

COURT OF APPEAL FOR ONTARIO

CITATION: Windrift Adventures Incorporated v. CTV-Bell Media Inc., 2025
ONCA 346
DATE: 20250502
DOCKET: COA-23-CV-1368

Gillease, Gomery and Pomerance JJ.A.

BETWEEN

Windrift Adventures Incorporated

Plaintiff (Appellant)

and

CTV-Bell Media Inc.*, Molly Thomas*, Paul Haber*, Anton Koschany*,
Rebecca Ledger*, Fern Levitt*, Chantel Dostaler, Francis “Frank”
Metivier, Marcie Moriarty and British Columbia Society for the
Prevention of Cruelty to Animals

Defendants (Respondents*)

Eric Gillespie, for the appellant

Carlos Martins and Emma Romano, for the respondents

Heard: April 9, 2025

On appeal from the order of Justice Julia Shin Doi of the Superior Court of Justice,
dated November 16, 2023, with reasons reported at 2023 ONSC 6488.

Gillease J.A.:

[1] This is an appeal from the dismissal of a defamation action pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”). After hearing from the appellant at the oral hearing of the appeal, the court found it unnecessary to call on the respondents and advised the parties the appeal was dismissed, with reasons to follow. These are the promised reasons.

Background

[2] The appellant, Windrift Adventures Incorporated, operates a dog-sledding business. Thomas Pryde and Adrienne Spottiswood are spouses who, together with Mr. Pryde’s mother, own the appellant corporation.

[3] The respondent CTV-Bell Media Inc. produces and broadcasts W5, a documentary news program that features investigative, inspirational, and topical stories. The other respondents are individuals who were involved in a W5 broadcast aired on February 5, 2022, entitled “Dogs in Distress” (the “Episode”). The Episode reported on the public debate, controversy, and calls for reform surrounding the dog-sledding industry in Canada and the conditions endured by sled dogs.

[4] The appellant was included as one of several dog-sledding operations profiled in the Episode. It had been involved in legal proceedings relating to the removal of its dogs by animal welfare authorities and the Ontario Animal Care

Review Board's finding that its dogs were in distress within the meaning of the *Provincial Animal Welfare Services Act, 2019*, S.O. 2019, c. 13.

[5] The appellant started a defamation action (the "Action") against the respondents in which it alleged it had been defamed by:

- The Episode
- A tweet published on the W5 Twitter account on January 31, 2022 (the "Tweet")
- A Facebook post published on the W5 Facebook page on January 31, 2022 (the "Facebook Post") and
- A 30-second video attached to the Tweet and the Facebook Post promoting the Episode (the "Video").

[6] The respondents moved for an order under s. 137.1 of the *CJA* dismissing the action (the "Motion"). The relevant parts of s. 137.1 read as follows:

137.1 (1) The purposes of this section ... 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. 2015, c. 23, s. 3.

(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. 2015, c. 23, s. 3.

(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. 2015, c. 23, s. 3.

(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. 2015, c. 23, s. 3.

[7] On the Motion, the parties agreed the applicable legal test was that in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587. The appellant conceded that the Episode, the Tweet, the Facebook Post, and the Video constitute an expression on a matter of public interest (the “Expression”).

[8] The motion judge made two findings on the Motion (the “Findings”). First, she found the appellant had not met its burden under s. 137.1(4)(a) to show the

Action had substantial merit and the respondents had no valid defence to its claim. Second, she found, pursuant to s. 137.1(4)(b), that the harm the appellant suffered as a result of the Expression was not sufficiently serious that the public interest in permitting the Action to continue outweighed the public interest in protecting the Expression.

The Issues

[9] The primary issue for determination on this appeal was whether the motion judge erred in her Findings, as the appellant submitted.

[10] However, the appellant raised a second issue at the oral hearing of the appeal, based on this court's recent decision in *Burjoski v. Waterloo Region District School Board*, 2024 ONCA 811. It submitted that *Burjoski* "developed" the law in *Pointes* and makes it mandatory that a proceeding be found to be "abusive" before it can be dismissed pursuant to s. 137.1. The appellant submitted that because the motion judge did not find the Action was abusive, the Motion had to be remitted for a new hearing.

Analysis

[11] Before addressing the issues, I observe that, in my view, the motion judge correctly stated the relevant legal principles, identified the issues raised by the parties, made factual findings amply supported on the record, and made no error in her application of the legal principles to the facts as she found them.

ISSUE 1 No error in the Findings

[12] Because the parties agreed that the Expression related to a matter of public interest, as the motion judge correctly stated, the burden was on the appellant to satisfy the judge there were grounds to believe both that its Action had substantial merit and that the respondents had no valid defence to it.

Absence of substantial merit

[13] To decide the question of merit, the motion judge began by setting out the test for defamation in *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 92: (1) the words complained of were published, meaning they were communicated to at least one person other than the plaintiff; (2) the words complained of referred to the plaintiff; and (3) 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. Applying that test, the motion judge found the appellant failed to establish there were grounds to believe the Action had substantial merit.

[14] The motion judge found that none of the Tweet, Facebook Post, or Video named, identified, or referred to the appellant and so the second element of the *Bent* test was not met in respect of them.

[15] However, as the motion judge acknowledged, the Episode did explicitly identify the appellant. Accordingly, the motion judge considered whether the

Episode met the third element of the *Bent* test. She found that it did not because, in the eyes of a reasonable person, the appellant's reputation had already been "tarnished" by the charges against it under the *Provincial Animal Welfare Services Act* and the removal of its dogs by the animal welfare authorities. On the record, this finding was fully available to the motion judge.

[16] In my view, the motion judge also implicitly rejected the appellant's submission that references to it in the Episode were capable of meaning the appellant had been guilty of a criminal offence related to animal cruelty. I will assume, without deciding, that the appellant established that viewers familiar with dogs would recognize certain images of dogs in the Episode, with the words "Dogs in Distress" imposed below their images, as dogs belonging to it. The motion judge did not explicitly state that "distress" is not synonymous with animal cruelty or inhumane treatment nor does it necessarily imply either of those things. However, the Episode fairly reported on the appellant's dispute with the animal welfare authorities, in particular by referring to the definition of "distress" in the applicable legislation. Accordingly, I see no basis for appellate intervention with the motion judge's implicit finding that a reasonable person viewing the Episode would understand the appellant was involved in ongoing legal proceedings and objected to the animal care orders and findings of the Animal Care Review Board – not that it had engaged in animal cruelty.

[17] In response to the appellant's arguments regarding how Ms. Spottiswood was depicted in the Episode, I see no error in the motion judge rejecting this argument because the statement of claim does not include a complaint about Ms. Spottiswood's reputation nor was she named as an individual plaintiff in it.

Valid defences

[18] The motion judge found that the appellant failed to show there were grounds to believe the respondents' defences of justification, fair comment, and responsible communication were not valid. In my view, the appellant has not identified any reversible error in that finding.

No error in weighing the competing public interests

[19] The motion judge found the appellant failed to discharge its burden to show the Expression caused it to suffer sufficiently serious harm that the public interest in allowing the Action to continue outweighed the public interest in protecting the Expression. On the Motion, the appellant argued that the Expression had caused serious harm to Ms. Spottiswood's health and her family. However, as the motion judge noted, that is not harm attributable to the appellant, the only plaintiff in the Action.

[20] Before us, the appellant reiterates its contention that because Ms. Spottiswood is its key employee, her suffering as a result of the Expression meant she could not continue to work for it, thereby leading to economic loss on its part.

I see no reversible error in the motion judge's determination that the harm the appellant allegedly suffered was not "sufficiently serious" to outweigh the public interest in protecting the Expression. That determination flowed from her finding both that the evidence of the causal link between the Expression and the alleged harm was weak and that the appellant's alleged harm was "questionable". Those findings were fully available to the motion judge on the record.

Issue 2 *Burjoski* does not change the *Pointes* test

[21] The appellant pointed to a number of paragraphs in *Burjoski* in which this court described the impugned proceeding on a s. 137.1 motion as "abusive". For example, at para. 6 of *Burjoski*, the court states that s. 137.1 is a screening mechanism designed to weed out "abusive legal proceedings". The use of the word "abusive" to describe such proceedings can also be found in paras. 41, 47, 81, and 102 of *Burjoski*.

[22] I do not accept the appellant's submission that *Burjoski* has changed the law in *Pointes* for two reasons. First, it is trite law that a decision of this court cannot change the law as pronounced by the Supreme Court of Canada. Second, on a fair reading of *Burjoski*, it uses the word "abusive" simply as a shorthand description for actions that seek to unduly limit expression on matters of public interest rather than as a means of seeking redress for a *bona fide* claim. This is clear from para. 102 of *Burjoski* where the court concludes that the anti-SLAPP

motion in that case had to be dismissed because the action was not “abusive, strategic or otherwise subject to the anti-SLAPP regime” created by s. 137.1 of the *CJA*.

Disposition

[23] For these reasons, I would dismiss the appeal with costs to the respondents fixed at \$10,000, all inclusive.

Released: May 2, 2025 “E.E.G.”

“E.E. Gillese J.A.”
“I agree. S. Gomery J.A.”
“I agree. R. Pomerance J.A.”