IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Grimmer* v. *Carleton Road Industries Association*, 2009 NSSC 169

Date: 20090528
Docket: Ken No 297098
Registry: Kentville

Between:

Peter R. Grimmer

Plaintiff

v.

Carleton Road Industries Association
and **Brad Corkum**

Defendant

Revised decision:	The text of the original decision has been corrected according to the erratum dated June 2, 2009. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Gregory M. Warner
Heard:	July 17, 2008; September 16, 2008; January 8, 2009; and February 23, 2009
Final Written Submission:	April 24, 2009
Counsel:	Andrew M. Montgomery, counsel for the Defendants, Carleton Road Industries Association and Brad Corkum Jonathan G. Cuming, counsel for the Plaintiff, Peter R. Grimmer

By the Court:

A. The issue

[1] Can a letter setting out the defendant employer's allegations against the plaintiff employee, sent to the plaintiff's counsel in response to his request that any allegations against him be disclosed to him by a letter sent to his lawyer and after the defendants had discussed the allegations with the plaintiff and invited his reply, constitute defamation?

[2] This is the basic question in the defendants' motions to: (a) strike (1972 **CPR14.25**) or (b) grant summary judgment (1972 **CPR13.01**) in respect of the defamation action against both the volunteer board chairperson of the non-profit employer, and the employer. Granting either motion would leave outstanding a wrongful dismissal claim against the employer Association.

[3] The defendants say the answer is no because:

a) publication to the plaintiff's agent, a lawyer, is not publication at law; or

b) the plaintiff consented, or is deemed to have consented, to the publication; or

c) the letter was a communication for the purpose of, or preparatory to, the commencement of legal proceedings and is therefore shielded by absolute privilege.

B. Overview of Facts

[4] On February 13, 2008, the defendant non-profit organization, through a letter to the plaintiff from its board chairperson (the second defendant), suspended with pay its executive director (the plaintiff) while the board investigated complaints made by employees.

[5] On March 13, the board chairperson and another board member met with the plaintiff and reviewed allegations of improper conduct by the plaintiff that arose during the investigation. They gave the plaintiff a written summary, in point form, of the four allegations. They arranged to meet with the plaintiff on March 17 to receive his response to the four allegations of misconduct.

[6] On March 17, the defendant received a letter from a lawyer stating that: (a) he had been retained by the plaintiff to assist him concerning employment issues; (b) the plaintiff's psychiatrist had placed him on 30-day stress leave; (c) "Mr. Grimmer called me this morning and advised that you have requested that he attend a meeting this afternoon apparently to discuss his employment. Unfortunately, due to his health he will be unable to attend the meeting. Furthermore, if there are allegations against him, he requests that these be disclosed to him by letter which is to be sent to me as his solicitor for review and reply."

[7] On March 18, the chairperson, on behalf of the Board, wrote the lawyer setting out the four allegations already provided to the plaintiff on March 13, acknowledging the plaintiff's health issue, and asking for a written response as soon as possible.

[8] On April 9, the lawyer forwarded the plaintiff's reply to the allegations. The letter concluded:

> He is quite prepared to defend his good name. If we had any indication that your letter of March 18th addressed to me was communicated to other persons, Mr. Grimmer would have a clear cause of action against you for defamation. For the moment we will assume that the letter was sent only to me and it has not been circulated.
>
> This current process which you have instituted against him has caused him unnecessary stress and health problems. He hopes to regain his health and the trust of the Board of Directors in order that he can return to his position as Executive Director.
>
> There is no justifiable reason why he should not be able to do so and we trust that on your review of the foregoing that your Board will come to the same conclusion.

[9] On April 17, the chairperson wrote to Mr. Grimmer that the responses did not satisfy the Board and that his employment was terminated.

[10] On June 5, 2008, the plaintiff sued the defendant association and chairperson for defamation, and the association for wrongful dismissal.

[11] On hearing the defendant's first application to strike the defamation action, the Court granted the plaintiff's cross-application to amend its Statement of Claim to allege the particulars of the defamation (that is, that the defamation consisted of the letter to the plaintiff's lawyer containing false and malicious allegations).

[12] On hearing the defendant's amended application (September 16, 2008) to strike the defamation action or, alternatively, to grant summary judgment, the plaintiff argued that the defences, upon which the applications were founded, had not been pleaded in the defence. The application was adjourned again. The defendants filed an amended defence, pleading the three defences argued in these motions, and both parties filed additional affidavits respecting the summary judgment (1972 **CPR 13.01**) application.

[13] The last written submissions were received on April 24, 2009.

C. Summary Judgment

C.1

[14] The test for an application to strike under 1972 **CPR 14.25** (recently replaced by summary judgment on pleadings in 2009 **CPR 13.03**) is not complex.

[15] 1972 **CPR 14.25(1)** provides that pleadings may be struck if it discloses no reasonable cause of action. 2009 **CPR 13.03** states that a judge must set aside a claim that discloses no cause of action or makes a claim that is clearly unsustainable when the pleading is read on its own.

[16] The plaintiff cites *NBFL v Potter*, 2006 NSSC 48 ,¶ 6, and *Ashby v MacDougall Estate*, 2005 NSSC 148. The defendants cite *NBFL v Potter* and *High Parklane Consulting Inc. v Royal Group Technologies*, 2007 CarswellOnt 117 (OSCJ), ¶¶ 14 to 18.

[17] In *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, the Supreme Court of Canada wrote that the question for the court was:

> Assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Only if the action is certain to fail because it contains a radical defect should it be struck.

[18] This test has been adopted repeatedly by our Court of Appeal.

[19] Relevant to this application is Bateman, J.A.'s statement in *CGU Insurance Co. of Canada v Noble*, 2003 NSCA 102 at § 13:

> A question of law may be determined on an application pursuant to the Civil Procedure Rule 14.25 . . . but such should occur only where the law is so clear that it is plain and obvious.

[20] Also relevant is Perell, J.'s statement in *High Parklane Consulting* at § 15:

> Matters of law that are not fully settled should not be disposed of on a motion to strike an action as not showing a reasonable cause of action . . . and the Court's power to strike a claim is exercised only in the clearest cases.

C.2

[21] The test for summary judgment is stated in 1972 **CPR 13.01** as: "no arguable issue to be tried".

[22] In *Guarantee Co. of North America v Gordon Capital Corp*, [1999] 2 S.C.R. 423, the Supreme Court of Canada endorsed a two-part test: (1) the applicant must show that there is no genuine issue of material fact requiring trial; (2) then the respondent must establish his/her claim as being one with a real chance of success; that is, that there is a triable issue.

[23] The Nova Scotia Court of Appeal has endorsed and frequently molded this test to various factual matrices. In *United Gulf Developments Ltd v Iskandar*, 2004 NSCA 35, ¶¶ 6 to 9, the Court expressly accepted the *Guarantee* test. In *Eikelenboom v Holstein Canada*, 2004 NSCA 103 (¶¶ 28 and 30), the Court noted that while complexity of factual and legal issues may make the analysis difficult and contentious, "neither complexity nor controversy would exclude a proper case from the rigors of summary judgment". A recent example of the application of the *Eikelenboom* doctrine to a complex case - where the plaintiff disputed the facts (¶ 40) and where the judge could find no Nova Scotia case law (¶ 47), is *Bowden v Withrow's Pharmacy Halifax (1999) Ltd.*, 2008 NSSC 252.

[24] In *Huntley (Litigation Guardian of) v Larkin*, 2007 NSCA 75, Roscoe, J.A. succinctly canvassed the law (¶¶ 29 to 39) highlighting two points relevant to this analysis:

(1) in a motion for summary judgment, the Court will never assess credibility, weigh the evidence, or find facts (*Dawson v Rexcraft Storage and Warehousing Inc.*, 1998 CarswellOnt 3202 [O.C.A.]); and,

(2) the focus of the first part of the *Guarantee* test is whether a genuine issue of fact exists; the essence of the second part is whether a real chance of success exists on the facts that are not in dispute.

[25] Some insight into the subtlety of the analysis is evident in Guy J Pratte, Nadia Effendi & Paul Taylor, "*Summary Judgment Motions: Recent Judicial Developments*" (2008) 35 The Advocates' Quarterly 114. The evolution from a fairly generous use of Ontario's summary judgment

rule 20 (introduced in 1985) evidenced in *Vaughan v. Warner Communications Inc*. (1986) 56 OR (2d) 242 (OCA), to a series of decisions in 1998 and 1999 that narrowed considerable the scope of the rule (including the *Dawson* decision cited in *Huntley*) has broadened slightly, at least in permitting a review of the evidence, with *Rozin v. Ilitcher* (2003) 66 OR (3d) 410, ¶¶ 8, and *Goldman v. Devine* [2007] O.J. No. 1491.

D. First Issue: Is the letter to the plaintiff's counsel a publication in law?

[26] **Raymond E. Brown** writes in *The Law of Defamation in Canada*, 2nd Edition (Carswell, 1994, looseleaf to 2008, Release 2), that the law of defamation protects a person's reputation from defamatory falsehoods. To be defamatory, it must:

a) be published to someone other than the plaintiff;

b) have a tendency to lower the plaintiff's actual reputation in the estimation of reasonable persons in the community; and,

c) be published of and concerning the plaintiff.

[27] It is the publication, not the defamatory thought or composition, that is actionable.

[28] The defendants submit that communication to a plaintiff's lawyer is not a publication at law. They rely on *Getz v Opseth*, 2005 SKQB 69; *Olson v Runciman*, 2001, ABQB 495; *Industrial Ecology Inc v Kayar Energy Systems Inc*, 1997 CarswellOnt 588 (OCJ GD); and, four United States decisions reflective of American law: (1) *MacDaniel v Crescent Motors Inc* (1947) 249 Ala. 330 (Supreme Court of Alabama), (2) *Maine v Allstate Insurance Company* (1970) 240 So. 2d 857 (Court of Appeal of Florida, 4th District), (3) *Brockman v Detroit Diesel Allison* (1977) 366 N.E. 2d 1201 (Court of Appeals of Indiana, and (4) *Reece v Finch* (1990) 562 So. 2d 195 (Supreme Court of Alabama).

[29] The plaintiff replies that the case law in Canada is not clear. The defendants have not met the threshold test to strike the pleadings (1972 **CPR 14.25**) because the law is not clear and obvious.

[30] He notes that in *Getz* the defamation action was defeated on the basis of absolute privilege and the statement supporting the defendant's position of non-publication was *obiter*. He says that the defendants are ignoring *Jones v Brooks*, 1974 CarswellSask 44 (SKQB). In dismissing that defamation action on the basis of consent (*volenti non fit injuria)*, MacPherson J. held that correspondence to the plaintiff's lawyer was a publication. He submits that *Olson* and *Industrial Ecology* have never been judicially followed or considered. He submits that the defendants' reliance upon American case law supports his position that the law in Canada in unsettled.

Analysis

[31] I agree with MacPherson J.'s 1974 observation at ¶ 21 in *Jones* that there has been a remarkable paucity of cases on the point in English, Commonwealth and Canadian law from 1849 to 1974. A review of the texts and case law over more than 100 years respecting the three defences raised in this application, highlights the divergent approaches in English, American and Canadian law in dealing with communications that may be defamatory but which, on first principles or for policy reasons, should not be held actionable.

[32] It was the lack of clear guidance that led Courts to find various ways to effect fairness and equity in the balance between the protection of one's reputation (closely related to one's innate sense of worthiness and dignity) and the equally fundamental democratic doctrine of freedom of expression, and in Canada, the Charter. (**Allen Linden & Bruce Feldthusen**, *Canadian Tort Law*, 8th Edition (Butterworths, 2006), pp 759-760, 808 - 812)

[33] English case law was largely created in the 19th century. It clearly favors the approach that recognizes publication wherever a communication is made to any third party (except to a spouse) and mitigates the harshness of this rule (harshness in the sense that not every communication has a tendency to lower actual reputation unfairly) through the development as such common law and statutory defences as consent (*volenti*) and variously described "privileges". The use of these privileges as shields to defamation claims has evolved from a distinctly different basis than the development of the defence of non-publication.

[34] For the observations as to English history, I rely upon:

(i) **Milmo & others, eds.**, *Gatley on Libel and Slander*, 10th Edition (London: Sweet & Maxwell, 2004) c. 6, pages 141 to 149, and the Second Supplement to the 10th Edition (2007), pages 30 to 33;

(ii) *Halsbury's Laws of England*, 3rd Edition (London: Butterworths, 1958) Volume 24, beginning at § 56, and 4th Edition (1979), Volume 28, beginning at § 58;and

(iii) the seminal English Court of Appeal decision in *Pullman v Hill*, [1891] 1 Q.B. 524.

[35] The American case law, which for the most part was decided in the early 20th century, evolved in another direction. Most of the case law supports the principle that communication to an agent of the plaintiff, especially a lawyer or other agent with a duty of confidentially, is tantamount to a communication to the plaintiff and therefore is not a legal publication. For example, in *Freeman v Dayton Scale Co.*, 1929, 159 Tenn. 413, 19 S.W. 2d 255, the Court stated:

> The authorities are in conflict as to whether or not such publication takes form of a letter written to the attorney representing the party libeled, standing instead of, and acting for, the party himself, in response to a demand, and in the course of, and connected with, an explanatory reply. The weight of the more recent authorities, supported we think by reason, is against liability in such a case, upon the ground both that such a communication is privileged, and also that there is no publication in the required sense. This view seems to rest partly on the theory that the [**3] attorney is the chosen agent of the party libeled, selected by him to stand in his stead, and to receive on his behalf any such communication as may pass between the parties to the controversy; and partly on the theory that a communication addressed to a third party, procured to be so addressed by the party libeled, does not amount to a publication. * * * We are of the opinion that this view is sound on principle. The confidential relationship in which an attorney stands to his client is well recognized. The essence of publication being the giving out to the public of the matter, it would seem that when one goes no further than to communicate the matter to the confidential attorney of another, he is not been guilty of doing that which might reasonably be expected to give the matter circulation.

[36] This view, also enunciated in *Taylor v MacDaniels*, 139 Okl. 262, 281 P. 963, is the current law in almost all American jurisdictions, and is reflected in the four decisions cited by the defendants.

[37] In Canada there is little caselaw on the point, none apparently at the appellate level.

[38] In his text, at c. 7.9, **Brown** writes that publication to a third party includes publication to a agent of the defamed person:

> The fact that the third person, to whom the words are published, was invited specifically for that purpose by the plaintiff, does not make it any less a publication although the defendant may have a defence on other grounds.

[39] For Canadian caselaw he cites *Jones* and *Ward v. MacIntyre* [1920] 48 N.B.R. 233, in support of this view, but notes that *Olson*, and *Keung v. Sheehan* (2001) 193 NSR (2d) 237 (NSSC) (which held that confidential communications to someone other than a lawyer did not constitute publication) went the other way. He also cites a 1906 Australian decision and a 1920 Irish decision. He acknowledges that some American jurisprudence says otherwise, and notes that Giles, J., writing on the behalf of the New South Wales Court of Appeal in *State Bank of New South Wales Ltd. v. Currabubula Holdings Pty Ltd.* [2001] NSWCA 47, suggested that the rule should be revisited:

> If the plaintiff has authorized his agent to receive the defamatory matter on his behalf, why should the communication not be regarded as a communication to the plaintiff whether or not the plaintiff is a company? Possibly this will one day call for reconsideration.

[40] Contrary to **Brown**'s view is the view of **Roger McConchie & David Potts** in *Canadian Libel and Slander Actions*, (Irwin Law, 2004) at p 261. Citing *Olson*, *Ward* and *Industrial Ecology*, they write that communication to the plaintiff's lawyer, who is bound as an officer of the Court to show the letter to no one but the plaintiff, is equivalent to publication solely to the plaintiff.

[41] Clearly *Olson* and *Industrial Ecology* stand for the position that the defendant's letter to the plaintiff's lawyer is not a publication. In *Industrial Ecology*, this determination resulted in the plaintiff's pleadings being struck.

[42] In *Getz*, Allbright J. determined the matter on absolute privilege but added as obiter at ¶ 23 that he found the non-publication submission persuasive:

> While I have determined the matter upon a consideration of Rule 173(a), I wish to offer the observation that I am also of the view that there is some compelling logic in principle to the proposition that under the particular facts of this matter, there has been no publication of the statements. Publication is of course an essential element to the tort of defamation. In this instance, the written correspondence was from the defendant's solicitor for the plaintiff's solicitor, and was not publish to any third party beyond this limited category. The argument is persuasive in suggesting that the exchange of correspondence between solicitors is in essence an exchange of correspondence between the parties themselves. Counsel act as advocates for their respective clients and the argument proceeds that this unique solicitor-client relationship and all that underpins such a relationship, is fairly considered as simply an exchange of correspondence between the parties themselves through the medium of each of their solicitors.

[43] The Court in *Jones* cited a 1959 New York decision to the effect that the better bar to recovery for communication of a defamatory matter to an agent of the defamed person in response to an inquiry is not that the communication is not a publication, but rather that the principle of *volenti* confers an absolute immunity or privilege in favor of the defendant (¶¶ 22 and 24).

[44] The gist of defamation is injury to reputation. Reputation is important to one's sense of self-worth and dignity. It is worthy of protection, but not absolute. It must be balanced against other equally fundamental values - freedom of expression, and in the context of this factual matrix, access

to legal counsel in respect of legal disputes (irrespective of whether that access is in the pursuance of litigation).

[45] While existing Canadian case law is not at the appellate level, it clearly supports the view that injury to a person's reputation cannot arise out of communications to that person's lawyer where the lawyer's retainer is based on confidentiality and is in relation to the subject matter of the defamation. While the courts in *Jones* and *Ward* preferred to dismiss the defamation claims on the basis of consent and absolute privilege respectively (as did Allbright J in *Getz*, while finding the "no publication" logic persuasive) , they did so on the same underlying principle that the courts in *Olson* and *Industrial Ecology* dismissed the claims - communication between a party to a legal dispute and a lawyer retained by another party in respect of that dispute, whether the communication contained statements or allegations that are subsequently found, on a balance of probabilities, to be false - and which, if communicated directly to the other party would not be defamatory, would bring incredible disruption to the legal system, and the role of lawyers in that system if they were not shielded from a defamatory claim. The harshness of 19th century English caselaw should be, and in my view has been, mollified by 21st century reality.

[46] The absence of appellate decisions does not make the caselaw any less plain and obvious. The principled approach to the law of defamation; that is, the protection of reputation, in the context of other fundamental values, including the role and obligation of lawyers in the legal process, supports the proposition that communication to a lawyer, at the request of the client, of allegedly defamatory statements relating to the subject matter of the retainer, is not a publication at law.

[47] This conclusion supports the striking of the portion of the Statement of Claim alleging defamation based upon the defendant's letter to the plaintiff's lawyer of March 18, 2008, given in response to plaintiff counsel's letter of March 17, 2008, stating that the plaintiff requested that any allegations against him respecting employment issues be forwarded to the lawyer for review and reply. The plaintiff authorized his counsel to write the March 17 letter.

E. Second Issue: Consent (*volenti non fit injuria*)

[48] In the alternative, the defendants seek summary judgment (1972 **CPR 13.01**) respecting the defamation portion of the action.

[49] As stated, the two-part test requires that the moving parties (defendants) establish that there is no genuine issue of material fact requiring trial and, if this threshold is met, the respondent (plaintiff) must then establish his claim is one with a real chance of success.

[50] The defendants argue that when the plaintiff directed the employer to communicate solely and exclusively through his retained solicitor respecting allegations about his employment performance, which allegations had been related to him directly a few days before, he expressly assumed the risk that anything the employer could have said to him directly could be communicated through his solicitor, whether defamatory or not.

[51] In support of this position, the defendants cite:

from Canada:

a *Hall v Hebert* [1993] 2 S.C.R. 159, ¶ 77;

b parts of *Williams*' text on *The Law of Defamation* at p 106 cited in *Burnett v CBC (No. 2)*, 1981 CarswellNS 416 (NSSC);

c *Jones*, ¶¶ 32 and 33;

d *Hanly v Pisces Productions Inc.*, 1980 CarswellBC 573 (BCSC), ¶¶ 15 to 19;

e *Beaulieu v Queen's University*, 2004 CarswellAlta 1620 (ACA), ¶¶ 12 to 14;

and from United States Appellate courts:

f *Williams v School District of Springfield R*-12, 1969, 447 S.W. 2d 256 (Supreme Court of Missouri);

g *Johnson v City of Buckner* (1980) 610 S.W. 2d 406 (Court of Appeal of Missouri);

h *Georgia Power Company v Busbin* (1982) 249 Ga. 180 (Supreme Court of Georgia); and,

i *Farrington v Bureau of National Affairs* (1991) 596 A. 2d 58 (District of Columbia Court of Appeals).

[52] The plaintiff cites Justice Cory's decision in *Hall*, ¶¶ 79 & 80, and extensively from *Burnett v. CBC (No.2)*, ¶¶ 159 to 164. He submits that the scope of consent is a question of fact and disputes that he knew or ought to have known that the letter would contain defamatory comments.

The Law

[53] For this analysis, I have read and relied upon:

a) *Raymond E. Brown, The Law of Defamation in Canada*, c. 11;

b) ***Gatley on Libel and Slander***, 10th Edition, pp 558 to 560 and The Second Supplement to the 10th Edition, pp 133 and 134;

c) **Roger McConchie & David Potts**, *Canadian Libel and Slander Act*, c. 22;

d) **Peter A. Downard**, *Libel* (LexisNexis, 2003) c. 9;

e) **Klar *et al*, eds.**, *Remedies in Tort* (Carswell, looseleaf to Release 8 in 2008), c. 6, by Janet Ames and Vincent Orchard;

Canadian caselaw:

f) *Jones*;

g) *Hanly*;

h) *Burnett v CBC (No. 2)*;

i) *Beaulieu*;

j) *Southam Inc. v Butler*, 2002 CarswellNS 602 (NSSC), and 2002 NSCA l49;

k) *Hall*;

American case law:

l) *Restatement (2nd) of Torts* (American Law Institute; to August 2008), c. 25, § 583;

m) *Maine v Allstate Insurance Company* (1972) 240 So. 2d 857 (Court of Appeal of Florida);

n) *MacDaniel v Crescent Motors* (1947) 249 Ala. 330 (Supreme Court of Alabama;

o) *Brockman v Detroit Diesel Allison* (1997) 366 N.E. 2d 1201 (Court of Appeal of Indiana);

p) *Reece v Finch* (1990) 562 So. 2d 195 (Supreme Court of Alabama);

q) and the four decisions cited by the defendants, including, in particular, *Farrington v Bureau of National Affairs*.

[54] In summary, **Brown** describes the defence of consent, as follows:

i) Consent is an absolute defence to a defamatory communication. It extends not only to what is true, but what is false and defamatory. A plaintiff may not recover for a publication to which he consented or which he authorized, procured or invited. (c. 11.2, adopted by Saunders J.A. in *Southam* at ¶ 3)

ii) It applies to publication of remarks elicited at the invitation or instigation of the plaintiff under circumstances where it is reasonable to conclude that the plaintiff consented (c. 11.2)

iii) The consent may be expressed or implied, and manifested by words or actions. Adopting the much quoted three-part test from *Farrington*, **Brown** writes that the defence applies if:

a) there is either express or implied consent to the publication;

b) the statements were relevant to the purpose for which consent was given;

c) the publication of those statements was limited to those with a legitimate interest in their content. (c. 11.3)

iv) Examples of express consent, include: release of documents containing defamatory statements to the plaintiff's attorneys at his/her request, and when a lawyer acting on behalf of his client requests that reasons for the client's non-renewal of a teaching contract be read at a public meeting.

v) Consent may be implied from all of the circumstances. (c. 11.3(3)(a)). In this regard, **Brown** relies upon the *Restatement (2nd) of Torts*, § 583 (1977 to August 2008):

> *c* . . . conduct that gives apparent consent is sufficient to bar recovery. Whether words or other conduct are reasonably to be interpreted as expressions of consent to the publication is to be determined by the reasonable inferences from the conduct in the light of the circumstances surrounding it. . . .
>
> *d.* *Extent of consent.* The extent of the privilege is determined by the terms of the consent. . . . a consent may be limited to a publication to a particular person or at a particular time or for a particular purpose. If so, the publication is privileged only if made within those limitations. . . .
>
> It is not necessary that the other know that the matter to the publication of which he consents

> is defamatory in character. It is enough that he knows the exact language of the publication or that he has reason to know that it may be defamatory. In such a case, by consent to its publication, he takes the risk that it may be defamatory. . . .
> *f.* The privilege conferred by the consent of the person about whom the defamatory matter is published is absolute. The protection given by it is complete, and it is not affected by the ill will or personal hostility of the publisher or by any improper purpose for which he may make the publication, unless the consent is to its publication for a particular purpose, in which case the publication for any other purpose is not within the scope of the consent.

[55] Examples of implied consent cited by **Brown**, include:

a) where the plaintiff permits a person investigating a theft at her workplace to come to her home and discuss the theft in the presence of others, if she would reasonably be aware that the conversation might result in an accusation of a crime; and,

b) where the plaintiff consents to a procedure initiated by others and is familiar with the procedure, but this consent is only with respect to matters relevant to and communicated with persons interested in the procedure.

[56] Respecting implied consent, at c. 11.03(3), **Brown** cites *Williams* and *Johnson* for the proposition that if the plaintiff, in the presence of third parties, invites an explanation as why she was not re-employed by the school board (*Williams*) or why he was discharged from employment (*Johnson*), the defence of consent will be successful. It is not necessary that the plaintiff know in advance the exact nature of the allegation. At pages 11-17, he writes that if the plaintiff agreed to a formal channel by which information may be furnished to a third party, "he or she will be deemed to have consented to any information furnished to that person under the usual and ordinary circumstances".

[57] The scope of the defence is limited to, and must not exceed, what is reasonable in light of the language or circumstances that created the consent. The scope of the consent is the context in which **Brown** cites *Syms v Warren* (1976) 71 D.L.R. 3d 558 (MQB). A plaintiff has been deemed to have consented to a particular publication or venue in which he or she reasonably risks defamatory comments (in *Syms* a radio interview), but not to the republication or expanded use beyond the limited purpose for which the consent was given (in *Syms*, permitting callers to repeat the rumors). It is in this sense - that is, circumscribing narrowly the scope of the consent, that the chambers court and Court of Appeal in *Southam Inc.***,** and the trial court in *Burnett v. CBC(No.2)* were decided. It was not the interviews for the specific broadcasts that were not shielded by consent. It was the rebroadcast or republication in a forum other than that to which the plaintiffs had expressly consented that were held to be defamatory and not shielded.

[58] Thus, for example, in *Hanly,* the response to the plaintiff's union by an employer of the reasons that Hanly was not hired was found to be consented to on the basis (first described in *Jones*) that the plaintiff had reason to anticipate that the response might include negative and ill-founded comments. It is not necessary that the plaintiff know precisely what negative or ill-founded comments might be made.

[59] Similarly, in *Beaulieu,* the plaintiff was living and working in Alberta at the time that he learned of an allegedly defamatory memo about him communicated by his former university in Ontario. He made an access to information request for the memo. At his request and with his authority, his assistant requested and obtained the information. The Alberta Court of Appeal held

that a reasonable person would assume that the plaintiff authorized his assistant to open the e-mail with the allegedly defamatory memo and that the "publication to the plaintiff's agents must be taken to have occurred with the knowledge, understanding and consent of the plaintiff."

[60] It is in this context of the scope of the consent (as opposed to a reasonable person's view as to whether it might be negative or false and therefore defamatory) that text writers and courts (most often citing *Syms v. Warren*) have stated that the defence is narrowly circumscribed. **Peter Downard** put it this way in *Libel* at p 128:

> It is clear that there must be a close connection between conduct of the plaintiff alleged to amount to consent or assumption of risk and the publication of the defamatory statement complained of.

[61] The most cited Canadian decision is *Jones*, applied by the Nova Scotia Supreme Court in *Burnett v. CBC (No.2)*, in the British Columbia Supreme Court in *Hanly*, and by the Alberta Court of Appeal in *Beaulieu*.

[62] In *Southam*, the Nova Scotia Supreme Court, without reference to *Jones*, but rather citing a Pennsylvania Supreme Court decision on the same point, held at ¶ 14 that it was clear that the plaintiffs consented to a defamatory "*Fifth Estate*" interview, but this consent would not extend to the subsequent written comment made in a daily newspaper. The Nova Scotia Court of Appeal affirmed this, including ¶ 14 in Justice Scanlan's trial decision.

[63] In my view the Canadian case law is clear. Consent can be an absolute defence to a defamatory statement. Consent may be express or implied and occur when a plaintiff authorizes, procures or invites the publication of the remarks about which he has some reason to believe might include negative or ill-founded comments. While not necessary for the determination of this motion, the analysis of whether the plaintiff had reason to believe that the remarks may be negative and ill-founded is an objective (reasonable person) analysis, not a subjective analysis. He need not have knowledge of the precise contents of the defamatory remarks. The scope of publication is the second aspect of consent. If the communication is to an agent, specifically designated to deal with the subject matter then, without specific knowledge of the contents, the plaintiff is deemed to consent to the publication to the designated agent.

Analysis

[64] The two-part *Guarantee* test for summary judgment requires the defendants to show no genuine issue of material fact requiring trial and, if they do so, the plaintiff has the onus of establishing a triable issue with a real chance of success.

[65] Five affidavits were filed by four affiants (two by the plaintiff). No one was cross-examined on their affidavits.

[66] The substance of Mr. Corkum's affidavit was to identify and attach copies of five written communications:

a The February 12, 2008, letter placing the plaintiff on paid leave pending investigation of staff complaints;

b The plaintiff's lawyer's letter to Corkum dated March 17;

c Corkum's reply to the lawyer dated March 18;

d The lawyer's March 19 letter to Corkum;

e The lawyer's April 9 response to the allegations in Corkum's March 18 letter.

[67] Catherine Savage was a board member. Her affidavit established the March 13, 2008, interview (misdated by her as on or about March 10, but corrected by the plaintiff) during which the plaintiff was given a written summary of the four allegations against him and an opportunity to respond to them.

[68] The plaintiff's first affidavit acknowledged the truth of Corkum's affidavit except paragraph 4, which refers to the defendant's March 18 letter to Mr. Newton. He does not take issue with receipt of this letter by his lawyer. He disputes that it "outlined a number of issues and concerns that had arisen in the process of investigation into the grievance" because, contrary to the Association's policies, staff grievances had to be in writing and filed within ten days of the problem and the incidents referred to in the March 18 letter, cited in paragraph 4 of Mr. Corkum's affidavit, described events that occurred long before February 2008.

[69] The plaintiff's supplementary affidavit responded to the Savage affidavit. He states that he met on March 13 with Mr. Corkum and Ms. Savage, during which meeting they were to provide him with the staff grievance and explain its contents. He was aware from the February letter that staff had made grievances against him as a result of a relationship breakdown between him and the staff. He states that the meeting was not to give him an opportunity to respond to allegations regarding his conduct. He further states that based on the February 12 letter, he did not anticipate the contents of the March 18 letter to Mr. Newton. He outlined with respect to each of the four allegations why he did not anticipate they would constitute claims of misconduct by him. Basically, he states that they were not true and the Board should have known that.

[70] Significantly (for the purposes of this application), Mr. Grimmer is silent on Ms. Savage's statement that at the March 13 meeting he was given the "written summary of certain issues and concerns that had come to light in the course of the Board's investigation into a staff grievance", a copy of which written summary was attached to her affidavit, nor that the substance of that written summary was not verbally conveyed to him.

[71] This Court is conscious of the fact that, for the purposes of a summary judgment application, it must not assess credibility, weigh the evidence or find facts. The Court is conscious of the Court of Appeal's recent decision in *Young v Merry*, 2009 NSCA 47.

[72] The plaintiff says that he did not anticipate the four allegations of misconduct against him. Therefore, I make this decision without assessing whether the plaintiff did anticipate that the Board would make defamatory statements (those are the statements that he considers to be untrue) with respect to his work employment.

[73] What is not in dispute, based on a clear reading of the affidavits, is the following:

a At a meeting on March 13, 2008, between Mr. Corkum, Ms. Savage and Mr. Grimmer, Mr. Grimmer was provided with the one-page written summary (attached to Ms. Savage affidavit) outlining the four complaints.

b Based on a plain reading of the plaintiff lawyer's letter of March 17, Mr. Grimmer acknowledged that he had been requested to attend a meeting on the afternoon of March 17 "apparently to discuss his employment" and that the lawyer had been retained to assist Mr. Grimmer

"concerning employment issues" and that "if there are allegations against him, he requests that these be disclosed to him by letter which is to be sent to me [Mr. Newton] as his solicitor for review and reply".

[74] I conclude from the letter of March 17 from Mr. Newton to Mr. Corkum, and the written summary delivered by the defendants to the plaintiff on March 13, that it is clear and undisputed that:

(1) Mr. Newton's retainer was to assist the plaintiff concerning his employment issues;

(2) Mr. Grimmer had been requested to attend a meeting that day to discuss his employment;

(3) Mr. Grimmer received on March 13th, the one-page point form summary of the four "incidents" that were described on two pages in the March 18th letter;

(4) Mr. Newton and Mr. Grimmer expected that if there were allegations against Mr. Grimmer in respect of Mr. Grimmer's employment that these were to be disclosed to Mr. Grimmer by a letter to be sent to his lawyer, Mr. Newton, who was retained to review and reply to them.

[75] Without assessing any disputed evidence, and relying solely upon the undisputed facts, it is clear that the plaintiff authorized and directed the defendants to send a letter to his lawyer respecting an intended meeting to discuss his employment containing "allegations against him".

[76] The phrase: "allegations against him", is not ambiguous. In long hand, it means a declaration or assertion as a matter of fact that is contrary or adverse to the position or interest of Mr. Grimmer.

[77] To succeed with the defence of consent it is not necessary that the defendants show that the plaintiff had reason to know the precise contents of the allegations against him, it is only necessary that the defendants show that the statements were relevant to the purpose for which the consent was given and that the publication of the statements was limited to the person with a legitimate interest in their contents, and in an objective sense that the plaintiff might reasonably expect them to be negative or ill-founded. In this case, the plaintiff consulted a lawyer to assist him concerning employment issues. Mr. Newton's letter is that Mr. Grimmer advised that he had been requested to attend a meeting that day to discuss his employment. He received four days before the "written summary of issues". Mr. Grimmer advised that if there were allegations against him, which could only means assertions of matters of fact that were contrary to his interest, they be disclosed to him by a letter to his lawyer.

[78] On these undisputed facts, that is, the contents of the letters and the one-page written summary of the allegations, and without analysis of any discussions between the plaintiff and defendants, it is plain and obvious that the plaintiff requested and authorized, and therefore consented to, the March 18 letter from the defendants setting out allegations against the plaintiff, regardless of whether the plaintiff subjectively anticipated that the defendants might believe them to be true, or know that there were not true. The contents of the March 18 letter contained, on two pages, what the plaintiff received four days earlier on one page.

[79] In *Southam*, Justice Scanlan found that it was clear that the plaintiffs consented to *The Fifth Estate* interviews and this consent would vitiate any action for defamation "in relation to that program".(¶ 12). This analysis was upheld in the Court of Appeal. The analysis is consistent with

Jones, *Burnett*, *Hanly*, and *Beaulieu*, and the *obiter* in *Getz*.

[80] In my view the law is clear as it applies to those facts which are not in dispute in this case. Mr. Grimmer authorized and directed that the defendants communicate allegations against him in respect of his employment to his lawyer. That constitutes consent, regardless of whether he actually anticipated that the allegations would be defamatory.

[81] If I am in error in striking the defamation claim on the basis of non-publication, I would grant summary judgment in favour of both defendants in respect of the defamation action on the basis of the plaintiff's consent to the publication of any employment allegations about him to his lawyer, retained for the purpose of receiving them. No genuine issue of material fact remains for trial.

F. Issue Three: Absolute Privilege

[82] The defendants argue that, if the March 18 letter is a publication, they are entitled to absolute privilege as the letter was a necessary incident to the commencement of judicial proceedings. They submit that the plaintiff's employment issues had reached the level that the plaintiff had retained counsel and shortly thereafter commenced an action for wrongful dismissal and defamation.

[83] They cite seven decisions as dealing with this issue in dealing with what they describe as similar circumstances:

i) *CNC Industries Ltd. v Precision Stamping Ltd.*, 1991 CarswellAlta 210 (AQB)

ii) *Ward*

iii) *1522491 Ontario Inc. v Stewart, Esten Professional Corp.*, [2008] O.J. No. 4872 (OSCJ)

iv) *Moseley-Williams v Hansler Industries Ltd.*, 2004 CarswellOnt 5827 (OSCJ)

v) *Elliot v Insurance Crime Prevention Bureau*, 2005 NSCA 115

vi) *Cooper v Charlottetown*, 2008 PESCTD 38

vii) *McDaniel v McDaniel*, 2009 BCCA 53

[84] The plaintiff cites: *Teskey v Toronto Transit Commission*, 2003 CarswellOnt 5274 (O.S.C.J) and *Moseley-Williams***.**

[85] The plaintiff argues that for a publication made before the commencement of legal proceedings, a factual analysis of whether the publication was for the purpose of, or preparatory to, the commencement of the proceeding was required. This factual analysis is not appropriately made in a summary judgment motion but rather is appropriate for a trial. He notes that at the time of the March 18 letter, the plaintiff had not been terminated by the defendant association and no action had been contemplated. The plaintiff lawyer's March 17 letter simply stated that the lawyer was retained to assist the plaintiff with employment issues and to review and reply to any allegations against him. Applying the test for summary judgment, he argues that it cannot be said that there is not a genuine issue of fact requiring trial or that the plaintiff's claim in respect of this issue is one without a real chance of success.

Analysis

[86] The Court has reviewed the case law cited by counsel, c. 12 in Brown's text, c. 13 in the *Gatley* text (both the 10th edition and the 2nd supplement to the 10th edition) and *Canadian Tort Law*, pp 787 to 791.

[87] At present, the law does not shield all communications between parties in a legal dispute. Protection does not extend to a communication in the course of, or for the purpose of, asserting a right alone, or even in respect to contemplated proceedings, unless the communication is for the purpose of or preparatory to (or as **Linden & Feldthusen** write at p 788, "necessary for") the commencement of proceedings. No Canadian case law disowns Justice Cullity's analysis at § 60 in *Moseley-Williams* to this effect. To the contrary, it has been adopted by several courts recently, including by Cromwell J.A. (as he then was) in *Elliott v Insurance Crime Prevention Bureau*, 2005 NSCA 115, at ¶¶ 159 and 160, in the context of the larger issue of immunity for witnesses, investigators, experts, and non-witnesses in respect of pre- and post- proceeding statements.

[88] The case law supports the plaintiff's submission that there is a genuine issue of material fact as to whether the March 18 letter was made for the purpose of or preparatory to an intended proceeding. The facts do not disclose that such the sole purpose of the letter so clearly as to preclude a trial on the matter. If anything, the factual matrix suggests that no action, by either the plaintiff or the defendants, was contemplated until after the plaintiff's employment was terminated a month later.

[89] If I had not struck (**CPR14.25**) or granted summary judgment (**CPR 13.01**) for other reasons, I would not have granted summary judgment on this basis. I do agree that limiting the absolute privilege to litigation, as opposed to communications in respect of a legal dispute, may be a matter that logically should be subject to possible reform, but that is not relevant to this application.

G. Conclusion

[90] The defendants' motion to strike the defamation portion of the action against the association and its chairman personally is granted on the basis that the letter to the plaintiff's lawyer was not a publication. In the alternative, summary judgment is granted to the defendants with respect to the defamation portion of the action on the basis of consent (*volenti non fit injuria*).

[91] It is the Court's understanding from the plaintiff that the wrongful dismissal action was against the defendant association and not against the association's chairman.

[92] The *Volunteer Protection Act*, S.N.S. 2002, c. 14, reads in part as follows:

> **Solicitor-and-client costs**
>
> 3A Where an action that is brought against a volunteer for damages caused by an act or omission of the volunteer on behalf of a non-profit organization does not result in a judgment against the volunteer, the volunteer is entitled to costs on a solicitor-and-client basis.
>
> **Application of Act**
>
> 4 This Act applies to any claim for damages caused by an act or omission of a volunteer where that claim is filed on or after the coming into force of this Act.

[93] The individual defendant, Brad Corkum, claims costs on a solicitor-client basis pursuant to that *Act*, payable forthwith. In his written submissions, the plaintiff sought costs payable forthwith if the motions were dismissed, but the opportunity to address Mr. Corkum's claim for solicitor-client costs if the motions were granted. The court will receive submission for the plaintiff in writing within 20 days, with a response from counsel for the defendant Corkum 20 days thereafter.

J.

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Grimmer* v. *Carleton Road Industries*, 2009 NSSC 169

Date: 20090528

Docket: Ken No 297098

Registry: Kentville

Between:

Peter R. Grimmer

Plaintiff

v.

Carleton Road Industries Association

and **Brad Corkum**

Defendant

Revised decision:	The text of the original decision has been corrected according to the attached erratum dated June 2, 2009
Judge:	The Honourable Justice Gregory M. Warner
Heard:	July 17, 2008; September 16, 2008; January 8, 2009; and February 23, 2009
Final Written Submissions:	April 24, 2009
Counsel:	Andrew M. Montgomery, counsel for the Defendants, Carleton Road Industries Association and Brad Corkum
	Jonathan G. Cuming, counsel for the Plaintiff, Peter R. Grimmer

Erratum:

[1] In Paragraph 4, on the first line the second word “through” should be deleted.

[2] In Paragraph 80, on the first line the words “they apply” should read “it applies”.

[3] In Paragraph 81, on the second line the word “against” should read “in favour of”.

[4] In Paragraph 83, on the second line the word “decision” should read “decisions”.

[5] In Paragraph 89, on the third line the word “and” should read “as”.

J.