

CITATION: MacDonald v. 10583308 Canada Inc., 2026 ONSC 3342
COURT FILE NO.: CV-24-98207
DATE: 2026/06/05

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Cameron MacDonald and Antonio Utano, Plaintiffs

AND

10583308 Canada Inc. o/a Botler AI, Amir Moravej and Ritika Dutt, Defendants

BEFORE: Mr. Justice Stanley J. Kershman

COUNSEL: Christopher Spiteri and Luigi Paravan, for the Plaintiffs, Responding Parties
Mark Bourrie, for the Defendants, Moving Parties

HEARD: March 3, 2025

DECISION ON MOTION

KERSHMAN J.

INTRODUCTION

[1] This motion is brought by the Defendants (the “Defendants”, the “Moving Parties”, or the “105 Group”) for an order striking the Statement of Claim and dismissing the underlying action pursuant to section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”) on the basis that the action is a strategic lawsuit against public participation (“SLAPP”).

[2] In coming to the decision on this motion, the court states that any findings made on this motion are strictly for the purposes of the motion and are not to be considered findings in relation to any other proceedings in this matter.

FACTUAL BACKGROUND

[3] The Plaintiffs, Cameron MacDonald (“MacDonald”) and Antonio Utano (“Utano”), are senior career public servants employed by the Government of Canada.

[4] MacDonald is an Assistant Deputy Minister (EX-04) at Health Canada. He previously served as Director General of Business Application Services Directorate at the Canada Board Services Agency (“CBSA”).

[5] Utano is a Director General (EX-03) within the Information Technology Branch at the Canada Revenue Agency.

[6] The Defendant 10583308 Canada Inc. o/a Botler AI (“Botler”) is federally incorporated with its head office in Montreal, Quebec. It was founded in 2017 by Ritika Dutt and Amir Moravej, who are both shareholders in the company. Botler develops artificial intelligence products, including chatbot technologies. Collectively, these three Defendants are referred to in this decision as the “105 Group”.

[7] In 2018, Parliament enacted Bill C-65, requiring federal employers to implement proactive measures to prevent and address workplace harassment and violence: *An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1*, 1st Sess., 42nd Parl., 2018 (assented to October 25, 2018).

[8] In an unrelated matter, following a competitive process, Botler was awarded a direct five-year contract in July 2019 with the Department of Justice Canada to support victims of workplace sexual harassment nationwide. In 2021, the project was expanded by Justice Canada to include employees in the law enforcement and public safety sectors.

[9] As it relates to the matter before the court, in 2019, CBSA President, John Ossowski (“Ossowski”), directed CIO, Minh Doan (“Doan”), to explore various technological solutions, including AI tools. Doan tasked MacDonald to assist with identifying and assessing options. As part of this routine market-engagement process, MacDonald met with multiple potential suppliers. In October 2019, MacDonald met with Kristian Firth (“Firth”), of GCStrategies, a supplier registered with Public Services and Procurement Canada (“PSPC”), and MacDonald advised that the CBSA was exploring AI-enabled solutions to support Bill C-65 compliance.

[10] According to the 105 Group, on November 4, 2019, Firth of GCStrategies contacted Botler, stating he acted on behalf of a senior CBSA official seeking to implement Botler's solution and requesting a proposal. Firth advised that, as Botler did not hold a direct contract with CBSA, Botler would need to subcontract through GCStrategies.

[11] According to the Defendants, Firth advised that his "client" was the Plaintiff Cameron MacDonald, who was directing him behind the scenes. Botler submitted its proposal through GCStrategies which was eventually approved by the CBSA's President, after which Firth and MacDonald shepherded it through the procurement process.

[12] On November 19, 2019, Firth sent MacDonald an unsolicited joint proposal from GCStrategies and Botler, which led to MacDonald forwarding the proposal to Doan. At Doan's direction, MacDonald relayed high-level feedback to Firth on information gaps such as bilingual capacity, AI use, and security architecture but did not draft, revise, or influence the proposal's substance. An updated version was later submitted.

[13] At the time, unbeknownst to the 105 Group, a government employee working with MacDonald named Diane Daly directed a third party, Coradix Technology Consulting Ltd. ("Coradix") - a company unknown to the 105 Group - to execute the Botler project contract. Firth also requested Dutt and Moravej's résumés for contracting purposes.

[14] According to the 105 Group, Coradix then submitted contracting documents without Botler's knowledge or consent. Dutt and Moravej later discovered that their résumés had been altered, including by inflating their work experience. According to the 105 Group, without these falsifications, Coradix would not have been awarded the contract for the Botler project, as Dutt and Moravej did not meet the minimum work experience required.

[15] Utano first learned of Botler in December 2019 during an in-person vendor presentation to the CBSA, consistent with his role in monitoring emerging technologies in the innovation directorate.

[16] Various demonstrations of the Botler AI technology were given including the following:

- a. On February 6, 2020, Botler presented a demonstration to Doan, MacDonald and the management team.
- b. In fall 2020, Botler gave a virtual demonstration attended by CBSA's President, senior executives, MacDonald and external counsel. Following the demonstration, there were several internal discussions. Ultimately, CBSA's Human Resources Branch ("HRB") approved a limited feasibility study under an existing IT services contract held by Dalian Enterprises Inc. ("Dalian") and Coradix, with authorization from Doan and CBSA's procurement authorities.

[17] In January 2021, Firth informed Dutt and Moravej that the Botler project contract had been executed between CBSA and Dalian in a joint venture with Coradix. According to the 105 Group, neither Dalian nor Coradix was known to it. According to the 105 Group, Firth further stated that Coradix and Dalian demanded a "pass-through" fee. The value of the Coradix and Dalian contract with CBSA had been inflated by \$84,000, while Botler's compensation was unilaterally reduced by \$14,000, all without Botler's knowledge or consent.

[18] Within this arrangement, GCStrategies was now a subcontractor to Dalian, and Dutt and Morvavej were listed as "consultants" to GCStrategies in their personal capacities, with no reference to Botler whatsoever. The contract also included six arbitrary deliverables that were not part of the 105 Group's actual statement of work.

[19] In January 2021, a Task Authorization was issued under the existing Dalian and Coradix contract. MacDonald signed it as the backup Technical Authority during Utano's temporary absence.

[20] Utano was designated as the "Project Authority". It covered only preliminary planning documents, excluding licensing, AI development, cloud services, or any commitment to a pilot or deployment. The HRB led and funded the initiative.

[21] A project kick-off meeting occurred in March 2021.

[22] After May 2021, MacDonald transferred to Health Canada and Utano became Acting Director General.

[23] In September 2021, the HRB directed that work be paused due to scope and governance issues. Afterwards, Dutt emailed Utano and others alleging non-payment by the prime vendor and proposed a direct contract between CBSA and Botler.

[24] Utano initially suggested a courtesy update meeting but later declined involvement in contractual matters. CBSA staff advised Botler accordingly and reminded the prime vendor of its payment obligations. The prime vendor paid Botler promptly. Dutt subsequently thanked CBSA staff and apologized for the inconvenience. The Task Authorization was cancelled in December 2021 through a standard government process led by the HRB. The Plaintiffs allege that neither of them directed, influenced, or decided on the cancellation of the Task Authorization.

The Botler Report

[25] In fall 2022, the 105 Group contacted CBSA President Erin O’Gorman. On October 20, 2022, Dutt claimed Botler had information about alleged procurement irregularities, requesting a meeting. According to the Plaintiffs, Botler sought a direct contractual relationship with CBSA.

[26] On November 2022, Dutt met with the Acting Vice President of the CBSA, who subsequently directed her to promptly hand over “all information” regarding the misconduct to the CBSA’s Chief Security Officer.

[27] On or around November 16, 2022, Botler issued a report called *The Pathfinder Report*, which advanced various allegations of wrongdoing against elected and unelected officials, cited numerous federal statutes and policies it claimed were violated, and pressed for a direct contract with the Government of Canada. The report also asserted that former CBSA President John Ossowski had granted Botler a three-year mandate to investigate and collect information on alleged misconduct within CBSA and across the federal government.

[28] On November 24, 2022, the Defendants delivered a second 13-page confidential report to CBSA senior executives titled the “*Canada Border Services Agency Preliminary Misconduct*

Report to Leadership” (the “Botler Report”). The Botler Report advanced numerous allegations of statutory breaches and named specific individuals including the Plaintiffs.

[29] The final page included a proposed “Resolution Framework” aimed at addressing multiple unresolved issues between CBSA and Botler, including non-payment for their work and the protection of their intellectual property and work product.

[30] Every page of the Botler Report was marked “CONFIDENTIAL AND PRIVILEGED.”

[31] The 105 Group disseminated the Botler Report to the media and repeated its allegations through national news coverage, social media, podcasts, and testimony before the House of Commons Standing Committee on Government Operations and Estimates on October 26, 2023 (“OGGO Meeting”). In the OGGO Meeting, Dutt gave evidence implying that MacDonald had engaged in wrongful activity and was rewarded with a promotion as a result.

[32] In addition to the Botler Report, from mid-2022 onward, the 105 Group obtained copies of the previously withheld contracting documents through Access to Information requests. The 105 Group claimed that the CBSA project contract had been obtained through fraud and forgery, involved inflated contract values, and misuse of a federal procurement program intended to support Indigenous Canadians. They also learned that an individual named Patrick van Abbema had been assigned top billing of \$153,221.16, despite being unknown to the 105 Group.

[33] The 105 Group alleges that an \$84,000 “pass-through” fee was added to a \$350,000 project.

[34] Following the Botler Report, the CBSA disclaimed their responsibility and referred the case to the RCMP, which launched a criminal investigation and contacted the Defendants as witnesses. That investigation is still ongoing.

[35] On May 10, 2023, the 105 Group submitted a report about improper procurement to PSPC, which made no mention of the Plaintiffs. PSPC also disclaimed responsibility.

[36] Frustrated by the federal government’s failure to enforce its own procurement rules, the Defendants contacted The Globe and Mail. The newspaper used Botler’s materials as just one of the sources for its own independent investigation.

[37] On October 4, 2023, The Globe published an investigative report entitled “RCMP probes alleged misconduct in outsourced CBSA contract.” The article revealed that the same Coradix/Dalian contract had been used for both ArriveCAN and Botler’s CBSA project, leading media, politicians, and investigators to link Botler with ArriveCAN.

[38] For the purposes of this decision, the court finds that the Botler Report and the 105 Group did not have any connection to the ArriveCAN app situation.

[39] On October 31, 2023, PSPC issued a Procurement Assessment Report into the Botler project and identified “serious breaches of policies and practices at all phases of the procurement process.” Apparently, the Assessment concluded that both Plaintiffs violated multiple federal procurement rules and had conflicts of interest in their dealings with GCStrategies, Coradix, and Dalian.

[40] The 105 Group claims that the Botler contract was obtained through fraud and forgery, particularly dealing with the resumes of Moravej and Dutt, which appeared to have been altered. The 105 Group also claims that the contract was given under an indigenous work program notwithstanding that neither Moravej and Dutt are indigenous.

[41] The Plaintiffs testified before OGGO on November 7, 2023, and February 22, 2024. At the first hearing, MacDonald testified that he had been threatened by his former supervisor, then Vice President of CBSA Minh Doan, who allegedly stated that the then Minister of Public Safety wanted “someone’s head on a platter” over ArriveCAN.

[42] On December 20, 2023, the Plaintiffs served cease-and-desist letters on the Defendants alleging defamation without identifying any allegedly false statements and threatening legal action. The letters specifically cited the Defendants’ testimony before Parliament as actionable defamation and demanded retraction.

[43] Between October 2023 and March 2024, the Defendants made further public statements to major media outlets repeating various allegations and posting various items on social media platforms.

[44] According to the 105 Group, they are still owed monies with respect to the work that they completed. They were paid \$112,000 and are owed \$238,000.

[45] On December 12, 2024, the Plaintiffs issued a Statement of Claim for various relief including a damages claim for \$4,000,000 for defamation.

[46] This motion was brought prior to any Affidavits of Documents or Examinations for Discoveries being held because, according to the Anti-SLAPP legislation, once such a motion is brought, the court processes for these steps are held in abeyance until a decision is rendered on the motion.

[47] According to the 105 Group, MacDonald testified in his first appearance before the OGGO Committee that he was being threatened by his former supervisor, Minh Doan. According to MacDonald, Doan told him the Minister of Public Safety wanted “someone’s head on a platter over ArriveCAN.”

[48] The Plaintiffs are currently involved in litigation against the CBSA in the Federal Court of Canada. This court has little information into the proceedings in Federal Court, save and except for one decision which is included in the materials.

Issues

[49] These are the issues:

- 1) Does the proceeding arise from expression relating to a matter of public interest?;
- 2) Have MacDonald and Utano established the merits of the underlying process and a lack of a valid defence?; and
- 3) Is the harm resulting from the expression sufficiently serious to outweigh the publish interest in protecting the expression?

Positions of the Parties

[50] The 105 Group argues that MacDonald and Utano initiated the defamation claim to punish them for bringing MacDonald and Utano's corrupt practices to light. MacDonald and Utano counters that the 105 Group's statements were highly defamatory, and that the 105 Group did not exercise any due diligence in verifying the hearsay statements of Mr. Firth.

[51] The 105 Group emphasizes that the impugned statements concern corruption in the public procurement process. They argue that these statements obviously relate to matters of public interest.

[52] MacDonald and Utano concede that the subject matter of the statements engages issues of public interest.

[53] As to the merits of the underlying claim, the 105 Group denies that any of their expressions were defamatory. In particular, they deny that the statements explicitly referred to MacDonald and Utano. The 105 Group further argues that, even if the statements were defamatory, the statements are true, protected by absolute and qualified privilege, and examples of responsible communication and fair comment. The 105 Group emphasizes the public interest in the expressions being made and suggests they were bound by duty to report on fraudulent conduct.

[54] MacDonald and Utano argue that the statements are obviously defamatory. The 105 Group characterized them, explicitly and implicitly, as corrupt government officials who manipulated the procurement process for profit. MacDonald and Utano argue that the statements were not true and, moreover, that the 105 Group was reckless in failing to verify the truth of the statements, which were largely based on hearsay statements by Mr. Firth. The inaccuracy and recklessness of the statements negates any of the defences advanced by the 105 Group.

[55] Finally, the 105 Group argues that MacDonald and Utano suffered no harm as a result of the expressions and that the significant public interest in protecting the expression overrides any possibly harm suffered by MacDonald and Utano. The 105 Group points to MacDonald and Utano's subsequent promotions to suggest that their reputations were not harmed. As well, the 105 Group argues that MacDonald and Utano were already the object of a CBSA investigation and that the public procurement process was already being investigated by various federal agencies and a Parliamentary Committee. The 105 Group denies any responsibility for the harm. Rather, the 105

Group argues that MacDonald and Utano targeted the 105 Group to stifle discussion on a matter of public interest and punish the 105 Group for bringing to light MacDonald and Utano's corrupt acts. To allow the defamation claim to proceed, they say, would have a chilling effect on whistleblowing.

[56] MacDonald and Utano argue that the resulting harm has been substantial and that the public interest in protecting the statements is minimal. Since the expressions were made, MacDonald and Utano have been investigated, called to testify before a parliamentary committee, and embroiled in the highly publicized discourse concerning corruption in the procurement process. MacDonald was suspended and had his security clearance revoked, and Utano has seen his diminished responsibilities pending the resolution of an internal investigation. MacDonald and Utano both claim to have suffered in their health and their personal lives as a result of the statements. They submit that this harm outweighs the limited public interest in protecting the 105 Group's expressions. Defamatory statements attract less protection, and the 105 Group was reckless in making the expressions. Rather than commenting only on the facts it was directly familiar with, the 105 Group repeated Firth's statements without verifying their truth.

[57] The positions of the parties are set out in greater detail below at the relevant stages of the analysis.

Legal Principles

[58] The statutory framework governing anti-SLAPP motions is set out in s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which read as follows:

Purposes

- (1) The purposes of this section and sections 137.2 to 137.5 are,
 - (a) to encourage individuals to express themselves on matters of public interest;
 - (b) to promote broad participation in debates on matters of public interest;
 - (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

- (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Definition, “expression”

- (2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

Order to dismiss

- (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

- (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

- (a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Jurisprudence

[59] The leading case in this area is *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587. The Supreme Court in *Pointes* clarified the framework and offered commentary on key principles in the application of s. 137.1 of the *CJA*.

[60] The respondents in *Pointes*, Pointes Protection, brought a pre-trial motion under s. 137.1 to dismiss the appellant’s action for breach of contract. Pointes Protection had opposed the appellants, 1704604 Ontario Ltd., in their proposed subdevelopment plan. After the parties reached

a settlement agreement on judicial review of a decision of the conservation authority, part of which mandated that Pointes Protection withhold comment on the decision of the conservation authority and avoid other action against 1704604 Ontario Ltd. for the same relief, the president of Pointes Protection testified before the Ontario Municipal Board against 1704604 Ontario Ltd. 1704604 Ontario Ltd. sued for breach of contract, and Pointes Protection brought an anti-SLAPP motion. In determining that the motion should be granted, the Supreme Court set out the following test for an anti-SLAPP motion under s. 137.1:

- (1) the moving party must demonstrate that the statement was made on a matter of public interest;
- (2) the responding party must provide grounds to believe that the underlying action has substantial merit and that the moving party would have no valid defence; and
- (3) the responding party must establish that the harm suffered or to be suffered outweighed the public interest in protecting the expressions.

[61] In *Pointes*, the Court said that section 137.1 is “meant to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions”: at para. 16. According to s. 137.1(3), the moving party – the 105 Group – bears the initial burden of establishing that the proceeding concerns an expression relating to a matter of public interest: at para. 18.

[62] The onus then shifts to the responding party – MacDonald and Utano – to satisfy the requirements under s. 137.1(4). MacDonald and Utano must demonstrate that there are grounds to believe that the proceeding has substantial merit and the moving party has no valid defence in the proceeding, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: at para. 18.

Analysis

[63] The court will now review each step of the test set out by the Supreme Court of Canada in *Pointes*, as set out in paragraph 88 above.

Issue #1 - Does the Proceeding Arise from an Expression Relating to a Matter of Public Interest?

Analysis

[64] This stage requires a two-step analysis. The 105 Group must show, on a balance of probabilities, that (1) the proceeding arises from an expression made by the 105 Group and that (2) the expression relates to a matter of public interest: at para. 23. It must also demonstrate that the proceeding arises from the expression, in that there is a clear nexus between the expression and the proceeding: *Pointes*, at para. 24.

[65] The “expressions” in question here include the (1) Botler Report, which was disseminated to the CBSA and to Mr. Curry of the Globe and Mail, (2) statements to other media, and (3) social media posts. MacDonald and Utano provided in their materials a full list of the particular expressions which they claim were defamatory.

[66] The court finds that the expressions set out by MacDonald and Utano clearly constitute “expressions” within the meaning of s. 137.1(2) of the *CJA*. In addition, the court finds that the defamation claim relates directly to those expressions.

[67] As to the second step, that the expressions clearly concern a matter of public interest, the 105 Group alleges corruption and fraud with respect to public procurement. It did so in the midst of a high-profile situation surrounding the Government of Canada public procurement regime, as evidenced by numerous media articles and political commentary on the topic. The expression “public interest” is interpreted broadly and liberally to give effect to the purpose of the statutory scheme: *Pointes*, at para. 26. The court is concerned with whether the expression relates to a matter of public interest, meaning that the expression concerns some topic about which “some segment of the community would have a genuine interest in receiving information”: *Pointes*, at paras. 27-30. Based on the evidence in this case, the court finds that the standard is met.

[68] Notwithstanding this analysis, both parties agree that the proceeding arises from an expression concerning a matter of public interest. Accordingly, this stage of the test is made out.

Issue # 2 - Have MacDonald and Utano Established the Merits of the Underlying Process and the Lack of Valid Defence?

Analysis

[69] MacDonald and Utano must now demonstrate grounds to believe (1) that the underlying defamation claim has substantial merit, and (2) that the 105 Group would have no valid defence.

[70] The test under s. 137.1, as set out in *Pointes*, does not impose an exacting standard at this stage of the proceeding. The standard of “grounds to believe” requires “a basis in the record and the law – taking into account the stage of litigation at which a s. 137.1 motion is brought – for finding that the underlying proceeding has substantial merit and that there is no valid defence”: at para. 39.

[71] In *Pointes*, the Court stated that motions judges should be “acutely aware of the limited record, the timing of the motion in the litigation process, and the potentiality of future evidence arising”: at para. 37. The adjudication at this stage is not a determinative conclusion of the underlying claim or any available defence.

[72] The scheme under s. 137.1 permits the parties to file evidence and allows for limited cross-examination. The evidentiary foundation required is less than under a motion for summary judgement. Accordingly, while the inquiry at this stage should go beyond the pleadings and consider the contents of the record, the evidentiary basis and expected depth of inquiry is less than that of a motion for summary judgement: at para. 38.

[73] The court is satisfied that MacDonald and Utano have demonstrated reasonable grounds to believe that the underlying defamation claim has substantial merit and that the 105 Group has no valid defence in the proceeding.

i) Are There Grounds to Believe That the Proceeding Has Substantial Merit?

[74] The court must next look at the issue of whether the underlying proceeding has substantial merit.

[75] The “substantial merit” standard requires a “real prospect of success – in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff.” MacDonald and Utano must establish a legally tenable claim, supported by evidence that is reasonably capable of belief, taking into account the early stage of the proceeding: *Pointes*, at para. 49.

[76] The court must consider the strength and prospect of success of the underlying claim. The claim must have “substantial merit”. This qualifying term requires that there be more than merely some merit. It is not sufficient, for example, to demonstrate technical validity or lack of a frivolous or vexatious character: at paras. 45-47. On the pleadings and the evidentiary record, the plaintiffs must have a “real prospect of success” on the underlying claim. This standard is more onerous than on a motion to strike, which requires simply that the claim have “some chance of success” or a “reasonable prospect of success”: at para. 50.

[77] Conversely, “substantial merit” falls below the standards of “likely to succeed”, “strong *prima facie* case” and “balance of probabilities”. The standard is similarly lower than on a motion for summary judgment, which typically occurs later in the litigation process with a greater evidentiary record and allows for greater fact-finding from the motions judge. An anti-SLAPP motion necessitates a more limited weighing and assessment of the evidence in recognition of the lower standard and the preliminary stage of the proceeding: at paras. 48, 50-52. Determinations on credibility and further assessments of the evidence should occur later in the litigation process.

[78] The Supreme Court in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28, set out the following three elements for the tort of defamation:

- a. 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;
- b. The words in fact referred to the plaintiff; and
- c. The words were published, meaning that they were communicated to at least one person other than the plaintiff.

[79] Where the above is established, falsity and damage are presumed: *Torstar*, at para. 28. MacDonald and Utano must establish the above on a balance of probabilities. Based on this analysis, the court finds that MacDonald and Utano have demonstrated grounds to believe that the defamation claim has substantial merit.

[80] The court will now analyse the three elements of the tort of defamation, as set out in *Torstar*.

(a) Were the Expressions Defamatory?

[81] MacDonald and Utano argue that the expressions were, in sum, defamatory insofar as they depicted MacDonald and Utano as “corrupt figures” and imputed to them “corruption, dishonesty, bribery, collusion, conflicts of interest, improper influence, and potentially criminality or fraud.” The Botler Report suggested that MacDonald directed Firth’s actions, that MacDonald and Utano together shaped the procurement process, and that they received payment for their seemingly improper involvement in the procurement process. Further statements to the media implied corruption and certain posts on social media made by the 105 Group were accompanied with “#corruption”. These statements appear, on their face, to lower the reputations of MacDonald and Utano in the eyes of the reasonable person by suggesting that they were corrupt and that they defrauded the government.

[82] The court finds that the expressions are well-identified, contrary to the 105 Group’s suggestions. The Statement of Claim clearly sets out the defamatory expressions. MacDonald and Utano, in large part, accurately reproduced those expressions. Copies of the expressions are contained in the motion records of the parties, as detailed above. Where the 105 Group did not explicitly allege fraud or corruption, the tenor of its expressions is that MacDonald and Utano were engaged in fraud or corruption.

[83] MacDonald and Utano clearly set out a set of statements made by the 105 Group, made directly or indirectly, in its Statement of Claim which implicate them in corruption of the government procurement process. Such an implication would, on its face, lower their reputations in the eyes of the reasonable person. On that basis, the court finds that the expressions were defamatory.

(b) Did the Expressions Refer to the Plaintiffs?

[84] This element asks (1) whether the expressions could be in reference to MacDonald and Utano and (2) whether the expressions would lead the reasonable person to conclude that they did in fact refer to MacDonald and Utano: *Foulidis v. Ford*, 2014 ONCA 530, 323 O.A.C. 269. Some of the expressions, including the Botler Report, the statements to the media, and the X posts, explicitly name MacDonald and Utano.

[85] Furthermore, MacDonald and Utano are identifiable even where the expressions do not explicitly refer to them. The court may look to the circumstances in determining whether the reasonable person would identify MacDonald and Utano as the subjects of the expressions: *Grant v. Cormier-Grant* (2001), 56 O.R. (3d) 215, at paras. 19-24. An individual could be identified by reference to their relationships with other named individuals or their presence or participation in certain impugned acts: *Cormier-Grant*, at para. 28; *ApSimon v. Hategan*, 2026 ONSC 300, at paras. 74-76.

[86] In certain instances, MacDonald and Utano are explicitly named. Even where they are not explicitly named, they are referred to in respect of their relationship with Mr. Firth and in the context of an ongoing investigation and public situation in which they are clearly identified. That the expressions refer to them can be easily inferred.

[87] Based on the explicit identification of MacDonald and Utano and the context of the statements on the whole, which allows one to easily infer their reference to MacDonald and Utano, this court finds that the statements referred to MacDonald and Utano.

(c) Did the 105 Group Publish the Expressions?

[88] In order to be liable for defamation, this court must find that the 105 Group published the expressions.

[89] In order for expressions to be published, they must be made known to a third party. The 105 Group provided the Botler Report to officials at the CBSA and to Mr. Curry, made comments

to the Globe and Mail and other media, and made various statements to the public generally through their publications on social media.

[90] Furthermore, the 105 Group made the expressions, despite its argument that they only repeated the words of Firth or that the Globe and Mail is the author of any expressions published in its newspaper.

[91] Regarding Firth, even if they were merely repeating his statements without any further commentary, the repetition rule extends liability to those who repeat a defamatory expression, except for expressions whose public interest lies in being made, rather than in their truth. However, this exception would require that the 105 Group explicitly acknowledge that it did not verify the truth of the expressions and that it report both sides of the dispute fairly: *Torstar*, at paras. 119-20. The 105 Group did not appear to do so.

[92] As to the Globe and Mail, the newspaper merely republished these expressions made by the 105 Group. The question of republication is better addressed in assessing harm at the balancing stage: *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 94. In any event, republication will only determine the extent of any further damages and does not absolve the 105 Group from having published its statements in the first place.

[93] The court finds the 105 Group published the impugned expressions to others. Therefore, there are grounds to believe that the claim of defamation has substantial merit.

[94] The court has determined that there are grounds to believe that the tort of defamation is made out. The court must now proceed to the next stage to determine whether the 105 Group has a valid defence to the tort.

ii. Are There Grounds to Believe That the 105 Group Has No Valid Defence in the Proceeding?

[95] In accordance with subsection s. 137.1(4)(a)(ii), MacDonald and Utano must demonstrate that there are grounds to believe that the 105 Group's proposed defences have no real prospect of success, in that there are grounds to believe that the defences do not weigh more in favour of the 105 Group, based on the law and the record at this preliminary stage of the proceeding: *Platnick*,

at para. 103. This is not a final determination of the merits of the defences. Rather, MacDonald and Utano simply need to demonstrate a basis in the record and the law for finding all of the defences could be negated: *Pointes*, at paras. 37-39.

[96] MacDonald and Utano must demonstrate that there are grounds to believe that none of the defences are valid. Accordingly, if any defence is valid on the law and the limited record at this stage, the motion would succeed and the underlying claim would be dismissed: *Pointes*, at para. 58.

[97] The court finds that MacDonald and Utano have demonstrated grounds to believe that the 105 Group has no valid defence in the proceeding. The burden at this stage is on the 105 Group to set out their proposed defences, and then for MacDonald and Utano to negate those defences: *Pointes*, at para. 56.

[98] The 105 Group advanced the following five defences: Justification (Truth); Absolute Privilege; Qualified Privilege; Responsible Communication; and Fair Comment. The court will consider each of the defences in turn.

(a) Justification (Truth)

[99] The 105 Group claims that all of the allegedly defamatory expressions are true and accurate. It claims that the allegations have been validated by numerous independent federal investigations, that MacDonald and Utano rely on fabrications, withheld evidence and material misrepresentations, and that MacDonald and Utano have otherwise conceded their defamatory expressions.

[100] At this stage, following a preliminary finding of defamation, the words complained of are presumed to be false. The 105 Group must therefore adduce evidence showing that the “sting” or main thrust of the expressions is substantially true. Not only must the facts be true, but the actual “sting” of the allegations must be true as well. Conversely, the thrust of the expressions may be true despite some factual inaccuracies where those inaccuracies are severable and distinct from the main thrust of the impugned expressions: *Platnick*, at paras. 107-8.

[101] The 105 Group must therefore demonstrate the truth of the core statements making up the allegations of fraud, corruption and dishonest dealings involving MacDonald and Utano. Those allegations include that MacDonald was aware of the forged resumes, that MacDonald and Utano accepted or communicated to Firth the need for a “pass-through fee”, that they manipulated the procurement process for their personal benefit, in collaboration with Firth, and that they terminated the contract in retaliation to the 105 Group raising concerns of fraud.

[102] There are grounds to believe that the 105 Group cannot adequately establish the truth of the expressions. MacDonald and Utano present a conflicting account of the relationships between the parties – namely, that Firth engaged in misconduct on his own and that MacDonald and Utano simply carried out their official functions. They claim that they did not have decision-making authority. The evidence of corruption consists mostly in expressions made by Firth regarding a relationship with MacDonald. It is not clear that MacDonald and Utano were aware of or responsible for the forged resumes, for instance, or that they did communicate to Firth their intention to collect a fee for the project. The court would need to conduct a credibility assessment to determine the truth and accuracy of the allegations of fraud and corruption, as was required in the recent case of *ApSimon*, at paras. 97-100.

[103] As well, the findings of the inquiries, to which the 105 Group points as confirmation of the content of its expressions, do not bind the courts. Investigations and inquiries do not replicate the trial process and they cannot make determinations of guilt or liability: *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, at para. 34.

[104] The reports and inquiries are largely inconclusive as to the responsibility of MacDonald and Utano. The 105 Group cites the suspension of the impugned contractors and the conclusions of a series of reports to suggest that independent authorities have verified their allegations with respect to MacDonald and Utano. PSPC suspended the contractors Dalian, Coradix, and GCStrategies, without reference to MacDonald or Utano. The Office of the Procurement Ombud Practice Review of the ArriveCAN application, the Auditor General’s ArriveCAN report, and the Auditor General’s GCStrategies Report all summarized various issues in procurement and noted shortcomings by the CBSA. However, they did not specifically mention either MacDonald or

Utano, nor did conclude definitively as to the truth of the 105 Group's particular allegations of fraud or corruption concerning MacDonald and Utano specifically.

[105] The PSPC does identify MacDonald in its Procurement Assessment. However, the Procurement Assessment is not determinative of the legal liability of MacDonald and Utano. According to the evidence, the CBSA's "Preliminary Statement of Facts" is under challenge in the Federal Court. The CBSA's submissions to the OGGO Committee are simply submissions, and not findings of fact. MacDonald and Utano contest these submissions.

[106] The expressions are presumed to be false at this stage, and the evidence of the 105 Group does not sufficiently rebut this presumption. The findings of the inquiries are not determinative of the issue. A finding on legal liability may require a credibility assessment, which is not available at this stage. The court finds that there are reasonable grounds to believe that the 105 Group will be unable to demonstrate the truth of its statements that MacDonald and Utano were involved in corrupt practices.

(b) Absolute Privilege

[107] The 105 Group claims absolute privilege for statements made during the OGGO hearings and reproduced elsewhere in the media. Absolute privilege attaches to statements made before a Parliamentary Committee and cannot be used against an individual in a criminal or civil proceeding: *Ontario v. Rothmans Inc.*, 2014 ONSC 3382, 120 O.R. (3d) 467, at paras. 12-15. However, based on the pleadings, MacDonald and Utano are not claiming defamation for statements made during the course of the OGGO hearings. They are claiming defamation for statements made outside of the OGGO hearings.

[108] As well, the 105 Group does not benefit from absolute privilege if it republished statements made during the OGGO hearings: *Stopforth v. Goyer* (1978), 20 O.R. (2d) 262 (H.C.J.), at p. 263. Importantly, the 105 Group has not specified which, if any, statements produced in the media are drawn directly from their OGGO testimony. The 105 Group provided Mr. Curry with the Botler Report before they made their appearance before the committee, which was on October 26, 2023. It stands to reason, at the very least, that commentary produced before October 26, 2023, was not derived from their OGGO testimony.

[109] The court finds that there are grounds to believe that most, and perhaps all, of the statements made outside the confines of the OGGO hearings will not be protected by absolute privilege.

(c) Qualified Privilege

[110] Qualified privilege shields statements where the person making the statement has “an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published” and the recipient has a “corresponding interest or duty to receive it”: *Platnick*, at para. 121, citing Peter A. Downard, *The Law of Libel in Canada*, 4th ed. (Toronto: LexisNexis, 2018), § 9.6. Qualified privilege attaches to the occasion, rather than the communication, meaning that privilege attaches only to the appropriate situation, rather than the contents of the message: *Platnick*, at para. 121. Any reproduction of communications outside of this situation would not be shielded. The court must assess whether the above interests existed and, if so, on which occasion, before considering whether the scope of the occasion had been exceeded or abused in some manner: *Thatcher-Craig v. Clearview (Township)*, 2023 ONCA 96, 480 D.L.R. (4th) 639, at para. 56.

[111] While there may be some duty to report negligent or criminal conduct, this defence can otherwise be defeated: (1) where the dominant motive behind the words was malice, including situations in which the speaker was reckless as to the truth of the statements, or (2) where the scope of the occasion of privilege was exceeded: *Platnick*, at para. 121. It would appear that, owing to the above risks of falsity and the lack of demonstrated due diligence, there are grounds to believe that the defence would fail on both scenarios.

[112] MacDonald and Utano contend that the 105 Group exceeded its duty and included their names with reckless disregard for the truth of the allegations. Malice may be demonstrated through simple dishonesty or reckless disregard for the truth, and there is no requirement for spite or ill intentions: *Platnick*, at para. 136.

[113] The court finds there are grounds to believe that the 105 Group was reckless in arguing that MacDonald and Utano willingly collaborated with Firth to defraud the CBSA and receive “pass-through fees”. MacDonald and Utano point to concessions by Dutt during cross-examination that “it was not [her] job to verify [the allegations]” and that it was “not [her] responsibility to confirm

with Mr. Utano” whether he was taking a commission. More specifically, the allegations against MacDonald and Utano are derived from statements made by Firth, which were never verified with MacDonald and Utano, and inferences drawn from those statements. The court in *Platnick* found malice under similar circumstances: see para. 137. The court finds that there is an evidentiary basis that Firth acted on his own accord, and that MacDonald and Utano were not complicit in organized corruption or fraud.

[114] By extension, the 105 Group’s decision to specifically name and accuse MacDonald and Utano in the Botler report, rather than to report the specific misconduct of Firth and discuss perceived gaps in the procurement system, could be considered as exceeding its duty. Comments which are not necessary to fulfil the duty exceed the scope of the privilege: *Platnick*, at para. 130. The 105 Group could have fulfilled its duty by reporting Firth’s specific misconduct, pointing to seeming gaps in the procurement system, and qualifying allegations concerning MacDonald and Utano by acknowledging that they did not verify Firth’s statements. Moreover, its passing on the Botler Report to Mr. Curry of the Globe and Mail and making repeat allegations in the media and on social media are clearly not necessary to fulfil what limited duty they may have had to report misconduct internally.

[115] The court finds that there are grounds to believe that the defence of qualified privilege will be defeated, MacDonald and Utano having established that the 105 Group was reckless in making the impugned statements and that the 105 Group exceeded whatever duty it may have had to report on fraudulent or criminal conduct by making unverified allegations against MacDonald and Utano.

(d) Responsible Communication

[116] The defence of responsible communication has two essential elements:

- (1) a statement on a matter of public interest, and
- (2) evidence that the publication was responsible, or that the publisher was diligent in trying to verify the allegations, given the circumstances: *Torstar*, at para. 98.

[117] Based on the previous analysis, the court finds that the first element is met.

[118] With respect to the second element of the defence of responsible communication, the Supreme Court has held that “[a] defendant who has acted with malice in publishing defamatory allegations has by definition not acted responsibly”: *Torstar*, at para. 125. Malice is one of the “relevant circumstances” which factors into the assessment of the publisher’s diligence: see *Torstar*, at para. 125.

[119] The court finds that there is an evidentiary basis that the 105 Group did not consider the status and reliability of the source, that it did not consider MacDonald and Utano’s side of the story, and that the inclusion of the defamatory statements was not justified given the 105 Group did not need to make the public statements and could have qualified the allegations concerning MacDonald and Utano. This defence is therefore also defeated.

(e) Fair Comment

[120] The defence of fair comment may be defeated by express malice and, in any event, might not apply in this case because it is unclear that the expressions were “comment”, rather than factual assertions. The defence of fair comment is comprised of five elements:

- (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 recognizable as comment;
- (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proven 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: *Torstar*, at para. 31.

[121] There is a sufficient evidentiary basis to find that the statements were statements of fact, and not comment. The Supreme Court has held that comment is not confined to opinion, but may

include “deduction, inference, conclusion, criticism, judgement, remark or observation which is generally incapable of proof”: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 26, citing *Ross v. New Brunswick Teacher’s Assn.*, 2001 NBCA 62, 201 D.L.R. (4th) 75, at para. 56. However, the Court also made sure to distinguish comment and the editorial context as unique, as compared to someone who is a “reporter of facts”: *Simpson*, at paras. 26-27.

[122] The 105 Group advanced allegations of corruption and fraud, first internally to the CBSA and then to the media and online. These expressions would appear to constitute statements of fact. The court finds that the 105 Group’s intent was not to simply opine on what had transpired; rather, it sought to present a factual account detailing improprieties involving both MacDonald and Utano.

[123] Given the expressions are statements of fact, and not comment, and the 105 Group may have acted negligently in making those expressions, there are grounds to believe that this defence fails.

[124] Having invalidated all defences, MacDonald and Utano must now demonstrate that the harm resulting from the expressions outweighs the public interest in protecting the expression.

Issue #3 - Is the Harm Resulting from the Expression Sufficiently Serious to Outweigh the Public Interest in Protecting the Expression?

Analysis

[125] This public interest hurdle is the final step in the screening process. It allows the court to dismiss a technically meritorious defamation claim if the limitations on free expression and public participation outweigh the purported harm suffered by the plaintiffs: *Pointes*, at paras. 62-63. The use of the term “outweigh” requires that the MacDonald and Utano demonstrate that the harm suffered outweighs the limits on free expression, on a ratio of at least 51/49: *Pointes*, at para. 66.

[126] This assessment has two steps: (1) the harm analysis, and (2) the weighing of public interest: *ApSimon*, at para. 161.

i. Harm Analysis

[127] MacDonald and Utano must demonstrate (1) the existence of harm and (2) causation, in that the harm resulted from the moving party's expression: *Pointes*, at para. 68. Either monetary or non-monetary harm would suffice. As this is a weighing exercise, the court does not set out a requisite threshold of harm. The plaintiff must simply demonstrate some harm, and the magnitude of that harm will affect the ultimate weighing exercise: *Pointes*, at paras. 69-70. General damages are presumed in defamation cases, given the presumptive falsity of the statements and the existence of harm, though this presumption may not itself be sufficient to establish the requisite harm at this stage: *Platnick*, at para. 144.

[128] Though a plaintiff must provide some evidence to draw an inference that the expression likely caused the harm, they need not definitively prove harm or causation at this stage, and the court is not required to determine the extent of the harm and the strength of the causal connection. It is not the motions judge's function to adjudicate on the merits. As well, the assessment is not an all-or-nothing affair. The causal element may appear weaker for some elements of the harm, and stronger for others: *Pointes*, at paras. 71-72.

[129] First, the court finds that the claims of harm by MacDonald and Utano are not bald allegations. MacDonald and Utano submit that, but for the expressions of the 105 Group, they would not have been considered as unfit for their positions of trust and their high security clearances. They note that the expressions, which have been broadly published and which concern a highly publicized situation, have prompted investigations into their conduct, triggered suspensions, stalled their career advancement, and caused significant personal distress.

[130] There is a sufficient evidentiary basis to find that MacDonald and Utano suffered some harm, being mostly reputational harm. MacDonald and Utano were called to testify before the OGGO committee. Furthermore, the CBSA went on to investigate MacDonald and Utano, referred the matter to the RCMP for further investigation, and then forwarded their preliminary investigation findings to MacDonald and Utano's current employers. MacDonald was suspended, with pay, as a result of the CBSA sharing its findings with his current employer. The 105 Group provided the Botler Report to a reporter of the Globe and Mail, and they provided statements and interviews with CBC and CTV. The X posts show between 900 and 212,000 views. The 105 Group's statements appear to have been widely disseminated.

[131] The 105 Group could be liable notwithstanding the publication of statements to the media and the republication of statements made elsewhere, as in the Botler Report. These statements form the basis of the defamation claim – the reporting on this matter was widespread and occurred across prominent media outlets. The 105 Group should have understood that republication of their allegations was the “natural and probable consequence” of their initial communication with members of the media, and that republication was foreseeable: *Platnick*, at para. 152. Indeed, the 105 Group justified sending the Botler Report to Mr. Curry as a measure of putting pressure on the CBSA to act on the allegations. If the trial judge determines that this republication caused damage to the reputation of MacDonald and Utano, it would be attributable to the 105 Group’s initial publication outside of the confines of the OGGO hearings.

[132] The 105 Group challenges this assessment on two grounds. First, they argue that MacDonald and Utano have not properly suffered harm, pointing to the promotions of each of MacDonald and Utano and noting that Utano remains employed. Second, they deny any causation, arguing that MacDonald and Utano became the subject of investigation and public scrutiny through the CBSA investigation into the ArriveCAN application.

[133] As to the existence of harm, the court finds that there appears to be sufficient harm. Contrary to the suggestion of the 105 Group, Zinn J. of the Federal Court did not declare that MacDonald and Utano had suffered no harm; rather, he concluded that they had not demonstrated irreparable harm should the court fail to grant an injunction suspending the CBSA’s “Preliminary Statement of Facts”: *Utano v. Canada (Public Safety)*, 2024 FC 805, at paras. 71-76. The 105 Group accused MacDonald and Utano of corruption, fraud and dishonesty. MacDonald and Utano point to the seriousness of reputational harm arising from false statements. In this case, MacDonald and Utano are civil servants in high-ranking government positions. Allegations of dishonesty and fraudulent conduct would certainly lower their esteem and reputation in the eyes of the public. In a defamation claim, the court may take into account the position and standing of the plaintiffs in determining damages, and it is reasonable to conclude the reputational harm of being labeled as corrupt civil servants is significant: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 182, citing Philip Lewis, *Gatley on Libel and Slander*, 8th ed. (London: Sweet & Maxwell, 1981), at pp. 592-93. Finally, MacDonald and Utano’s claims of personal distress are a

relevant consideration, provided there is some evidentiary basis to infer that this harm is real: *Platnick*, at para. 149.

[134] As to causation, the Supreme Court of Canada has been clear that the court need not definitively determine that the statements caused the harm at this stage. The 105 Group alleges that any harm was the result of the broader investigations into procurement practices stemming from the ArriveCAN application. They claim that this preceded the Botler Report. MacDonald and Utano suggest that, prior to the Botler Report, they had never been explicitly named or accused of being involved in impropriety.

[135] The reports of the Auditor General and the Office of the Procurement Ombud concerned procurement generally. They did not name any individual wrongdoers in the civil service. Rather, they identified gaps and inefficiencies within the procurement process. Based on the available evidence, the 105 Group appears to have been responsible for providing the Botler Report or parts thereof to Mr. Curry prior to the OGGO committee hearing, and for continuing to name MacDonald and Utano in interviews and social media posts. It is worth noting that the PSPC Procurement Assessment, which directly assigns blame to Mr. MacDonald, concerns only the Botler AI Task Authorization and specifically notes in the “Background” section that the internal investigation arose from the 105 Group’s communication with the CBSA in November 2022.

[136] Notwithstanding that the court must be more cautious to the issue of causation where there are other possible sources for the damages, the causation assessment is not “all-or-nothing” and the court could find some damages arising from the conduct of the 105 Group: *Pointes*, at para. 72. Here, the PSPC’s conclusions in the Procurement Assessment and the initial publications in the Globe and Mail clearly arose from the dissemination of the Botler Report, and the 105 Group’s activity in the media and on social media is obviously separable from the CBSA inquiry into MacDonald and Utano.

[137] The court is satisfied, for the purpose of this motion, that MacDonald and Utano have demonstrated harm, being primarily reputational harm, arising from the 105 Group’s publication of the Botler Report to the CBSA and Mr. Curry of the Globe and Mail, and statements in the media and on social media.

ii. *Public Interest Assessment*

[138] Having established harm, MacDonald and Utano must demonstrate that the level of harm outweighs the public interest in protecting the expression. The court must qualitatively assess the public interest in the expression, taking into account the quality of the expression and the motivation behind it: *Pointes*, at paras. 73-74.

[139] The Supreme Court of Canada in *Pointes* set out the various considerations in assessing the public interest in protecting an expression. The court must consider the purpose of s. 137.1, being to “screen out lawsuits that unduly limit expression on matters of public interest”: at para. 62. Those purposes including encouraging expression and participation in debates on matters of public interest, discouraging the use of litigation as a means of stifling expression on matters of public interest, and reducing the risk that discourse on matters of public interest is hampered by threat of legal action: *CJA*, s. 137.1(1).

[140] The court may also consider the principles central to the freedom of expression under s. 2(b) of the *Charter*, namely search for the truth, participation in political decision making, and diversity in forms of self-fulfillment and human flourishing: at para. 77. The court may also look for the indicia of a SLAPP suit in the underlying claim: at paras. 78-79. Finally, the Court in *Pointes* set out a series of other factors in assessing the public interest in protection expression:

- (a) the importance of the expression;
- (b) the history of litigation between the parties;
- (c) broader or collateral effects on other expressions on matters of public interest;
- (d) the potential chilling effect on future expression either by a party or by others;
- (e) the defendant’s history of activism or advocacy in the public interest;
- (f) any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award;

(g) the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation: at para. 80.

[141] MacDonald and Utano point to the reckless disregard for the truth and suggest that the 105 Group's attacks were malicious, excessive and commercially motivated, implying a *quid pro quo* by offering information on fraud within the CBSA in exchange for a government contract to install Botler AI broadly among different departments. The 105 Group counters that the claim is a "textbook SLAPP proceeding", pointing to the small size of the organization, MacDonald and Utano's targeting Botler AI rather than other parties, and the importance of whistleblowing.

[142] First, it is not clear on the record that this is a SLAPP proceeding. The Court of Appeal in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 90, aff'd 2020 SCC 23, set out four indicia of SLAPP litigation: (a) a history of the plaintiff using litigation or the threat of litigation to silence critics; (b) a financial or power imbalance that strongly favours the plaintiff; (c) a punitive or retributory purpose animating the plaintiff's bringing the claim; and (d) minimal or nominal damages suffered by the plaintiff. Firstly, there is no evidence of MacDonald and Utano being litigious, aside from challenging a purportedly unfair internal investigation by the CBSA. Secondly, there is no evidence of any significant power imbalance between the two parties. Finally, though the damages claimed are high and may seem retributory, they are rooted in an arguable defamation case arising from a set of statements alleging significant fraud and corruption. MacDonald and Utano have been, since October 2023, targets of internal investigation and key figures in a highly publicized affair concerning allegations of large-scale fraud and corruption in the context of public procurement.

[143] Additionally, the nature of the statements attracts a lessened public interest in their protection. Defamatory statements are very tenuously related to the core values underlying s. 2(b) of the *Charter*, and the court is entitled to consider the possibility of gratuitous personal attacks and the motivation behind the expressions: *Platnick*, at para. 163. As in *Platnick*, the expressions could be considered a personal attack which, despite some laudable goal, was taken without due diligence or proper substantiation. The 105 Group could have alerted the CBSA to the misconduct without "unnecessarily singling out an individual in a way that is extraneous or peripheral to the

public interest”: at paras. 164-67. The potential chilling effect is, therefore, limited as the 105 Group could have properly engaged their duty to “whistleblow” without advancing the specific allegations against MacDonald and Utano.

[144] Given the limited importance of the expression and impact on future expression by the parties, the other factors do not militate in favour of a strong public interest. There is no litigation history between the parties. There is no evidence of collateral effects on expression on matters of public interest. The 105 Group does not appear to have a history of public activism or advocacy. The parties are not obviously disparate in their resources. Nor will this defamation motion present any hostility against an identifiable group.

[145] Bearing in mind the intended purposes of the anti-SLAPP legislation, the court finds that the harm caused by the expression outweighs the public interest in protecting the expression. There is limited public interest in protecting the expressions, and allowing the defamation claim to proceed does not give rise to a risk of use of litigation as a tool to stifle discussion on matters of public interest. The 105 Group could have reasonably participated in public debate on corruption in procurement by sharing its experiences without reference to MacDonald and Utano. Their implication of MacDonald and Utano in corruption is based on hearsay statements of Mr. Firth, statements which the 105 Group did not verify. The recklessness in making the statements undermines the public interest in their protection.

[146] The court finds that MacDonald and Utano have demonstrated that the harm resulting from the expressions outweighs the public interest in the protection of the expressions.

Conclusion

[147] Based on the aforementioned analysis, the court finds that the 105 Group’s motion fails.

Costs

[148] Both parties sought costs of this motion.

[149] Pursuant to s. 137.1(8) of the *CJA*, the moving party is not required to pay costs on an unsuccessful motion “unless the judge determines that such an award is appropriate in the

circumstances.” However, there is authority for ordering costs, typically of no more than \$50,000, on successful defence of an anti-SLAPP motion: *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 165 O.R. (3d) 753, at para. 39, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 172; see also, *ApSimon v. Hategan*, 2026 ONSC 2582.

[150] A costs award is available even where the anti-SLAPP proceeding arises from statements made in the public interest: *2110120 Ontario Inc. v. Buttar*, 2023 ONCA 539, 485 D.L.R. (4th) 551, at para. 101, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 432. This court considers the purpose of the statements and the possibility that the 105 Group acted recklessly in making the expressions concerning MacDonald and Utano. Accordingly, the court is satisfied that this is an appropriate case to order costs for the successful resistance to an anti-SLAPP motion.

[151] The 105 Group claimed costs on a full indemnity basis, including disbursements and HST, of \$114,179.92. MacDonald and Utano claimed costs on a full indemnity basis of \$37,296.92, inclusive of disbursements and HST.

[152] Under the circumstances, since MacDonald and Utano were successful, the court finds that it is appropriate to order costs of \$25,000, inclusive of disbursements and HST payable by the 105 Group to MacDonald and Utano within 30 days. The 105 Group cannot take any fresh step in this proceeding until such time as these costs are paid in full.

[153] Order accordingly.

Mr. Justice Stanley J. Kershman

Date: June 5, 2026

CITATION: MacDonald v. 10583308 Canada Inc., 2026 ONSC 3342
COURT FILE NO.: CV-24-98207
DATE: 2026/06/05

ONTARIO
SUPERIOR COURT OF JUSTICE

RE: Cameron MacDonald and Antonio
Utano, Plaintiffs

AND

10583308 Canada Inc. o/a Botler AI,
Amir Moravej, and Ritika Dutt,
Defendants

COUNSEL: Christopher Spiteri and Luigi Paravan,
for the Plaintiffs, Responding Parties

Mark Bourrie, for the Defendants,
Moving Parties

DECISION ON MOTION

Kershman J.

Released: June 5, 2026