

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

B.W. (BRAD) BLAIR

Plaintiff  
(Appellant/Respondent by Cross-Appeal)

and

PREMIER DOUG FORD

Defendant  
(Respondent/Appellant by Cross-Appeal)

**FACTUM OF THE RESPONDENT,  
PREMIER DOUG FORD**

May 25, 2021

**GARDINER ROBERTS LLP**

Lawyers  
Bay Adelaide Centre, East Tower  
22 Adelaide Street West, Suite 3600  
Toronto ON M5H 4E3

Gavin J. Tighe (34496Q)

Tel: (416) 865-6664  
gjtighe@grllp.com

Tel: (416) 865-6600

Fax: (416) 865-6636

Lawyers for the Defendant (Respondent/Appellant  
by Cross-Appeal),  
Premier Doug Ford

TO:

**FALCONERS LLP**  
Barristers and Solicitors  
10 Alcorn Avenue  
Suite 204  
Toronto ON M4V 3A9

Julian N. Falconer (29465R)  
Julianf@Falconers.Ca

Asha James (56817K)  
Ashaj@Falconers.ca

Tel: (416) 964-0495  
Fax: (416) 929-8179

Lawyers for the Plaintiff (Appellant/Respondent by Cross-Appeal),  
Brad Blair

**AND TO: DMG ADVOCATES LLP**  
155 University Avenue  
Suite 1230  
Toronto, ON M5H 3B7

Ryder Gilliland (45662C)  
Rgilliland@dmgadvocates.com

Tel: (416) 238-7537  
Fax: (647) 689-3062

Co-counsel for the Plaintiff (Appellant/Respondent By Cross-Appeal),  
Brad Blair

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**PART I – OVERVIEW**

1. This appeal concerns the application of s. 137.1 of the *Courts of Justice Act* (“**CJA**”) to an action for defamation that arose out of a highly publicized war of words between former interim OPP Commissioner Bradley Blair, who levelled serious accusations of police interference in the OPP and potential criminal conduct against Premier Doug Ford in a letter he and his lawyer prepared and then released, through a media release, to the public for wide distribution on December 11, 2018 (the “**Letter**”), and Premier Ford, who, in response to media questions about Blair’s accusations and his conduct in publishing the Letter via media release stated on three separate occasions his view that Blair’s conduct breached the *Police Services Act* (Code of Conduct) (the “**PSA**”). On December 18, 2018 Premier Ford had invited the media to investigate Blair’s conduct and later stated that someone needed to hold him accountable.

2. On a s. 137.1 CJA motion to dismiss Blair’s defamation action, the Honourable Justice Belobaba determined that Blair had not proven that Premier Ford’s defence of fair comment did not have a real prospect of success and that, in the alternative, the public interest in permitting Blair to continue with his personal \$5 million defamation action did not outweigh the public

interest in permitting Premier Ford to speak about the accusations levelled against him about personal wrongdoing and government interference in the OPP.

3. Blair misconstrues the scope of s. 137.1 in his factum by criticizing Justice Belobaba's decision for failing to adequately consider that his defamation action did not bear the hallmarks of a classic SLAPP lawsuit. His Honour correctly determined that s. 137.1 is not confined to cases where the plaintiff is a powerful or financially strong party and the defendant is a weak party, without necessary financial means to defend an action. Section 137.1 simply applies to any claim that is about an expression that involves a matter of public interest.

4. Blair also misinterprets Justice Belobaba's application of the "no valid defence" test. Justice Belobaba correctly found that Blair had failed to meet the threshold established by the Supreme Court of Canada in *Pointes Protection* because the evidence demonstrated that the fair comment defence had a *solid* chance of success. In other words, Blair had not demonstrated that he was even close to showing that his action could go "either way".

5. As well, Justice Belobaba correctly found that the public interest favoured dismissal because Blair had failed to show that he suffered harm caused by the alleged defamatory statements. In fact, Blair's allegation in the defamation action that he suffered psychological and reputational harm as a result of Premier Ford's statements are repeated in a separate \$15 million wrongful dismissal action against Premier Ford and others that Blair is pursuing. Blair has claimed that his psychological harm and loss of reputation was caused by his wrongful termination from the OPP, which occurred six weeks *after* Premier Ford's last impugned statement about Blair.

6. The Ministry of the Attorney General ("MAG") has consented to Blair commencing the wrongful dismissal action without being required to meet any of the conditions that may be

found in the *Crown Liability and Proceedings Act, 2019* (the “**CLPA**”).<sup>1</sup>

7. With respect to Blair’s preliminary motions concerning production of government records in multiple Ministries based on an alleged general waiver of solicitor-client privilege and the re-attendance of Premier Ford for cross-examination on his affidavit filed in support of the s. 137.1 motion, Justice Belobaba properly exercised his discretion in refusing additional production and requiring Premier Ford to re-attend cross-examination. As consented to by Blair in a court order, Premier Ford was cross-examined for a “morning” or almost 3 hours. The motion for re-attendance also followed a failed motion for refusals.<sup>2</sup>

8. A MAG Briefing Note, dated December 12, 2018 (the “**Briefing Note**”), that contained legal advice about whether Blair’s letter broke the PSA and which was the only legal advice Premier Ford relied upon in making his impugned statements, had been fully disclosed in the defence of the action and on the motion. This disclosure was correctly found by Justice Belobaba to not constitute a general waiver of solicitor-client privilege such that no additional productions were required.

9. As well, Justice Belobaba appropriately dismissed Blair’s contention that certain questions during Premier Ford’s cross-examination on his affidavit had been improperly refused. Remarkably, Blair did not formally actually make a refusals motion and filed no affidavit in support of such a motion.

10. This case is unique in that Blair has commenced multiple proceedings in pursuit of the same alleged damages after having initiated a public media campaign from December 11, 2018 to at least September 13, 2019 against Premier Ford. He and his lawyer held multiple press

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<sup>1</sup>Decision of Justice Belobaba, dated December 15, 2021 (“**Main Decision**”), Footnote 3, Compendium of the Respondent (“**COR**”) at Tab 61

<sup>2</sup> Endorsement of Justice Belobaba, dated November 23, 2020 (“**First Preliminary Motion Decision**”), COR Tab 58; Endorsement of Justice Belobaba, dated November 30, 2020, (“**Second Preliminary Motion Decision**”), COR Tab 59

conferences throughout this period and accused Premier Ford of being a liar, committing fraud and rigging the OPP Commissioner hiring process that resulted in Ron Taverner being appointed as the new OPP Commissioner instead of Blair, who also sought the coveted position.<sup>3</sup>

11. Blair also still has an extant judicial review application against the Ombudsman of Ontario (the “**Ombudsman**”) for his refusal to investigate Blair’s allegations concerning the job competition in which Blair was not hired as the permanent OPP Commissioner.

## **PART II – THE FACTS**

### **General response to Blair’s factum**

12. The Respondent accepts as correct the statements of fact set out at paragraphs 21, 22, 23 (to the extent that Premier Ford relied on the Briefing Note), 27 (to the extent, however, that Premier Ford has no knowledge in regard to the distribution of his impugned statements by the media), and 35 (to the extent that Premier Ford felt constrained by Blair’s defamation action from being able to respond to the remarkable accusations in Blair’s letter) of Blair’s factum.

13. The Respondent disagrees with the statements of fact set out in the remainder of the paragraphs in Part III of Blair’s factum and the arguments made therein.

### **Blair makes accusations against Premier Ford prior to any statements by Ford**

14. On December 11, 2018, Blair wrote a 9-page letter, on OPP letterhead, in both his capacity as Interim OPP Commissioner and in his personal capacity to the Ombudsman, in which he made serious personal accusations against Premier Ford and disclosed confidential police information about Premier Ford’s security arrangements and matters related to the potential purchase of a new vehicle to be used by the OPP in transporting Premier Ford during his official duties. The Letter also accused Premier Ford and his staff of having breached Ontario’s

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<sup>3</sup> Ron Taverner later refused to accept the appointment and Thomas Carrique was ultimately appointed by the government as the new, permanent, OPP Commissioner.

financing laws by alleging that the new vehicle purchase was to be “off the books”.<sup>4</sup>

15. The Letter generally expressed concern about “political interference” and “inappropriate political influence”. It asked for the Ombudsman to investigate the government’s hiring process.<sup>5</sup>

16. The Letter was released by Blair and his lawyer by a widely distributed media release and was widely distributed to the public the same day.<sup>6</sup>

Lawyers at Ministry of Attorney General prepared a Briefing Note about Blair’s letter

17. In response to the Letter, on December 12, 2018, lawyers at MAG prepared the Briefing Note. The Briefing Note concluded that “certain aspects” of the Letter “could arguably be construed in a way that could constitute a breach of one or more of the provisions” of the PSA. Four potential breaches were listed: (i) corrupt practices; (ii) breaches of confidence; (iii) deceit; and (iv) discreditable conduct.<sup>7</sup>

18. Meanwhile, the Ombudsman announced that he would not be investigating Blair’s accusation about police interference and the OPP Commissioner hiring process. On December 14, 2018, Blair commenced a judicial review application against the Ombudsman. Blair’s lawyer made the judicial review application public through a press conference held that day.<sup>8</sup>

19. Premier Ford was made aware of the Briefing Note before December 18, 2018.<sup>9</sup>

Statements made by Premier Ford

20. On December 18, 2018, Premier Ford was asked numerous questions by the media at a press conference. The press conference lasted more than 12 minutes. During the conference,

<sup>4</sup> Main Decision at para. 10, COR Tab 61; Affidavit of Doug Ford, sworn September 8, 2020 (“**Ford Affidavit**”), Exhibit “D”, Letter from Brad Blair to the Ombudsman of Ontario, dated December 11, 2018, (the “**Letter**”), COR Tab 9

<sup>5</sup> The Letter, COR Tab 9

<sup>6</sup> Affidavit of Stephen Thiele, sworn September 10, 2020 (“**Thiele Affidavit**”), Exhibits “K”, Press Advisory dated December 11, 2018, COR Tab 18; Thiele Affidavit, Exhibit “L”, Globe and Mail article “OPP interim head calls on Ombudsman to review Ford friend Ron Tavernet appointment”, dated December 11, 2018, COR Tabs 19; Transcript of Blair’s cross-examination held on October 26, 2020, Qs. 380-381 [pp. 106-107, line 17 to line 3), COR Tab 2

<sup>7</sup> Main Decision, para. 12, COR Tab 61; Ford Affidavit, Exhibit “E”, Ministry of the Attorney General Briefing Note dated December 12, 2018 (the “**Briefing Note**”), COR Tab 10

<sup>8</sup> Thiele Affidavit, Exhibit “N”, Falconer’s LLP Press Advisory dated December 14, 2018, COR Tab 20

<sup>9</sup> Main Decision, para. 12, COR Tab 61

Premier Ford said, among other things, in response to Blair's accusations set out in his Letter:

You know my friends this is gonna move forward. I could sit here and give you all the items that weren't accurate in that Letter and there's endless ones. I could give you a list of all the...the Police Act that was broken throughout that whole Letter, but none of you want to report on that.

So, what I'm gonna do, I'm taking the high road. I'm gonna take the high road and let the review go through.<sup>10</sup>

21. On January 14, 2019, Premier Ford attended the AutoShow in Detroit to promote Ontario car manufacturing. On the same day, Blair sought to expedite his judicial review application against the Ombudsman. Blair's motion for an expedited hearing was dismissed. After the motion was dismissed, Blair's lawyer was interviewed by the media in front of Osgoode Hall in his barrister's robes. Continuing the war of words, Blair's lawyer invited Premier Ford to take his "best shot" at Blair.<sup>11</sup>

22. Premier Ford was then interviewed by Global TV and CP24 about Blair's judicial review application. In response to the Global TV journalist, Premier Ford said:

Well, I am not surprised that Global has asked me at an automotive show like this. But anyways run through the proper process and Ron Taverner was the person they chose, and I was thoroughly disappointment (sic) with uh Brad Blair uh you know the way he has been going on. Breaking the Police Act numerous times is disturbing to say the least.<sup>12</sup>

23. In response to a question from CP24 about the motion, Premier Ford said:

It's unfortunate that one person has sour grapes, and it is very disappointing actually, and reacting the way he's been reacting and breaking the Police Act numerous times. Someone needs to hold him accountable I can assure you of that.<sup>13</sup>

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<sup>10</sup> Main Decision, para. 14, COR Tab 61; Ford Affidavit, para. 38, COR Tab 8; Reply Affidavit of Stephen Thiele, dated October 13, 2020 ("**Thiele Reply Affidavit**"), Exhibit "C", "Best efforts" transcripts of First Video published by CityNews, dated December 18, 2020 the "**First Video**", COR Tab 29; Thiele Reply Affidavit, Exhibit "D", "Best efforts" transcripts of Second Video published by CityNews, dated December 18, 2020 the "**Second Video**", COR Tab 30

<sup>11</sup> Thiele Reply Affidavit, COR Tab 28; Exhibit "H", "Best efforts" transcript of Blair's counsel's interview at Osgoode Hall on January 14, 2019, COR Tab 33. Video Exhibit uploaded to Dropbox. (To date, Blair's judicial review application has not been heard.)

<sup>12</sup> Main Decision, para. 14, COR Tab 61

<sup>13</sup> Main Decision, para. 14, COR Tab 61



24. Premier Ford made no other comments and on March 15, 2019, Blair commenced his \$5 million defamation action.<sup>14</sup>

Blair terminated from OPP for breach of public service oath

25. Two weeks before commencing the defamation action (on March 4, 2019), Blair, who had never been disciplined by the OPP or sanctioned by the government for his false accusations in the Letter or for bringing his judicial review application, was terminated from the OPP on the grounds that he had included confidential information in a new filing in his judicial review proceeding. The termination was carried out by the Public Service because Blair had breached his oath of office under the *Public Service of Ontario Act*. Blair's appointment as a Deputy Commissioner under an Order-in-Council was revoked the same day.<sup>15</sup>

26. On September 13, 2019, Blair held a one-hour press conference at Queen's Park to publicly announce the commencement of a \$15 million wrongful dismissal action against Premier Ford and others. In that press conference, which was aired live on radio, television and online, Blair and his lawyer accused Premier Ford of being a liar, and having a fraudulent and rigged OPP Commissioner hiring process. While Blair later withdrew this action, he then brought an application seeking leave to re-issue it as part of Charter challenge to the CLPA.<sup>16</sup>

27. There is no dispute that Blair intends to pursue his \$15 million wrongful dismissal action as advised by Blair's lawyer on the s. 137.1 motion and that MAG has consented to this claim being allowed to proceed.<sup>17</sup>

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<sup>14</sup> Main Decision, para. 15, COR Tab 61; Ford Affidavit, para. 65, COR Tab 8

<sup>15</sup> Ford Affidavit, paras 60-61, COR Tab 8; Exhibit "O", Order-in-Council, 277/2019, COR Tab 13; Affidavit of Brad Blair, sworn October 17, 2020, Exhibit "N", Termination letter to Brad Blair, dated March 4, 2019, COR Tab 27

<sup>16</sup> Main Decision, Footnote 3, COR Tab 61; Ford Affidavit, Exhibit "X", Video of Blair's press conference on September 13, 2019, (Dropbox), COR Tab 14; Thiele Affidavit, Exhibit "MMM", Transcript of Blair's Press Conference on September 13, 2019, COR Tab 25

<sup>17</sup> Letters from Zachary Green, MAG to Blair's lawyer dated December 23, 2019, August 27, 2020, January 29, 2020, COR Tab 52

### Blair's preliminary motions

28. Prior to the hearing of the s. 137.1 motion, Blair brought two preliminary motions. In the first motion, Blair expressly sought the production of solicitor-client communications from various ministries and Premier Ford's lawyers on the grounds that Premier Ford had waived privilege because of the Briefing Note's disclosure in supporting affidavits filed on the s. 137.1 motion. Blair also sought, even though no formal Notice of Motion was issued, answers to refusals given on Premier Ford's cross-examination.<sup>18</sup>

29. In the second motion, Blair sought Premier Ford's re-attendance for cross-examination.

30. Pursuant to an amended timetable consented to by Blair's lawyers, it was agreed that Premier Ford would be cross-examined on his affidavit for the morning of October 28, 2019. Premier Ford was cross-examined for nearly 3 hours.<sup>19</sup>

31. Before examining Premier Ford, Blair's lawyers cross-examined OPP Sgt. Kearns as a non-party witness. Sgt. Kearns was examined in connection with an OPP internal report which he had authored on the subject of the government's request for a new vehicle and whether a member of Premier Ford's staff had ever advised OPP officers to keep the costs of a new vehicle sought for Premier Ford's transportation when on official government business "off the books", as Blair had alleged. The report concluded that neither Premier Ford nor any of his staff had made any such comment.<sup>20</sup>

### Preliminary motions dismissed

32. The preliminary motions were dismissed on November 23, 2019 and November 30, 2019 respectively.

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<sup>18</sup> First Preliminary Motion Decision, COR Tab 58; Second Preliminary Motion Decision, COR Tab 59

<sup>19</sup> Affidavit of Stephen Thiele sworn November 16, 2020, Exhibits "F", "G" and "H", Correspondence with Counsel and Honourable Justice Archibald, dated October 5 and 6, 2020, COR Tab 43; COR Tabs 44-46

<sup>20</sup> Supplementary Reply Affidavit of Stephen Thiele, sworn October 25, 2020 ("Thiele Supplementary Reply Affidavit"), Exhibit "A", Report by the OPP Standards Bureau, dated September 11, 2019, COR Tab 35

33. With respect to the production (and refusals) motion, Justice Belobaba determined that Premier Ford had made clear in his evidence that, on the issue of legal advice, he made his impugned statements relying only on the Briefing Note. The Briefing Note had been produced and no other legal advice documents, other than this note, were accordingly relevant to any issues on the motion.<sup>21</sup>

34. With respect to Blair's refusals "motion", no formal motion had actually been issued by him. While Justice Belobaba did not disagree with Premier Ford's contention that the refusals motion was improperly before the court, His Honour also found that on the merits each of the impugned refusals were proper because they were irrelevant to the s. 137.1 motion.<sup>22</sup>

35. With respect to Blair's motion to have Premier Ford re-attend for cross-examination, Justice Belobaba found that Blair's lawyer had agreed that he would be examining Premier Ford for "half a day", which normally meant 3 hours. Premier Ford was cross-examined for 2.8 hours.<sup>23</sup>

36. Justice Belobaba noted that during the cross-examination Blair's lawyer advised that he was going to "wrap up in the next five minutes." He then spent the balance of his time asking questions that became the subject of the dismissed production/refusals motion.<sup>24</sup>

37. Given the dismissals, there was no reason for Premier Ford's reattendance.<sup>25</sup>

38. While Blair submitted that "procedural fairness" should permit Premier Ford's continued cross-examination about his evidence of personal prejudice as related to the public interest test under s. 137.1(4)(b) of the CJA, Justice Belobaba disagreed. His Honour held that the weighing analysis under the subsection as it related to Premier Ford required an objective assessment of

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<sup>21</sup> First Preliminary Motion Decision, COR Tab 58

<sup>22</sup> First Preliminary Motion Decision, COR Tab 58

<sup>23</sup> Second Preliminary Motion Decision, COR Tab 59

<sup>24</sup> Second Preliminary Motion Decision, COR Tab 59

<sup>25</sup> Second Preliminary Motion Decision, COR Tab 59

public interest in protecting his expression. Therefore, Premier Ford's subjective evidence about personal harm or prejudice was irrelevant to the s. 137.1 motion.<sup>26</sup>

Reasons to dismiss Blair's defamation action

39. On the main motion, Justice Belobaba accepted that Premier Ford's motion fell within the scope of s. 137.1 on the basis that the section was not confined to claims in which a purportedly financially stronger party was bringing a defamation claim against a weaker party as a mere façade.<sup>27</sup>

40. Blair conceded on the motion that the impugned statements related to a matter of public interest. Accordingly, the burden immediately shifted to Blair. Even though Justice Belobaba noted that the "substantial merit" hurdle alone posed significant difficulties for Blair on an examination of the evidence, the only issues dealt with on the motion were (i) whether Premier Ford had "no valid defence" to Blair's action, and (ii) the weighing of the public interest under s. 137.1(4)(b).<sup>28</sup>

41. With respect to "no valid defence", Justice Belobaba explained that based on *Pointes Protection* Blair had the burden to show that there were grounds to believe "that the defences have no real prospect of success." Justice Belobaba noted that "real prospect of success" was less than a "likelihood of success" but more than merely "some chance of success" or even a "reasonable chance of success". Contrary to Blair's submission, Justice Belobaba did not heighten the threshold on Blair.<sup>29</sup>

42. However, Blair was unable to meet his burden in connection with Premier Ford's "fair comment" defence because the evidence on the motion showed that Premier Ford met all five

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<sup>26</sup> Second Preliminary Motion Decision, COR Tab 59

<sup>27</sup> Main Decision, paras. 4 and 19, COR Tab 61

<sup>28</sup> Main Decision, para. 24, COR Tab 61

<sup>29</sup> Main Decision, para. 28, COR Tab 61

elements of the defence.<sup>30</sup>

43. Justice Belobaba found that the first two elements, a matter of public interest and based on fact, were not really in issue. When Premier Ford made his comments, Blair's Letter had already been widely published and the Letter's contents were facts that were "well-known".<sup>31</sup>

44. His Honour concluded that Premier Ford's statements were also recognizable as "comment" because no reasonable journalist or member of the public who heard Premier Ford's statement on December 18, 2018 that Blair broke the PSA would believe that Blair had already been charged and convicted for the facts disclosed a mere seven days earlier in the Letter.<sup>32</sup>

45. Justice Belobaba noted as well that on January 14, 2020 Premier Ford had stated that "someone needs to hold [Blair] accountable". His Honour found that the plain meaning of this was that Blair had not yet been held accountable (i.e. charged and convicted) for the (alleged) breaches of the PSA.<sup>33</sup>

46. His Honour found that the comment reflected Premier Ford's honest belief on the grounds that he had reasonably relied on the Briefing Note and that Premier Ford's opinion was shared by others. The evidence revealed that a retired police officer had made a very similar complaint to the Ontario Independent Police Review Director (the "OIRPD") at around the same time accusing Blair of breaching the PSA and asking for an investigation. This complaint referred to breaches of, among other things, the same (PSA) Code of Conduct provisions as the Briefing Note: "corrupt practices", "breaches of confidence", "deceit" and "discreditable conduct".<sup>34</sup>

47. Although not referred to in Justice Belobaba's decision, but in evidence, journalist Mark

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<sup>30</sup> Main Decision, paras. 30 and 31, COR Tab 61

<sup>31</sup> Main Decision, paras. 33 and 35, COR Tab 61

<sup>32</sup> Main Decision, para. 40, COR Tab 61

<sup>33</sup> Main Decision, para. 40, COR Tab 61

<sup>34</sup> Main Decision, paras. 42-44, COR Tab 61

Towhey had also questioned Blair's actions and the contents in the Letter.<sup>35</sup>

48. Lastly, Justice Belobaba found that Premier Ford did not act with malice. There was no credible evidence whatsoever that Premier Ford's dominant purpose in making the statements was to harm Blair or that Premier Ford made the impugned statements knowing they were not true or were made with reckless indifference to their truth.<sup>36</sup>

49. Blair had undermined his own "dominant purpose" submission by pointing out no less than five times in his factum that the impugned statements had been made for the primary purpose of "deflect[ing]" criticism away from the 'rigged' OPP Commissioner hiring process.<sup>37</sup>

50. Meanwhile, Justice Belobaba concluded that Premier Ford's interpretation of the Briefing Note was neither unreasonable nor recklessly indifferent to what the MAG lawyers were saying about whether Blair's actions had breached the PSA. At one point, the Briefing Note unequivocally stated that Blair had clearly disclosed confidential information and that evidence whether the breaching party was acting in good faith or with some other motive was irrelevant.<sup>38</sup>

51. With respect to the test under s. 137.1(4)(b), Justice Belobaba agreed that Blair had led no evidence of either harm or causation. Blair had simply made a bald assertion of psychological harm and there was no evidence of any financial harm. There was no evidence that Blair had been disciplined by the OPP or suspended from his duties because of Premier Ford's statements. There was also no credible evidentiary support that Blair had lost any job opportunities because of Premier Ford's statements.<sup>39</sup>

52. In any event, His Honour found that Blair intended to proceed with a \$15 million wrongful dismissal action against Premier Ford, among others, and that there was no public

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<sup>35</sup> Thiele Affidavit, Exhibit "P", Mark Towhey Tweets, dated December 14, 2018 COR Tab 21; Exhibit "Q", Mark Towhey Tweet dated January 25, 2019, COR Tab 22

<sup>36</sup> Main Decision, paras. 47-48, COR Tab 61

<sup>37</sup> Main Decision, para. 49, COR Tab 61

<sup>38</sup> Main Decision, para. 55, COR Tab 61

<sup>39</sup> Main Decision, paras. 63-66, Tab 61

interest in allowing a plaintiff to bring two separate proceedings for the same alleged harm.<sup>40</sup>

53. On the other hand, Justice Beloboba concluded that there was a significant public interest in hearing Premier Ford's comments about the Letter and Blair's allegations of impropriety and political interference in the appointment of the new OPP Commissioner.<sup>41</sup>

54. Blair did not satisfy the court that the harm he allegedly suffered as a result of Premier Ford's comments was sufficiently serious that the public interest in permitting his action to continue outweighed the public interest in protecting that expression.<sup>42</sup>

### **PART III – ISSUES AND THE LAW**

55. Premier Ford submits that:

(a) Justice Beloboba did not improperly deny (i) Blair's production motion; (ii) Blair's motion to have Premier Ford re-attend cross-examination on his affidavit, or (iii) Blair's refusals motion, which had not formally been placed before the court with a Notice of Motion or a supporting affidavit;

(b) Justice Beloboba correctly found that Blair had failed to prove that Premier Ford had "no valid defence" to the defamation action. In doing so, Justice Beloboba did not, contrary to Blair's assertion, raise the threshold burden on Blair. By finding that Premier Ford's fair comment defence had a "solid" prospect of success, Justice Beloboba found that Blair's evidence was not even close to demonstrating that his claim could go "either way". Rather it was relatively certain to not succeed;

(c) Justice Beloboba neither mischaracterized the fair comment defence nor the issue of malice; and

(d) Justice Beloboba appropriately assessed the test under s. 137.1(4)(b) to find that the public interest in protecting Premier Ford's expression outweighed the public interest in permitting Blair's defamation action to continue. As part of his assessment, His Honour appropriately considered the fact that Blair was committed to his \$15 million wrongful dismissal action against Premier Ford and others, in which Blair was seeking the same damages for reputational loss and psychological harm.

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<sup>40</sup> Main Decision, para. 69, Tab 61

<sup>41</sup> Main Decision, para. 71, Tab 61

<sup>42</sup> Main Decision, para. 74, Tab 61

Standard of review on the appeal

56. The within appeal includes appeals of both interlocutory, discretionary, orders and the final order to dismiss Blair’s defamation action under s. 137.1 of the CJA.

57. While in general, the standard of review on questions of law is correctness,<sup>43</sup> the applicable standard of review on a motion under s. 137.1 is deference.<sup>44</sup>

58. Deference is also the standard of review to be applied to an interlocutory, discretionary, order of a judge. This standard applies to all of the decisions to dismiss Blair’s motions.<sup>45</sup>

59. In the event that a higher standard applies, it is submitted that Justice Belobaba’s decisions were correct. All of the motions were properly dismissed and His Honour correctly found that Blair was unable to demonstrate (i) that Premier Ford’s defence of fair comment did not have a real (or solid) prospect of success and (ii) that the public interest balancing exercise under s. 137.1(4)(b) of the CJA weighed in his favour.

No reason to reverse Justice Belobaba’s decisions on preliminary motions

*(i) No error with respect to dismissal of documentary production motion*

60. Contrary to the appellant’s contention that Justice Belobaba erred in law by refusing the production of unknown solicitor-client privileged documents based on waiver of privilege, this discretionary order was appropriate. The Briefing Note was fully disclosed by Premier Ford and there was clear evidence in the record that it was the only document containing legal advice which Premier Ford received or reviewed at the relevant time.<sup>46</sup>

61. Yet Blair sought information contained in the files of no less than 4 government departments and remarkably, opposing counsel in this litigation in connection with any legal

<sup>43</sup> *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII) at para. 8

<sup>44</sup> *Nanda v. McEwan*, 2020 ONCA 431 (CanLII) at para. 33; *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 (CanLII), at para. 21

<sup>45</sup> *Chrusz v. Cheadle LLP*, 2010 ONCA 553, at para. 13; *Brown v. Hanley*, 2019 ONCA 395 at para. 24

<sup>46</sup> Transcript of Premier Ford’s cross examination, held on October 28, 2020, Qs. 232, 247, 251 and 253, COR Tab 3



advice Premier Ford received in defending Blair's defamation action based on the disclosure of the Briefing Note.

62. The disclosure of the Briefing Note did not permit Blair carte blanche access to everything in all of the legal files of every lawyer who had ever considered Blair's legal position. There was no blanket waiver of privilege and the refusal to grant Blair's motion did not impact the finding of malice or the weighing of the public interest under s. 137.1(4)(b) of the CJA.

63. As a matter of first principles, solicitor-client privilege is a sacrosanct right. It is recognized as a substantive rule of law and not a mere rule of evidence, and must be as close to absolute as possible to ensure public confidence in the legal system.<sup>47</sup>

64. There simply is not waiver of privilege between lawyer and client communications from the mere fact that during events giving rise to a claim or a defence, the party received legal advice and relied upon it. There must be more.<sup>48</sup>

65. Blair's reliance on *R. v. Campbell* is entirely misplaced since that case dealt with a statement of reliance upon legal advice, *without* the accompanying disclosure of the very advice that was relied upon. Here, Premier Ford stated that he had relied upon the Briefing Note and fully disclosed it.

66. As determined by the Alberta Court of Appeal in regard to waiver of privilege through a party's reliance on legal advice, the only thing which must be produced is the information that was conveyed and upon which reliance was placed. A party is not entitled to the research undertaken by the lawyer who prepared and communicated the opinion or report because it plays no role in determining good faith or in explaining what induced a person to act and decide as

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<sup>47</sup> *Descoteaux v. Mierzwinski*, [1982 CanLII 22 \(SCC\)](#) at para. 27; *R. v. Lavelee, Rachel & Heinz*, [2002 SCC 61](#) at para. 36

<sup>48</sup> *Creative Career Systems Inc. v. Ontario*, [2012 ONSC 649](#) at [para. 27](#)

they did.<sup>49</sup>

67. What Premier Ford did not receive and what he did not rely upon was completely irrelevant to the motion. Contrary to Blair's argument, neither goes to the issue of malice or the weighing of public interest.

68. The irrelevance of the documents sought by Blair to the s. 137.1 motion was evidenced by Blair's own conduct in connection with seeking such documents. The Briefing Note was expressly pleaded in Premier Ford's statement of defence and was disclosed in his Affidavit of Documents. However, at no time did Blair seek something more.

69. Premier Ford submits that Justice Belobaba saw through Blair's purely tactical motion, which was designed to delay the hearing of the motion, and appropriately exercised his discretion to deny the production motion based on sound legal principles.

70. The disclosure of the Briefing Note was not used as a "sword" for Premier Ford's own benefit, while protecting the full content of that information for discovery, as contended by Blair. The disclosure of the Briefing Note was made because it was a relevant document in the factual sequence of events that took place and Premier Ford admitted that he relied upon it.

71. Blair's Letter was circulated to the media on December 11, 2018 and instantaneously became a news item as he and his lawyer had intended. Given that the Letter was written on OPP Letterhead and purported to have been written in both Blair's professional and personal capacities, it raised valid concerns about whether Blair had breached his duties as a police officer. The Briefing Note formed an opinion on that issue.

72. The Briefing Note came to the attention of Premier Ford before December 18, 2018 and it informed his view that Blair broke the PSA, as was suggested throughout its review of, among other things, specific Code of Conduct categories.

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<sup>49</sup> *Refco Alberta Inc. v. Nipsco Energy Services Inc.*, [2002 ABCA 312](#) at [para. 4](#)

(ii) *No error with respect to dismissal of the refusals motion*

73. Justice Belobaba committed no error in denying Blair’s refusals motion, which had been improperly placed before the court, without a Notice of Motion or a supporting affidavit as was required by the *Rules of Civil Procedure*.<sup>50</sup>

74. In any event, the refusals at issue were entirely irrelevant to the s. 137.1 motion.

75. The refusals were related to the role of Premier Ford’s former Chief of Staff, Dean French, the Briefing Note’s “provenance”, the production of solicitor-client privileged documents, verification of an organizational chart of MAG prepared by Blair’s lawyers, and the production of communications in the possession of Mr. French and Steve Orsini regarding the appointment of Ron Taverner as OPP Commissioner.<sup>51</sup>

76. All of these questions were irrelevant to Blair’s defamation action. Relevance is the test under the rule.<sup>52</sup>

77. Questions that go beyond the scope of a cross-examination, that are overbroad and speculative, and that are unfair are impermissible. The principle of proportionality, which is set out in both rules 1.04(1) and 29.2.03(1), of the *Rules of Civil Procedure*, applied.<sup>53</sup>

78. The principle that the scope of a cross-examination will vary depending upon the nature of the motion and will vary depending on the character and nature of the evidence that is the subject of the cross-examination also applied to Blair’s refusals motion.<sup>54</sup>

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<sup>50</sup> *Rules of Civil Procedure*, r. 37.01 and r. 37.06

<sup>51</sup> Refusals Chart from examination of The Honourable Premier Ford November 16, 2020, COR Tab 55

<sup>52</sup> *Strathan Corp. v. Chromeshield Co.*, [2012 ONSC 5076 \(CanLII\)](#) at [para. 25](#) [Strathan Corp.]

<sup>53</sup> *Price v. H. Lundbeck A/S*, [2018 ONSC 2483 \(CanLII\)](#) at [para. 27](#); *Two Sisters Resorts Corp. v. Niagara-on-the-Lake (Town)*, [2019 ONSC 6112 \(CanLII\)](#) at [paras. 14-18](#); *Strathan Corp.*, *supra*, at [para. 26](#); *Rules of Civil Procedure*, rr. 1.04 and 29.2.03(1)

<sup>54</sup> *Ontario v. Rothmans*, [2011 ONSC 2504 \(CanLII\)](#) at [para. 148](#)

79. In *Platnick v. Bent*, Justice Dunphy dismissed a refusal's motion in relation to a s. 137.1 motion on the basis that matters were unexplored on the cross-examination and the questions refused were predicated on pure speculation.<sup>55</sup>

80. On Premier Ford's cross-examination, Blair's lawyer spent considerable time on irrelevant and speculative matters. His questions essentially sought to probe the findings of Ontario's Integrity Commissioner, which had vindicated Premier Ford in connection with the hiring of Ron Taverner, and to collaterally attack the Commissioner's decision. Blair and his lawyer were displeased with the findings, with Blair's lawyer commenting to the media that Commissioner Wake was a "keystone cop".<sup>56</sup>

81. However, Premier Ford's s. 137.1 motion raised issues of substantial merits, and whether his defences had a real prospect of success. None of the refused questions were related to these issues, and therefore Justice Belobaba appropriately dismissed this motion.

82. Questions asked by Blair's lawyer concerning the Briefing Note related to the defence of justification and the correctness of the legal opinion. The justification defence was not pursued on the s. 137.1 motion and whether the contents of the Briefing Note and its opinion was correct or not was irrelevant to the fair comment defence. The only relevance in the Briefing Note was that it existed and formed a basis for Premier Ford's personal opinion that Blair broke the PSA.

83. As set out above, questions about the production of solicitor-client privileged documents sought by Blair were properly refused because, contrary to Blair's position, Premier Ford had not waived any privilege over solicitor-client communications.

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<sup>55</sup> *Platnick v. Bent (No. 2)*, [2016 ONSC 7474 \(CanLII\)](#) at paras. 42-49

<sup>56</sup> Thiele Affidavit, Exhibit "MMM", Transcript of Blair's press conference on September 13, 2019, COR Tab 25; Ford Affidavit, Exhibit "X", Video of Blair's press conference on September 13, 2019, uploaded to Dropbox, COR Tab 14

(iii) *No error made in refusing to order Premier Ford to re-attend on cross-examination*

84. Contrary to Blair’s submission at paragraphs 48 and 49 of his factum, Justice Belobaba appropriately refused to require Premier Ford to re-attend a cross-examination on his affidavit. Blair’s factum conveniently ignores the fact that he had consented to an order made by Justice Archibald to examine Premier Ford only for “a morning”, or, in general, 3 hours. Premier Ford was cross-examined from 10:04 am until 12:52 pm.<sup>57</sup>

85. Blair made it clear that his request for the continued cross-examination of Premier Ford was tied to the waiver of privilege issue and answers to refusal by stating in his notice of motion:

38. The requested files are relevant to the examinations of Mr. Thiele and Mr. Fidani-Diker **and to the continued examination of Premier Ford**, and as such, the plaintiff’s right of examination would be prejudiced without first having the refusal and waiver issues adjudicated by the court. (Emphasis added)<sup>58</sup>

86. Yet, Blair’s lawyer subsequently indicated that he wanted to continue cross-examine Premier Ford on issues of “prejudice” and “other areas” which were not defined and unlimited.<sup>59</sup>

87. The filing and hearing of the re-attendance motion followed the dismissal of the production and refusals motion.

88. Given the dismissal of the first preliminary motion, there was no practical utility to require the re-attendance of Premier Ford for further cross-examination. The questions concerning “prejudice” were admitted to relate to Premier Ford’s subjective views on the issue of public interest under s. 137.1(4)(b) of the CJA.<sup>60</sup>

89. However, as stated by Justice Côté in *Pointes Protection*, s. 137.1(4)(b) is about harm, not subjective prejudice. The section requires the court to weigh the harm caused by a party’s

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<sup>57</sup> Transcript of cross-examination of Premier Ford, pp 4 & 131, COR Tab 4

<sup>58</sup> Notice of Motion of Brad Blair dated November 6, 2020, COR Tab 53

<sup>59</sup> Affidavit of Akosua Matthews, sworn November 25, 2020, Exhibit “D”, Letter from Julian Falconer to Justice Belobaba, dated November 23, 2020, COR Tab 48; Second Preliminary Motion Decision, COR Tab 59

<sup>60</sup> Second Preliminary Motion Decision, COR Tab 59

alleged defamatory statements against the objective public interest in protecting a defendant's expression.<sup>61</sup>

90. In any event, whether or not to order Premier Ford to re-attend cross-examination fell within the absolute discretion of Justice Belobaba. While r. 39.02 establishes a *prima facie* right to cross-examine, the right is subject to the court's authority to control its own process and its ability to disallow cross-examinations.<sup>62</sup>

91. A court is entitled to refuse an adjournment to permit cross-examination or refuse leave to cross-examine on an affidavit and refuse the re-argument of a motion, where a court has already disposed of the motion.<sup>63</sup>

92. A court is also entitled to refuse to permit cross-examination or restrict their scope in the interests of justice.<sup>64</sup>

93. In the circumstances, there is nothing to justify overturning Justice Belobaba's discretionary decision to refuse Blair the ability to continue Premier Ford's cross-examination.

Threshold on Blair to prove that Premier Ford had no valid defence was not increased

94. Blair contends that Justice Belobaba increased his burden to prove that Premier Ford had "no valid defence" when he stated that the threshold of "real prospect of success" under s. 137.1(4)(a)(ii) meant "a solid prospect of success."

95. Premier Ford submits that contrary to Blair's interpretation, Justice Belobaba actually may have made it easier for Blair to meet his burden. If there was no "solid" prospect of success in relation to a defence raised by Premier Ford, then Blair would have cleared the threshold.

96. Accordingly, not only did Blair not meet a threshold which might have caused Justice

<sup>61</sup> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at paras. 79-82 [Pointes]

<sup>62</sup> *Siddiqsons Tin Plate Ltd. v. Adler Steel Ltd.*, 2015 ONSC 4113, 2015 CarswellOnt 9640, at para. 128; *Ferguson v. Imax Systems Corp.*, 1984 CanLII 2021 (ON SC), at para. 32

<sup>63</sup> *A.H. Al-Sagar & Bros. Engineering Project Co. v. Al-Jabouri* (1984), 47 C.P.C. 33 (Ont. H.C.); *Ridley v. Ridley* (1989), 37 C.P.C. (2d) 167 (Ont. H.C.) at paras. 7-12; *Stauffer v. Sampson*, [1962] O.W.N. 115 (H.C.) at p. 116

<sup>64</sup> *Canada (Attorney General) v. Mennes*, 2014 ONCA 690, at para. 27

Belobaba to determine that a ruling on Premier Ford’s fair comment defence could have “gone either way”, Blair could not meet a “lower” threshold to demonstrate that Premier Ford’s fair comment would not “solidly” succeed in the circumstances.

97. Under s. 137.1(4)(a)(ii), the onus was on Blair to demonstrate that Premier Ford’s defences were either not legally tenable or supported by evidence that was reasonably capable of belief such that the defences could be said to have no real prospect of success.<sup>65</sup>

98. There were simply no “grounds to believe” that Premier Ford’s fair comment defence did not have a real prospect for success based on the evidentiary record and the law.<sup>66</sup>

99. Blair had simply failed to satisfy Justice Belobaba that the fair comment defence did not tend to weigh more in Premier Ford’s favour.<sup>67</sup>

100. Justice Belobaba’s conclusion was fully supported by the evidentiary record and the law, and is entitled to deference.

101. The elements of the fair comment defence are: (i) that the comment was on a matter of public interest; (ii) the comment was based on fact; (iii) the comment is recognizable as comment; (iv) the same comment on the proved facts could be honestly expressed by any person; and (v) the comment was not actuated by malice.<sup>68</sup>

102. The word “fair” in the context of the defence refers to limits to what any honest person, however, opinionated or prejudiced would express upon the basis of the relevant facts.<sup>69</sup>

103. Comment includes “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof.”<sup>70</sup>

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<sup>65</sup> *Pointes*, at [paras. 59 and 60](#)

<sup>66</sup> *Pointes*, at [para. 38](#)

<sup>67</sup> *Bent v. Platnick*, [2020 SCC 23 \(CanLII\)](#) at [para. 103](#) [*Bent SCC*]; *Subway Franchise Systems of Canada, Inc. v. Canada Broadcast Corp.* [2021 ONCA 26](#) at [para. 53](#) [*Subway*]

<sup>68</sup> *WIC Radio Ltd. v. Simpson*, [2008 SCC 40](#) at [para. 28](#) [*WIC Radio*]; *Grant v. Torstar*, [2009 SCC 61](#) at [para. 31](#)

<sup>69</sup> *Chopak v. Patrick*, [2020 ONSC 5431 \(CanLII\)](#) at [para. 53](#)

<sup>70</sup> *WIC Radio*, *supra*, at [para. 26](#)

104. Outrageous, ridiculous and moderate opinions are protected by the defence.<sup>71</sup>
105. To qualify as comment, the facts must be well known and already understood by the audience.<sup>72</sup>
106. Where the facts suggest the commission of a crime, a commentator can still fairly express that precise opinion.<sup>73</sup>
107. The defence contains an objective belief test and thus if someone else could have honestly expressed the same comment as the commentator, the defence is made out.<sup>74</sup>
108. Blair's submission that Premier Ford's impugned remarks did not constitute comment or opinion ignores Justice Belobaba's clear findings of fact that Premier Ford's statement was qualified, that it came only days after Blair had circulated the Letter to the public and made allegations against Premier Ford, and that the media who elicited Premier Ford's statement that Blair broke the PSA published no stories suggesting that Blair had been charged or convicted of breaching the PSA. Premier Ford's statement was not received as a statement of fact.
109. When Premier Ford responded to the media on December 18, 2018 for the first time about the Letter, the facts of the Letter had been widely distributed by the media and were well known. The media specifically asked Premier Ford about the Letter and he gave his opinion accordingly, inviting the media to investigate and assess whether Blair broke the PSA.<sup>75</sup>
110. The opinion expressed by Premier Ford was shown to have been honestly held by others. As early as December 14, 2018, prior to Premier Ford's first comment, journalist Mark Towhey questioned the ethical conduct and integrity of Blair and called on him to be fired or to resign.<sup>76</sup>

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<sup>71</sup> *WIC Radio, supra*, at [para. 4](#)

<sup>72</sup> *WIC Radio, supra*, at [paras. 31](#) and [34](#)

<sup>73</sup> *Williams v. Standard-Examiner Pub Co.*, [83 Utah 31, 27 P.2d 1](#)

<sup>74</sup> *WIC Radio Ltd., supra*, at [paras. 40-41](#) and [49-51](#)

<sup>75</sup> Thiele Reply Affidavit, Exhibit "C", "Best-efforts" transcript of First Video, COR Tab 31; Exhibit "D", "Best-efforts" transcript of Second Video, COR Tab 32

<sup>76</sup> Thiele Affidavit, Exhibit "P", Mark Towhey Tweet dated December 14, 2018, COR Tab 21



111. As found by Justice Belobaba, a retired police officer also commenced a complaint to the OIRPD accusing Blair of having breached the PSA and that he should be investigated. The complaint, among other things, referenced many of the same sections as the Briefing Note, namely “corrupt practices”, “breaches of confidences”, “deceit” and “discreditable conduct”. This complaint was dated December 22, 2018.<sup>77</sup>

112. There is no reason to impugn the views of Mr. Towhey or the retired police officer who had both reached a conclusion or opinion about Blair’s conduct. Contrary to Blair’s argument, reaching an opinion about Blair’s conduct did not require a high-level of sophistication given the circumstances and the very public manner by which Blair released the Letter to the public and, more specifically, to the media by way of a press conference.

113. Malice can defeat the defence of fair comment. However, there simply was no evidence that Premier Ford’s impugned statements were made with malice. The test for malice in the law of defamation is whether the commentator has demonstrated any ill-will or spite toward the person allegedly defamed or that the commentator had any indirect motive or ulterior purposes that conflicted with the sense of duty or the mutual interest which the occasion created. Malice can also be established by showing that the commentator spoke dishonestly, or in knowing or reckless disregard for the truth.<sup>78</sup>

114. However, malice must be the commentator’s dominant motive.<sup>79</sup>

115. The Supreme Court of Canada has stated that the requirement that malice be the dominant motive for expressing an opinion in order to defeat the fair comment defence helps to maintain a proper balance between protecting freedom of expression and reputation.<sup>80</sup>

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<sup>77</sup> Cross-examination of Brad Blair, October 27, 2020, Exhibit “10” - Complaint to the OIRPD, dated December 22, 2018, COR Tab 7

<sup>78</sup> *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC) at para. 145

<sup>79</sup> *Bent SCC*, *supra*, at para. 123; *WIC Radio*, at para. 106

<sup>80</sup> *WIC Radio*, at para. 106

116. On the s. 137.1 motion, Blair's lawyer admitted on at least five occasions in the responding factum that the dominant motive of Premier Ford's statement was not to cause Blair reputational harm.<sup>81</sup>

117. In fact, Blair's reputation was not harmed at all. He and his lawyer continued their relentless media campaign against Premier Ford notwithstanding the comments. Blair suffered no loss of employment and remained as Deputy OPP Commissioner. Blair was not disciplined at all as result of Premier Ford's comments.

118. Blair was the author of his own termination, which only followed his decision to file within his judicial review application against the Ombudsman confidential police information which was in breach of his oath of office as a public servant.

119. The record also showed through the media videos that when Premier Ford made his comments there was no evidence of any ill-will. Premier Ford spoke calmly about the events. A finding that a person did not act with malice is a finding of fact or an inference from facts to which deference must be paid and with which an appellate court can interfere only if a palpable and overriding error is made. Justice Belobaba made no palpable or overriding error in finding that Premier Ford did not act with malice.<sup>82</sup> There is no evidence of any malice whatsoever.

Test under s. 137.1(4)(b) properly weighed in favour of protecting Premier Ford's expression

120. Under s. 137.1(4)(b) of the CJA, Blair was required to show that his harm was sufficiently serious that the public interest in permitting his action to continue outweighed the public interest in protecting Premier Ford's expression. Under this section, the court is to weigh public interest and public participation implications.<sup>83</sup>

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<sup>81</sup> Responding factum of Brad Blair, dated December 1, 2020, at para. 3, 14, 70, 79, 90, COR Tab 60

<sup>82</sup> *D.W. v. White*, [2004 CanLII 22543 \(ON CA\)](#) at [para. 64](#)

<sup>83</sup> *Pointes*, at [paras. 61](#) and [62](#)

121. More specifically, Blair was required to show (a) that he likely had or will have suffered harm and (b) that such harm was as a result of the impugned comments, and (c) that the public interest in allowing the action to proceed outweighed the public interest in protecting the impugned statements.<sup>84</sup>

122. Here, His Honour was entitled to consider the importance of the expression, the history of the litigation between the parties, broader collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the moving party's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and harm caused or the expected damages, and the possibility that the expression or the claim might provoke hostility against an identifiable vulnerable group.<sup>85</sup>

123. At its most basic, the court under s. 137.1(4)(b) is really being asked and is given the ability to scrutinize “what is really going on” in a particular case.<sup>86</sup>

124. A court is not required to take a respondent's allegation of harm at face value and a causal link between the expression and the harm is important where there are sources other than the moving party's expression that may have caused the respondent harm.<sup>87</sup>

125. As well, the Supreme Court of Canada has clearly signalled that the public interest weighing exercise under s. 137.1(4)(b) is, contrary to Blair's contention, not simply an inquiry into the hallmarks of a SLAPP. The only factors that are relevant are those tethered to the text of s. 137.1(4)(b).<sup>88</sup>

126. In *Platnick*, Justice Côté stated: “This Court in *Pointes Protection* squarely rejects any

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<sup>84</sup> *Pointes*, at [para. 62](#)

<sup>85</sup> *Pointes*, at [para. 80](#)

<sup>86</sup> *Pointes*, at [para. 81](#)

<sup>87</sup> *Pointes*, at [para. 71](#)

<sup>88</sup> *Pointes*, at [para. 79](#)

inquiry into the hallmarks of a SLAPP.”<sup>89</sup>

127. Accordingly, Blair is simply misguided in his heavy reliance on the purported hallmarks of SLAPP to strenuously criticize Justice Belobaba’s decision. Although the anti-SLAPP Advisory Panel Report may have viewed SLAPP motions to be a tool to dismiss meritless defamation claims typically brought by powerful parties to the dominant purpose of stifling public expression, s. 137.1 was enacted to apply to any expression that involved a matter of public interest.

128. Although both monetary and non-monetary harm are relevant to the assessment under s. 137.1(4)(b), harm is not synonymous with the damages alleged, and a plaintiff must “provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link.”<sup>90</sup>

129. Blair led no evidence of reputational harm (assuming a presumption of harm) and moreover is suing for the precise same alleged harm to his reputation in his \$15 million wrongful dismissal action where he claims that his reputation had been harmed as a result of his termination, not as a result of Premier Ford’s impugned statements.

130. Blair suffered no discipline whatsoever as a result of Premier Ford’s comments.

131. While Blair contended that he lost a job opportunity because of the comments this was at best speculation on Blair’s part. He provided no evidence whatsoever from the prospective employer to support his bald assertion.

132. As well, Blair and his lawyer were in the forefront of the media throughout. Blair initiated the fight in the media and public arena. When Premier Ford responded to questions from the media about Blair’s accusations, Blair and his lawyer escalated their attack.

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<sup>89</sup> *Bent SCC*, at [para. 171](#)

<sup>90</sup> *Pointes*, at [para. 71](#); *Subway*, *supra*, at [paras. 83-86](#)

133. On January 14, 2019, Blair's lawyer, from the courthouse steps at Osgoode Hall, and in his barrister's robes, invited Premier Ford to take his "best shot".

134. Then following Premier Ford's vindication by the Ontario Integrity Commissioner in connection with a members' integrity investigation into the hiring of Ron Taverner as OPP Commissioner, Blair's lawyer issued a press release and held a press conference to continue Blair's public attack against Premier Ford. Notwithstanding the findings of Commissioner Wake, Blair's lawyer charged the Premier Ford had "rigged" the process.

135. Premier Ford took "the high road". He did not respond to the childish and blatantly false allegations of Blair and his lawyer.

136. On September 13, 2019, Blair, who was clearly not intimidated in anyway by Premier Ford's isolated comments, made on two occasions, and only in response to media questions, held a press conference at Queen's Park for the purpose of making further disparaging remarks about Premier Ford and to publicly announce a further \$15 million lawsuit against Premier Ford, the Ontario government and others in connection with his dismissal from the OPP.

137. While Blair in his defamation action claimed that he suffered psychological harm because of Premier Ford's impugned comments, he provided no doctor's opinion to support this bald assertion on the motion.

138. A careful reading of Justice Belobaba's decisions shows that with respect to Blair's harm, he found that there was nothing in the record to support Blair's bald assertions of emotional or psychological harm. There was also no evidence of any resulting financial or economic harm. There was no evidence that Blair was disciplined by the OPP for "breaching the PSA" or that he was suspended from his duties because of Premier Ford's allegations or that he lost any pay.

Blair's claim of a lost opportunity was also without credible support in the evidence.<sup>91</sup>

139. Justice Belobaba found that Blair had not cleared the threshold of showing harm and causation. But Justice Belobaba then stated that even if it was otherwise, and there was some evidence of resulting harm, he was required to consider the \$15 million wrongful dismissal action, which was three times more than the \$5 million defamation action.<sup>92</sup>

140. There was no doubt that Blair intended to proceed with that claim and there was no doubt that in that action Blair specifically claimed damages for, among other things, the intentional infliction of mental suffering and the loss of reputation allegedly caused by the impugned statements.<sup>93</sup>

141. Paragraph 1 of the second action claims damages in the amount of \$7 million for wrongful termination, misfeasance in public office, negligence, negligent misrepresentation, intentional infliction of mental suffering, and breaches of section 2 of the *Canadian Charter of Rights and Freedoms*. In addition to punitive damages of \$4 million, exemplary and/or aggravated damages of \$2 million, Blair seeks special damages in an unspecified amount and \$2 million in family law damages.

142. At page 49, paragraph 136 of his pleading in the wrongful dismissal action, Blair contends that as a result of his wrongful termination and the conduct of the defendants, he suffered "...*mental distress*, embarrassment and *loss of reputation* as a direct result of the defendants' deliberate and/or reckless conduct."<sup>94</sup>

143. At paragraph 138, Blair pleaded that he continued to suffer mental distress from the very public impact of the incidents set out in his pleading, including emotional, psychological and/or

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<sup>91</sup> Main decision, para. 66, COR Tab 61

<sup>92</sup> Main decision, at para. 69, COR Tab 61

<sup>93</sup> Main decision, at para. 69, COR Tab 61

<sup>94</sup> Thiele Affidavit, Exhibit "KKK", Mr. Blair's \$15 million wrongful dismissal lawsuit dated September 13, 2019, para. 134, COR Tab 25

mental trauma, embarrassment, loss of reputation and economic loss.<sup>95</sup>

144. Although Blair filed a Notice of Discontinuance of this claim on November 11, 2019, he subsequently filed an application as Court File No. CV-19-00631259-0000 to seek leave to commence the wrongful dismissal action that he had discontinued. MAG has waived any requirement for leave. The claims for mental distress and allegations related to loss of reputation are found at paragraphs 1, 139 and 141 of “proposed” statement of claim.<sup>96</sup>

145. Blair’s wrongful dismissal action is predicated on the theory that he was not treated fairly and that a proper process was not followed in regard to his termination. In essence, the theory is that he was not terminated in good faith. If he is able to prove his case, then he would be eligible for foreseeable and compensable damages, that very well might include distress and loss of reputation.<sup>97</sup>

146. Justice Belobaba took into account that Blair’s second action would not deprive Blair of his day in court or his ability to secure an appropriate damages award.<sup>98</sup>

147. On the other hand, Justice Belobaba found that there was a significant public interest in hearing Premier Ford’s comments about the Letter and its allegations of impropriety and political interference in the appointment of the OPP Commissioner.<sup>99</sup>

148. Although not expressly referenced in Justice Belobaba’s decision, evidence produced shortly before the hearing of the s. 137.1 of the CJA motion, some of which had been in the possession of Blair, painted a picture that the allegations in the Letter were knowingly false and that OPP command, which included Blair, attempted to exert pressure on frontline OPP officers who were providing dignitary protection to Premier Ford to change their evidence to support

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<sup>95</sup> Ibid at para. 138, COR Tab 25

<sup>96</sup> Proposed Statement of Claim contained in Application Record, bearing Court File No.: CV-19-00631259-000, dated November 18, 2020, COR Tab 56

<sup>97</sup> *Honda Canada Inc. v. Keays*, 2008 SCC 39 at paras. 58-59

<sup>98</sup> Main Decision, at para. 70, Tab 61

<sup>99</sup> Main Decision, at para. 71, COR Tab 61

Blair’s narrative about political interference in connection with new transportation that Premier Ford was contemplating so that he could work comfortably while travelling throughout the province on official duties.<sup>100</sup>

149. The frontline officers were extremely concerned about the pressure coming from OPP command and they feared for the loss of their jobs. Regardless, they refused to comply with the directions that came from OPP command to, *inter alia*, revise their notes of the discussions.<sup>101</sup>

#### **PART IV – ORDER REQUESTED**

150. Premier Ford asks that this Honourable Court dismiss the within appeal, with costs. If this appeal is allowed, Premier Ford asks that the s. 137.1 be reheard on the validity of the qualified privilege defence and that, in any event, no costs be ordered per s. 137.1(8).

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated: May 25, 2021

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Gavin J. Tighe

Lawyers for the Respondent, Premier Ford

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<sup>100</sup> Thiele Supplementary Reply Affidavit, Exhibit “K”, DC’s handwritten notes, a “best efforts” transcript, COR Tab 36; Exhibit “L”, True copy of RP handwritten notes, a “best efforts” transcript; COR Tab 37; Exhibit “N”, L.D.’s handwritten notes, a “best efforts” transcript”, COR Tab 38; Cross-examination of Brad Blair, October 27, 2020, October 27, 2020, Exhibit “2”, email exchange between RP and DC re request for will say statements and notes, COR Tab 5; Exhibit “3” - email exchange between MM, DC and other OPP members re request for will say statements and notes, COR Tab 6

<sup>101</sup> Thiele Supplementary Reply Affidavit, Exhibits “K”, DC’s handwritten notes, a “best efforts transcript”, COR tab 36; Exhibit “O”, Superintendent MV’s handwritten notes, a “best efforts” transcript; COR Tab 39



## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Housen v. Nikolaisen*, [2002 SCC 33 \(CanLII\)](#)
2. *Nanda v. McEwan*, [2020 ONCA 431 \(CanLII\)](#)
3. *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, [2019 ONCA 166 \(CanLII\)](#)
4. *Chrusz v. Cheadle LLP*, [2010 ONCA 553](#)
5. *Brown v. Hanley*, [2019 ONCA 395](#)
6. *Descoteaux v. Mierzwinski*, [1982 CanLII 22 \(SCC\)](#)
7. *R. v. Lavelee, Rachel & Heinz*, [2002 SCC 61](#)
8. *Creative Career Systems Inc. v. Ontario*, [2012 ONSC 649](#)
9. *Refco Alberta Inc. v. Nipsco Energy Services Inc.*, [2002 ABCA 312](#)
10. *Strathan Corp. v. Chromeshield Co.*, [2012 ONSC 5076 \(CanLII\)](#)
11. *Price v. H. Lundbeck A/S*, [2018 ONSC 2483 \(CanLII\)](#)
12. *Two Sisters Resorts Corp. v. Niagara-on-the-Lake (Town)*, [2019 ONSC 6112 \(CanLII\)](#)
13. *Ontario v. Rothmans*, [2011 ONSC 2504 \(CanLII\)](#)
14. *Platnick v. Bent (No. 2)*, [2016 ONSC 7474 \(CanLII\)](#)
15. *1704604 Ontario Ltd. v. Pointes Protection Association*, [2020 SCC 22 \(CanLII\)](#)
16. *Siddiqsons Tin Plate Ltd. v. Adler Steel Ltd.*, [2015 ONSC 4113](#), 2015 CarswellOnt 9640
17. *Ferguson v. Imax Systems Corp.*, [1984 CanLII 2021](#) (ON SC)
18. *A.H. Al-Sagar & Bros. Engineering Project Co. v. Al-Jabouri* (1984), [47 C.P.C. 33 \(Ont. H.C.\)](#)
19. *Ridley v. Ridley* (1989), [37 C.P.C. \(2d\) 167 \(Ont. H.C.\)](#)
20. *Stauffer v. Sampson*, [\[1962\] O.W.N. 115 \(H.C.\)](#)
21. *Canada (Attorney General) v. Mennes*, [2014 ONCA 690](#)
22. *Bent v. Platnick*, [2020 SCC 23 \(CanLII\)](#)
23. *Subway Franchise Systems of Canada, Inc. v. Canada Broadcast Corp.*, [2021 ONCA 26 \(CanLII\)](#)
24. *WIC Radio Ltd. v. Simpson*, [2008 SCC 40](#)
25. *Grant v. Torstar*, [2009 SCC 61](#)
26. *Chopak v. Patrick*, [2020 ONSC 5431 \(CanLII\)](#)
27. *Williams v. Standard-Examiner Pub Co.*, [83 Utah 31, 27 P.2d 1](#)
28. *Hill v. Church of Scientology of Toronto*, [1995 CanLII 59 \(SCC\)](#)
29. *R. v. Reilly*, [2020 SCC 23](#)
30. *D.W. v. White*, [2004 CanLII 22543 \(ON CA\)](#)
31. *Honda Canada Inc. v. Keays*, [2008 SCC 39](#)

**SCHEDULE “B”****TEXT OF STATUTES, REGULATIONS & BY - LAWS Courts of Justice Act  
R.R.O. 1990, REGULATION 194***Rules of Civil Procedure****INTERPRETATION******General Principle***

**1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

***Proportionality***

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

***Matters Not Provided For***

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them. R.R.O. 1990, Reg. 194, r. 1.04 (2).

(3) REVOKED: O. Reg. 231/13, s. 2.

***“Party and Party” Costs***

(4) If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs. O. Reg. 284/01, s. 3.

***“Solicitor and Client” Costs***

(5) If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs. O. Reg. 284/01, s. 3.

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***CONSIDERATIONS******General***

**29.2.03** (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
- (b) the expense associated with answering the question or producing the document would be unjustified;
- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
- (e) the information or the document is readily available to the party requesting it from another source. O. Reg. 438/08, s. 25.

### ***Overall Volume of Documents***

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person. O. Reg. 438/08, s. 25.

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## **MOTIONS AND APPLICATIONS**

### **RULE 37 MOTIONS — JURISDICTION AND PROCEDURE**

#### **NOTICE OF MOTION**

**37.01** A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary. R.R.O. 1990, Reg. 194, r. 37.01.

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#### **CONTENT OF NOTICE**

**37.06** Every notice of motion (Form 37A) shall,

- (a) state the precise relief sought;
- (b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
- (c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.06.

**B. W. (BRAD) BLAIR**  
Plaintiff (Appellant/Respondent by Cross-Appeal)

-and- **PREMIER DOUG FORD**  
Defendant (Respondent/Appellant by Cross-Appeal)  
Court File No. C68965

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**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE RESPONDENT,  
PREMIER DOUG FORD**

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**GARDINER ROBERTS LLP**

Lawyers  
Bay Adelaide Centre, East Tower  
22 Adelaide Street West, Suite 3600  
Toronto ON M5H 4E3

Gavin J. Tighe (34496Q)

Tel: (416) 865-6664  
gjtighe@grllp.com

Tel: (416) 865-6600

Fax: (416) 865-6636

Lawyers for the Defendant (Respondent/Appellant by  
Cross-Appeal), Premier Doug Ford

Email of Parties Served:

Julianf@Falconers.ca

Ashaj@Falconers.ca

Rgilliland@dmgadvocates.com