Court File No: CV-20-82717

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MAXIME BERNIER

Plaintiff

and

WARREN KINSELLA, DAISY CONSULTING GROUP INC., and DAISY STRATEGY GROUP LIMITED

Defendants

FACTUM OF THE RESPONDENT, MAXIME BERNIER

PART I – INTRODUCTION

1. This Factum is submitted on behalf of Maxime Bernier, the Plaintiff in the main action against Kinsella and Daisy Consulting Grp. Inc and Daisy Consulting Group Ltd. (the **Moving Parties),** each of whom is a defendant in the main action commenced by Mr. Bernier. The Moving Parties have brought a motion to have Mr. Bernier's action for defamation dismissed as a Strategic Lawsuit Against Public Participation (SLAPP) pursuant to Sec. 137.1 of the *Courts of Justice Act.*
2. The Respondents request a dismissal of this motion so that the main action may move forward for trial for the reasons set out below.
3. Mr. Bernier concedes the writings by Daisy staff and its owner, Warren Kinsella, were on matters of public interest. However, the defamatory publications were made while Mr. Kinsella and Daisy were

secretly in the pay of a third party, operating under an agreement that Mr. Kinsella refuses to disclose, for a term and an amount that he also refused to give during cross-examination.[1]

4. The fact that Mr. Kinsella and Daisy published with ulterior motives, along with Mr. Kinsella's own malicious statements made to his employees about Mr. Bernier, denies Daisy and Mr. Kinsella the defence of fair comment. Mr. Kinsella was not acting as an anti-racist activist when attacking Mr. Bernier. He was selling his credibility to Mr. Bernier's political opponents who feared a vote split on the Right in the 2019 federal election. Mr. Kinsella seeks protections established to protect honest public debate and real journalism, when, in fact, he was engaged in a paid campaign of smear.
5. The Moving Parties try to rely on the defence of justification, using guilt-by-association and innuendo to continue their attack on Mr. Bernier.
6. Mr. Kinsella and Daisy were employed to do as much damage as possible to Mr. Bernier's reputation. They attempted to brand Mr. Bernier a racist through their own publications and to influence other commenters to do likewise. The stigma of racism is so utterly toxic to the reputation of a politician and lawyer that the truth of the allegation is an issue for a trial, not a matter for a motion hearing.
7. Mr. Bernier is suing for the tort of defamation and the tort of portrayal in a false light. In all their materials, the Defendants/Moving Parties have only addressed the tort of defamation and have not addressed the tort of portrayal in false light at all.

PART II: BACKGROUND

8. The Respondent, Maxime Bernier, is a lawyer and the leader of the People's Party of Canada.
9. Mr. Bernier held several portfolios in the Conservative government of Stephen Harper. He came within a few votes of winning the Conservative Party of Canada's leadership in 2017. Mr. Bernier was elected to the House of Commons four times and an incumbent Member of Parliament in 2019.

[1] Kinsella cross-examination, Questions 38-57

10. Mr. Bernier left the Conservative Party in 2018, believing it had failed to offer voters a platform for less intrusive government and greater individual freedom. He was, in 2019, trying to organize the People's Party of Canada, working to create a national network of electoral district associations, to find candidates to run in every riding in the country and to build a national campaign team.
11. The People's Party of Canada, on the Right of the political spectrum, had the potential to divide the conservative movement in the way the Reform Party-Progressive Conservative split of the 1990s had reduced the PC Party from a majority government to just two seats in 1993.
12. Warren Kinsella is a lawyer who calls himself "The Prince of Darkness of Canadian Politics". He sells "war room" services, claiming to be able to shape public opinion on behalf of his clients and against their opponents. He is also a columnist for the *Toronto Sun* newspaper and sometimes appears as a guest on radio shows.
13. In early 2019, Mr. Kinsella published a series of *Toronto Sun* columns attacking Mr. Bernier that were re-printed on his personal blog and Facebook pages. One called Mr. Bernier a "Gaulieter" (a senior regional Nazi official in the Third Reich). Mr. Kinsella also linked to them on his Twitter account, with more than 30,000 followers.
14. He wrote separate blog posts in which he said directly, or strongly implied Mr. Bernier was a bigot, a homophobe, a racist, a racist enabler, a cross-burner, a white supremacist, a hater of women, a man with neo-Nazi friends, the "leader of the alt-right White People's Party", and "David Duke North". He also approved and posted defamatory anonymous comments about Mr. Bernier to his blog.
15. At the same time, employees of Daisy Grp., a company owned by Mr. Kinsella, waged a paid attack campaign against Bernier. Their in-house organization "STAMP," which they designed to appear to be a grass-roots anti-hate citizen's organization, created a huge number of defamatory social media posts and amplified the opinions of Mr. Bernier's critics to portray Mr. Bernier in the worst light possible.

16. Mr. Kinsella said in his cross examination and admits in his factum that he or his firm were paid by a Conservative Party of Canada lawyer to amplify derogatory material posted online about Mr. Bernier.[2] In Paragraph 6 of the Moving Parties' factum are details about Project Cactus denied to the Respondents in cross-examination on affidavits. Mr. Kinsella, in cross-examination on his affidavit in this motion, refused to produce the contract for this work, claiming there was no written agreement. He refused to say how much he was paid, what the start and end-dates were for the contract, what he and Daisy were expected to deliver, and how the project was to be evaluated.[3]
17. In his affidavit, Mr. Kinsella included a letter from Elections Canada sent to him in response to a report he had filed to that agency on Project Cactus but did not include the actual report. The Ontario Court of Appeal and the Supreme Court of Canada have allowed cases to proceed to trial to give a Plaintiff the opportunity to clear his name by having access to the discovery process.[4]
18. The Moving Parties have attempted to separate Mr. Kinsella, STAMP and Daisy, but they are one and the same. Mr. Kinsella financially benefited from Project Cactus and conducted his online posting campaign in sync with it.
19. The only issue to be resolved in this motion is whether the Action should be dismissed as against the Moving Parties under s. 137.1 of the CJA. The Responding Party respectfully submits that this question must be answered in the negative.

PART III: FACT AND LAW ARGUMENT AGAINST THE MOTION

Dismissal of An Action Under Section 137.1 of the CJA

20. In *Bent v. Platnick* ("*Bent*"), the companion ruling to *Pointes Protection*, the Supreme Court identified the two policy goals embodied in Ontario's anti-SLAPP regime: **First**, "[s]ection 137.1 of the CJA is intended '*to function as a mechanism to screen out lawsuits that unduly limit expression*

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[2] Kinsella cross-examination, Question 48
[3] Kinsella cross-examination, Questions 38-56
[4] *Platnick v Bent,* 2018 ONCA 687, para. 75, AR, Vol. 1, tab 9.

on matters of public interest through the identification and pre-trial dismissal of such actions';" and **second**, "in addition to protecting expression on matters of public interest, s. 137.1 must also '*ensur[e] that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it*'."[5] The reconciliation of these potentially competing goals is reflected in the multi-faceted, multi-stage statutory process established by s. 137.1:

a. *Order to dismiss*
137.1(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
b. [137.1](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 continues outweighs the public interest in protecting that expression.

21. If Mr. Kinsella and Daisy show their expression meets the **Threshold Burden** (under s. 137.1(3), the proceedings must be dismissed *unless*, under s. 137.1(4), Mr. Bernier demonstrates both:

(a) That there are grounds to believe (i) that is substantial merit to the Plaintiff's claims, and (ii) that the Defendants have no valid defence (the **"Merits-Based Hurdle**"); and

(b) That the public interest in allowing Mr. Bernier to pursue his claim outweighs the public interest in protecting the Defendant's right of free expression (the "**Public Interest Hurdle.**")

A. The "Threshold Burden": Under Sec. 137.1.(3): Did the Proceedings Arise from an Expression Relating to a Matter of Public Interest?

22. Sec. 137.1(2) defines expression to include "any communication," whether verbal or non-verbal, whether public or private, whether directed at an entity or not.[6] The Supreme Court has affirmed that the drafters of Sec. 137.1 (2) intended the word "expression" to be construed "expansively."[7] The

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[5] *Bent, supra*, at para. 74 (emphasis added), See also *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (CanLII) (*Pointes),* at paras. 16 and 46.
[6] *Bent, supra,* at para. 79.
[7] *Pointes, supra*, at para. 25; *Bent, supra*, at para. 79

Supreme Court also confirmed that the phrase "relates to a matter of public interest" should be given a "liberal," "broad," "generous and expansive" interpretation.[8]

23. Keeping in mind the various Courts' conclusion that motivation and quality of content are not relevant at this stage of the analysis, the Respondent concedes that the expressions by Mr. Kinsella and Daisy, on their face meet the Threshold Burden.

B. "The Merits-Based Hurdle" under Section 137.1(4)(a): Does the Claim Have Substantial Merit and Do Valid Defences Exist?

24. Under sec. 137.1(4), the burden of proof changes from the balance of probabilities to the grounds to believe standard.[9] Mr. Bernier, as Plaintiff, must persuade this Court that there are grounds to believe: (a) that his claims of defamation and portrayal in a false light have substantial merit (as required by s. 137.1(4)(a)(i)); and (b) that Mr. Kinsella and Daisy have no valid defence to Mr. Bernier's claims of defamation and portrayal in a false light (as required by s. 137.1(4)(a)(ii)).[10]

25. A key question raised by the Merits-Based Hurdle is the substance of the burden of proof imposed on us, as Respondents and Plaintiffs in the main action. What must we establish to satisfy the grounds to believe standard? The Supreme Court settled this question with the following analysis:

- *The Substantive Content of the Grounds to Believe Standard:* To satisfy this standard, the Respondents/Plaintiffs must point to a basis in law and a basis in the evidentiary record that our claims have substantial merit and that all the defences of the Moving Parties lack validity. Although a single basis in law and a single basis in fact will suffice, the Motion Judge must be satisfied that the positions offered by Mr. Bernier are legally tenable and reasonably capable of belief. In conducting this assessment, the Motion Judge must bear in mind the preliminary stage of the litigation.[11]

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[8] *Pointes supra*, paras. 26, 28 and 30; *Bent, supra,* at para. 81.

[9] *Pointes, supra,* at para. 31, 33 and 35; *Bent, supra*, at paras 86 and 87.

[10] *Pointes, supra,* at para. 112.

[11] *Bent, supra,* at para. 88; *Pointes, supra*, at paras. 36-39 and 42,.

- *How is the Grounds to Believe Standard Satisfied*? This standard is distinct from the tests applied in motions to strike and motions for summary judgment. To meet the grounds to believe standard, the Respondents/Plaintiffs must establish "something *more than* a mere suspicion but *less than*… proof on the balance of probabilities."[12]

26. The Supreme Court also provided guidance in respect of the content of the substantial merit test that must be satisfied under para. 137.1(4)(a)(i):

(a) *The Meaning of Substantial Merit*: To satisfy the substantial merit test, Mr. Bernier must marshal sufficient law and evidence to convince the Motion Judge that his claims have a "real prospect of success that tends to weigh more in favour of [Mr. Bernier]" than in favour of the Moving Parties.

(b) *Satisfying the Substantial Merit Test*: As with the grounds to believe standard, the substantial merit test is *more* stringent than the test that applies on a motion to strike, but *less* stringent than the test for summary judgment. It is *not* sufficient for Mr. Bernier to show his claims have "some merit," "technical validity," "some chance of success" or a "reasonable prospect of success. He is not required, however, to prove his claims have "a demonstrated likelihood of success" or constitute a "strong *prima facie* case."[13]

- *Each Claim Must Have Substantial Merit as a Question of Law:* The substantial merit criterion requires Mr. Bernier to establish grounds to believe that each of his causes of action are legally tenable, has been properly pleaded and has a real prospect of success.
- *Each Claim Must Have Substantial Merit as a Question of Fact*: From an evidentiary perspective, Mr. Bernier's claims must be supported by evidence that is reasonably capable of belief. Where the evidence is disputed or conflicting, neither a deep dive into the evidence nor a final assessment of credibility is appropriate at this stage. The Motion Judge must engage in a limited weighing and assessment of the

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[12] *Pointes, supra,* at paras. 38, 40 and 41.

[13] *Bent, supra*, at para. 90; *Pointes, supra*, at paras. 45-54.

evidence adduce and preliminary assessment of credibility to determine whether Mr. Bernier's claim has real prospect of success, keeping in mind the early stage of the action.

27. In demonstrating there are grounds to believe that the Moving Parties have no valid defences, Mr. Bernier must establish that "the defence or defences put in play are not legally tenable or supported by evidence that is reasonably capable of belief such as that they can be said to have no real prospect of success" at trial.[14]

28. The Respondents must show, from a legal and factual standpoint, that the defences put into play do *not* tend to weigh more in favour of the Moving Parties than Mr. Bernier. In fact, Mr. Bernier can show *none* of the defences is legally tenable and/or supported by evidence that is reasonably capable of belief.

Applying the Sec. 1.37.1(4)(a) Principles to The Kinsella-Daisy Defence

29. Applying the foregoing principles, the Responding Party respectfully submits that the Moving Parties have failed to establish that Mr. Bernier's claim does not have substantial merit or that Mr. Kinsella and Daisy have valid defences. Mr. Kinsella's defences for defamation are examined below:

1. Justification: The Defence of Truth

30. The three non-party affiants, who were hostile to the Plaintiff, admitted they had never heard the Respondent say his plan for reduced immigration should exclude anyone because of their race or religious beliefs. Matthew Conway, the one affiant who claimed to hear the Respondent make a racist remark, admitted to staying silent about this politically-powerful allegation through the 2019 federal election campaign, the media frenzy when Project Cactus was exposed in October, 2019, and the media coverage of the filing of this lawsuit in February, 2021. He came forward in the spring of 2021 after re-joining the Conservative Party, the organization that, directly or through its proxy,

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[14] *Pointes, supra,* at paras. 56-60; *Bent, supra*, at paras. 101-103, 109 and 116.

party chairman John Walsh, hired Mr. Kinsella and his company. Mr. Bernier denied making the the comment and called the accusation a lie.[15] Mr. Conway's evidence should be given no weight.

31. In their motion materials and in vigorous cross-examination on Mr. Bernier's affidavit filed for this motion, the Moving Parties tried to shake Mr. Bernier from his assertion that he is not a racist. Mr. Bernier withstood this assault. In cross-examination, he said, "I want to say to everybody that I'm not a racist, I'm not a Nazi, I'm not a xenophobe, and the People's Party of Canada is not alt right political party."[16][17]

32. Counsel for the Moving Parties strenuously tried to make Mr. Bernier admit that his expression against "globalism" and "globalist" targets Jews. Mr. Bernier rejected that claim, referred to the Cambridge dictionary definition that refuted Mr. Kinsella's counsel's accusation. Mr. Bernier read out and adopted the dictionary's definition as "someone who believes that economic and foreign policy should be planned in an international way, rather than according to what is best on (sic) one particular country" and said his opposition to globalism was directed at the power of international bodies like the European Union to assume powers normally held by nation states.[18]

33. There is no credible proof of the claims made by the Moving Parties in their motion materials, in the writings of Mr. Kinsella, and in the posts of the Kinsella-controlled fake public interest group STAMP that Mr. Bernier is a racist. There are attempts to establish guilt by association, citing media coverage of social media posts by PPC members. The Moving Parties claim in a heading of their factum that "Mr. Bernier welcomes a notorious neo-Nazi to his November 2018 rally". In fact, the Moving Parties' witness, Mr. Isidorou, testified he had no idea whether Mr. Bernier interacted with this man at all, let alone welcomed him.

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[15] Cross-Examination of Mr. Bernier, Question 77
[16] Cross-Examination of Mr. Bernier, Question 1198
[17] Cross-Examination of Mr. Bernier, Question 119
[18] Cross-Examination of Mr. Bernier, Question 1196

34. The Moving Parties also offer criticism of various People's Party members and organizers, without proof they acted with Mr. Bernier's direction or approval, and in the face of evidence that they did not.

35. The Moving Parties offer an affidavit from Evan Balgord, Executive Director of the Canadian Anti-Hate Network, that was crafted as an expert report but was self-described as a statement on material facts. Under cross-examination, the affiant admitted having no academic training in propaganda theory, to having done no serious research into Mr. Bernier, to having no evidence of Mr. Bernier engaging in racist expression, including wanting to keep non-white immigrants from Canada, or endorsing racist groups and their leaders.[19]

36. The Respondent asks the Court to look carefully at the timing of the Kinsella-STAMP online posts and the arrival on the scene of their witnesses. So much of this material surfaced *after* the creation and publication of the defamatory statements. Matthew Conway, the one person who, in the hundreds upon hundreds of pages of online posts and newspaper clippings filed by the Moving Parties and cited in their factum, claims to have heard Mr. Bernier make racist remark, surfaced weeks after the filing of the lawsuit.

37. Angelo Isidorou's affidavit was sent to the Respondents at 10 p.m. the night before cross-examinations. Even so, this witness for the Moving Parties – who is shown in the Respondent's Supplemental Reply in a photograph wearing a Make America Great Again cap and making a "White Power" sign – admitted his advice to Mr. Bernier that he should not be photographed with a known Nazi may well have been taken. Mr. Isidorou admits he did not check.

38. This is symptomatic of Mr. Kinsella's smear now, check later approach, He was recorded admitting to his staff of successfully attacking former Prime Minister Kim Campbell, Reform Party leader Preston Manning and Reform Party leader Stockwell Day as racists during federal election campaigns, and then later determining they were not. In the Project Cactus campaign, Mr. Kinsella

[19] Cross-Examination of Evan Balgord, Questions 9-12; 43-47; 49-56.

and his employees were not interested in determining whether Mr. Bernier was a racist, and made no serious effort to determine the truth of their allegations.[20] They only began to do so after they were sued.

2. The Defence of Fair Comment

Malice

39. *In Hill v. Church of Scientology of Toronto*,[21] the Supreme Court of Canada described malice in the context of a claim for libel as follows:

> 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, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.

40. In *WIC Radio v Simpson*, Binnie J. noted that proof of objective honest belief will not negate a finding of malice if the trial judge finds that subjective malice was the dominant motive of a particular comment.[22]

41. If a defendant's comment was actuated by malice, the defence of fair comment will fail.[23] Malice may be established where it is shown that the intention was to injure the plaintiff.[24] Expression with an ulterior motive – in this case, payment – is also malicious.[25]

42. The Moving Parties' malice is obvious: Mr. Kinsella's order to staff telling them "I want the hatred you have for Maxime Bernier to wash over you as a purifying force" and reminding them, "There's nobody in the country doing what we are doing to Max Bernier. There's nobody else doing it. It's

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[20] Cross-Examination of Warren Kinsella, Question 59.

[21] *Hill v. Church of Scientology of Toronto*, 1995 CanLII (SCC), [1995] 2 S.C.R. 1130, at para. 135.

[22] *WIC Radio v Simpson,* [2008] S.C.J. No. 41, [2008] 2 S.C.R. 420 at para. 53 (S.C.C.) *per* Binnie J

[23] *WIC Radio v Simpson, supra,* at para. 52; *Spiller v Joseph* [2010] UKSC 53 at para. 4 per Lord Phillips.

[24] *Awan v. Levant,* [2016] O.J. No. 6642, 2016 ONCA 970 at paras. 55, 96, (Ont. C.A.); *Bernstein v. Poon,* [2015] O.J. No. 190, 2015 ONSC 155 at paras 138-140 (Ont. S.C.J.) *per* Mew J; *WeGo Kayaking Ltd. v. Sewid* [2007] B.C.J. No. 56, 2007 BCSC 49 at para. 84 (BCSC)

[25] *Hill, supra,* at para 145; *Botiuk v. Toronto Free Press* Publications Ltd., [1995] S.C.J. No. 69 [1995] 3 S.C.R. at para 39; *Hodgson v. Canadian Newspapers Co.,* [2000] O.J. No. 2293, 49 O.R. (3d) 161 (Ont. C.A.) at para. 35; *Grant v. Cormier-Grant,* [2001] O.J. No. 3851, 56 O.R. (3d) 215 at para. 11

the people in this room. So do it." This was no "pep talk" as Mr. Kinsella argues in his motion materials. It was a malicious incitement to hatred made by an employer to his employees.

43. Mr. Kinsella still attacks and demeans Mr. Bernier online. Mr. Bernier made one comment on Twitter in 2021 in his own defence, posting about a one-sided CBC story that reported on Matthew Conway's affidavit in the Moving Parties' motion record. Mr. Bernier was immediately served with a Libel Notice by Mr. Kinsella.[26] His obvious malice, shown both in his statement to his staff and the fact that he had the ulterior motive of being secretly paid by Mr. Bernier's opponents, denies Mr. Kinsella and his companies the defence of fair comment.

The Tort of Portrayal in a False Light

44. In *Yenovkian v. Gulian,*[27] the Ontario Superior Court of Justice recognized a new invasion of privacy tort: "publicity which places the plaintiff in a false light in the public eye." The test for a false light privacy tort will be met if:

    (i) an individual gives publicity concerning another before the public in a false light;

    (ii) the false light in which the other was placed would be highly-offensive to a reasonable person; and

    (iii) the individual had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

45. This tort concerns the waging of campaigns of hatred, smear, ridicule and defamation.

46. This tort has a lower evidentiary burden than a claim of defamation. The trial judge in *Yenovkian* wrote:

> While the publicity giving rise to this cause of action will often be defamatory, defamation is not required. It is enough for the plaintiff to show that a reasonable person would find it highly offensive to be publicly misrepresented as they have been. The wrong is in publicly representing someone, not as worse than they

[26] This Notice of Libel was sent by Mr. Kinsella to Mr. Bernier on May 18, 2021, after Motion Materials were filed and cross-examinations had taken place.

[27] *Yenovkian v. Gulian*, 2019 ONSC 7279 (CanLII)

> are, but other than they are. The value at stake is respect for a person's privacy right to control the way they present themselves to the world.[28]

47. Mr. Bernier pleaded this tort in his Statement of Claim.[29] The Moving Parties have chosen to ignore this tort in their Motion Record and Factum and offer no defence whatsoever.

C. The "Public Interest Hurdle" under Section 137.1(4)(b): Does he Public Interest in Permitting the Responding Party's Claim to Proceed Outweigh the Public Interest in Protecting the Moving Party's Right of Expression?

General Principles Governing Section 137.1(4)(b)

This critically-important final test has been described by the Supreme Court of Canada as "the fundamental crux of the [anti-SLAPP] analysis" and "the core of s. 137.1."[30] In contrast to the more lenient grounds to believe burden imposed under s. 137.1(4)(a), the onus placed on the Responding Party under s. 137.1(4)(b) reverts to the more challenging *balance of probabilities* standard.[31] Mr. Bernier must demonstrate that the harm he has suffered or is likely to suffer as a result of the Moving Parties' expression "is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression."[32]

48. The Motion Judge's task under s. 137.1.(4)(b) is to carefully weigh which interest is more deserving of protection *in the unique context of this particular proceeding*[33] through three successive steps:

(i) Examining Claims of Harm Suffered: The Court must determine whether Mr. Bernier has suffered or will suffer harm caused by the impugned expressions (while initially disregarding the seriousness of that harm).

(ii) Determining the Value of the Impugned Expression: If necessary, the Court must assess the value (from a public interest perspective) of the Moving Parties' expression; and

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[28] *Yenovkian, supra,* at para. 171

[29] Fresh as Amended Statement of Claim, *Bernier v Kinsella et al*, OCJ CV-20-82717, February 3, 2020, paras 34-39.

[30] *Pointes, supra,* at paras 18, 33, 48, 53, 61, 62 and 82; *Bent, supra,* at paras 76, 88 and 139.

[31] *Pointes, supra,* at paras. 82, 103, 126; *Bent, supra,* at paras 141 and 174.

[32] *Pointes, supra*, at para. 70.

[33] *Pointes, supra*, at paras. 65-67.

(ii) Weighing the Harm Against the Value of the Expression: Finally, the Court must assess the seriousness of the specific harm allegedly suffered by Mr. Bernier and then weigh (a) that quantified harm against (b) the value of the unique expression at issue, to determine which should take priority over the other.

49. Mr. Bernier's first hurdle under Sec. 137.1(4)(b) is to establish, on a balance of probabilities, he has suffered, or is likely to suffer, harm that was caused by the Moving Parties' expression. Particularly:

50. *Proving the Likelihood of Harm Caused by the Expression*: Mr. Bernier must "provide evidence for the motion judge to draw an inference" that harm is *likely* to be suffered and is *likely* to be caused by the relevant "expression."[34]

How is Such Likelihood to be Established? To establish the existence of the likelihood, Mr. Bernier faces a challenge that he can easily meet:

- Mr. Bernier must demonstrate on a balance of probabilities that he has, or is likely to suffer financial loss, reputational injury or other harm.
- He must also show, on a balance of probabilities, that the harm was likely suffered as a result of the Moving Party's expression.

51. In *Pointes*, the Supreme Court of Canada noted this harm need not be financial:

> [Harm is principally important in order for the plaintiff to meet its burden under s. 137.1(4)(b). The statutory provision expressly contemplates the *harm* suffered by the responding party *as a result* of the moving party's expression being weighed against the public interest in protecting that expression. As a prerequisite to the weighing exercise, the statutory language therefore requires two showings: (i) the existence of harm and (ii) causation — the harm was suffered *as a result* of the moving party's expression.
>
> Either monetary harm or non-monetary harm can be relevant to demonstrating (i) above. I am in agreement with the Attorney General of Ontario at the time the legislation was debated, who recognized at second reading "that reputation is one of the most valuable assets a person or a business can possess" (Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur)). Accordingly, harm is not limited to monetary harm, and neither type of harm is more important than the other. Nor is harm synonymous with the damages alleged. The text of the provision does not depend on a particular *kind* of harm, but expressly refers only to *harm* in general.[35]

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[34] *Pointes, supra,* at paras. 71 and 114-119; *Bent, supra,* at para.160

[35] *Pointes, supra*, at paras. 68-69.

52. Mr. Bernier then faces a second hurdle: persuading the Motion Judge on a balance of probability that the impugned expressions are of *relatively low value* (from a "public interest perspective"). The Motion Judge must assess both "the *quality* of the expression and the *motivation* behind it (emphasis in original).[36] The least deserving of protection are communications that contain "deliberate falsehoods," "gratuitous personal attacks," "lies" and "vitriol."[37]

53. Mr. Bernier is then required to convince the Motion Judge on a balance of probabilities that the seriousness of this harm outweighs the public interest value of the expression, and if he does so, the motion must be dismissed.

Applying the Section 137.1(4)(b) Principles to Mr. Kinsella and Daisy's Claims:

1. The Value of a Reputation

54. The Respondent asks the Court to keep in mind that he is a lawyer as well as a politician. Mr. Bernier is a middle-aged man who should have the option to return to the practice of law after his political career. In *Botiuk v Toronto Free Press Publications Ltd.* the Court held that "a reputation for integrity and trustworthiness is the cornerstone of [a lawyer's or doctor's or any other professional's] life."

55. In *Hill*, the Supreme Court discussed the importance of the reputation of the individual, saying, "A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws."[38]

56. Mr. Bernier has a sec. 3 *Charter of Rights and Freedoms* right to engage in the political process. A sustained, organized malicious attack on his reputation not only harms Mr. Bernier, but it also deters qualified and talented people from becoming involved in politics.

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[36] *Pointes, supra,* at paras. 74 and 76.
[37] *Pointes, supra,* at paras. 75 and 76.
[38] *Hill, supra,* at para. 107.

57. The Moving Parties direct the Court to the *Rebel News v. Al Jazeera*[39] decision and asks that the Court make the same negative conclusions about the harm claimed by Rebel News to that claimed by Mr. Bernier. Simply put, Al Jazeera, a news organization, submitted that Rebel News's reputation was already "so low" (due to its pre-existing connection to violent acts and hateful conduct), and as such Rebel's reputation could not be further lowered by the publication of the three statements.

58. In that case, the Court was assessing claimed damages of a *corporate* plaintiff, not an individual. Much of the jurisprudence on reputational value describes issues of inherent dignity that a corporation does not share with a person. As well, Mr. Bernier's reputation was, before Mr. Kinsella and Daisy's paid attacks on him, substantially better than the Motion trial judge's description of Rebel News's.

59. In the 2019 case *Levant v. Day*, the Ontario Court of Appeal found Rebel News owner Ezra Levant did suffer enough damages to warrant a trial on Levant's defamation claims because of the nature of the attack: a prolonged, malicious campaign (by one person, over several days, commented on and shared by others) on Twitter.[40]

60. The assessment of damages in a libel case flows from a particular confluence of the following elements: the nature and circumstances of the publication of the libel; the nature and position of the victim of the libel; the possible effects of the libel statement upon the life of the plaintiff; and the actions and motivations of the defendants.[41]

61. The claims of racism, Nazi sympathies, antisemitism, homophobia, and support for the Ku Klux Klan published by the Moving Parties are accusations that go to the core of the integrity and self-worth of a person. They are, in today's social and political climate, poison to the reputation of a politician and lawyer. They are as vicious an attack as is possible today.

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[39] *Rebel News v. Al Jazeera Media*, 2021 ONSC 1035 (CanLII) at para 74. See Pp. 16-16 of the Moving Parties' factum.
[40] *Levant v Day,* 2019 ONCA 244 (CanlII), paras. 18-22.
[41] *Hill v. Church of Scientology supra* at para. 181.

62. This labelling was not a one-off event. The Respondent has provided material showing this was a relentless campaign sustained, day after day, for months, by the Moving Parties in any media they had access to. The Moving Parties demand the Respondent spell out and argue each one. To do so would consume the entire space allowed for this factum and be a waste of the Court's time. Just listing and describing them takes seventeen pages of Mr. Bernier's motion affidavit.[42] Highlights include Mr. Kinsella and his employees calling Mr. Bernier "a fucking bigot,"[43] saying Mr. Bernier "doesn't like anyone who doesn't look like him,"[44]calling him "a dangerous racist,"[45] saying "Bernier and his cabal have devolved into the porch-light of Canadian politics, attracting all the bugs and creepy-crawlies. (Which should make it easier to deploy the necessary political insecticide.)"[46]
63. Mr. Bernier says the campaign to stigmatize him as a racist has already caused emotional harm to him personally, has affect ted his ability to campaign for office, and has been particularly hard on his family, since two of his adult daughters are starting careers in Toronto.[47]
64. In *Hill v Church of Scientology*, Cory J. called defamatory statements "inimical to the search for truth" and incapable of enhancing individual self-development or participation in public affairs.[48]

2. Other Negative Publicity as a Dilution of Damage Caused by the Moving Party

65. The Moving Parties contend Mr. Bernier lost his seat and his party fared poorly because of bad publicity from other pundits and online critics. In this, they hope the Court will lose sight of the fact

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[42] Pages 15-33 of Mr. Bernier's Affidavit Sworn May 3, 2021. The Affidavit is found at Page 2, Vol. 1 of the Responding Parties' Motion Record. One page in that section does not deal with Mr. Kinsella's attacks on Mr. Bernier, but on Mr. Kinsella's manipulation of a photograph of Justin Trudeau for another of his online posts where he accused the Prime Minister of "sharing a platform" with an alleged racist..

[43] Kinsella blog post February 13, 2019, reproduced as Exhibit WW1 of Mr. Bernier's Affidavit Sworn May 3, 2021

[44] Kinsella blog post, February 23, 2019, reproduced as Exhibit WW2 of Mr. Bernier's Affidavit Sworn May 3, 2021

[45] STAMP tweet May 2, 2019, reproduced as Exhibit K of Mr. Bernier's Affidavit Sworn May 3, 2021.

[46] Kinsella column in the *Toronto Sun*, reproduced as a Facebook post and on Kinsella's blog, reproduced as Exhibit JJ of Mr. Bernier's Affidavit Sworn May 3, 2021

[47] Cross-examination of Maxime Bernier, Question 1284

[48] *Hill*, supra, at para. 1174

that changing media and public opinion is the service Mr. Kinsella and Daisy Group sell to their clients.

66. *Awan v. Levant* is case where polemicist Ezra Levant attacked a lawyer for his role in a highly charged hearing at the British Columbia Human Rights Tribunal. The trial

67. judge noted Mr. Awan was subject to a considerable amount of negative publicity from people who shared Mr. Levant's views, and by commentators in the mainstream media. (*Maclean*'s magazine was the defendant in the human rights action and it had support from other media outlets.) The judge realized the readership of Levant's blog posts was small. Still, after assessing those factors, the trial judge award $50,000 in general damages and $30,000 in aggravated damages to Mr. Awan.[49]

68. The Moving Parties argue that a campaign that went on, week after week, in the pages of the *Toronto Sun,* on Warren Kinsella's blog, on Facebook, on Twitter, and wherever else it was conducted had no effect on the reputation of the Respondent. If the Court agrees with this line of reasoning, it is accepting Mr. Kinsella and Daisy's plea of incompetence and that persistent online and newspaper article defamation is incapable of causing damage. The whole ***point*** of the campaign was to do as much damage to Mr. Bernier as possible. That was the service offered by Mr. Kinsella, and for which his client paid.

69. In their motion materials, especially in Reply, the Moving Parties use selected metrics to claim the Project Cactus campaign and Mr. Kinsella's other attacks had little impact. In the cross-examination of affidavits before this motion hearing, the Respondent was questioned about several pieces of negative mainstream and online journalism and was asked whether they were damaging. The Moving Parties suggest Project Cactus was just part of a stream of media criticism against Mr. Bernier. This is disingenuous. Mr. Kinsella and his employees' paid defamation was not opinion journalism. It was content designed to mimic real journalism and community activism. To accept the

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[49] *Awan v. Levant*, 2016 ONCA 970 (CanLII)

premise that this material was protected political expression allows the malignancy of this paid defamation to hide among the normal cut and thrust of political debate and opinion journalism.

70. In a very real sense, the Moving Parties were paid to instigate a mob to attack Mr. Bernier, and now they seek to hide in that angry crowd and claim to be just a small part of it.

71. A search of the case law and academic writings on paid defamation show there has never been a case like this litigated in Canada. For that reason, this case should be allowed to proceed to trial.

IV CONCLUSION

72. In summary, this Court is being asked to weigh the expression rights of an individual, Warren Kinsella, and his company to engage in paid defamation while retained under secret contract by Mr. Bernier's political opponents against Mr. Bernier's right to his reputation. The balance is clearly in Mr. Bernier's favour.

73. The Moving Parties have no valid defences to the claim of defamation and made no defence of the claim of portrayal in a false light. In their defence of defamation, they have not shown justification and are barred from the defence of fair comment.

74. Regarding damages, their defamation was published relentlessly, without any regard for the truth, without any fact-checking. It contained vicious, false allegations, and was ***intended*** to destroy Mr. Bernier's reputation.

75. Mr. Bernier's reputation, as both a lawyer and politician, has real value to him and his family. The Moving Parties worked extremely hard to strip him of this reputation.

76. The Moving Parties claim many others attacked Mr. Bernier. They were, in fact, paid to help instigate those attacks and amplify them.

77. The Respondent's action is not a SLAPP action (Strategic Litigation Against Public Participation). The anti-SLAPP law was designed to protect political speech. The *Protection of Public Participation* Act (PPPA) and s. 137.1 of the *Courts of Justice Act* exist to prevent the serious damage caused to

public discourse by the existence of lawsuits against public participation. SLAPP actions are filed by people trying to shut down public debate, not plaintiffs who want to take cases through the trial process. They are meant to bully and intimidate. The Legislature did not create anti-SLAPP law to protect the expression rights of people who pose as journalists and activists and publish the most outrageous, destructive defamations against a politician while secretly in the pay of that politician's opponents.

78. A hearing under Sec. 137.1 should not be a venue to label Mr. Bernier as a racist and block him from having the opportunity to clear his name. The Moving Parties are asking this Court to say there are grounds to believe their unproven claims that Mr. Bernier is a racist, a homophobe and a Nazi are true. If Mr. Bernier is to be tried as a racist, it should be done after he is afforded the full process of civil discovery and the opportunity to mount a full case.

Disposition

79. The Responding Party seeks dismissal of this Motion. While Sec. 137.1 allows a Court to decline to award costs to a Responding Party that succeeds, considering the malice of the Moving Parties, their continued attack on Mr. Bernier, substantial indemnity costs are appropriate.

All of which is respectfully submitted,

Mark Bourrie, Co-Counsel to Maxime Bernier

Schedule A

List of Authorities with Hyperlinks

1. *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 (CanLII)
https://canlii.ca/t/j9kjz

2. *Bent v. Platnick*, 2020 SCC 23 (CanLII)
https://canlii.ca/t/j9kjw

3. *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130
https://canlii.ca/t/1frgn

4. *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 2008 SCC 40
https://canlii.ca/t/1z46d

5. *Spiller v Joseph* [2010] UKSC 53
https://www.bailii.org/uk/cases/UKSC/2010/53.html

6. *WeGo Kayaking Ltd. v Sewid*, 2007 BCSC 49
https://canlii.ca/t/1q86c

7. *Bernstein v. Poon,* [2015] O.J. No. 190, 2015 ONSC 155 at paras 138-140 (Ont. S.C.J.)
https://canlii.ca/t/gfzrr

8. *Botiuk v. Toronto Free Press* Publications Ltd., [1995] S.C.J. No. 69 [1995] 3 S.C.R.
Botiuk v. Toronto Free Press Publications Ltd. - SCC Cases (scc-csc.ca)

9. *Hodgson v. Canadian Newspapers Co.,* [2000] O.J. No. 2293, 49 O.R. (3d) 161
https://canlii.ca/t/1gs9x

10. *Yenovkian v. Gulian*, 2019 ONSC 7279 (CanLII)
https://canlii.ca/t/j4gqn

11. *Awan v. Levant*, 2016 ONCA 970 (CanLII)
https://canlii.ca/t/gwlk7

12. *Rebel News v. Al Jazeera Media,* 2021 ONSC 1035 (CanLII)
https://canlii.ca/t/jd650

13. *Levant v. Day,* 2019 ONCA244 (CanLII)
https://canlii.ca/t/hzd3v

MAXIME BERNIER		**WARREN KINSELLA, DAISY CONSULTING GROUP INC. and DAISY STRATEGY GROUP LTD**	
Plaintiff	v.	**Defendants**	CV-20-82717

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SUPERIOR COURT OF JUSTICE
Proceeding commenced at Ottawa

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