SUPREME COURT OF NOVA SCOTIA
Citation: Robertson v. McCormick, 2012 NSSC 4

Date: 20120105
Docket: Hfx No. 313736
Registry: Halifax

Between:

Mark Robertson

Plaintiff/Respondent

v.

Heather McCormick

Defendant/Applicant

Judge: The Honourable Justice Glen G. McDougall

Heard: June 21, 22 and 29, 2011, in Halifax, Nova Scotia

Counsel: Nancy Gail Rubin, Ll.B., Maggie Stewart, Ll.B., and Kyle DeYoung, Summer Student, on behalf of the defendant/applicant
Mark Robertson, on his own behalf

By the Court:

INTRODUCTION

[1] The plaintiff claims damages against the defendant for defamation. The defendant seeks summary judgment on the pleadings or, in the alternative, on the evidence, pursuant to **Civil Procedure Rule** 13. The plaintiff is a licensed teacher who was employed by the Annapolis Valley Regional School Board (AVRSB) as a, day-to-day, substitute teacher commencing on September 2, 2008. He was teaching at Middleton Regional High School (MRHS) where the defendant was principal. In January 2009, the defendant principal informed the plaintiff that he would not be retained as a substitute for the second semester. The plaintiff alleges that he was "defamed in his profession by the defendant as being unfit for the profession of teaching."

THE PLEADINGS

[2] It appears that various issues arose in the plaintiff's classroom during the Fall of 2008. After discussions about "the former lack of diligent teaching expectations and the Plaintiff's discovery of academic misconduct," the defendant directed the plaintiff to "change his pedagogy" by letter dated November 4, 2008. (para. 6) The plaintiff goes on to allege:

> 7. The Plaintiff claims that the parents of failing, or near failing, students were called by the Principal, even though the Plaintiff refused to do so, and were assured that the teaching and assessment practices of the Plaintiff would be changed. These negative remarks demeaned the reputation of the Plaintiff and inferred that the Plaintiff had somehow failed in his duties as a teacher. The imputation that the Plaintiff's failure was due to unprofessional teaching meant that he was considered a poor educator. The Plaintiff also claims that the Defendant had no duty to phone the parents specifically regarding the Plaintiff's pedagogy.

[3] On January 26, 2009, the defendant is alleged to have informed the plaintiff that "he was not a suitable teacher, that he had not fulfilled his list of teaching practices as supplied by ... the Defendant, that he specifically had failed with instruction and assessment of his students, resulting in failure with the students' learning." (para. 9) He says he denied these claims, but the defendant "declined to review any evidence of success" he offered. (para. 10) He goes on to state:

> 11. The Defendant stated to the Plaintiff that she had confided with her Vice-Principal before making her decision and that the MRHS Vice-Principal Jodie Rutledge, was in agreement with her decision that the Plaintiff was not a suitable teacher, had not performed the list of duties supplied by her and therefore should not be allowed to continue with his assignment. The Plaintiff claims that the Vice-Principal had no duty to receive this communication.
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> 12. The Plaintiff told the Defendant that this action against him was damaging, that it would cost him his opportunity to achieve 175 days of further service in order to become a term teacher and gain full representation under the Collective Agreement, and that he would seek the advice of AVRSB and his Union on the matter.

[4] The plaintiff says the defendant then informed him "of a slanderous attack on his profession by the Defendant to a third party." (para. 13) The Amended Statement of Claim continues:

> 14. The Defendant told the Plaintiff that prior to their meeting on Monday the 26th she had already informed the AVRSB that he had not performed his professional duties as a teacher, and consequently was not a suitable substitute teacher for continuing the assignment. Therefore there would be no intervention by the AVRSB.

[5] The plaintiff says the defendant "did no evaluation" with him (para. 15) and adds that she told him that Erica Bawn, the School Board's Coordinator of Employee and Labour Relations, had informed her that the School Board was "within their rights" not to allow him "to continue with his assignment due to this alleged lack of professionalism." (para. 16) The Amended Statement of Claim continues:

> 17. On Monday January 26, 2009 the Defendant officially informed the Plaintiff through email that there was no more work for him and replaced the Plaintiff from his position. The Defendant was aware of the clear inference of professional incompetence that is inevitably relayed to the Plaintiff's employers, union, colleagues, students and parents as a result of removing him from his assignment. The Plaintiff claims that the Defendant's decision to remove the Plaintiff from his assignment is not a duty of the Principal according to the Education Act and was deliberately taken in order to injure the reputation of the Plaintiff.
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> ....
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> 19. On January 27th the Defendant then informed a second MRHS Vice-principal, Jim Gushue, that the Plaintiff was not going to be allowed to continue his assignment due to his unprofessional practices further broadcasting the defamation. The Plaintiff claims that the Vice-Principal had no duty to receive this communication.
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> ....
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> 20. The Plaintiff claims that all of the communication by the Principal related to the initial failing and underperformance of some students and the consequential replacement of the Plaintiff was driven by the motive to injure the Plaintiff's reputation, in order to deny the Plaintiff the opportunity to secure a term position, and to conceal the knowledge of the academic misconduct that was both occurring and further, pre-existed in her school.

> 21. After the removal of the Plaintiff the Defendant then compounded the slander by communicating to the employers that the Plaintiff was derelict in his professional duties as a teacher by not adhering to the unilateral list of teaching strategies issued by the Defendant and staying with the assignment until the end of the term. That he was refusing to supervise the exam, correct the exam and enter marks and comments for the students taught this semester.

[6] The plaintiff alleges that the School Board informed his union that his name had been "arbitrarily removed from the AVRSB substitute list and that he would no longer be able to substitute with AVRSB." (para. 22) Presumably the reference to "the Plaintiff's actions" is meant to refer to the defendant's actions. The plaintiff alleges that the defamation has denied him "access to full membership and protection as a term teacher under the Collective Agreement." (para. 23) He claims to have been "publicly humiliated, professionally humiliated, ridiculed by students, ostracized and harmed monetarily and professionally as a result of the Defendant's actions." (para. 23) He also says the alleged slander has left him "with no means of income as a teacher and no references to seek future employment elsewhere. The Plaintiff cannot seek employment as a teacher as a result of the Defendant's actions." (para. 24)

[7] A motion by the plaintiff seeking an adjournment so that he could bring a motion to allow further amendments to his statement of claim was dismissed.

Particularization of the alleged slanders:

[8] The defendant sought particulars of "each instance of defamation alleged in the Amended Statement of claim, with reference to the specific paragraph." In an "Answer to Demand for Particulars of Amended Statement of Claim," filed April 9, 2010, the plaintiff made reference to paras. 14, 17 and 21. It appears from his response that he has particularized the alleged defamation in those paragraphs. This is the defendant's position; the plaintiff initially argued that this is not the case, and argued that he should be permitted to rely on additional instances of alleged defamation referenced in the Amended Statement of Claim, the original Statement of Claim and the Answers to Demands for Particulars regarding each of them. It is clear, however, that in answer to a demand for particulars of "each instance of defamation alleged in the Amended Statement of Claim, with reference to the specific paragraph," these were the three paragraphs the plaintiff identified. Moreover, in response to particulars of any additional allegations of defamation, the plaintiff answered "[a]s per the particulars

of paragraphs 14, 17, and 21 of the Amended Statement of Claim." The plaintiff's status as a self-represented litigant does not excuse him from the rules of pleading: **Lieb** v. **Smith** (1994), 120 Nfld. & P.E.I.R. 201, 1994 CarswellNfld 176 (Nfld. S.C.T.D.), at paras. 14-16. He confirmed on discovery that is was those "three instances of defamation" on which he was relying to assert his claim, and no others that he was aware of. The plaintiff appeared to agree in the hearing that the defamation was limited to paras. 14, 17 and 21.

The defence pleading:

[9] The defendant denies that any statements or gestures she made in respect of the plaintiff were defamatory. (Amended Statement of Defence, para. 5) She denies meeting with students as alleged by the plaintiff (para. 6) and says there were a series of meetings with the plaintiff concerning student difficulties in his classes, how to conduct ongoing assessments and the teacher's duty to inform parents of missed assignments or test results followed by a letter outlining suggested practices on November 4, 2008 (paras. 7-8). She says the plaintiff was informed about concerns with his performance in October 2008, was given support in addressing these concerns, and was told that he would not be retained as a substitute if his performance did not improve (para. 10). She denies that the plaintiff's assignment as a substitute was terminated on January 26, 2009, when he was informed that he would not be kept on for the second semester. (para. 11) She notes that the *Education Act* requires the principal, among other duties, to communicate regularly with parents and to evaluate the performance of substitute teachers. (paras. 13-15)

[10] The defendant denies that she made "any negative remarks about the Plaintiff to parents of students...." She says she did call parents in accordance with School policy on account of missed assignments or test failures, as the plaintiff refused to do so. (para. 9) As to the specific allegations of defamation identified at paras. 14, 17 and 21 of the Amended Statement of Claim, she says the claim of slander is unsustainable at law in the absence of specifically-pleaded words. (para. 16) She denies that she spoke any words capable of defamatory meaning as alleged at para. 14 but that if she spoke any words capable of defamatory meaning, she denies that they were in fact defamatory of the plaintiff. (para. 18)

[11] In the further alternative, the defendant pleads, if she did use defamatory words, she used them in speaking to persons who were part of the School Board Senior Administration and Human Resources Labour Relations Department and who

therefore "had a reciprocal interest and responsibility to receive such information respecting the Plaintiff's performance and employment as a substitute teacher." (paras. 19-20)

[12] The defendant also denies that the facts alleged at para. 17 of the Amended Statement of Claim can establish a "slanderous gesture." While denying that he was removed from his substitute teaching assignment, the defendant says that if he was removed, the fact of the plaintiff's non-employment cannot constitute a "slanderous gesture" as alleged. She denies that any actions were deliberately taken to injure the plaintiff's reputation as alleged at para. 17 of the Amended Statement of Claim. (paras. 21-24)

[13] The defendant denies that she stated or implied that the plaintiff was "derelict in his professional duties as a teacher" as alleged at para. 21 of the Amended Statement of Claim. She also advances the defences of qualified privilege and fair comment.

THE LAW OF DEFAMATION

[14] Defamation may take the form of libel (where the communication is in a written or otherwise permanent form) or slander (where the statement takes an oral or otherwise transitory form). The requirements for a defamation claim were set out in **Grant** v. **Torstar Corp.**, 2009 SCC 61, where McLachlin, C.J.C. said, for the majority, at paras. 28-29:

> [28] A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism.... (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se*: R. E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), vol. 3, at pp. 25-2 and 25-3.) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
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> [29] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.

[15] The categories of slander that are actionable *per se* include "oral imputations calculated to disparage the plaintiff in the way of his or her work, business, office, trade, calling or profession": **Waterbury Newton** v. **Saunders**, 2007 NSSC 230 at para. 18, citing **Bell** v. **Intertan Canada Limited**, [2002] SKQB 446, at para. 22.

[16] The *Judicature Act*, R.S.N.S. 1989, c. 240, requires that proceedings for libel and slander be tried by a jury unless the parties agree otherwise (s. 34(a)(i)), but the determination of whether words are capable of bearing a defamatory meaning so as to be put to the jury is a question of law for the trial judge: Raymond E. Brown, *The Law of Defamation in Canada*, 2d ed, vol. 1 (Toronto: Carswell looseleaf) at §5.12(1). The defendant submits that if the alleged communications are not capable of bearing a defamatory meaning the claim must be dismissed.

[17] The rules of pleading have been said to be particularly strict when applied to defamation claims. The allegedly defamatory words constitute material facts and generally should be set out verbatim: Roger D. McConchie and David A. Potts, *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 535. Brown writes, in *The Law of Defamation in Canada*, vol. 5, at §19.1:

> Because of the technical nature of the tort, pleadings are of critical importance in an action for defamation. They must adequately define the nature of the action or defences and the issues being tried. The defamatory words must be set out with reasonable certainty, clarity and precision and if the words are innocent on their face, or have some special meaning, the facts or circumstances which give them a defamatory sting must be pleaded and proved. The plaintiff must also plead and prove that the words were published of and concerning the plaintiff and were communicated to persons other than the plaintiff, identifying the time when, the place where and the persons to whom they were published. Where the action is one for slander not actionable per se or where special damages are otherwise sought to be recovered, the plaintiff must allege and prove such damages in order to succeed.

[18] In **D.C.** v. **Children's Aid Society of Cape Breton**, 2008 NSSC 196, Coughlan, J. struck a claim in defamation under the former Rule 14.25 commenting that "a plaintiff must set out fully and precisely the defamatory words the defendant is alleged to have published and specify how, when, where and to whom they were published. In this proceeding, the statement of claim does not specify any defamatory statements, whether the statements were written or oral, or anything about to whom, when or where any defamatory statement was made." (para. 15) There is, however,

authority to the effect that where the plaintiff does not know the exact words of an alleged slander, there is some flexibility. In **Lawrence** v. **Wallace**, 2002 NSCA 36, Cromwell, J.A. (as he then was) said that "in cases of slander in which the plaintiff is not aware of the specific words or precise occasions on which the allegedly defamatory words were published, the usual requirements of very precise pleading of the claim may be somewhat relaxed." (para. 6) The plaintiff says he has pleaded the necessary words, as far as they are within his knowledge, sufficiently for the defendant to know the case she has to meet.

[19] Where the plaintiff is not able to particularize the defamatory words directly, and relies on third-party documents, the plaintiff must establish that there has, in fact, been defamation. In **Abrams** v. **Johnson**, 2009 ABQB 575, where a teacher alleged defamation against a principal, a teacher and two school administrators in connection with allegations of improper conduct, Master Hanebury said:

> [48] The Amended Statement of Claim refers to members of the CBE [Calgary Board of Education] and the public. The Reply to Demand for Particulars names "CBE; Doe and to other unnamed parties as may apply; principals and staff members of the CBE; the Alberta Teachers' Association; parent councils ; and others as will be presented as become available." The Supplemental Demand for Particulars refers to "Doe", being parties of whom he is not aware. It names certain members of the CBE who apparently are colleagues, other colleagues who he cannot name, the Social Studies 33 students who are not named, unnamed parents and the unnamed parents' councils. Mr. Abrams argues that he is trying to ascertain the names of these people and has been stymied in his attempts to get information through the defendants and under the provincial freedom of information legislation.
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> [49] For policy reasons the courts have taken a different approach to defamation actions and have required such actions to be properly particularized. They have refused to allow defamation actions to proceed when they are "fishing" expeditions. In this case the memo and notes were prepared by CBE employees for the purposes of reporting to their supervisors. Mr. Abrams has taken the information found in those documents and alleged that the words or similar words were repeated to a number of named parties who are apparently colleagues, administration, supervisors and investigators and various unnamed colleagues, students, parents and the student council. The time frame described covers a period of a year and a half.
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> [50] This third component of Mr. Abrams' claim against the named defendants lacks the particularity needed to proceed. In the absence of that particularity Mr. Abrams must at least establish a *prima facie* case that the alleged defamation has occurred. The passing reference in the Neilsen note to "parental ... negative reaction"

> is insufficient to do so. The case law holds that in such an instance the claim is an abuse of the process of this court.

[20] Where a plaintiff claims that words which are not defamatory on their face nevertheless give rise to a defamatory meaning, the plaintiff is said to be relying on "true" or "false" innuendo.

SUMMARY JUDGMENT

[21] Civil Procedure Rule 13 "allows a party to move for summary judgment on the pleadings that are clearly unsustainable and to move for summary judgment on evidence establishing that there is no genuine issue for trial": Rule 13.01(1). The defendant says the statement of claim fails to particularize the allegedly slanderous words, or the details of publication, and submits that no defamatory meaning can be found in her words or actions, as a matter of law. She says it is plain and obvious that the pleadings do not disclose a cause of action. Accordingly, she seeks summary judgment on the pleadings, pursuant to Rule 13.03. In the alternative, the defendant says there are no genuine issues of material fact which would require a trial and that the claim has no real chance of success. She says the words and actions alleged by the plaintiff are not capable of defamatory meaning. Even if *prima facie* defamation is established, she says, the defences of qualified privilege and fair comment apply, and there is no evidence of malice that could defeat them. She therefore seeks summary judgment on evidence pursuant to Rule 13.04.

Summary judgment on the pleadings:

[22] The Amended Statement of Claim, alleges that the defendant "informed" the School Board that he "had not performed his professional duties as a teacher, and consequently was not a suitable substitute teacher for continuing the assignment." (para. 14) The plaintiff does not quote exact words. He says he was informed by the defendant that this is what she told the School Board. Paragraph 17 alleges that the plaintiff's replacement by another substitute carried a "clear inference of professional incompetence" that was relayed to his employers, union and colleagues, as well as students and parents. It appears that this is an allegation of defamation by conduct. Paragraph 21 alleges that after the plaintiff's assignment was ended, the defendant "compounded the slander by communicating to the employers that the Plaintiff was derelict in his professional duties as a teacher by not adhering to the unilateral list of teaching strategies issued by the Defendant and staying with the assignment until the

end of the term. That he was refusing to supervise the exam, correct the exam and enter marks and comments for the students taught this semester." Once again, no precise words are cited.

[23] As noted, the defendant maintains that the Amended Statement of Claim is deficient in that it does not particularize the allegedly defamatory words and fails to make out any defamatory meaning in the alleged words or actions, thus disclosing no cause of action. As such, the defendant seeks summary judgment on the pleadings pursuant to Rule 13.03, which provides, in part:

> (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> ....
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> (2) The judge must grant summary judgment of one of the following kinds, when a pleading is set aside in the following circumstances:
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> ....
>
> (b) dismissal of the proceeding, when the statement of claim is set aside wholly;
>
> ....
>
> (d) dismissal of a claim, when all parts of the statement of claim that pertain to the claim are set aside.
>
> (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

[24] Summary judgment on the pleadings is the successor to the former application (under the **Civil Procedure Rules 1972**) for striking a pleading for failure to disclose a cause of action. As under the former proceeding, the test is whether it is "'plain and

obvious' that the claim does not disclose a cause of action; that the action is ‘obviously unsustainable"': **Nova Scotia (Attorney General)** v. **MacQueen**, 2007 NSCA 33, at para. 8; **Innocente** v. **Canada (Attorney General)**, 2010 NSSC 111, at para. 11. The Court of Appeal provided the following discussion of the analysis in **MacQueen**, *supra*:

> [7] The applications to strike were made after the statement of claim was filed and before any defences were filed. No party took issue with the test to be applied by the judge on an application to strike. The judge stated:
>
> > [12] The parties are not in dispute as to the burden resting on the defendants with respect to their respective applications to strike portions of the plaintiffs' statement of claim. Each of the defendants acknowledges the onus on them is to establish it is "plain and obvious" the plaintiffs' statement of claim discloses no reasonable cause of action, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.... Also acknowledged by the defendants is that a court, in considering an application to strike, is to assume the facts contained in the statement of claim are true and then to assess whether, assuming those facts to be true, a claim may be made out. The applications will only succeed if, on the facts as pleaded, the action is "obviously unsustainable". Also, in considering applications to strike, counsel for Ispat references *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323 ... where at p. 325, Macdonald, [J.A.] on behalf of the court, commented:
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> > > " . . . it is not the court's function to try the issues but rather to decide if there are issues to be tried."
> >
> > [8] All parties agree that a pleading should only be struck if it is "plain and obvious" that the claim does not disclose a cause of action; that the action is "obviously unsustainable." This test was recently approved by this Court in *Mabey v. Mabey*, 2005 NSCA 35, (2005) 230 N.S.R. (2d) 272:
> >
> > [13] It is well settled that the test pursuant to Rule 14.25(1)(a) is that the application will not be granted unless the action is "obviously unsustainable". In considering an application to strike out a pleading it is not the court's function to try the issues but rather to decide if there are issues to be tried. The power to strike out pleadings is to be used sparingly and where the action raises substantial issues it should not be struck out: *Vladi Private Islands*.... An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length and complexity of the issues, the novelty of the cause of action, nor

> the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case: *Hunt*....

[25] The defendant says the allegations of defamation at paras. 14, 17 and 21 of the Amended Statement of Claim are not sufficiently particularized to be capable at law of bearing a defamatory meaning. The defendant also says the act described at para. 17 cannot sustain a cause of action in defamation under Rule 13.03. To repeat, para. 17 alleges that by "removing" the plaintiff from the substitute teaching assignment, the defendant knowingly relayed a "clear inference of professional incompetence" to the plaintiff's "employers, union, colleagues, students and parents." In his Answer to Demand for Particulars of Amended Statement of Claim, the plaintiff made the following comments about para. 17:

> a) the precise words claimed to be defamatory;
>
> Answer: This was a slanderous gesture.
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> b) the specific date, time and occasion when the words were allegedly communicated;
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> Answer: The Plaintiff was notified by the Defendant by email on Monday January 26, 2009 that, "We do not have further work for you at this time."
>
> c) whether the allegedly defamatory words were oral or written;
>
> Answer: This was a slanderous gesture.
>
> d) the names of the persons to whom, or in whose presence these allegedly defamatory words were spoken or communicated;
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> Answer: The Human Resources Department of AVRSB, all staff of MRHS, all staff of BRHS [sic], the entire student body of MRHS, parents of senior students of MRHS.
>
> e) the defamatory meaning claimed;
>
> Answer: That the Plaintiff was not professionally capable of finishing his assignment.

[26] The defendant says it is not sufficient for the plaintiff to rely on the act of ending his substitute teaching assignment as the source of defamation. Moreover, the plaintiff has not provided specific pleadings as to "how, when, where and to whom" the defamation was published. The only date pleaded is that of the e-mail, which the plaintiff concedes is not defamatory. The pleadings are also (according to the defendant) "vague and overly broad", with the reference to publication to "a broad list of categories of people (not specified individuals) who may, at some unspecified time, have become aware that Robertson was no longer teaching Mr. Eddy's classes." As such, the defendant submits, para. 17 does not establish *prima facie* defamation.

[27] The defendant further takes the position that the action referred to in para. 17 is not capable of bearing a defamatory meaning. The ending of a substitute teacher's assignment is not, on its face, a basis to find defamation. The defendant cites **Gowin** v. **Hazen Memorial Hospital Association** (1984), 349 N.W.2d 4, where the plaintiff was demoted from the position of head of a hospital laboratory. The Supreme Court of North Dakota held that the action of demotion could not support a claim of slander; the demotion "was not false" and "any inferences that may have been drawn by third parties" did not "make the demotion itself slanderous." (paras. 14-15) The defendant maintains that the fact the plaintiff was not retained for further teaching duties, and that others may have been aware of this fact, does not constitute defamation. The defendant adds that no false innuendo can be drawn from this action since the action of ending a substitute teacher's day-to-day assignment could carry any number of "ordinary meanings."

[28] The plaintiff takes the position that a "gesture" can constitute defamatory speech. The *Defamation Act*, R.S.N.S. 1989, c. 122, defines "words" as including "pictures, visual images, gestures or other methods of signifying meaning" (s. 2(e)). The defendant argues that this broadened definition is only relevant to deeming a broadcast to be in permanent form and in relation to various defences. An actionable gesture, it is submitted, must be a physical movement that signifies meaning.

[29] The defendant also submits that paras. 14 and 21 of the Amended Statement of Claim cannot support allegations of slander. Paragraph 14 alleges that the defendant told the plaintiff that she had informed the School Board that "he had not performed his professional duties as a teacher, and consequently was not a suitable substitute teacher for continuing the assignment." In his answer to Demand for Particulars, the plaintiff said the following in respect of para. 14:

a) The precise words claimed to be defamatory;

Answer: that the Plaintiff had not performed the duties assigned to him.

b) whether the allegedly defamatory words were oral or written;

Answer: oral.

c) the specific date, time and occasion when the words were allegedly communicated;

Answer: according to the Defendant, before the meeting of January 26, 2009 between the Plaintiff and the Defendant. The Plaintiff is not aware of the specific time or place. The occasion was a discussion between AVRSB Human Resources and the Defendant regarding the Defendant's decision not to allow the Plaintiff to continue his assignment.

d) the persons to whom, or in whose presence these allegedly defamatory words were spoken or published;

Answer: the AVRSB Human resources; Erica Bawn and/or Allen Hume.

e) the defamatory meaning claimed;

Answer: that the Defendant had not performed his duties as a teacher.

[30] The defendant says it is plain and obvious that para. 14 is not sufficient to support an allegation of defamation. The plaintiff does not establish the particular words allegedly spoken by the defendant to Ms. Bawn. As Brown states, at vol. 5, §19.3(2)(a)(i):

> The general rule is that the defamatory words about which the plaintiff complains must be set out fully and precisely in the statement of claim. The particular words that are claimed to be defamatory must be included in the claim. The impugned words must be pleaded. They should be set forth verbatim, or at least with sufficient particularity to enable the defendant to plead to the allegation.... It is preferable if the defamatory language is alleged in the form of a quotation, although that is not required, or attached as an exhibit to the statement of claim....

> In an action for defamation "it is essential to know the very words on which the plaintiff founds his claim." This is particularly true in an action for slander....
>
> Ordinarily it is not sufficient to give the tenor, substance or purport of the libel or slander, or an approximation of the words, or words to a certain "effect", or any other words of a similar import. Merely to refer to "demeaning and slanderous remarks" or to plead that the plaintiff was defamed is not sufficient. Nor can the plaintiff rely on some vague general statement of the defamatory words, or his or her interpretation of what they mean, or the inferences that might be drawn, otherwise the defendant would be deprived of the right to have the court, rather than the plaintiff, determine whether they are capable of a defamation imputation.... The exact words must be set out with reasonable certainty, clarity, particularity and precision. Without the words, there is nothing to construe as defamatory....

[31] The defendant says the court cannot determine whether the words allegedly spoken to Ms. Bawn were capable of a defamatory meaning. In addition, the defendant says para. 14 does not sufficiently establish the particulars of the publication pleading only that it occurred at some time before the plaintiff and defendant spoke on January 26, 2009. The result, the defendant says, is that the plaintiff is "fishing" for material to substantiate his claim.

[32] The defendant also argues that it is plain and obvious that para. 21 cannot support a defamation claim. As has been noted, para. 21 alleges that after the plaintiff was removed, the defendant "compounded the slander by communicating to the employers that the Plaintiff was derelict in his professional duties as a teacher by not adhering to the unilateral list of teaching strategies issued by the Defendant and staying with the assignment until the end of the term," and that "he was refusing to supervise the exam, correct the exam and enter marks and comments for the students taught this semester." In his Answer to the Demand for Particulars, the plaintiff said, in relation to para. 21:

> a) the ‘slander"
>
> Answer: That the Plaintiff was derelict in his professional duties.
>
> b) the names of the "employers";
>
> Answer: Erica Bawn and /or Allen Hume.
>
> c) the precise words claimed to be communicated;

> Answer: That the Plaintiff was derelict in his professional duties. That the Plaintiff had refused to supervise the exam, correct the exam and enter marks and comments for the students taught that semester.
>
> d) whether the words were communicated orally or in writing;
>
> Answer: Orally.
>
> e) the specific date, time and occasion when the words were allegedly communicated;
>
> Answer: Tuesday January 27 during a conversation between the Defendant and Erica Bawn and/or Allen Hume.

[33] The defendant says the plaintiff has failed to plead the allegedly defamatory words in para. 21, and, as with para. 14, this results in a failure to provide a sustainable pleading in defamation.

[34] I am satisfied that it is plain and obvious that the Amended Statement of Claim does not make out a cause of action in defamation. Firstly, none of the paragraphs containing the alleged defamatory communications contain exact words, or even an attempt at exact words. While failing to plead exact words is not necessarily fatal, particularly where, as here, the plaintiff does not claim to have been present to hear the alleged defamatory statements, the statements alleged at paras. 14 and 21 do no more than relay the plaintiff's own gloss on what he appears to believe was said. As for para. 17, I am not satisfied that the failure to continue or extend a substitute's assignment under the Nova Scotia *Education Act*, on its own, can be regarded as an act of defamatory communication. As such, I grant the order for summary judgment on the pleadings. In case I am in error on this ground, I will go on to consider the motion for summary judgment on the evidence.

Summary judgment on the evidence:

[35] Summary judgment on the evidence is governed by Rule 13.04, which provides:

> (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
>
> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.
>
> (6) The motion may be made after pleadings close.

[36] The two-part test for summary judgment on the evidence is well-known. Fichaud, J.A. put it in the following terms in **Turner** v. **Halifax (Regional Municipality)**, 2009 NSCA 106:

> [15] The prerequisites for summary judgment to dismiss an action are first that the applying defendant shows there is no genuine issue of material fact requiring trial, and second that the responding plaintiff fails to show that his claim has a real chance of success. *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General),* 2007 NSCA 38, at ¶ 9, per Cromwell, J.A., citing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at ¶ 27.

[37] The parties to a motion for summary judgment on the evidence are obliged to "put their best foot forward." Fichaud, J.A. commented, in **Turner**:

> [19] As Justice Roscoe said in *MacNeil v. Bethune*, 2006 NSCA 21 at ¶ 33, "at the second step of the test, there is an evidential burden on the responding party to put his best foot forward or risk losing". Justice Roscoe adopted, as do I, the following

passage from *Marco Ltd. v. Newfoundland Processing Ltd.*, [1995] N.J. No. 168, 130 Nfld. & P.E.I.R. 317 (Nfld. T.D.):

> 76.... 7. If the applying party satisfies the threshold test for the application of the rule by putting forward an evidentiary basis for his or her position, the responding party then has an evidentiary burden to demonstrate that there is a genuine issue for trial. This cannot be accomplished by showing an issue raised by the pleadings. The argument on a Rule 17A application takes place at a level below the pleadings within the forums of evidence and legal argument. The responding party must therefore "put his best foot forward" since failure to do so may lead the court to conclude that there is in fact no genuine issue for trial. The responding party should therefore set out in affidavits, or answers given on interrogatories or oral discoveries, an evidentiary foundation for his or her case so that the court can see that there is a genuine issue of fact or law that is joined and has to be resolved before the court can make an ultimate determination on the merits.

[38] Both parties have provided affidavit evidence as well as references to other documentary evidence and examinations for discovery. The defendant's evidence is that, while she had discussions with Ms. Bawn (as well as other members of the school's administrative team) with respect to making a change in the substitute teaching position for the second semester, she never told "Ms. Bawn or anyone else at the AVRSB that Mr. Robertson was unfit to teach, incompetent or words to that effect as alleged by Mr. Robertson." (Affidavit of Heather McCormick, para. 26) Moreover, she says:

> 33. I have never stated that Mr. Robertson is unfit for the profession of teaching, derelict in his professional duties as a teacher, an unprofessional teacher, not a suitable teacher, a poor educator, incompetent or words to that effect, as alleged by Mr. Robertson in his Amended Statement of Claim.
>
> 34. I have no motivation to injure Mr. Robertson's reputation.

[39] Ms. Bawn's affidavit similarly states that "Ms. McCormick never said to me that Mr. Robertson is unfit for the profession of teaching, derelict in his professional duties as a teacher, an unprofessional teacher, a poor educator, incompetent or words to that effect." (Affidavit of Erica Bawn, para. 19) On the basic fact of whether the defendant made the statements alleged, the evidence of both persons who were allegedly privy to the conversations is a denial that such words were ever said. (The plaintiff agreed

that he could only confirm that Ms. Bawn was a recipient of the alleged statements, not Allen Hume, whom he identified in his Answer to Demand for Particulars.)

[40] The plaintiff's own affidavit provides little that would supplement the allegations as set out in the Amended Statement of Claim and the associated Answer to Demand for Particulars. In his account of the meeting with the defendant, he states only the following:

> When asked why his assignment would be interrupted, the Plaintiff was told by the Defendant McCormick, that he was not a suitable teacher, that he had not fulfilled his list of practices as supplied by (her) the Defendant, and that he specifically had failed to deliver sufficient classroom notes and assessment to his students, resulting in failure with the students' learning.
>
> I was demeaned and baffled by the accusation of poor teaching and assessment and not having adhered to the Defendant's list of November 4, 2008.
>
> After unsuccessfully appealing to the Defendant to reconsider and acknowledge this fabrication to facilitate my replacement, and to express the ulterior motive in order to find a compromise, I left the meeting with the commitment to involve the employers through the union.
>
> The Defendant had informed me during the meeting that she had already reported a failure to fulfill my duties to our [sic] Erica Bawn and that the employers would not intercede.

[41] The plaintiff goes on to state that he subsequently e-mailed Ms. Bawn for "confirmation that I had been removed arbitrarily from the substitution list; he attaches the e-mail, although Ms. Bawn, in response to his message, responded only "I am writing to acknowledge receipt of this e-mail. Should you wish to discuss your situation with either Allen Hume or me, feel free to contact us to arrange a meeting time." The plaintiff refused to meet without representation and demanded that all communication be in writing.

[42] Put simply, the plaintiff's evidence, as advanced on the motion, adds nothing to the bare pleading in his Amended Statement of Claim. He has still not provided any specifics of what was allegedly said. Nor does his affidavit (or his son's affidavit also filed on the motion) provide any evidence of actual defamatory effect from any of the alleged statements. If anything, the affidavit evidence provides less detail on the material issue than the pleadings. Based on the affidavit evidence provided by the

defence, and the ineffective evidence in reply, I am not satisfied that there is a dispute of material fact.

[43] The defendant says the allegation of a defamatory act in para. 17 of the Amended Statement of Claim has no real chance of success. In the absence of allegedly defamatory words, the plaintiff must establish that the act of ending his teaching assignment actually resulted in lowering his reputation in the eyes of a reasonable person. The defendant says there is no evidence that actual defamation occurred. The plaintiff was a day-to-day substitute and the principal had the authority to end his assignment. His assignment was ended at the end of a semester, a time when (according to the defendant) it is not unusual for substitutes to change assignments. The defendant attempted to limit discussion of the change to those who needed to know. Finally, the defendant says, there were 40 teachers and 21 assistants at the School during the 2008-2009 school year and there was no evidence that the change of substitutes at the end of the semester was not routine. The law of defamation protects a person's actual reputation, not that which "he deserves or wishes he had...": Brown, vol. 1, at §4.1. The plaintiff was a substitute teacher who had never held a permanent position. He was not a permanent teacher dismissed from a long-term position.

[44] With respect to paras. 14 and 21, the defendant notes that the plaintiff has no actual knowledge of the conversations between the defendant and Ms. Bawn and thus no direct evidence of the allegedly defamatory words. The plaintiff refers to the content of an e-mail message he received from a union representative, Grant MacLean, on January 30, 2009, referring to conversations between himself and Ms. Bawn. Mr. MacLean wrote:

> ... I have talked to Erica Bawn twice this week, our most recent conversation was yesterday, and she informed me that you have been removed from the substitution list for your actions at Middleton high on Wednesday. Those actions were" refusing to supervise the exam, correct the exam and enter marks and comments for the students you taught this semester.
>
> Did you have a conversation with the vice-principal on Wednesday of this week concerning the above? Erica Bawn informed me on Tuesday that you received a written list of areas of concern from administration in November, did you receive such?
>
> You should contact the Union to discuss the allegations and options.

[45] On discovery, the plaintiff confirmed that he did not know what words were spoken by the defendant and that he relied on "the inference of the tone from my union rep" to establish slander. To the extent that the plaintiff seeks to rely on words derived from the e-mail, the defendant says this would be hearsay resting on the assumption that the defendant said something to Ms. Bawn. In addition, the defendant points out that the plaintiff has asserted "privilege in the same sense as solicitor-client privilege" over other communications between himself and the union, in a response to an inquiry about undertakings by defendant's counsel. As such, the defendant submits, paras. 14 and 21 cannot sustain a claim in slander.

[46] The defendant specifically denies making the statements to Ms. Bawn that the plaintiff alleges in para. 14. She states in her affidavit that she consulted Ms. Bawn about locating another substitute and to confirm that she was not required to retain the plaintiff for the second semester. She says she did not tell anyone that the plaintiff was unfit to teach or incompetent. When it became clear that the plaintiff would not return to correct the final exams (after January 26, 2009), their conversations became concerned with arranging for a teacher to correct the exams. There is no direct evidence that the defendant told Ms. Bawn that the plaintiff was incompetent or derelict in his professional duties. Both Ms. Bawn and the defendant deny that the defendant said anything to this effect. The defendant takes the position that there is no basis upon which to find that any words spoken between her and Ms. Bawn can bear a defamatory meaning.

[47] The plaintiff's own affidavit recounts a pattern of what he calls "confrontations" between himself and the defendant about teaching methods, including his refusal to call "parents of failing students with the request that I should assure the parents that my pedagogy was to be corrected", and the claim that the "unsolicited list of pedagogical demands" he received from the defendant "included academic misconduct unpractised by me." He nevertheless states that he "genuinely adjusted my teaching and assessment to follow the demands of the Defendant." He was subsequently surprised to learn that the defendant had decided not to retain his services. He also points to a note by the defendant dated January 26, 2009, as evidence that she "knew" that he had "fulfilled his duties concerning this unilateral list." The note reads:

> Asked to speak to Mark in my office
>
> - Reviewed that he had been in a sub position

- Reviewed that he had complied with the Nov. 4/08 list.

[48] I am not convinced that the language of this note supports the interpretation the plaintiff seeks to give it. Even if he had complied fully with the defendant's list of concerns (an assertion called into question by his own affidavit), this would not appear to make the defamation claims more likely to succeed. Similar comments would apply to a positive assessment of his teaching performance by the defendant during a substituting assignment in 2006-07.

[49] I can see no genuine issue raised on the evidence provided by the plaintiff that supplements the allegations in the pleadings. The plaintiff's evidence and his written submission is primarily concerned with his complaints about the manner in which the defendant ran the school. It adds little or nothing to support the view that his claim in defamation is one with a real chance of success. It is evident that the substance of the plaintiff's claim is a complaint about the defendant's decision not to retain him as a substitute teacher in the second semester. More broadly, his complaint appears to be with the employment conditions of substitute teachers. None of this, it seems to me, helps to substantiate a claim in defamation. As such, the defendant is entitled to summary judgment on the evidence.

Qualified privilege and fair comment:

[50] The defendant goes on to argue, in the event that the plaintiff was able to show that his claim was one with a real chance of success that summary judgment on the evidence should be granted on the basis of the defences of qualified privilege or fair comment. The defendant submits that the question of whether the occasion was one of qualified privilege is one that can be determined as a question of law pursuant to Rule 13.04(5). I will proceed on that basis.

[51] The defence of qualified privilege is available where a person is entitled to publish statements that may be untrue and defamatory. In such instances, there will be no liability for defamation unless there was actual malice in making the statement. Cory, J. described the doctrine in **Hill** v. **Church of Scientology of Toronto**, [1995] 2 S.C.R. 1130:

146 Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:

> ... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

....

147 The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice....

148 Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson, J. pointed out in dissent in [Cherneskey v. Armadale Publishers Ltd., [1979] 1 S.C.R. 1067] at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created.... Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth....

149 Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded.... As Loreburn E. stated, at pp. 320-321 in Adam v. Ward, supra:

> ... the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or the safeguarding of the interest which creates the privilege will not be protected.

150 In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given....

[52] The defendant submits that there is an ongoing duty and interest on the part of school administrators to evaluate teaching performance and the teacher's suitability to his position and to discuss this among the members of the administrative team. There is also a duty upon school boards to receive such information. The defendant cites **Abrams**, *supra*, where the court, in the course of determining whether the proceeding should be left to be dealt with under the legislative scheme for workplace disputes, said:

> [17] Counsel for the defendants argued that Ms. Marson, as the head of the social studies department, had a statutory duty to go to her principal with the statements about Mr. Abrams that she had heard in class.
>
> [18] Whether she was statutorily obligated, she had an obligation as a teacher and the head of the department to report the concerns raised by the students in her class and another teacher about Mr. Abrams' appropriateness for the position, and this she did, as is reflected in her memo.
>
> [19] Ms. Neilsen, the principal of E.P. Scarlett had an obligation under s. 20 of the School Act to evaluate teachers employed in the school and promote co-operation between the school and the community that it serves. Investigating a concern that a teacher is not a good fit for a particular school or community would come within a principal's duties. Ms. Neilsen also had an obligation to take that information further to determine the appropriate course of action, which she did. As a result Ms. Clark and Ms. Johnson also became aware of the statements about Mr. Abrams, and ultimately his placement was terminated.

[53] In **Korach** v. **Moore** (1991), 76 D.L.R. (4th) 506, 1991 CarswellOnt 1105 (Ont. C.A.), leave to appeal refused, 79 D.L.R. (4th) vii (S.C.C.), it was held that, while a vice-principal's letter to a school board expressing concerns about a substitute teacher contained defamatory statements, there was "no doubt that the letter was written on an occasion of qualified privilege..." (para. 4). The Court of Appeal held that the trial judge erred by finding malice on the basis of carelessness or negligence in making the statement despite an honest belief in its truth (para. 47). **Korach** confirms that the onus is on the plaintiff to prove malice in relation to a defence of qualified privilege.

[54] Similarly, in **Haight-Smith** v. **Neden et al**, 2000 BCSC 1233, the court said, in the context of a teacher's defamation claim against various administrators and staff:

> [35] Mr. Betton accepts that qualified privilege exists where the person making a statement has a social, moral, or legal duty to make the statement, and the person

> receiving the statement has a social, moral, or legal duty to receive it. He referred in his submission to that principle as an unassailable statement of law. I agree. That principle was expressed in *McLoughlin v. Kutasy* (1979), 8 C.C.L.T. 105 (S.C.C.). The contention of Ms. Haight-Smith, however, is that qualified privilege is forfeited where there is malice on the part of the person making the statement. *Korach v. Moore* (1991), 1 O.R. (3d) 275 (Ont. C.A.). Indirect motives other than a sense of duty will serve of proof as malice and do away with any allegation of qualified privilege: *Westbank Band of Indians v. Tomat* (6 September 1989), Kelowna Reg. 86-205 (B.C.S.C.).
>
> [36] I find that the materials filed disclose no malice on the part of any of the persons involved. On the contrary, the teachers, secretary, support worker and custodian who were interviewed, at the very least, had a social or moral duty to respond to the questions of Mr. Shamsher and Mr. Dickson. They should be commended for speaking honestly despite the threat of litigation which was implied, if not expressly stated, by Ms. Haight-Smith. Good faith disclosures are in the public interest. The furtherance of that public interest requires that persons in the position of the teachers and staff receive the support of the Court when they respond in good faith to investigations such as these.

[55] The defendant says there is a legal duty and a public interest duty as between her and Ms. Bawn that would shield their discussions about school matters and particularly human resources matters with qualified privilege. These duties arise from ss. 32 and 64 of the *Education Act*, S.N.S. 1995-96. The principal's role is described at s. 38, which provides, in part:

> 38 (1) The principal of a public school is the educational leader of the school and has overall responsibility for the school, including teachers and other staff.
>
> (2) It is the duty of a principal to
>
> (a) ensure that the public school program and curricula are implemented;
>
> ....
>
> (d) communicate regularly with the parents of the students;
>
> (e) ensure that reasonable steps are taken to create and maintain a safe, orderly, positive and effective learning environment;

> (f) ensure that provincial and school board policies are followed;
>
> (g) identify the staffing needs of the school;
>
> (h) assist the school board with the selection of staff for the school;
>
> (i) evaluate the performance of teachers and other staff of the school....

[56] The duties and powers of school boards are set out at s. 64, which provides, in part:

> 64 (1) A school board is accountable to the Minister and responsible for the control and management of the public schools within its jurisdiction in accordance with this Act and the regulations.
>
> (2) A school board shall, in accordance with this Act and the regulations,
>
> (a) make provision for the education and instruction of all students enrolled in its schools and programs;
>
> (b) ensure that its schools adhere to the provincial program of studies;
>
> (c) promote excellence in education;
>
> ....
>
> (f) promote its schools as safe, quality learning environments and as community resources;
>
> ....
>
> (j) provide regional services to assist public schools....

[57] The defendant submits that the public interest duty between herself and Ms. Bawn, as well as between herself and the vice-principals, relates to the public interest in ensuring that children are well-served by the public school system. In this context, comments about the plaintiff's performance of his teaching duties and his suitability

for the position, made without malice, would be protected by qualified privilege. I agree. A school principal must be permitted to speak frankly to other necessary personnel in dealing with the retention of substitute teachers. The plaintiff's allegations of malice essentially rest on his view that there must have been malice because he revealed deficiencies in the way the school was being run and she knew his strengths as a teacher.

[58] The defendant also raises the defence of fair comment. The elements of fair comment were set out by the Supreme Court of Canada in **WIC Radio Ltd.** v. **Simpson**, [2008] 2 S.C.R. 420, 2008 SCC 40, at para. 28, per Binnie, J., for the majority:

> [28] For ease of reference, I repeat and endorse the formulation of the test for the fair comment defence set out by Dickson, J., dissenting, in Cherneskey as follows:
>
> (a) the comment must be on a matter of public interest;
>
> (b) the comment must be based on fact;
>
> (c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice....

[59] The defendant argues that the defamatory meaning the plaintiff attributes to her conversations with Ms. Bawn are subject to a defence of fair comment.

[60] Brown suggests that issues "relating to the competency of school administrators, or the operation and condition of a school or school system, or the appointment and tenure of faculty are matters of public interest" for the purpose of fair comment (*Law of Defamation in Canada*, vol. 4, §15.5(2)(d)). There is ample authority (including such cases as **Korach**, **Abrams** and **Neden**) to support the conclusion that the defendant's discussions regarding the performance of substitute

teachers would be a matter relevant to the broader public interest in the proper running of the school system.

[61] The defendant says any opinions she would have expressed in the relevant conversations were based on fact. Specifically, they would have related to certain undisputed facts, among them: that some students in classes taught by the plaintiff had failed tests, did not hand in assignments and were having difficulty following the plaintiff's teaching; that this issue had been addressed by the plaintiff, the defendant and the vice-principals; that the defendant had provided the plaintiff a letter, dated November 4, 2008, outlining "suggested practices," and that the plaintiff did not complete all the suggestions; and that the plaintiff did not supervise or mark the final exams, did not mark some assignments and did not complete report cards.

[62] The defamatory meanings the plaintiff attributes to the defendant's discussions – that he had not performed his duties as a teacher and that he was derelict in his professional duties – are, the defendant submits, opinions based on facts that a person could honestly hold and therefore subject to the defence of fair comment.

[63] Both defences – qualified privilege and fair comment – may be displaced by proof of actual malice. Rule 38.03(3) requires a plaintiff alleging unconscionable conduct, including malice, to plead full particulars of the claim which the defendant says has not been explicitly done. The defendant does not deny, however, that the Amended Statement of Claim alleges that she ended the plaintiff's assignment in order to deny him the chance to secure a term position and to conceal academic misconduct at the school.

[64] In *Canadian Libel and Slander Actions*, McConchie and Potts describe malice in the following terms, at 299:

> A defendant is actuated by express malice if he or she publishes defamatory expression:
>
> i) knowing it is false; or
>
> ii) with reckless indifference whether it is true or false; or
>
> iii) for the dominant purpose of injuring the plaintiff because of spite or animosity; or

> iv) for some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

[65] Where malice is alleged, it is not sufficient that the speaker may have been partly motivated by dislike for the plaintiff; as Lord Diplock stated in **Horrocks** v. **Lowe** [1974] 1 All E.R. 662 at 670 (quoted by McConchie and Potts at 322-323), it is "only where his desire to comply with the relevant duty or protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that ‘express malice' can properly be found." In other words, the authors state, the "desire to injure must be the dominant notice.... Mere dislike or indignation and welcoming the opportunity to expose the plaintiff does not constitute express malice, as long as the defendant otherwise spoke honestly" (323).

[66] With respect to the allegation that the defendant intended to deprive the plaintiff of an opportunity to obtain a term position, it is useful to consider the collective agreement governing substitute teachers. The rights of substitute teachers are governed by a collective agreement between the Province and the Nova Scotia Teachers Union ("the Collective Agreement"). Article 32.01 of the Collective Agreement that was in force at the time the plaintiff was at the School describes a "substitute teacher" as "a teacher or other qualified person engaged on a day-to-day basis to take the place of a person regularly employed as a teacher by a School Board." The Collective Agreement sets out pay rates for substitute teachers including salary raises for substitutes after 21 days (Art. 32.02). In addition to a pay raise to the level of a regular teacher after 21 days, a substitute is classified as a regular teacher for certain specific purposes including retention of salary or benefits on days when school is closed (Art. 32.06) and entitlement to sick leave (Art. 32.07). (This is presumably what the plaintiff is referring to when he calls himself a "long-term substitute" in his brief.) A school board is not permitted to "break a substitute teacher's teaching service for the purpose of interrupting consecutiveness in order to minimize the cost of a substitute teacher's daily pay rate," that is, by avoiding the 21-day raise (Art. 32.10). Further, a substitute who teaches for 175 days may be able to apply that time toward a probationary period in order to ultimately seek a permanent teaching position (Art. 33), although there is no obligation on a principal to retain a substitute for the entire period in order to allow the substitute to fufill the probationary period. As such, the defendant says, the plaintiff would remain a substitute in any event. Nor, she says, is there any evidence that she was motivated by a desire to deny the plaintiff a chance at a term position.

[67] As to the second allegation, the defendant says there is no evidence that she was motivated by the intention to conceal academic misconduct. The only evidence of misconduct, she says, is hearsay that some students had a copy of a previous test. The plaintiff did not make any specific allegation that cheating had occurred. Moreover, the alleged misconduct came to the defendant's attention in October, but the plaintiff was kept on for three more months. This would make little sense if her intention were to punish the plaintiff in connection with the misconduct allegations.

[68] In any event, the defendant points out, the plaintiff's own discovery evidence was that he did not believe that she bore him any ill will or malice prior to his commencing the legal proceeding. When questioned, he stated: "I don't think [the defendant] bore any grudge to me at all...."

[69] On the basis of these arguments, the defendant says it is plain and obvious that the defences of qualified privilege or fair comment will succeed.

CONCLUSION

[70] It is clear from the plaintiff's pleading and argument that his complaint, while framed in defamation, is in substance a complaint about the defendant's decision not to retain him as a substitute teacher. Neither the pleadings nor the evidence support a conclusion that there are sustainable claims in defamation. Nor can I accept the plaintiff's argument that the law should be applied differently to teachers effectively permitting him to sue in defamation for losing a job. As such, the motion for summary judgment on the pleadings is allowed, as is, in the alternative, the motion for summary judgment on the evidence. The claim is dismissed.

[71] The parties are encouraged to try to reach agreement on costs failing which they are invited to file written submissions within 30 calendar days of the date of release of this decision.

McDougall, J.