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(Winnipeg Centre)

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**COURT OF KING'S BENCH OF MANITOBA**

**B E T W E E N:**

MANITOBA MÉTIS FEDERATION, and	)	<u>David F. Sutherland, K.C.</u>
MANITOBA MÉTIS FERDATION INC.	)	<u>Murray N. Trachtenberg</u>
and DAVID CHARTRAND,	)	<u>Genevieve Y. Benoit</u>
	)	for the plaintiffs
plaintiffs,	)	
	)	
- and -	)	
	)	
MÉTIS NATION BRITISH COLUMBIA,	)	<u>Robert B. Cohen</u>
and MÉTIS PROVINCIAL COUNCIL OF	)	for the defendants
BRITISH COLUMBIA, and MÉTIS	)	
NATION BRITISH COLUMBIA TRUSTEE	)	
CORPORATION, and LOUIS DE JAEGER,	)	
	)	
defendants.	)	
	)	JUDGMENT DELIVERED:
	)	December 5, 2023

**PERLMUTTER A.C.J.**

**INTRODUCTION**

[1] In this defamation action, the plaintiffs move under *King's Bench Rule* 25.11(1) to strike out paragraphs of the statement of defence raising the defences of justification, fair comment, and qualified privilege on the ground that the required factual basis and particulars for proper pleading are not provided.

Alternatively, the plaintiffs seek further and better particulars of these defences. It is the defendants' position that each of these defences has been properly pleaded with sufficient particularity included in the statement of defence and particulars, which they say provide details of the impugned conduct relied upon by the defendants in support of their justification and fair comment defences as well as the defendants' duties to respond to such impugned conduct by publication of the words in question in support of their qualified privilege defence.

### **THE PLEADINGS**

[2] The statement of claim pleads that the plaintiff Manitoba Métis Federation which includes the plaintiff Manitoba Métis Federation Inc. (collectively, "MMF") is the democratic self-government of the Manitoba Métis, also known as the Red River Métis. The plaintiff David Chartrand is the elected leader and president of Manitoba Métis Federation and the president and chief executive officer of Manitoba Métis Federation Inc.

[3] The statement of defence pleads that the defendant Métis Nation British Columbia is the democratic government of the Métis Nation within British Columbia. The defendant Métis Nation British Columbia Trustee Corporation is operated by Métis Nation British Columbia. The defendant Métis Provincial Council of British Columbia (MPCBC) forms the administrative arm of Métis Nation British Columbia government. These entities are collectively referred to as "MNBC". MNBC is a governing member of Métis National Council (MNC) and recognized as the government of the Métis in British Columbia. The defendant Louis De Jaeger

is an elected director of MNBC and MPCBC and was the acting vice-president of MNBC.

[4] The defendants admit that on December 7, 2021, they posted on the MNBC Website under the title "Special Statement from Acting Vice-President" (the "special statement") a message in two forms, first, a YouTube video of De Jaeger stating the special statement verbatim and second, a verbatim transcript of the text. The words of the special statement (the "words") are included in the pleadings (para. 13 and schedule "A") with their alleged defamatory meanings (the "defamatory meanings") set out in the statement of claim (paras. 14 and 23), as follows:

14. In their plain and ordinary meaning or, in their intended or inferential meaning, the Words were intended to convey to the viewing public and the Words meant and were understood to mean that:
  - a. The MMF has created a B.C. Chapter for the sole and illegitimate purpose of disrupting MNBC to support the self-aggrandizing aspirations of MMF politicians and David Chartrand in particular;
  - b. The MMF and David Chartrand have created a franchise in B.C. by recruiting a former CEO and a former president of MNBC;
  - c. There is a consistent pattern that the MMF and David Chartrand are conspiring with allies to breach fiduciary duty, and do special favours for friends and insiders in the course of encroaching on the Métis governments in three other provinces;
  - d. It is embarrassingly clear that David Chartrand is intent on financial corruption by means of more and continued special favours for his friends and insiders;
  - e. The MMF and David Chartrand are hostile to, and intend harm to, the welfare of the Métis and their duly elected government;

- f. The MMF and David Chartrand are secretly and unfairly conspiring to funnel funds earmarked for support of Manitoba Métis to desirable salaries for co-conspirators in B.C.;
- g. The MMF and David Chartrand are secretly betraying the Métis in Manitoba;
- h. That the Plaintiffs are:
  - i. Illegitimate;
  - ii. Engaged in the singular purpose of disrupting government;
  - iii. Threatening self-government;
  - iv. Responsible for an MMF faction located in Golden, B.C.;
  - v. Unfairly diverting funds from Manitoba Métis;
  - vi. Lining pockets at expense of Métis people;
  - vii. Operating under false guise of doing good;
  - viii. Intending to hurt the Métis in B.C.;
  - ix. A disgrace to the Métis Nation broadly; and
  - x. Warranting denunciation.
- i. Actions by the Plaintiffs have caused an emergency warranting that worthy representatives of the MNBC speak out unanimously;
- j. The Plaintiffs are guilty of unending hostile dispute over control and of conspiring with others beyond the mandate of the Plaintiffs or any of their co-conspirators;
- k. That the Plaintiffs are guilty of harmful, odious antics to the detriment of all Métis;
- l. Such that all Métis citizens should denounce the Plaintiffs for doing political harm and causing suffering.

(hereinafter the "**Defamatory Meanings**")

....

- 23. In their plain and ordinary meaning, the materials, links, and the title of the website itself at MMFexposed.com meant and were understood to mean that:
  - a. The Words and the Defamatory Meanings were substantiated and true; and
  - b. The truth of the Defamatory Meanings was concealed by the Plaintiffs but is now exposed.

[5] The paragraphs of the statement of defence which the plaintiffs move to strike out or be provided with further particulars are as follows:

**The Words are justified**

31. In the alternative, if the Words are found to be defamatory (which is not admitted), the defendants plead that the Words are true in substance and in fact and are accordingly justified.
32. In particular, but without limitation, the Words contain accurate statements about the motives and actions taken by the plaintiffs and the BC Red River Métis Assn in their improper attempt to expand MMF's influence into British Columbia and to undermine, among others, MNBC, as well as the corresponding concern of the defendants.

**The Words are fair comment**

33. The defendants further plead that the Words, in whole or in part, consist of fair comment insofar as they contain opinions or comments based on facts, and were made in good faith and without malice upon matters which are of public interest.
34. The purpose of the Statement was to bring attention to the Métis community of the improper conduct of the plaintiffs, as described above. The Statement is a matter of public interest as it pertains to the legitimacy and status of MNBC in the Province of British Columbia, and the actions of the plaintiffs in attempting to usurp representation of the Métis and appropriate federal and provincial funding in British Columbia (and to correspondingly deprive MNBC of such funding).
35. Further, and as set out in the Proposal, the initial funding for the BC Red River Métis Assn is to be drawn from the coffers of MMF. It is, therefore, also in the public interest and the interest of MMF citizens specifically to be apprised of this inappropriate use of MMF funds.
36. These issues are important matters of public interest for the Métis peoples residing in British Columbia, and for Indigenous communities more broadly. The Statement was based on facts set out in the plaintiffs' and the BC Red River Métis Assn's own documents and public statements, includes the defendants' inferences derived therefrom, and contained genuinely and honestly held comments and opinions.

**The Words are subject to qualified privilege**

37. As set out above, the defendants owe a duty to the citizens of MNBC and to other Canadians to inform them about matters of concern to the Metis Nation. The actions by the plaintiffs and the BC Red River Métis

Assn strike at the heart of MNBC's legitimacy and purpose as the elected government of Métis peoples in the Province of British Columbia.

38. The defendants were accordingly morally and socially obligated to inform the citizens of MNBC and others about the aforesaid motivation and actions by the plaintiffs. Further, MNBC's citizens and others rely on and have an interest in receiving information about such issues from the defendants.

## **ANALYSIS**

[6] The plaintiffs' counsel submits that this motion was filed to avoid the "mess the discoveries [and trial] can get into, if the pleadings are not carefully drafted and settled" (*Del Zotto v. Canadian Newspapers Co.* (1990), 46 C.P.C. (2d) 179 (Master Sandler), paras. 9 and 11).

[7] In *Kazakoff v. Taft*, 2017 BCSC 66, Justice Funt described the defendant's obligation when pleading an affirmative defence in defamation pleadings (para. 30):

Raymond E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2d ed. (Toronto: Carswell, 1999) (loose-leaf updated 2013, release 1) vol. 7 sets forth a defendant's general obligations with respect to the pleadings at 19-155:

A positive case by way of defence must be made in the pleadings. If the defendant wishes to raise any defences in the statement of defence, he or she must do so expressly and plainly. Affirmative defences must be specifically alleged. A general denial is insufficient. ... The purpose of this requirement is to ensure that the plaintiff will be apprised of any defense that might defeat his or her cause of action. **A plaintiff is also entitled to have the pleadings by the defendant framed in such a way so that he or she can comprehend their scope and meaning and be adequately informed of the defenses that have to be met. The defendant's answer must set out the matter relied upon and inform the plaintiff of what he or she must be expected to meet in order to prevent surprise.**

"It is critically important for the plaintiffs to know what the defendants are saying and will seek to prove at trial." They must not be left "uncertain and confused." The general allegations against a plaintiff

must be sufficiently particularized as to enable him or her to know what charges the defendant proposes to make. Thus if the paragraphs of the defence are inappropriately arranged so that individual defences are confused and misplaced, the court may direct the defendant to amend and rearrange the paragraphs and group the separate defences under their appropriate heads. **If the allegations set out in the pleadings are unclear or, if clear, would not constitute any defence or justification if proved to be true, they will be struck out as embarrassing ...**

[Emphasis added]

[8] The foregoing is consistent with the following direction outlined in ***Sarrasin v. Sokal***, 2022 MBCA 67, by Simonsen J.A., albeit in considering the pleading requirements for a statement of claim in a defamation action (para. 35):

...Pleadings cannot be in the form of vague or general conclusions of law or fact. The material facts alleged should be sufficiently precise, clear, certain and specific that a defendant can be apprised of the nature of the claim.

[9] As also observed in ***Sarrasin***, “a determination of a preliminary motion to strike cannot be undertaken without regard to the ultimate question to be decided at trial” (para. 17).

### ***JUSTIFICATION***

[10] In ***Green v. Bush***, 2017 MBQB 83, Edmond J. (as he then was) referenced the following regarding the defence of justification (para. 38):

In ***Brown on Defamation***, the defence of truth or justification is described as follows (at p. 1-58):

A defendant may successfully defend an action for defamation if he or she can show that the defamatory publication is true. What is required is not the literal truth of each and every act in the publication, but only that the whole of the defamatory matter is substantially correct. The justification must meet the gist or sting of the charge.

[11] In ***British Columbia Society for the Prevention of Cruelty to Animals v. Stone***, 2009 BCSC 725, Fenlon J. referred to the following regarding

the particularity required in the context of a plea of justification (paras. 36 and 44):

As set out in Raymond E. Brown, *The Law of Defamation in Canada*, Vol. 3, 2nd ed. Looseleaf (Scarborough Ont.: Carswell, 1999) [Brown] at 20-21-22, citing, *Television New Zealand Ltd. v. Ah Koy*, [2002] 2 N.Z.L.R. 616 at 622 (C.A.), and *Barnes v. Sykes*, [1926] 3 W.W.R. 476, [1927] 1 D.L.R. 282 (Man. K.B.):

The purpose of particulars in the context of a plea of justification is to enable the plaintiff to determine the veracity of the allegations, inform him or her fully of the facts and circumstances relied on in support of the plea, require the defendant to vouch for the sincerity of those contentions, and confine the defendant at trial to that evidence consistent with the facts and circumstance in the particulars ... The plaintiff must be given the specific facts for instances upon which the defendant relied in support of his or her plea.

...

The test for sufficiency of the particulars is whether the plaintiff is able to identify in a reasonable way the incident described by the defendants. It will not be necessary in every case for the defendants to provide the exact date, place, name of employee, or name of animal, but enough of these details should be available to the plaintiff to put it in a position to investigate the allegation.

[12] Downard, Peter A., *The Law of Libel in Canada [Previously known as "Libel"]* 5<sup>th</sup> ed. (LexisNexis Canada Inc., 2022, September 2022) discusses the following regarding particulars of justification (p. 141):

The scope of the particulars required to support a defence of justification will turn upon the nature of the statement sued upon and the scope of the defamatory meaning asserted by the plaintiff...

...

Particulars of justification must be relevant, necessary and reasonably probative, in the sense that they must be capable of proving the truth of the defamatory sting to be justified. They should provide a succinct and clear summary of the essential facts relied upon by the defence, so that the plaintiff will know the precise nature of the defendant's case and have sufficient detail to be able to meet it...

See also, ***Makow v. Winnipeg Sun*** (2003), 172 Man.R. (2d) 213 (para. 61), aff'd (2004), 184 Man.R. (2d) 97 and ***Ministic Air Ltd.***

***v. Canadian Broadcasting Corp.*** (1995), 103 Man.R. (2d) 296 (Q.B.) (para. 21)

[13] It is the plaintiffs' position that the statement of defence and particulars do not identify the facts that the defendants say are true in their justification defence.

[14] The "gist" or "sting" of the charge is the alleged defamatory meanings (set out above). As described by the defendants' counsel in his submissions, broadly, the defendants allege that Mr. Chartrand and MMF set up with disgruntled former executives of MNBC a competing chapter in British Columbia after MMF and Mr. Chartrand left the federal organization MNC to compete.

[15] The statement of defence alleges "Chartrand and MMF were instrumental in the creation, development and propagation of the Red River Métis – British Columbia Association (the 'BC Red River Métis Assn')" and the "actions of the BC Red River Métis Assn and its creators, developers and agents were the impetus for the published 'Words'" (para. 7). The defendants plead the particulars of the underlying "Dispute between MMF, Chartrand and MNC" (paras. 8-12). The pleaded particulars include reference to the "Governance Litigation" (arising from a dispute at the MNC about the "National Definition" of Métis citizenship) and the "MNC September Meeting", prior to which the plaintiffs and others "engaged in communications and meetings in order to plan and coordinate their exit from MNC and to undermine the authority of MNC and its remaining governing members, including MNBC, going forward".

[16] The statement of defence pleads particulars of "MMF's Campaign to Undermine MNC and MNBC" (paras. 13-15). It pleads details of a "Priority and

Planning committee”, made up of Mr. Chartrand, Clement Chartier (former president and chief executive officer of MNC) and Clara Morin Dal Col (at the time president of MNBC, “until she was removed from office for breaching her fiduciary duty to MNBC in January 2021”), meeting in June 2017, to discuss a “phased plan for re-establishing the Métis Nation government in the historic Red River Settlement, now the city of Winnipeg” and “the headquarters of the Métis National government would be relocated from Ottawa to Winnipeg” (paras. 14 and 15). It is alleged that these “plans progressed until the withdrawal of MMF from MNC in September of 2021”. (para. 15). The defendants plead (paras. 16-25) particulars of “MMF’s Efforts to Expand into British Columbia” (as part of the plaintiffs’ alleged “efforts” to “undermine” MNC and MNBC), including:

- The “BC Red River Métis Assn submitted a funding proposal to MMF (the ‘Proposal’)” which “contains information about the BC Red River Métis Assn claiming to represent ‘true Métis’” in British Columbia, and “states that MMF is ‘the only recognized Métis government in Canada’” (para. 16).
- The Proposal “sets out the intention of the BC Red River Métis Assn to enter into a memorandum of understanding with MMF in order to seek funding from provincial and federal governments”, seeking “\$634,365 in funding payable to MMF to cover start-up and organizational costs for a period of 18 months” (para. 17).
- The BC Red River Métis Assn (whose “registered office” is in Golden, British Columbia) was “incorporated...on November 17, 2021 by Morin Dal Col and

Dale Drown...the former Chief Executive Officer of MNBC” and that Morin Dal Col and those others “listed as directors of the BC Red River Métis Assn” are “former MNBC elected officials or disgruntled former staff members of MNBC who are now collaborating and working with the plaintiffs’ efforts to expand into British Columbia to undermine both MNC and MNBC” (paras. 18 and 19).

- “MMF is soliciting Métis persons for citizenship who live outside of Manitoba, including individuals who reside in British Columbia. This campaign, dubbed the ‘Beyond Borders Task Force’ has... included widespread social media outreach, MMF postings disparaging MNC and its member governments and hosting events in British Columbia with the purpose of recruiting citizens. The messaging of the campaign ‘Return to Red River – Welcome Home’” (para. 20).

[17] The statement of defence also pleads (at paragraphs 21-25) that:

- “The creation of the BC Red River Métis Assn and its campaign to solicit members in British Columbia” are “part of MMF’s plan to seize power by poaching and undermining the legitimacy of MNC, and its governing members, including MNBC, in an effort by MMF to be recognized as the sole authority of a National Métis government” (para. 21);
- “MMF has a direct pecuniary interest in expanding its borders and soliciting memberships” (para. 22); and

- “MMF and Chartrand have made numerous public statements about controlling Métis governments outside of Manitoba” and since “at least October 2021...statements are live on the MMF website under the title “Manitoba Métis Federation – the National Government of the Red River Métis”, including the “MMF is the only officially recognized Métis Government in Canada” (at para. 23).

[18] Having carefully reviewed the statement of defence and related particulars, I am satisfied that the particulars of justification provide a succinct and sufficiently clear summary of the essential facts relied upon by the defendants such that the plaintiffs ought to be able to reasonably identify the precise nature of the defendants’ case, have sufficient detail to be able to meet it, and be in a position to investigate the allegations. The allegations in the statement of defence and particulars describe the nature of the dispute that allegedly led to the publication of the special statement and what the defendants plead as justifying the sting of the charge (the defamatory meanings). They refer to salient timeframes (including some specific dates) of events, communications, and individuals relating to this defence.

[19] The plaintiffs’ counsel also argued that the statement of defence ought to be struck out as the factual allegations would not constitute a defence. In my view, this argument descends into the merits of the defence in a manner that is beyond the relevant issue of whether, assuming the facts pled are true, it is “plain and obvious” that the defence is certain to fail while also recognizing the more

critical evaluation required in defamation pleadings (*Dennis v. The Attorney General of Canada et al.*, 2020 MBCA 118, para. 4; *Sarrasin*, paras. 25-26 and 34-35). It must be borne in mind that it is only material facts that are to be pled. Here, the statement of defence and particulars are sufficiently precise, clear, certain and specific that the plaintiffs can be apprised of the nature of the defence.

It must also be borne in mind that:

In general, statements drawing inferences and conclusions are not properly included in pleadings. Drawing conclusions engages argument and involves the application of the law to the facts -- which is a matter for a judge to assess. Rather, it is material facts that are to be pleaded... (*Sarrasin*, para. 29)

[20] Underscoring again that the justification must meet the gist or sting of the charge and it is the whole of the defamatory matter that must be substantially correct, it is my view that the material facts pleaded provide reasonable substantiation of the defence of justification.

### ***FAIR COMMENT***

[21] In *Hansman. V. Neufeld*, 2023 SCC 14, Karakatsanis J. enumerated the elements of the fair comment defence as follows (para. 96):

The fair comment defence has five elements. First, the "comment must be on a matter of public interest" (*Grant*, at para. 31). Second, it must be "based on fact" (para. 31). Third, "though it can include inferences of fact, [it] must be recognisable as comment" (para. 31). Fourth, it must satisfy an objective test: "could any person honestly express that opinion on the proved facts?" (para. 31). Finally, even if the above elements are met, "the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice" (para. 31). Consideration of the elements of the fair comment defence requires an assessment of the defamatory words used in the full context surrounding their use (*WIC Radio*, at paras. 55-56)...

[22] With respect to the issue of whether the expression was based on fact, Karakatsanis J. provided as follows (paras. 99 and 100):

To constitute fair comment, a factual basis for the impugned statement must be explicitly or implicitly indicated, at least in general terms, within the publication itself or the facts must be "so notorious as to be already understood by the audience" (*WIC Radio*, at para. 34). The defence is unavailable if "the factual foundation is unstated or unknown, or turns out to be false" (para. 31).

There is, however, no requirement that the facts *support* the comment, in the sense of confirming its truth (para. 31). The expression must relate to the facts on which it is based, but the comment need not be a reasonable or proportionate response (paras. 39, 51 and 59). The purpose of this element is not to measure the fairness of expression, but to ensure the reader is aware of the basis for the comment to enable them "to make up their own minds" as to its merit (para. 31).

[23] Downard wrote as follows regarding the pleading of fair comment (p. 291):

The facts which must be proven to be true or privileged are the essential facts upon which the comment is based, which go to the "pith and substance of the matter".

[24] The plaintiffs' counsel submits that the statement of defence and particulars do not identify what facts are apparent to the reader of the special statement or listener of the video to make clear the "contradistinction" to the opinion, such that the opinion is fair comment. That is, the defendants have not appropriately pleaded fair comment because they have not pleaded the facts on which the comment is based such that it is known and apparent to the reader or listener what is to be viewed as fact or opinion.

[25] It is the defendants' position that the facts upon which the comments are based are found in both the words of the special statement itself and also detailed in the statement of defence and particulars (described above in reference to the justification defence).

[26] The statement of defence pleads "...the Words, in whole or in part, consist of fair comment insofar as they contain opinions or comments based on facts..." (para. 33). The words are those of the special statement which are included in a six-page transcript attached to the statement of claim as schedule "A". Specific facts are included in the special statement. As such, this is not a situation where the statements are general in nature. This distinction is highlighted in the following extract from Brown, Raymond E., *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2d ed. Vol. 5 (1999, 2017 Thomson Reuters Canada Limited), (20:12):

In Ontario **a distinction has been drawn between cases "where the facts relied upon as a basis of the comments are specifically stated in the alleged libel...[and where] the statements are general in their nature" and, with regard to the latter, particulars will be ordered so that the plaintiff would know the case he has to meet.** The defendant will be required to give particulars distinguishing those words which are fact and those which are opinion and it is no answer to say that such a requirement would pre-empt the authority of the jury. **If, on the other hand, the defendant is basing his or her comment on the statement of facts contained in the defamation, there is no reason for the court to order particulars.**

[Emphasis added]

[27] In the case at bar, to the extent that the defendants are basing their comments on the facts contained in the special statement, there is no reason to order particulars.

[28] The statement of defence further pleads that the "purpose of the Statement was to bring attention to the Métis community of the improper conduct of the plaintiffs, as described above" (para. 34). This part of the statement of defence is preceded by the same factual allegations pleaded by the defendants in support

of their plea of justification (as set out above) and identified in the related particulars provided by them. It is my view that to the extent that the facts are not included as part of the special statement, particulars of the essential facts on which the defendants rely in support of their plea of fair comment are sufficiently provided in the statement of defence and particulars for the same reasons (described above) as to why these facts are sufficiently pleaded for the defence of justification.

[29] The case at hand is distinguishable from *Del Zotto*, which is relied upon by the plaintiffs in support of their argument for further particulars, where particulars of a "rolled-up plea" were ordered. In *Del Zotto*, the alleged libelous statements were of a general nature: that the plaintiff had been involved in a "wide range of activities incompatible with being a member of a police commission" (para. 1). As indicated, in the present case, the "activities" relied upon by the defendants are included in the special statement and in the statement of defence with related particulars.

[30] In the submissions of the plaintiffs' counsel, he noted that the defendants rely on certain facts as a basis for their comments that were not known at the time of publication of the special statement and as such, they cannot be relevant to this defence (or the defence of qualified privilege). It is apparent that this arises by virtue of the drafting approach to the statement of defence which sets out a factual matrix (described above) and then pleads the various defences, including justification, fair comment, and qualified privilege. I would not strike out the

defence of fair comment (or qualified privilege) on this basis, recognizing that on a motion to strike out a pleading, the pleading is to be read generously to accommodate drafting inadequacies (*Sarrasin*, para. 26). In any event, in a fair comment defence, the facts which must be proven to be true or privileged are the essential facts upon which the comment is based, which go to the "pith and substance of the matter". To have included some facts which do not directly relate to the defence of fair comment are not, in the circumstances at hand, a sufficiently persuasive rationale to strike out this defence.

[31] In my view, based on the facts in the special statement and those included in the statement of defence and related particulars, sufficient detail is provided to permit the plaintiffs to meet the defendants' fair comment defence and to investigate the allegations. Accordingly, I am not striking this defence and no further particulars need be provided.

### ***QUALIFIED PRIVILEGE***

[32] In *Bent v. Platnick*, 2020 SCC 23, the Supreme Court of Canada described the defence of qualified privilege as follows (paras. 121 and 122):

An occasion of qualified privilege exists if a person making a communication has "an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" *and* the recipient has "a corresponding interest or duty to receive it": Downard, at s.9.6 (footnote omitted). Importantly, "[q]ualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself": *Hill*, at para. 143; *Botiuk*, at para. 78. Where the occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff": *Hill*, at para. 144; *Botiuk*, at para. 79. However, the privilege is *qualified* in the sense that it can be defeated. This can occur particularly in two situations: where the dominant motive behind the words was malice, such as where the speaker was reckless as to the truth of the words

spoken; or where the scope of the occasion of privilege was exceeded (Downard, at s.1.9; see also *Hill*, at paras. 145-47; *Botiuk*, at paras. 79-80).

For this reason, a precise characterization of the "occasion" is essential, as it becomes impressed with the limited, qualified privilege, which in turn becomes the benchmark against which to measure whether the occasion was exceeded or abused.

[33] Downard provides as follows regarding the defendant's obligation when pleading qualified privilege (p. 197):

It is for the defendant to plead and prove the facts supporting a plea of qualified privilege and persuade the court that the occasion of publication was privileged.

[34] In the case at hand, the defendants plead the basis for their duty to publish the special statement to the citizens of MNBC and to other Canadians as well as the corresponding interests of MNBC's citizens and others to receive this information from the defendants. It is the plaintiffs' position that this is inadequate as there is no pleading of what fact prompted the occasion resulting in the interest of the recipients of the special statement in receiving it.

[35] In my view, the plaintiffs' challenge to the pleading of qualified privilege fits better within the question of whether the information communicated by the special statement exceeded the limits of the duty or interest. In *Bent*, Cote J. explained as follows when qualified privilege may be defeated (para. 128, with authorities omitted):

Qualified privilege may be defeated "when the limits of the duty or interest have been exceeded"... This is the case when the information communicated in a statement is not relevant to the discharge of the duty or the exercise of the right giving rise to the privilege, or when the information is not reasonably appropriate to the legitimate purposes of the occasion...

[36] However, I would not expect that in pleading qualified privilege, the defendants are required to plead facts to pre-empt what may be the plaintiffs' position that the limits of the duty or interest have been exceeded.

[37] I see no basis to conclude that the defence of qualified privilege is inadequately pled or that further particulars are required.

### **CONCLUSION**

[38] In conclusion, the plaintiffs have not demonstrated that it is "plain and obvious" that the defences, as pleaded, are certain to fail. This is particularly so in light of the very high bar for striking a pleading and recognizing that a pleading is to be read generously to accommodate drafting inadequacies while also recognizing the more critical evaluation required in defamation pleadings (*Sarrasin*, paras. 25-26 and 34-35). Through the material facts alleged, the defendants have provided reasonable substantiation of the defences of justification, fair comment, and qualified privilege. As well, it is my view that the allegations pleaded in the statement of defence, along with the sets of particulars provided thereafter, are sufficient for the plaintiffs to meet the defendants' case. As such, I am not striking out these defences and no further particulars are ordered.

[39] The costs of this motion are in the cause.

\_\_\_\_\_ A.C.J.