry was visited upon Mr. Awan and was the ulterior motive for the defamatory

[32] Reasons for Decision, para. 169, ALA, Tab 2.
[33] Reasons for Decision, para. 171, ALA, Tab 2.
[34] Reasons for Decision, para. 166, ALA, Tab 2.
[35] Reasons for Decision, paras. 172-176, ALA, Tab 2.

statements.[36] In other words, Mr. Levant had ill-will towards Mr. Awan and it was the dominant motive for the defamatory statements.

47. Further, "his repeated failure to take even basic steps to check his facts showed a reckless disregard for the truth." Accordingly, the trial judge found that where the defence of fair comment had prevailed it was defeated by Mr. Levant's two-fold malice.[37]

48. The trial judge awarded Mr. Awan $50,000 in general damages and emphasized that Mr. Awan was at a vulnerable stage in his career at the time of the defamatory statements and they impacted on his ability to find a job. The trial judge also pointed to the fact that the defamatory statements were extremely serious as they "go to the heart of the plaintiff's reputation as a lawyer and as a member of this society."

49. Finally, the trial judge determined that the malicious conduct of the appellant increased the injury to Mr. Awan. As a result, he was awarded $30,000 in aggravated damages.[38]

PART II – STATEMENT OF THE QUESTIONS IN ISSUE

50. Has the Applicant identified a question that ought to be decided by the Court because of its public or national importance?

PART III – STATEMENT OF ARGUMENT

51. This Application for leave to appeal identifies no errors necessitating the intervention of this Court and raises no questions of public importance that have not already been definitively decided by this Court. Mr. Levant submits that his proposed appeal gives rise to four questions:

[36] Reasons for Decision, para. 182, ALA, Tab 2.
[37] Reasons for Decision, paras. 183-189, ALA, Tab 2.
[38] Reasons for Decision, paras. 210-213, ALA, Tab 2.

(a) Should a finding of malice no longer be able to defeat a valid defence of fair comment in defamation cases in Canada?

(b) Can malice or ill will against someone other than the plaintiff be transferred to the plaintiff to find malice?

(c) Should a court consider the full context of publication when deciding that the defendant's description of the plaintiff as a "liar" is an expression of opinion or comment and not a statement of fact?

(d) Should aggravated damages be abolished in defamation cases?

52. For the reasons explained below, none of these issues warrant the intervention of this Honourable Court.

(a) Should Malice Defeat Fair Comment?

53. Mr. Levant asks this Court to revisit a settled Canadian legal principle in *WIC Radio*—that malice defeats a defence of fair comment in defamation cases—and completely depart from this precedent. Respectfully, there is no reason for doing so.

54. *WIC Radio* has been applied uniformly across the country since 2008. It has provided clarity, certainty and guidance to lower courts and has been interpreted consistently by appellate courts. There is no indication that courts are misinterpreting or misapplying this Supreme Court decision. These are the hallmarks of a good decision. Mr. Levant is asking this court to revisit this decision without good reason. Departing from a precedent of this Court "is a step not to be lightly undertaking."[39] While "compelling reasons"[40] might permit such a departure, Mr. Levant has failed

[39] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII), [2011] 2 S.C.R. 3, at para. 56.
[40] *R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, at para. 44.

to articulate any national or public interests that would compel the departure from *WIC Radio*; the only interests served by revisiting this settled law are those of Mr. Levant.

55. Moreover, as Mr. Levant is raising this issue on appeal for the first time before this Court, this is not the proper case in which to consider whether this precedent should be overturned. There is an insufficient record to determine the impact that this substantial change in law would have on the present case. Mr. Levant asks that this Court change the law such that malice would only be considered when determining whether a person could hold the opinion of the defendant. In the present case, the lower courts relied on and properly applied settled law in making their determinations.

56. Mr. Levant's Memorandum of Argument has articulated no reason to revisit the question of whether malice defeats fair comment other than a statutory change of law in the UK and the identification of a different approach in New Zealand. Respectfully, the Supreme Court of Canada has never adopted the unwise practice of revisiting recently settled law following either a change in the law in another country or the identification of a disparate legal approach in a foreign jurisdiction. Mr. Levant has not identified any conflicting Canadian appellate authority or other circumstances that would require this Court's intervention. Moreover, the changes that Mr. Levant points to from foreign jurisdictions are legislative—they do not arise from the high courts of those countries. This demonstrates that such changes, if appropriate, shoul be left to the Parliament of Canada.

57. While Mr. Levant posits that the settled legal principle in *WIC Radio* is an error and that if not corrected, would 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,[41] this is simply not true. The reality is that it is more difficult to establish liability in defamation cases now than ever before. A recent empirical study on defamation actions in Canada shows that plaintiffs established liability much more often from 1973-1983 than from 2003-2013.[42] This empirical research shows that Canadian courts—and the precedents they consistently apply—have become more sensitive overtime to the significance of free expression and its importance in a free and democratic society when determining defamation actions. Contrary to Mr. Levant's submissions, there is no threat to free expression brewing below the surface.

(b) Can Malice be Transferred?

58. First, this issue is unique to Mr. Levant and is not of national or public importance. He points to no trend in defamation cases where courts have found malice based on a transference of ill-will. Compounding the problem for Mr. Levant is that the trial judge found malice on a second basis independent of the finding of fact that Mr. Levant held ill-will towards Mr. Awan. The trial judge found that his failure to fact-check or correct errors he knew to be present in his publications amounted to recklessness and, therefore malice. Mr. Levant takes no issue with this finding in his Memorandum of Argument.

59. Mr. Levant states in his Memorandum of Argument that the Court should clarify the law related to malice because of conflicting decisions on the issue.[43] However, he only cites one decision from the British Columbia Supreme Court from 1997 to support his assertion that there is "conflicting case law on this issue."[44] That decision has no bearing on the case at bar. In

[41] Memorandum of Applicant, para. 5, ALA, Tab 5.
[42] Young, Hilary, The Canadian Defamation Action: An Empirical Study (June 30, 2016). Available at SSRN: https://ssrn.com/abstract=2802787 or http://dx.doi.org/10.2139/ssrn.2802787
[43] Memorandum of Applicant, para. 48, ALA, Tab 5.
[44] Memorandum of Applicant, para. 48, ALA, Tab 5.

Ironworkers Local 97[45], the court simply found that the defendants did not target the plaintiff (a union) with their publication but had ill-will towards the provincial government – a non-party to the litigation. The court undertook the common inquiry of whether the words were directed at the plaintiff and whether there was malicious intent directed by the defendant at the plaintiff. Here, the trial judge found that Mr. Levant displayed ill-will towards Dr. Elmasry and, as he did not testify at the hearing and Mr. Awan did, he chose to defame Mr. Awan instead and direct his ill-will at him. The trial judge conclude that such conduct amounted to an ulterior motive and amounted to actual malice. The trial judge found that Mr. Levant acted maliciously towards Mr. Awan specifically.

60. The factual findings and conclusions of malice found by the trial judge and confirmed by the Ontario Court of Appeal are accordingly not novel and do not raise issues of national or public importance such that leave on this issue should be granted.

(c) Should a court consider the full context of publication when deciding that the defendant's description of the plaintiff as a "liar" is an expression of opinion or comment and not a statement of fact?

61. Both the trial judge and the Ontario Court of Appeal directed their attention to the issue of whether Mr. Levant's numerous statements that Mr. Awan was "a liar" were factual assertions or merely honestly held opinions. The trial judge made a factual finding, based on the record before her, that the accusations were statements of fact. However, even if they were opinions, the trial judge was of the view that Mr. Levant had no factual basis for his opinion. Essentially, Mr. Levant labelled Mr. Awan a liar where he had no intention to deceive.

[45] *Ironworkers Local 97 of The International Assn. of Bridge v. Campbell*, 1997 CanLII 1379 (BC SC).

62. Mr. Levant takes the position that the courts below failed to consider his blog posts in their proper context. He fails, however, to point to any portion of either judgment to establish his point. The trial judge carefully considered the words complained of, their context and tone when determining whether the defamatory words were stated as facts or opinions. Mr. Levant's real complaint (see paragraph 55 of his Memorandum of Argument) is that the Court of Appeal gave deference to the trial judge on her findings of fact. Given that Mr. Levant cannot point to any palpable or overriding errors of fact in the trial judge's reasons, appellate intervention on this issue was not warranted.

63. At paragraph 61 of his Memorandum of Argument, Mr. Levant argues that if the Court does not grant leave and correct the trial judge, it will have the result of chilling political speech in Canada and an abandonment of the caution Justice Binnie mentioned in *WIC Radio* that we should avoid "an overly solicitous regard for personal reputation."

64. However, the findings of the trial judge set no precedent. Her Honour carefully considered *WIC Radio* and applied its reasoning to her findings of fact.[46]

65. There is no issue of national or public importance being advanced by Mr. Levant, just a desire to have a second appellate court hear the exact same argument he made that was rejected by the Court of Appeal. He then adds in a floodgates argument that somehow free speech will be in peril if the findings of the trial judge are not overturned. Mr. Levant does not offer any compelling argument that the issue transcends him. The simple fact is that Mr. Levant left his journalistic integrity by the side of the road when he decided to report on Mr. Awan's sworn testimony before the BC Human Rights Tribunal.

[46] See for example paragraphs 122-124 of the trial judge's reasons where she instructs herself on the *WIC Radio* test and applies that test to her findings of fact.

(d) Should aggravated damages be abolished in defamation cases?

66. The trial judge's award of aggravated damages was well reasoned and she turned her mind to the analysis set out in *Hill v. Church of Scientology*.[47]

67. The trial judge made a finding of fact that Mr. Levant's malicious conduct increased Mr. Awan's damages. Her Honour pointed to many findings of fact based on the "ample testimony of the plaintiff in that regard":

> a. That Mr. Levant repeatedly accused Mr. Awan of being a liar in his numerous false and defamatory blog posts;
> b. That Mr. Levant titled his blog posts "Awan, the Liar" which amplifies the damage because of their impact on internet searches of Mr. Awan's name;
> c. That Mr. Levant repeatedly failed to address errors in his blog posts (which remained published for more than five years despite his knowledge that there were errors;
> d. When Mr. Levant was served with the Notice of Libel, a document specifically designed to give a defendant the opportunity to mitigate the damage he has caused to the plaintiff, he decided to further the defamation and ridicule Mr. Awan. He even compounded the damage in another blog post after the statement of claim was issued which required Mr. Awan to amend his statement of claim to plead the further libels;
> e. That Mr. Levant is a lawyer and was, for many of the blog posts, purporting to report from a hearing room, concerning a legal proceeding;
> f. Given his training as a lawyer, he was well aware of the impact of such serious allegations on a law student – allegations that go to the heart of the integrity of a lawyer.[48]

68. In their analysis of the aggravated damage award, the Court of Appeal addressed the issues raised by Mr. Levant in this leave application. In assessing Mr. Awan's argument that the aggravated damages were duplicative, the Court of Appeal outlined the factors set out by Justice Cory in *Hill* and turned their minds to the fact that some double counting may occur and is

[47] Reasons for Decision, paras. 204 and 205, ALA, Tab 2.
[48] Reasons for Decision, paras. 207-211, ALA, Tab 2.

permissible.[49] Clearly, the trial judge applied the appropriate test and considered the correct factors when assessing whether aggravated damages should be awarded and in what amount.

69. Mr. Levant complains that there was no medical evidence introduced by Mr. Awan at trial to establish the emotional impact of the defamation upon him. There is no requirement that medical evidence is submitted, rather, there is a requirement that evidence is led and accepted by the trial judge that a plaintiff has suffered emotionally from the defamatory words. The trial judge concluded, based on the evidence of Mr. Awan, that the emotional effect of the defamation caused damage to him and warranted the imposition of aggravated damages.

70. Mr. Levant has offered no studies or empirical data to show that awarding aggravated damages is problematic and that this Court should revisit its decision in *Hill* where, on the issue of aggravated damages, the Court was unanimous.

PART IV – SUBMISSIONS IN SUPPORT OF ORDER SOUGHT CONCERNING COSTS

The Respondent seeks an order that he receive the costs of this application.

PART V – ORDER SOUGHT

The Respondent seeks an order that the application for leave be dismissed with costs payable to him.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, Ontario, this 24th day of March, 2017.

Justin Power

Brian Shiller

Counsel for the Respondent

[49] Reasons for Decision, paras. 102-105, ALA, Tab 2.

PART VI – TABLE OF AUTHORITIES

Document	*Paras cited*
Caselaw	
Ironworkers Local 97 of The International Assn. of Bridge v. Campbell, 1997 CanLII 1379 (BC SC).	59
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