COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Martin v. Lavigne,*
2011 BCCA 104

Date: 20110308
Docket: CA038433

Between:

Peter Martin and Meah Martin

Appellants
(Plaintiffs)

And

Leo Lavigne and Andrew Neufeld

Respondents
(Defendants)

Corrected Judgment: On the front page of the judgment the name of the respondents' second counsel was added on March 11, 2011

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, August 17, 2010 (*Martin v. Lavigne and Neufeld,* 2010 BCSC 1136, Vancouver Registry No. S086433)

Counsel for the Appellants:
Counsel for the Respondents:
Place and Date of Hearing:

Place and Date of Judgment:

Written Reasons by:
The Honourable Madam Justice D. Smith
Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[1] This appeal concerns a dispute between the appellant owners of a strata unit in a residential building, the Savona, and the respondents who were members of the Savona's volunteer strata council (the "Strata Council"). The dispute spilled into a civil action commenced by the appellants, Peter and Meah Martin, in the Supreme Court of British Columbia, in which they sought damages in nuisance for "staring" by the respondent Leo Lavigne, a member of the Strata Council and former Strata Council president. They also sought damages in defamation for a headline published in the

"*Savona Update*", a document that was distributed by Andrew Neufeld, the president of the Strata Council at the material time, to all of the strata owners. Each of the respondents denied claims and Mr. Neufeld asserted the alternative defence of qualified privilege to the claim in defamation.

[2] Following a seven day trial, Mr. Justice Burnyeat dismissed both claims. He concluded that the appellants' claim in nuisance was "a trivial complaint" that the law of nuisance was not intended to address. He also found that while the words in the headline of the *Savona Update* were defamatory, they had been made on an occasion of qualified privilege. See *Martin v. Lavigne and Neufeld,* 2010 BCSC 1136.

[3] The appellants submit the trial judge erred in fact or in mixed fact and law in finding that Mr. Lavigne's actions did not amount to a nuisance. They further submit the trial judge erred in law in finding that the defamatory words were published on an occasion of qualified privilege. In the alternative, they assert that if the defamatory words were published on an occasion of qualified privilege, the trial judge erred in fact or in mixed fact and law in finding that Mr. Neufeld had acted without malice and/or had not exceeded the scope of his duties as president of the Strata Council in publishing the defamatory remarks to all of the strata owners.

[4] For the reasons that follow, I would dismiss the appeal.

Background

[5] In 2004, the appellants purchased a ground floor corner unit in the Savona. The unit contains several floor-to-ceiling windows. The windows on the north side of the unit look out onto a public greenway which abuts city gardens and includes a number of walking paths. Also situated on the north side of the unit is a 400-square-foot patio. The windows on the east side of the unit are about five to six feet from a public sidewalk that is separated from the city street by a fence.

[6] The dispute between the parties began with a number of complaints from the appellants to the Strata Council about the state of the strata corporation's finances and bookkeeping. In October 2005, the appellants wrote a letter to the Strata Council marked "Urgent and Confidential. For the eyes of council members only", asking that strong action be taken to address their issues. The Strata Council forwarded this letter to the property manager.

[7] The appellants allege that shortly after the October 2005 letter was forwarded to the Strata Council, Mr. Lavigne began a daily routine of walking on the public pathway abutting their unit, either with his dog or on his way to or from running errands. As he walked by their unit, they said he would stare into their living room windows in an intimidating fashion. During these times, they observed that Mr. Lavigne never smiled or spoke. Nor did he make any threats or physical gestures. The appellants estimated that this behaviour by Mr. Lavigne occurred between 100 to 200 times over the course of the following year. It was their belief that it was triggered by their complaints of the Strata Council's financial mismanagement.

[8] At some point the appellants engaged the services of a lawyer. In September 2006, the appellants sent a letter outlining a number of their concerns regarding the strata corporation's financial records to all 102 strata owners. To this letter they attached a copy of a letter they had received from their lawyer. Mr. Neufeld forwarded the appellants' letter to the Strata Council and to the property manager for their respective consideration and reply.

[9] On September 28, 2006, the dispute escalated to what has been described as the "incident".

On that date, the appellants said that as Mr. Lavigne and his dog walked by their unit and stared at them, they felt compelled to stare back at him in an attempt to stop his "constant gazing". Mr. Martin testified that he "walked out onto the patio and glared at [Mr. Lavigne]" in order to show Mr. Lavigne that what he had been doing for the past year was "no longer acceptable". The appellants said the "incident" was emotionally upsetting to them and thereafter they immediately called 911. A member from the Vancouver Police Department (the "VPD") attended and took their complaint but advised them that in his view the dispute with Mr. Lavigne was "a civil matter".

[10] On the same date as the incident, the appellants emailed the property manager, asking him to pass on the following to the Strata Council as soon as possible:

> Dear Council:
>
> Since last September around the time we began communicating with the council about their non-compliance with the Strata Property Act regarding the Financial Reporting and Management of the Strata Corporation, Mr. Lavigne has made it a point to, when he walks by our suite, stare in all the windows in a deliberate and intimidating manner. We have for the most part ignored this, but still have had to put up with this for a year. However, since the two letters that were sent out to the council and the owners last week Mr. Lavigne has escalated his behavior letting us know in no uncertain terms how he feels. We feel he has crossed the line. <u>We ask you to advise Mr. Lavigne to cease his intimidating behavior towards us. It is inappropriate for Mr. Lavigne to act out his displeasure with us because he is being requested to comply with the Strata Property Act regarding the Financial Reporting and Management of the Strata Corporation's funds.</u>
>
> This letter is to advise you that we consider this serious enough to warrant a complaint, which we filed today with the Vancouver Police Department regarding the behavior of Mr. Lavigne.
>
> We trust you will convey this to Mr. Lavigne.
>
> [Emphasis added.]

[11] After receiving that email from the property manager, four available members of the seven-member Strata Council met informally on October 1, 2006, to discuss what should be done about the appellants' request. No minutes were taken at the meeting. At the conclusion of the meeting, the members agreed to obtain a written statement from Mr. Lavigne about the "incident" and then respond to the appellants' request by publishing the *Savona Update* and providing it to all the strata owners to address, among other things, the dispute.

[12] In his written statement, Mr. Lavigne denied the appellants' allegations. He maintained that on the date of the alleged "incident" he was walking his dog to a nearby garbage bin to deposit "a doggy bag", when he passed the appellants' unit. He said that Mr. Martin had positioned himself along the outer perimeter of his patio in front of the direction in which he and his dog were walking, and that Mr. Martin "glared" at him. He said that he kept on walking but that Mr. Martin moved with him so as to continually be "in his face" while maintaining his glare. He said that he looked at Mr. Martin "for a couple seconds", then said "what a nut" and continued on his way. There is no indication that Mr. Lavigne (or his dog) experienced any emotional trauma over the "incident".

[13] On October 13, 2006, after speaking with the strata corporation's lawyer, Mr. Neufeld distributed the *Savona Update* to all the strata owners and the property manager. The newsletter dealt

with a number of matters, including the dispute with the appellants. It read in part:

> **Savona Council Forced To Consult Strata Lawyer; Police Complaint To Be Filed Against Peter and Meah Martin of Suite #105**
>
> Recent further incidents involving Peter and Meah Martin of suite #105 have caused the Council to once again consult the strata's lawyer for legal advice and assistance.
>
> ...
>
> Subsequent to the Martin's distributing their September 22 document, matters escalated in a very troubling way. A recent interaction between Peter Martin and Leo have prompted Council to prepare a report to be filed with the Vancouver Police. (A copy of the report is available to whomever wishes to see it—contact Council President Andy Neufeld).
>
> Council takes no pleasure in having to take these steps and having to take up owner's time and money with such distractions. The ongoing issues with the Martins, which appear to be escalating, take up a good deal of the time and energy of Council. The Strata Corporation's lawyer has advised Council that owners should be kept apprised of developments involving the Martins, and that owners should promptly report any concerns or questions with respect to the Martins. Any such concerns or questions should be reported to ... [the Property Manager], or Council President Andy Neufeld ...

[14] The "police complaint" was never in fact filed by Mr. Neufeld on behalf of the Strata Council; nor was the "statement" by Mr. Lavigne forwarded on to the VPD.

[15] On May 1, 2007, the appellants moved out of the Savona. On August 2, 2007, they filed a Small Claims action against Mr. Lavigne and Mr. Neufeld. That action was dismissed on June 23, 2008, as being beyond the jurisdiction of the Provincial Court.

[16] On September 11, 2008, the appellants commenced the within action in which they alleged that: (i) Mr. Lavigne had committed a nuisance by staring into their ground floor unit, and (ii) Mr. Neufeld had defamed them in the headline of the *Savona Update* that was published to all the strata owners and the strata corporation's property manager, in which he advised the recipients of: (a) the escalation of the dispute with the appellants; (b) the Strata Council's discussion about the dispute; (c) the legal advice obtained about the dispute; and (d) the necessity of filing a "police complaint" against the appellants.

The Trial Judge's Reasons

(i) The Nuisance Claim

[17] The trial judge described the tort of nuisance "as an activity which results in an unreasonable and substantial interference with the use and enjoyment of land". He cited *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756, [1979] 2 W.W.R. 462 (B.C. C.A.) at 761, where McIntyre J.A. observed: "the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong". The trial judge also acknowledged that while "watching and besetting" a property could constitute nuisance, a distinction had to be drawn between staring (even intensely) and "watching and besetting", citing *Motherwell v. Motherwell* (1976), 73 D.L.R. (3d) 62, [1976] 6 W.W.R. 550 (Alta. C.A.).

[18] He noted that unreasonable interference with another's use and enjoyment of land by "watching and besetting" must be "serious" and "of an aggravated character" as was described by Lord Justice Chitty in *J. Lyons & Sons v. Wilkins,* [1899] 1 Ch. 255 at 271-72, and which was quoted by Mr. Justice Clement in *Motherwell* at 72:

> ...True it is that every annoyance is not a nuisance; the annoyance must be of a serious character, and of such degree as to interfere with the ordinary comforts of life. To watch or beset a man's house for the length of time and in the manner and with the view proved would undoubtedly constitute a nuisance of an aggravated character.

[19] In *Wilkins,* the conduct that was found to amount to "watching and besetting" involved members of a trade union who were on strike and picketing the works of the owner of the property and the subcontractor.

[20] The trial judge made no finding of fact as to whether Mr. Lavigne engaged in conduct that included numerous incidents of staring into the appellants' strata unit over the course of a year, as was alleged by the appellants. For the purpose of his reasons, he assumed the appellants' account of what occurred was correct. On that basis, he rejected the appellants' claim that Mr. Lavigne's staring rose to a level of a "substantial and serious" interference with the use or enjoyment of their strata unit. He noted that their unit was ground level, with floor to ceiling windows and situated adjacent to a public walkway/greenway, all within an urban setting. In these circumstances, he found, the appellants' expectation of privacy would be significantly less than if they had lived in an above-ground unit. He also noted that there was no evidence that the appellants had received any threats or gestures of a threatening nature.

[21] In the result, the trial judge found that the appellants' allegations of staring by Mr. Lavigne did not amount to a "watching and besetting" of their property as those terms were described in *Royal Anne Hotel* and *Motherwell*, and concluded that "[t]he law of nuisance is simply not intended to address such trivial complaints as are advanced by the Plaintiffs" (para. 44).

(ii) <u>The Defamation Claim</u>

[22] The trial judge was satisfied that the words in the heading of the *Savona Update* were defamatory in that they met the requirements of having referred to the appellants in a manner that would tend to lower the appellants' reputation in the eyes of a reasonable person, and had been published to the other strata owners. He found there to be a distinction between the statement that the appellants had filed a police report in the body of the article, which he found was not defamatory, and the statement in the headline of the *Savona Update* that the Strata Council had filed a police complaint against the appellants, which he found was more serious as it implied the laying of criminal charges.

[23] He then addressed the defence of qualified privilege. He concluded that the use of the language "police complaint" rather than "police report" in the article was not so "violent and excessively strong" as to disentitle Mr. Neufeld to the defence of qualified privilege and that Mr. Neufeld, as president of the Strata Council, had a duty to communicate information on how the Strata Council had dealt with the dispute with the appellants to the strata owners and the property manager, as all of them had a corresponding interest in receiving that information. He also found that Mr. Neufeld had not acted out of malice, nor had he exceeded the scope of his duties as president of the Strata Council in publishing the newsletter to the strata owners, either of which findings would have disentitled Mr. Neufeld from the protection of the defence.

Analysis

(i) Nuisance

[24] A finding or failure to find a nuisance is a question of fact or a question of mixed fact and law. In the absence of an identifiable or extricable error of law (which is not alleged), the standard of review is palpable and overriding error: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 36.

[25] The trial judge accepted the appellants' allegations of the events leading up to the "incident" for the purpose of analysing the nuisance claim. However, the appellants submit the trial judge erred by focusing on the nature of and degree of seriousness of Mr. Lavigne's actions, rather than on the harm his conduct caused them. They frame the issue as whether, in light of all of the surrounding circumstances, the cumulative effect of Mr. Lavigne's daily conduct constituted an unreasonable imposition on the appellants' use and enjoyment of their property. They contend that Mr. Lavigne's actions should have been viewed as daily intimidation by a member of the Strata Council, who was a person in authority.

[26] The focus of the tort of nuisance is on the harm, rather than the conduct, that caused the interference with an occupier's use and enjoyment of his or her property. The Court in *Royal Anne Hotel* described it in this fashion:

> [9] When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of Street on Torts, at p. 215, in these terms:
>
> > A person then may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land, where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.
>
> This proposition, stated in a variety of ways, has been accepted generally in the authorities.
>
> ...
>
> [12] What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said (see McLaren, "Nuisance in Canada") that Canadian judges have adopted the words of Knight Bruce V.C. in *Walter v. Selfe* (1815), 4 De G. & Sm. 315, 64 E.R. 849 at 852, affirmed on other grounds 19 L.T.O.S. 308 (L.C.), to the effect that actionability will result from an interference with:
>
> > ... the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober ... notion.

...

> [13] In reaching a conclusion, the court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration and many other factors which could be of significance in special circumstances. ... The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected. ...
>
> [Emphasis added.]

[27] This description was echoed by the Supreme Court of Canada in *St. Lawrence Cement Inc. v. Barrette,* 2008 SCC 64, [2008] 3 S.C.R. 392:

> [77] At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 559; L. N. Klar, *Tort Law* (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536). [Emphasis added.]

[28] Therefore, in the circumstances of this case, legal liability for nuisance will only follow if the degree of harm caused by Mr. Lavigne's actions would also have caused a reasonable person, living in similar circumstances, interference with their use and enjoyment of their property.

[29] The appellants suffered no damage to and no physical invasion of their unit or property. At the most, they suffered momentary interferences with the enjoyment of their unit when Mr. Lavigne gazed into their windows. This could hardly rise to the level of an "annoyance ...of a serious character" or an invasion that was "substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong" (*Royal Anne Hotel* at 761). Indeed, assuming the appellants were home when Mr. Lavigne's "staring" occurred, one must wonder why they did not simply turn away as Mr. Lavigne walked by, or close their window coverings, or simply ignore him.

[30] The trial judge found as a fact that the appellants' complaints were of a trivial nature. In reaching this finding, he effectively found that the degree of harm allegedly suffered by the appellants was not sufficiently "substantial or serious" to be actionable. In my view, the appellants are unable to demonstrate a palpable and overriding error in this finding. I would not accede to this ground of appeal.

(ii) The Defence of Qualified Privilege

[31] The appellants submit the trial judge erred in law in finding that the defamatory headline in the *Savona Update* was published on an occasion of qualified privilege. They say that there was no occasion to engage the defence of qualified privilege as Mr. Neufeld was under no legal duty (under the *Strata Property Act*), or moral or social duty, to communicate the defamatory words. They further submit that the strata owners had no corresponding interest in receiving the information communicated, as the dispute was a private matter between the appellants and Mr. Lavigne. Whether or not the circumstances amounted to an occasion of qualified privilege is a question of law which is reviewable on the standard of correctness: *Housen v. Nikolaisen,* at para. 8.

[32] The appellants further contend that if the occasion was one of qualified privilege, the privilege was lost as Mr. Neufeld acted with malice and/or exceeded what was reasonably appropriate to the occasion: See *Douglas v. Tucker,* [1952] 1 S.C.R. 275 at p. 286. Whether Mr. Neufeld acted out of malice or exceeded the boundaries of what was appropriate for the "occasion" is a question of fact or mixed fact and law. Absent an error of principle (which is not alleged), the standard of review is palpable and overriding error: *Housen v. Nikolaisen* at para. 36.

(a) *Was the defence of qualified privilege established?*

[33] The defence of qualified privilege arises at common law when the defamatory words are published in a manner and at a time that is "reasonably appropriate in the context of the circumstances existing on the occasion when that information was given": *Hill v. Church of Scientology of Toronto,* [1995] 2 S.C.R. 1130 at para. 147. In *Hill,* the Supreme Court of Canada summarized the common law defence of qualified privilege as follows:

> [143] Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward,* [1917] A.C. 309 (H.L.), at p. 334:
>
> > ... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.
>
> This passage was quoted with approval in *McLoughlin v. Kutasy,* [1979] 2 S.C.R. 311, at p. 321.
>
> [144] The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the *bona fides* of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff.
>
> [Emphasis added.]

[34] The Court went on to identify those circumstances in which the defence of qualified privilege may be defeated:

> [144] ...However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice. See *Horrocks v. Lowe,* [1975] A.C. 135 (H.L.) at p. 149.
>
> [145] Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in

Cherneskey, supra, at p. 1099, “any indirect motive or ulterior purpose” that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor v. Despard,* [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, *supra,* at pp. 323-24, and *Netupsky v. Craig,* [1973] S.C.R. 55, at pp. 61-62.

[146] Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. See *The Law of Defamation in Canada*, *supra,* at pp. 13-193 and 13-194; *Salmond and Heuston on the Law of Torts* (20th ed. 1992), at pp. 166-67. As Loreburn E. stated at p. 320-21 in *Adam v. Ward, supra*:

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

[Emphasis added.]

[35] In sum, the privilege attaches to the occasion and not to the defamatory words; absent an occasion of qualified privilege, the law will presume the defamatory words were communicated out of actual or express malice. However, where the occasion attracts a qualified privilege, the law will presume the defamatory words were made honestly and in good faith unless actual or express malice is proved.

[36] The requirement of reciprocity of duty or interest between the publisher and the recipient of the defamatory remarks is at the heart of the defence. Identifying the duty or interest of both involves a contextual analysis. Relevant factors to be considered include “the nature of the statement, the circumstances under which it was made, and by whom and to whom it was made”: *RTC Engineering Consultants Ltd. v. Ontario* (2002), 58 O.R. (3d) 726, 2002 CanLII 14179 (Ont. C.A.) at para. 16; and see *Sapiro v. Leader Publishing Co.,* [1926] 3 D.L.R. 68, [1926] 2 W.W.R. 268 (Sask. C.A.) at paras. 13-14. Where the circumstances in which the defamatory words were made give rise to a special relationship between the publisher and the recipients of the communication, the defence of qualified privilege will be available as it is an occasion which the interests of society justify protection so as to facilitate an open and frank exchange of communication.

[37] The appellants’ submissions ignore the context in which the decision to publish the *Savona Update* was made. In their letter of September 28, 2006, the appellants asked the Strata Council to address their complaint about Mr. Lavigne’s impugned conduct. They did so because it was their belief that Mr. Lavigne, as a member of the Strata Council, was engaging in the impugned conduct as a form of retaliation for the appellants’ earlier allegations of financial mismanagement by the Strata Council which they had communicated to all of the strata owners. By involving the Strata Council in their dispute with Mr. Lavigne, the appellants made their issue with Mr. Lavigne the business of the Strata Council. Consequently, the strata owners acquired a corresponding interest in being advised by the Strata Council as to what they had done and how they intended to deal with the appellants’ request.

[38] To that end, a quorum of four members of the volunteer Strata Council met at their earliest convenience to decide upon a course of action for what they believed to be an urgent and escalating problem. After obtaining a written statement from Mr. Lavigne and consulting with legal counsel and the absent members of the Strata Council, the Strata Council decided to advise all of the strata owners about what had transpired as a result of the appellants’ letter of September 28, 2006, and the

subsequent actions of the appellants regarding their complaint against Mr. Lavigne. The Strata Council used the *Savona Update* as the vehicle through which to disseminate information. This was, in my view, an appropriate course of action. The strata owners had elected the members of the Strata Council to manage and safeguard their interests. As president of the Strata Council, Mr. Neufeld had a common law duty to keep the strata owners informed about the business of the Strata Council.

[39] The appellants take issue with the manner in which the meeting was held, asserting that it was an informal meeting from which no binding decision on behalf of the Strata Council could be made. In particular, they rely on s. 35 of the *Act* which requires that minutes of council meetings be kept and made available to owners upon demand. They further submit that Mr. Neufeld's duties to the strata owners were circumscribed by the provisions of the *Strata Property Act,* which requires that the president "act honestly and in good faith with a view to the best interests of the strata corporation", "exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances" (s. 31), and is obliged to inform owners only of certain matters (s. 65).

[40] The fact that the informal meeting may not have been constituted in accordance with the provisions of the *Strata Property Act* is, in my view, of no consequence in determining whether the defence of qualified privilege applies in the circumstances of this case. Mr. Neufeld's duty to communicate relevant information to the strata owners arose not under the *Strata Property Act,* but at an "occasion" where a special relationship existed that, in the interests of society, the common law has granted qualified privilege in order to facilitate an open and frank discussion.

[41] A helpful explanation of the interaction between the common law and statute law was provided by Madam Justice L'Heureux-Dubé, in concurring reasons, in *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool),* [1996] 3 S.C.R. 919, where she stated, at para 97:

> ... To determine what interaction there is between the common law and statute law, it is necessary to begin by analysing, identifying and setting out the applicable common law, after which the statute law's effect on the common law must be specified by determining what common law rule the statute law codifies, replaces or repeals, whether the statute law leaves gaps that the common law must fill and whether the statute law is a complete code that excludes or supplants all of the common law in the specific area of law involved. ...

[42] The *Strata Property Act* and its bylaws do not codify, replace or repeal the common law tort of defamation. Nor do they define the "occasion" on which the defence of qualified privilege may arise or define the duties and obligations of the president of the Strata Council on such an occasion. In short, the *Strata Property Act* does not create, alter or affect the qualified privilege defence to the common law tort of defamation.

[43] In my view, the trial judge correctly found that Mr. Neufeld, as the elected president of the Strata Council, had a duty to inform strata owners about the appellants' allegations and the Strata Council's actions in an attempt to resolve them.

(b) *Was there malice or did Mr. Neufeld exceed the boundaries of his duty?*

[44] Once the defence of qualified privilege is engaged, it may only be lost by proof of malice or through proof of irrelevant or excessive communications in the discharge of the duty. The burden to prove affirmative malice is "not one that is lightly satisfied": *Horrocks v. Lowe,* [1975] A.C. 135 (H.L.) at 151. As noted above, appellate review of this issue is governed by a deferential standard.

[45] The trial judge was satisfied that Mr. Neufeld's dominant motive in publishing the newsletter

was to fulfill his obligations as president of the Strata Council. He found that Mr. Neufeld honestly and reasonably believed he was under a duty to communicate the information he did to the strata owners. He carefully reviewed the article in the *Savona Update* and noted the distinction between the non-defamatory language of the substance of the article and the defamatory words of the article's headline. These findings were based on an assessment of the evidence and more significantly on an assessment of the credibility of the witnesses who testified. I am not persuaded the appellants have established any palpable and overriding error in the trial judge's finding that Mr. Neufeld acted without malice.

[46] Similarly, Mr. Neufeld's decision to communicate the information about the dispute to the strata owners through the *Savona Update* was undertaken after speaking with legal counsel, and with the consent of a majority of the Strata Council. He acted only after he had received the appellants' letter of September 28, 2006, in which the appellants described the "incident", advised that they had filed a police complaint about Mr. Lavigne's conduct, and requested the Strata Council to act on their complaint. The information in the newsletter was relevant to the interests of the strata owners; it indicated how they might be affected by a lengthy, continuing and escalating dispute between the appellants and the Strata Council. In my view, the appellants have not established palpable and overriding error in the trial judge's finding that Mr. Neufeld did not exceed the scope of his duties as president when he published the defamatory words to the strata owners.

Conclusion

[47] In the result, I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Huddart"

I AGREE:

"The Honourable Mr. Justice Low"