SUPREME COURT OF NOVA SCOTIA

Citation: *Fraser and DLF Law Practice Incorporated., v. MacIntosh-Wiseman* 2024 NSSC 378

Date: 20241210
Docket: HFX No. 522092
Registry: Halifax

Between:

Donn Fraser and DLF Law Practice Inc.

Plaintiff

v.

Sarah MacIntosh-Wiseman

Defendant

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	April 29, 2024, in Halifax, Nova Scotia
Final Authorities Provided:	July 2, 2024
Counsel:	Self-represented, for the individual Plaintiff and as directing mind of the corporate Plaintiff Peter Rogers, K.C. and Raylene Langor, for the Defendant

By the Court:

OVERVIEW

[1] The Plaintiff, Donn Fraser ("**Fraser**"), was a partner at the now-defunct law firm of MacIntosh MacDonnell & MacDonald – known more familiarly as "Mac Mac & Mac". Fraser held his partnership interest through a professional corporation called DLF Law Practice Incorporated, a co-Plaintiff in this action.

[2] The Defendant Sarah MacIntosh-Wiseman ("**MacIntosh-Wiseman**") was also a partner at Mac Mac & Mac.

[3] MacIntosh-Wiseman did not consistently meet the firm's financial targets for partners, despite assistance from her father, Bruce MacIntosh, who was a senior partner at the same firm. Mr. MacIntosh would involve MacIntosh-Wiseman in significant files which, in turn, enhanced her revenue generation.

[4] On Monday, April 1, 2019, MacIntosh-Wiseman took a leave of absence from Mac Mac & Mac to begin a two-year position as the first Chief Executive Officer for Pictou County Regional Enterprise Network ("**REN**").

[5] On Saturday, March 30, 2019, MacIntosh-Wiseman sent an e-mail to everyone at Mac Mac & Mac formally announcing her imminent departure. The e-mail concluded with the suggestion that MacIntosh-Wiseman might continue working on firm files while also working at REN. That suggestion concerned Fraser.

[6] On Sunday, March 31, 2019, Fraser e-mailed all his law partners (including MacIntosh-Wiseman) questioning whether MacIntosh-Wiseman should be working on firm files while at REN. If so, Fraser wondered, what were the firm's expectations of MacIntosh-Wiseman? And what was being contemplated in terms of compensation for this work? Fraser also raised a related issue around setting a deadline for MacIntosh-Wiseman to advise the firm "whether she is coming back at the ended of the 2-year REN stint".

[7] A few hours later, MacIntosh-Wiseman sent a responding e-mail to Fraser, with a copy to one of the firm's managing partners, Julie MacPhee (referred to below as "**MacPhee**").[1]

[1] Based on the evidence, the other managing partner was Gerald Green who, at the time, was confronting a serious medical issue that significantly diminished his ability to work.

[8] As Fraser and MacIntosh-Wiseman traded e-mails into the night, the tone became more heated and personal. At 12:01 a.m. on April 1, 2019, Fraser sent an e-mail sharply criticizing MacIntosh-Wiseman for "frittering off on [her] personal interests over the firm's at the end of 2018 (while others were drowning)". He did not want that "frittering off" to be seen as having been accepted or formalized, while her law partners stayed behind to "keep the lights on". He would rather that she be "working, as [his] partner, taking file responsibility and pulling the same weight." I refer to this e-mail below as the "**12:01 a.m. April 1, 2019, e-mail**". MacPhee, a managing partner at the firm, was copied on this exchange.

[9] The next morning, MacIntosh-Wiseman sent an e-mail to MacPhee saying that Fraser's e-mail had caused her to consider resigning altogether. A few hours after that, Fraser apologized for the timing and the manner in which he delivered the message. He did not retract or apologize for the essential complaint regarding MacIntosh-Wiseman performance. The e-mail discussion cooled and returned to calmer inquiries around potential additional terms that would apply while MacIntosh-Wiseman was on leave – including a deadline for providing notice of any intended return to the firm. Again, MacPhee was copied.

[10] The lingering issues regarding potential additional terms associated with MacIntosh-Wiseman's leave of absence were never resolved.

[11] On March 8, 2020, MacIntosh-Wiseman resigned as a partner of the firm, effective December 31, 2019.

[12] Almost exactly a year after resigning, on March 9, 2021, MacIntosh-Wiseman sent an e-mail to Fraser (the "**March 9, 2021 E-mail**"). A complete copy of the text from the March 9, 2021 Email is attached at Schedule A, because it is this communication that triggered this action.

[13] In the March 9, 2021 E-mail, MacIntosh-Wiseman resurrected the 12:01 a.m. April 1, 2019, e-mail. She said that this e-mail from Fraser was:

> … directly responsible for the fact that [she] walked away from not only a law practice that I loved and excelled at, but a partnership and firm that I considered family. The partnership and firm that my grandfather started; my father then led; and which I intended to practice with for the remainder of my career (excepting only my intended temporary two year leave). Your angry, late night e-mail started the snowball rolling through which my partnership and planned future disappeared almost overnight.

[14] MacIntosh-Wiseman also stated that she would never have wanted to rejoin the partnership given the disrespect shown to her in this email.

[15] MacIntosh-Wiseman did not send the March 9, 2021 E-mail to Fraser alone. She also sent a copy of it to her father, Bruce MacIntosh, who had been a senior partner at the firm. And she understood that Mr. MacIntosh would share the e-mail with Fraser's existing law partners and, as well, the firm's office manager. There is no evidence that the e-mail was distributed beyond Mac Mac & Mac partners and the firm's office manager other than, perhaps, to MacIntosh-Wiseman's husband.

[16] By Notice of Action filed March 10, 2023 (amended on June 14, 2023, and further amended on March 13, 2024), Fraser sued MacIntosh-Wiseman alleging that the March 9, 2021 E-mail was defamatory and publicly placed him in a false light. Fraser alleges that MacIntosh-Wiseman's March 9, 2021 E-mail wrongfully accused him of being responsible for her leaving Mac Mac & Mac and the private practice of law. According to Fraser, MacIntosh-Wiseman made up this lie "ostensibly to mask the fact that she was a failure as a lawyer in private practice, who indeed could not 'cut it'" (Fraser's written submissions at para. 12). Fraser further alleges that the March 9, 2021 E-mail inflicted emotional, reputational and financial harm by dishonestly casting him as the villain who forced MacIntosh-Wiseman's departure from the firm.

[17] The matter is to be tried by a judge and jury, unless the parties agree otherwise in the future (section 34(a)(i) of Nova Scotia's *Judicature Act*, R.S.N.S. 1989, c. 240, as amended).

[18] For reasons that are not entirely clear, Fraser launched a separate action against Bruce MacIntosh. I understand that this separate action includes allegations of defamation related to Mr. MacIntosh's role in distributing the March 9, 2021 E-mail (i.e. the same facts and circumstances which gave rise to this action). For the purposes of this motion, neither party made an issue of this apparent duplication. Beyond recognizing the overlap, I make no determinations involving this related action. These reasons should not be interpreted otherwise.

[19] The Defendant MacIntosh-Wiseman now brings this motion under *Civil Procedure Rule* 13.04 (Summary Judgment on Evidence) for an Order summarily dismissing this action.

[20] Fraser states that the context and circumstances surrounding the March 9, 2021 E-mail give rise to genuine issues of material fact which cannot be resolved in a motion for summary judgment.

[21] The reasons which follow begin with a review of summary judgment law in Nova Scotia. I then apply that law to the issues raised in this motion.

[22] The decision is lengthy primarily as it became necessary to review in detail the contextual evidence which is material to the claims. However, the following facts are unique to this case and bear emphasizing as they offer important context:

> 1. The impugned March 9, 2021 E-mail occurred at the end of a longer, simmering dispute where two, now former law partners (Fraser and MacIntosh-Wiseman) exchanged subjective and critical complaints related to their respective, relative worth as law partners;
>
> 2. The March 9, 2021 E-mail was only distributed to persons who were law partners and their office manager. In other words, the small audience who received the e-mail who would be familiar with the underlying concerns and in a position to put the relevant communications in their proper perspective; and
>
> 3. In a law partnership, the same people who generate revenue for, and bring value to, the firm are also required to divide profits based on their perceived relative worth to the firm. Critical, comparative comments regarding the performance of other partners within these confined and competitive quarters is inevitable, frequent, and necessary,

[23] There are other more specific issues described below. In the end and for the reasons to follow, a reasonable and right-thinking ordinary person would not conclude that the content of the March 9, 2021 E-mail is defamatory or publicly placed Fraser in a false light.

THE LAW AROUND SUMMARY JUDGMENT

[24] Motions for summary judgment are designed to identify and cull claims or defences which do not require the time, expense and procedural rigours associated with a full trial. In *Burton Canada Company v. Coady*, 2013 NSCA 95 ("***Burton v. Coady"***), Saunder, J.A. wrote:

> "Summary" is intended to mean quick and effective and less costly and time consuming than a trial. The purpose of summary judgment is to put an end to claims or defences that have no real prospect of success. [para. 22]

[25] In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 ("***Hercules Management***"), the Supreme Court of Canada developed the following two stage test for summary judgment:

> Stage 1: The moving party bears the evidentiary burden of demonstrating that there is no genuine issue of material fact for trial. If there are genuine issues of material fact, the motion for summary judgment must be dismissed; and
>
> Stage 2: If there are no genuine issues of material fact for trial, the Court examines whether the party opposing summary judgment had a real chance of success.
>
> [at para. 15]

See also *Guarantee Company of North America v. Gordon Capital*, [1999] 3 S.C.R. 423, referred to herein as "*Guarantee Company*," at para. 27.

[26] Nova Scotia originally adopted this two-stage test as the governing template when assessing a request for summary judgment (*Burton Canada Company v. Coady*, 2013 NSCA 95 ("***Burton***"), at paras. 31, 38, 41, and 42). In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 ("***Shannex***"), the Nova Scotia Court of Appeal sought to provide clarity and a degree of analytical discipline by enveloping the two-part test within the following five questions which the motion judge must consider in sequential order:

> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
>
> 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
>
> 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
>
> 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law? The motion judge's discretion to determine a question of law is confirmed in Civil Procedure Rule 13.04(6)).
>
> 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?
>
> [*Shannex*, at paras. 34 – 42]

[27] Questions 1 – 3 from Shannex's sequential analysis bear additional comment. And of those 3, Question 1 often proves the most challenging.

QUESTION 1: DOES THE CHALLENGED PLEADING DISCLOSE A GENUINE ISSUE OF MATERIAL FACT, EITHER PURE OR MIXED WITH A QUESTION OF LAW?

[28] The focus at this stage "… is solely whether there is a dispute of material fact" (*Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72 ("***Arguson***"), at para. 35, *emphasis added*). The singular nature of this task suggests a simplicity that can be deceiving because the analytical constraints may be complicated, legally and factually.

[29] Starting with the basics, a "material" fact is one which will affect the outcome of a trial (*Tri-County Regional School Board v. 3021386 Nova Scotia Limited*, 2021 NSCA 4 ("***Tri-County Regional School Board***"), at para. 20).

[30] However, just because Question 1 involves a factual analysis does not mean the law is entirely irrelevant. Material facts do not exist in a legal vacuum. As indicated, a fact is only "material" if it will affect the outcome at trial. In other words, material facts must be significant at law or legally consequential. Obviously, therefore, making any assessment as to whether an alleged fact is "material" (or whether there is a genuine issue of material law) requires an understanding of the controlling law.

[31] If a particular fact will impact the legal result, it is material. By contrast, "[a] dispute about an incidental fact - i.e. one that would not affect the outcome - will not derail a summary judgment motion" (*emphasis added*, from *Shannex* at para. 34, adopting *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74 ("***2420188***"), at para. 27, and *Burton* at paras. 41 and 87 (#8)). In sum, although Question 1 of *Shannex* is focussed solely on assessing whether there is a genuine issue of material fact, this does not (and cannot) mean that the inquiry is entirely factual in nature and untethered from the governing law.

[32] At this point, it is important to pause and underscore two important, related points:

> 1. Question 1 requires the motion judge to first identify and filter the material facts in support of (or in opposition to) the challenged pleading. Having done so, the motion judge assesses whether a genuine issue of material fact exists. If a genuine issue of material fact exists, the motion judge does not go further and draw conclusions around (or answer) the underlying, ultimate questions of law. The task is largely factual in nature although, as indicated, material facts cannot emerge in a legal vacuum. Were that true, the Court's factual inquiries would become an unguided, arbitrary journey through the evidence; and
>
> 2. The related point is that the motion judge must be careful to not entangle the factual determinations with the ultimate questions of law. In

> order to avoid falling into legal error, the motions judge must remain cognizant of the ultimate legal question and ensure that s/he neither mistakes nor conflates issues of material fact with the ultimate question of law.

[33] The decision in *Arguson* provides a useful illustration of the potential complexity. That case involved the re-development of a large commercial building in downtown Halifax. The Project Manager (the Appellant, Arguson) entered into standard form subcontracts with a subcontractor (the Respondent, Gil-Son) who agreed to provide certain mechanical and electrical work. The Respondent sought compensation for certain construction delays.

[34] On August 4, 2021, the Respondent Subcontractor (Gil-Son) submitted two invoices claiming additional compensation for the alleged delay. On September 14, 2021, the Appellant Project Manager (Arguson) wrote the Respondent Subcontractor (Gil-Son) to say that the invoices received to date were reviewed but the claim for additional compensation was denied. However, the e-mail concluded, “on a without prejudice basis, should Gil-Son provide sufficient documentation to support its position we would reconsider re-evaluating the claim.”

[35] The Respondent submitted three more invoices claiming further amounts being tacked on to its delay claim.

[36] On July 4, 2022, the Respondent wrote a further e-mail saying, among other things, that "To date I've had not heard back from you regarding your plans to resolve the number of delay claims we sent you."

[37] Two days later, on July 6, 2022, the Appellant replied. The Appellant Project Manager referred the Respondent Subcontractor back to the original e-mail dated September 14, 2021, and added that: "The claim has been reviewed and there is no significant change since our e-mail response of Sept 14/21 (copy attached). As such we accept no responsibility."

[38] Condition 8.1.1 of the subcontracts confirmed the process that the Respondent subcontractor must follow where it disagreed with a "decision" made by the Appellant Project Manager. It required the subcontractor to send a Notice in Writing of dispute to the Project Manager within seven Working Days of the Decision. Moreover, and importantly, if the subcontractor failed to send this Notice in Writing, the subcontractor "shall be conclusively deemed to have accepted a decision of the [Appellant Project Manager] … and to have expressly waived and released the *Contractor* from any claims in respect of the particular matter dealt with in that decision."

[39] The following two facts were uncontested:

1. The Appellant Project Manager's September 14, 2021, e-mail denied the Respondent Subcontractor's request for additional compensation; and

2. The Respondent Subcontractor did not send any Notice in Writing of the dispute within seven Days of receiving the July 6, 2022, e-mail.

[40] The central issue (and the focal point of the Court's decision) became whether the Appellant Project Manager's July 6, 2022, e-mail constituted a "decision" under Condition 8.1.1 which, in turn, would have obliged the Respondent Subcontractor to send a Notice in Writing of dispute or risk being deemed to have expressly waived and released the Appellant from any future claims.

[41] The motion judge determined, among other things, that the issue of whether the Appellant Project Manager made a "decision" under Condition 8.1.1 "is a question of material fact, because only that would trigger the other section and the requirement to respond within the seven working days or to reply a note of dispute within the seven working days" (quoted at para. 21 of *Arguson*).

[42] At first blush, it is easy to see how the question of what constitutes a "decision" under Condition 8.1.1 might be considered an issue of fact. However, Bourgeois, J.A. clarified that:

1. The only issues of "material fact" related to the July 6, 2022, e-mail. More specifically, Bourgeois, J.A. determined:

    a. There was no dispute or contest regarding either the wording of that e-mail; or

    b. The fact that no Notice in Writing of dispute was written in response to that e-mail within seven working days, as required under Condition 8.1.1 of the contract.

    With that, Bourgeois, J.A. concluded, Question 1 under *Shannex* was fully answered. There were no additional, genuine issues of material fact that required consideration on this issue;

2. Bourgois, J.A. then turned to whether, in the context of these material facts, the July 6, 2022, e-mail constituted a "decision" under Condition 8.1.1 and, if so, whether the Respondent Subcontractor's failure to respond to that "decision" resulted in a waiver and release

> of the delay claim. Bourgeois, J.A. described these issues as "extricable questions of law" (at para. 46) – not issues of fact that might be included within the Question 1 analysis; and
>
> 3. The motion judge fell into error by intertwining these “extricable questions of law” with her assessment of material fact. Bourgeoise, J.A. concluded that the motion judge incorrectly "collapsed the first two stages of the *Shannex* analysis into one" (at para. 46) and "short-circuited" the proper analysis (at para. 48).

[43] In short, the material facts were limited to the uncontested wording of, and the circumstances surrounding, the July 6, 2022, e-mail. The residual questions of whether that e-mail constituted a "decision" under the governing contract or whether the parties waived strict compliance with the terms of the subcontract were separate, legal questions to be addressed later in the *Shannex* analysis.

[44] In summary and at the risk of repetition, the motion judge must necessarily be able to identify the "material facts" that will affect the outcome of the trial – either in support of the claims being asserted or the defences made in response. In doing so, the motions judge must consider the basic law that will inform the impugned claim or defence and affect the outcome at trial. Absent a coherent, legal framework, the motion judge cannot assess whether a fact is "material" in a principled manner - let alone distinguish "material" facts from those that are "immaterial".

[45] If a genuine issue (or dispute) around the material facts emerges, the motions judge must dismiss the motion for summary judgment. However, in making that assessment, the motion judge must be vigilant not to compress the assessment of any alleged dispute of material fact with the subsequent task of assessing the more specific legal questions that may require determination – and potentially mislabel a legal issue as a factual issue, as occurred in *Arguson*.

[46] Answering Question 1 from *Shannex* is informed by the following additional four guiding principles:

> 1. Identifying the applicable legal principles with sufficient clarity to identify genuine disputes of material fact typically begins with the pleadings and identifying the constituent or essential elements which comprise an alleged claim or defence. In *Arguson*, Bourgeois, J.A. wrote:
>
> > … To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material [at para. 37].

Note, as well, that the Civil Procedure Rules mandate that statements of claim and statements of defence include a "concise statement" of the material facts upon which they rely (see, for example, Civil Procedure Rules 4.02(4)(a) and 4.05(4)(c)). While the phrase “genuine issue of material fact” has a meaning specific to motions for summary judgment on evidence, the "concise statement" of material facts in the pleadings will at least reveal the nature of the claim (or defence) and help identify the legal test that the parties must confront and/or the essential elements that may comprise a pleaded claim or defence.

The following appellate cases illustrate the importance of conducting this analysis and understanding the constituent elements of claims or defences being made:

a. By approaching the factual issues from the proper legal vantage point, the motion judge may be able to more surgically isolate and address a particular issue that may be determinative of the entire motion, as occurred in *Tri-County School Board*.[2]

b. The Nova Scotia Court of Appeal decision in *Canada (Attorney General) v. Geophysical Services Incorporated*, 2022 NSCA 41 ("***Geophysical Services Incorporated***"), provides a further useful example. In this case, the motion judge granted summary judgment and dismissed the Plaintiff's claims of unlawful interference in economic relations; interference with contractual relations; negligent infliction of economic harm; and unjust enrichment. However, the motion judge allowed the Plaintiff's two remaining claims (misfeasance in public office and conspiracy) to

[2] This case involved the sale of certain lands owned by a school board to a local developer. The soil on the acquired lands was contaminated with hydrocarbons. Post-closing the transaction, the purchaser/local developer sued the school board in negligence and negligent misrepresentation. The school board moved for summary judgment. For the purposes of summary judgment, the Nova Scotia Court of Appeal stripped the dispute down to a threshold, determinative question: did the school board owe the purchaser/developer a duty of care, at law? In the absence of a duty of care, the claims fell apart. And any residual issue of material fact on other elements for a claim in negligence or negligent misrepresentation became irrelevant. Hamilton, J.A. wrote: “The first requirement that must be established for the Board to be liable to the Company on any of these claims is that it owed a duty of care to the Company at the time it purchased the property. Absent such a duty of care, the Company's claims against the Board cannot succeed, so that the disputed facts are not material as they cannot affect the outcome of the trial; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 (S.C.C.) at para. 18 ("*Maple Leaf*"); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at para. 34 (at para 23). At para. 37, Hamilton, J.A. continued: “In the absence of a duty of care none of the disputed facts found by the judge are material as they could not affect the outcome of the trial.” She then determined that there were no issues of material fact regarding the alleged duty of care, and that the law was clear. She wrote: “The Board does not owe a duty of care to the [developer] Company with respect to the environmental condition of the property. Without the Board owing a duty of care to the [developer] Company, the [developer] Company’s claim has no real chance of success. Indeed, the absence of a duty of care is fatal to the [developer] Company's claims. Summary judgment should be granted to the Board” (at para. 45).

> continue. On appeal, Beveridge, J.A. upheld the motion judge's decision to dismiss and further allowed the Defendant's appeal of the two claims that survived. Thus, the entire claim was dismissed. In doing so, Beveridge, J.A. separated the various causes of action and began his analysis by breaking down each alleged cause of action into its essential elements (see paras. 57-58 for unlawful interference in economic relations; paras. 75-76 for interference in contractual relations; para. 80 for negligent infliction of economic harm; paras. 89-92 for unjust enrichment; paras. 100-102 for misfeasance in public office; and paras. 117-118 for conspiracy).

2. The existence or absence of a genuine issue of material fact must be grounded in the actual evidence before the Court - not conjectural thinking or artful pleadings which are not supported by the evidence. The following two appellate cases speak to this issue:

> a. In *Risley v. MacDonald*, 2022 NSCA 76 ("***Risley***"), Farrar, J.A. wrote that "determining whether a genuine issue of material fact exists is based on both the pleadings ***and the evidence***, not simply 'an issue tied to the pleadings'" (at para. 56, emphasis in original). See also *Burton*, at para. 87, point 6; and
>
> b. In *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29 ("***SystemCare Cleaning***"), the Nova Scotia Court of Appeal offered insight into this concern. In that case, Bourgeois, J.A. concluded that the motion judge:
>
> > … was sidelined by delving into a consideration of the factual similarities in this matter and others where an agency was found to exist. Further, his consideration of the principles of agency by estoppel was incomplete. Determining whether there is a genuine issue of material fact must be founded in the pleadings and the evidence presented in the matter under consideration. Case authorities may be helpful for identifying issues of law, but the material facts which will govern the outcome will be determined based on each unique context [at para. 37].

3. There is an evidentiary obligation for responding parties to "lead trump" or "put their best foot forward" when marshalling evidence in opposition to a motion for summary judgment. A responding party risks having its claims or defences summarily struck if it fails to make every reasonable, good faith, effort to marshal its evidence. The time is now - not later. Vague representations or presupposed suspicions about what evidence might surface in the future are insufficient (see *Nova Scotia Association of*

Health Organizations Long Term Disability Plan Trust Fund v. Amirault, 2017 NSCA 50, at paras. 14 - 15). Similarly, uncorroborated (or bald) factual assertions, even if contained in a sworn affidavit, will not suffice to create a genuine issue of material fact for trial (see, for example, *Coady* at para. 87). Note that these comments assume that the responding party has been provided with a fair opportunity to respond and is not being forced to march forward toward final judgment in circumstances that are sufficiently prejudicial as to require an adjournment (e.g., inadequate disclosure or discovery. See Civil Procedure Rule 13.04(6)(b)).

4. The caselaw draws certain clear boundaries around what a judge may (and may not) do to resolve factual disputes at a motion for summary judgment. For example:

a. The Court will not evaluate credibility at a motion for summary judgment (*Coady* at para. 87, point 11). Credibility assessments for civil claims are conducted by the trial judge - not at an interlocutory motion.

b. The Court will not weigh evidence in the sense of either minimizing or increasing its relative persuasive value. The process of evaluating the comparative strength (or weakness) of evidence should occur at trial (*Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61 ("***Hatch***"), at paras. 26 - 30). Thus, in *Hatch*, the judge hearing a motion for summary evidence fell into error when he assigned no value whatsoever to an expert opinion that was deemed admissible (*Hatch* at paras. 44 – 45 and 50).

c. The Court's ability to draw inferences is very limited. The motion judge "may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts" (*2420188* at para. 53, quoting with approval from the Supreme Court of Canada decision in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 11 ("***Lameman***"). The same quote from *Lameman* is also included in *Coady* at para. 210, and the principle is confirmed at para. 29 of *Globex Foreign Exchange Corporation v. Launt*, 2011 NSCA 67, at para. 29.

QUESTION 2: IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT THEN: DOES THE CHALLENGED PLEADING REQUIRE THE DETERMINATION OF A QUESTION OF LAW, EITHER PURE, OR MIXED WITH A QUESTION OF FACT?

[47] Question 1 prioritizes questions of fact, either pure or mixed with law. With Question 2, the focus or priority shifts to the ultimate question of law – either pure, extricable questions of law or questions of law mixed with fact.

[48] The distinction between a pure question of law and a question of law and fact is not always obvious. These types of issues (questions of law versus mixed law and fact) often arise in appellate proceedings when ascertaining the appropriate standard of review. And, as the Court of Appeal observed in *Tufts v. Nova Scotia (Workers' Compensation Appeal Tribunal)*, 2023 NSCA 50: "The distinction between a question of law and a question of mixed fact and law is sometimes difficult to discern" (at para. 16).

[49] In any event, the task is not to choose between pure questions of law and questions of mixed law and fact. Rather, if there are no genuine issues of material fact, the key residual task is to identify whether it is also necessary to determine a question of law.

QUESTION 3: IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND IF THERE IS A RESIDUAL QUESTION OF LAW, DOES THE CHALLENGED PLEADING HAVE A REAL CHANCE OF SUCCESS?

[50] This question mirrors the second stage of the *Hercules Management* test: “If there are no genuine issues of material fact for trial, the Court examines whether the party opposing summary judgment had a real chance of success” (see para. 25 above).

[51] In this case, the Defendant MacIntosh-Wiseman moves for summary judgment. Thus, if the analysis reaches this stage, the question would become whether the Plaintiff’s claims in defamation have a “real chance of success”.

[52] In *Burton v. Coady*, the Nova Scotia Court of Appeal elaborated on what was meant by a “real chance of success”. Saunders, J.A. wrote:

> The phrase “real chance” should be given its ordinary meaning – that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation. A claim or a defence with a “real chance of success” is the kind of prospect that if the judge were to ask himself/herself the question: “*Is there a reasonable prospect for success on the undisputed facts*”. The answer would be yes [at para. 44].

[53] I turn now to apply this framework within the facts and issues raised in this motion.

ANALYSIS

QUESTION 1: DOES THE CHALLENGED PLEADING DISCLOSE A GENUINE ISSUE OF MATERIAL FACT, EITHER PURE OR MIXED WITH A QUESTION OF LAW?

[54] The first issue is whether the March 9, 2021 E-mail constitutes *prima facie* defamation. What is "*prima facie* defamation"?

[55] In *Grant v. Torstar*, 2009 SCC 61, the Supreme Court of Canada said, at para. 28, that in order to succeed in a case for defamation, the Plaintiff must prove:

> (1) that 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; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than a plaintiff. the preliminary assessment into whether the impugned words constitute defamation.

The term "*prima facie* defamation" is a short-hand expression to capture these basic legal elements.

[56] As to the second element of the test (whether the impugned words in fact referred to the plaintiff), there is no genuine issue or dispute that MacIntosh-Wiseman's statements in the March 9, 2021 E-mail referred to the Plaintiff, Donn Fraser.

[57] As to the third element of the test, there is no genuine issue or dispute that the March 9, 2021 E-mail was communicated to at least one other person beyond Fraser himself. More precisely:

> 1. MacIntosh-Wiseman sent a copy of the e-mail to her father, Bruce MacIntosh. Mr. MacIntosh was also a senior partner at Mac Mac & Mac when MacIntosh-Wiseman left for REN, but had retired some months later, and before the March 9, 2021 E-mail was received; and
>
> 2. MacIntosh-Wiseman understood that a copy of the e-mail would be shared with the partners at Mac Mac & Mac as well as the office manager. She conceded that she may have shown it to her husband as well. At the time (March 9, 2021), the partnership was comparatively small and consisted of

> Fraser, MacPhee, Joel Sellers, Gerald Green, Eric Atkinson, Mary Jane Saunders, and Heather MacDonald.[3]

[58] There is no evidence the March 9, 2021 E-mail was distributed circulated beyond that group of individuals. It is necessary to pause here and address a related concern raised by Fraser and repeated throughout his affidavit and submissions.

[59] Generally speaking, Fraser points out that MacIntosh-Wiseman moved for summary judgment prior to both the process of completing disclosure and conducting discovery examinations. Fraser claims that lack of disclosure and discovery leave him unable to "to fully understand the extent to which the Defendant has propagated her lies, misrepresentations and false characterizations of the Plaintiff in an effort to create a false narrative" (Fraser Responding Submissions, at para. 14). More generally, Fraser insists that this motion is premature and alleges prejudice due to the lack of disclosure and discovery (see, for example, Fraser's written submissions at paras. 13 – 16 and 25 – 30).

[60] Fraser did not bring a motion to adjourn the motion for summary judgment although, in fairness, he clearly and consistently raised concerns about prematurity. His general concern around prematurity was echoed in more specific complaints, and including grievances regarding the March 9, 2021 E-mail. Fraser says that:

> 1. He expects the March 9, 2021 E-mail was also published further beyond the persons identified above (Second Amended Statement of Claim, at para. 28), but does not offer any details; and
>
> 2. There is "no basis on which [he] could reasonably believe the communications would be kept confidential to the Partnership" (Fraser Affidavit sworn February 15, 2024, at para. 134), but, again, does not offer any details.

[61] A motion for summary judgment may be brought any time after pleadings close (*Civil Procedure Rule* 13.05(1)) The timing is not conditional upon completing disclosure and/or discovery. However, I have the discretion to adjourn the hearing for any just purpose including, for example, to permit necessary disclosure, production or discovery (*Civil Procedure Rule* 13.04(6)(b)).

[62] I declined to exercise my discretion in favour of an adjournment. First, the motion was originally scheduled to be heard in February 2024 and, at Fraser's

[3] Fraser, MacPhee, Joel Sellers and Eric Atkinson were also partners in 2019 when MacIntosh-Wiseman left. Jane Saunders joined the partnership in 2020. Heather MacDonald is Fraser's spouse and joined the partnership after MacIntosh-Wiseman's departure.

request, had already been adjourned once. More importantly, in my view, it was not in the interests of justice to grant a further adjournment.

[63] Focussing on the specific question of who received the March 9, 2021 E-mail, respectfully, Fraser's belief and expectation that MacIntosh-Wiseman may be responsible for distributing the March 9, 2021 E-mail beyond the firm's partners, the firm's office manager, and possibly her husband, does not suffice to justify a further adjournment.

[64] Fraser's allegations are grounded, in part, on the fact that the March 9, 2021 E-mail was sent to persons other than Fraser himself and, in particular, was sent to a specific and contained group of individuals based mainly on their connection with Mac Mac & Mac. MacIntosh-Wiseman admits that she knew the March 9, 2021 E-mail would be distributed to those persons.

[65] In the circumstances, the Plaintiff may not deny or delay the Defendant's procedural right to seek summary judgment based on an unsubstantiated fear that the allegedly defamatory e-mail might (or might not) have been distributed to unidentified members of a larger, unknown audience. Allowing adjournments to address this sort of speculative prejudice would invite fishing expeditions chasing people whose existence is a matter of ungrounded conjecture. To the extent Fraser's concerns of prematurity are relevant to this decision, I return to them below.

[66] The issue in this motion comes down to the final element of the test: whether the impugned words were defamatory, in the sense that they would tend to lower Fraser's reputation in the eyes of a reasonable person.

[67] The Courts have clearly established this element of the test is a question of law (*Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 516 (Ont. C.A.) ("***Mantini***"), at para. 10). The Courts have also clearly stated that an objective standard is applied when addressing this question. In *Colour Your World Corp. v. Canadian Broadcasting Corp.* (1998), 38 O.R. (3d) 97 (Ont. C.A.), Abella, J.A. (as she then was) wrote:

> A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of the society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one [at para. 14].

[68] In this case, the question becomes whether the March 9, 2021 E-mail "had a tendency to injure the reputation of [Fraser]" or "lower [Fraser] in the estimation of right-thinking members of society generally and in particular to cause [Fraser] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem."

[69] Fraser's argument is that the March 9, 2021 E-mail unlawfully lowered his reputation because it blamed him for MacIntosh-Wiseman's decision to both leave Mac Mac & Mac permanently (i.e. not return after completing her term as CEO of REN) and, he says, to abandon the private practice of law altogether. Fraser insists that this false and libellous narrative was manufactured to hide the fact that MacIntosh-Wiseman was an abject failure as a lawyer and partner. She had no future in law. Rather than simply admit that, Fraser says, she chose to publicly blame him for her own shortcomings. As part of that same argument, Fraser insists that when MacIntosh-Wiseman left the firm on April 1, 2019, to take a position with REN, it was a one-way, irreversible, and permanent decision because a majority of partners would never allow her to return. Fraser says that the partnership decided to "style" or "spin" MacIntosh-Wiseman's departure as a leave of absence because this "adopted messaging to the world outside of the Partnership… for good business or goodwill purposes and in the hope that this may pay off for the Partnership (Fraser affidavit sworn February 15, 2019, at para. 92). Internally within the partnership and in reality, Fraser says it was clear that MacIntosh-Wiseman was simply leaving before her partners forced her to go. Characterizing her departure as "leave" was a pretense or charade.

[70] The more important point for present purposes is Fraser's insistence that his conflicting evidence raises numerous significant and genuine issues of material facts such that this action cannot be summarily dismissed at this stage and, as such, the action must be allowed to proceed towards trial.

[71] Fraser is correct in law that the moving party (MacIntosh-Wiseman, in this case) only progresses further along the sequential *Shannex* pathway towards this legal question if, based on the admissible evidence, there are no genuine disputes around the material facts.

[72] In this case, the alleged disputes of material fact largely boil down to concerns around context. Fraser says that there are significant and genuine factual issues which are material to a proper assessment of whether the March 9, 2021 E-mail constitutes *prima facie* defamation in the circumstances.

[73] On the question of context, the following statement from the concurring judgment of LeBel, J. in *WIC Radio v. Simpson*, 2008 SCC 40 ("***WIC Radio***"), is an appropriate starting point:

> Relevant factors to be considered in assessing whether a statement is defamatory include: whether the impugned speech is a statement of opinion rather than of fact; how much is publicly known about the plaintiff; the nature of the audience; and the context of the comment [at para. 69].

[74] I turn now to a review of the material facts. In my view, the facts material to the claim are:

1. At para. 50 of Fraser's affidavit sworn February 15, 2024, he states:

> a. in fiscal year 2014, the Defendant[4] had a billings target of $275,000, but **failed to meet that target by $88,161 and worked 622 hours less than her hourly target;**
>
> b. in fiscal year 2015, the Defendant had a billings target of $285,000, but failed to meet that target by $97,033 and worked 293 hours less than her hourly target;
>
> c. in fiscal year 2016, the Defendant had a billings target of $292,000, and exceed that year that target by $458,178, but only worked 19 hours more than her hourly target;
>
> d. in fiscal year 2017, the Defendant had a billings target of $302,000, but **failed to meet that target by $14,008 and worked 255 hours less than her hourly target;**
>
> e. In fiscal year 2018, the Defendant had a billings target of $302,000 and exceeded that target by $5,200 or possibly roughly $7,300 with an adjustment shown in certain records, **but worked 193 hours less than her hourly target.**
>
> [Emphasis and double emphasis in Fraser's affidavit.]

2. MacIntosh-Wiseman was supported by her father and senior law partner at the firm: Bruce MacIntosh.[5] Mr. MacIntosh engaged MacIntosh-Wiseman to help with client matters. One file was known as "File X". It significantly increased MacIntosh-Wiseman's billings in 2016 and 2018 – the two years where she exceeded her financial billing targets. Mr. MacIntosh also

[4] Fraser's original affidavit sworn February 15, 2024, misspelled "Defendant" as "Defenant" through para. 50. However, Fraser subsequently filed a supplementary affidavit sworn February 20, 2024, which attaches a new version of the original affidavit where these typos were corrected. Out of deference to this effort, I have corrected the typos in my decision. However, to ensure transparency, I am equally compelled to make a note of this issue.

[5] For reasons that are unclear, a significant portion of Fraser's affidavit evidence is devoted to an attack on Mr. MacIntosh who is depicted as a controversial, polarizing, and divisive force in the firm. I make no comment regarding Mr. MacIntosh's legacy at the firm. Respectfully, this evidence is irrelevant for the purposes of this decision.

engaged MacIntosh-Wiseman in a personal injury file. In this way, Mr. MacIntosh helped prop up MacIntosh-Wiseman's financial contributions to the firm, although the uncontroverted fact is that she still failed to consistently meet financial contribution targets.

3. This basic financial information supporting these conclusions would have been equally available to all firm partners and the office manager (i.e. the people who received the impugned March 9, 2021 E-mail).

4. MacIntosh-Wiseman took a leave of absence from Mac Mac & Mac as of April 1, 2019, when she began a two-year term as CEO of REN. At the time of her departure, there were lingering, unresolved issues around the extent to which MacIntosh-Wiseman would remain involved in firm matters and firm files during her leave of absence.

5. On Saturday, March 30, 2019, MacIntosh-Wiseman sent an e-mail to the entire firm announcing her imminent departure for REN. The e-mail ended with an oblique suggestion that she would still be at the firm working while on leave. That suggestion concerned Fraser.

6. On Sunday, March 31, 2019, Fraser sent an e-mail to the firm partners, including MacIntosh-Wiseman. In that e-mail, he questioned:

> a. whether MacIntosh-Wiseman would be working on firm files during her leave and, if so, what were the corresponding expectations or terms (e.g. billable hours and compensation); and
>
> b. whether the firm should fix a deadline for MacIntosh-Wiseman to advise if she was returning.

7. Fraser's responding e-mail triggered a response from MacIntosh-Wiseman. From this point forward, only MacPhee (a managing partner) would be copied on the exchange.

8. As MacIntosh-Wiseman and Fraser traded e-mails through the night of March 31, 2019, the tone became more heated. At 12:01 a.m. on April 1, 2019, Fraser sent a more severe and personal e-mail criticizing MacIntosh-Wiseman's historical contributions to the firm as a law partner.

9. MacIntosh-Wiseman wrote MacPhee the next morning (April 1, 2019) that Fraser's email caused her to consider resigning from the partnership. Later that same afternoon, Fraser apologized to MacIntosh-Wiseman for the timing of his e-mail and the manner in which it was delivered. He neither mentioned, nor apologized for, the substance of his criticism of MacIntosh-Wiseman.

10. After MacIntosh-Wiseman left for REN on April 1, 2019, in meetings where MacIntosh-Wiseman was not present, Fraser admits that he and other partners privately mocked MacIntosh-Wiseman and exchanged insulting jokes about her work style.

11. On March 8, 2020, MacIntosh-Wiseman resigned from the partnership. Her resignation was retroactive with an effective date of December 31, 2019.

12. In or around March 2021, about a year after MacIntosh-Wiseman left the firm, MacPhee spoke to MacIntosh-Wiseman. During this conversation, MacPhee said that Fraser said, or implied to, MacIntosh-Wiseman's former partners that:

a. Fraser knew MacIntosh-Wiseman's long-term career intentions and had for some time;

b. Fraser and MacIntosh-Wiseman were on close social terms; and

c. MacIntosh-Wiseman backed away from managing partner duties in 2018 for reasons that were related to [MacPhee].

13. This information prompted MacIntosh-Wiseman to write the impugned March 9, 2021 E-mail (Schedule A) to Fraser which lies at the heart of his claims of defamation in this action.

[75] For the reasons which follow, I find that there is no genuine issue of material fact. By way of explanation, I have broken down the material facts summarized above into separate chronological components. With each component, I include comments explaining my decisions and taking into account the restrictions which constrain my ability to resolve any such genuine disputes of material fact and including certain prohibitions around weighing evidence, evaluating credibility, etc. (see para. 45 above).

[76] *There is no genuine issue or dispute over the following material facts:*

1. *At para. 50 of Fraser's affidavit sworn February 15, 2024, he states:*

   i. *in fiscal year 2014, the Defendant had a billings target of $275,000, but **failed to meet that target by $88,161 and worked 622 hours less than her hourly target;***

   ii. *in fiscal year 2015, the Defendant had a billings target of $285,000, but failed to meet that target by $97,033 and worked 293 hours less than her hourly target;*

> *iii.* *in fiscal year 2016, the Defendant had a billings target of $292,000, and exceed that year that target by $458,178, but only worked 19 hours more than her hourly target;*
>
> *iv.* *in fiscal year 2017, the Defendant had a billings target of $302,000, but* ***failed to meet that target by $14,008 and worked 255 hours less than her hourly target;***
>
> *v.* *In fiscal year 2018, the Defendant had a billings target of $302,000, and exceeded that target by $5,200 or possibly roughly $7,300 with an adjustment shown in certain records,* ***but worked 193 hours less than her hourly target."***
>
> *[Emphasis and double emphasis in Fraser's affidavit.]*
>
> 2. *MacIntosh-Wiseman was supported by her father and senior law partner at the firm: Bruce MacIntosh. Mr. MacIntosh engaged MacIntosh-Wiseman to help with client matters. One file was known as "File X". It significantly increased MacIntosh-Wiseman's billings in 2016 and 2018 – the two years where she exceeded her financial billing targets. Mr. MacIntosh also engaged MacIntosh-Wiseman in a personal injury file. In this way, Mr. MacIntosh help prop up MacIntosh-Wiseman's financial contributions to the firm although the uncontroverted fact is that she still failed to consistently meet financial contribution targets.*
> 3. *This basic financial information supporting these conclusions would have been equally available to all firm partners and the office manager (i.e. the people who received the impugned March 9, 2021 E-mail).*

[77] MacIntosh-Wiseman does not dispute the accuracy of these facts as stated by the Plaintiff. She challenged the relevance of this information. Respectfully, I disagreed. These facts provide context which is relevant to the judgment of a reasonable, right-thinking, ordinary person assessing whether the March 9, 2021 E-mail was defamatory.

[78] Counsel for MacIntosh-Wiseman cross-examined Fraser around whether other partners also did not hit their billings target but, again, there was no question around the fact that these targets existed for partners at the firm.

[79] Fraser argues that the historical context regarding MacIntosh-Wiseman's financial contributions as a partner raise issues around credibility that cannot be resolved at a motion for summary judgment. Respectfully, I disagree.

[80] The financial data summarized above was not contested by MacIntosh-Wiseman. Uncontested, uncontroverted evidence does not necessarily give rise to credibility issues simply because it may cast a negative light on one party. Moreover, the Court in a motion for summary judgment is entitled to draw inferences which are strongly supported by uncontested evidence (see para. 45(4)(c) above).

[81] Fraser seeks to expand on this financial information by offering his own subjective and conclusory opinions:

> 1. MacIntosh-Wiseman "…did not have a sustainable practice on her own and absent her being supported and effectively "propped up" by her father's files" (Fraser's affidavit sworn February 15, 2024, at para. 69); and
>
> 2. MacIntosh-Wiseman "did not have a standalone sustainable practise without being supported and "propped up" by her father on his files and in circumstances where her father's future time of practising law was limited" (Fraser's affidavit sworn February 15, 2024, at para. 102).

[82] The criticisms in Fraser's affidavit are relatively subdued compared to much harsher statements reserved for submissions. In written argument, Fraser states:

> 1. MacIntosh-Wiseman was "unable to 'cut it' in private practice" and "…survived as a partner longer than otherwise would have been the case simply by virtue of her father "propping her up" with billings on his files" (Fraser's written submissions at para. 4);
>
> 2. MacIntosh-Wiseman was "… grossly unprofessional in breaching and disregarding her obligations to her law partners for years" (Fraser's written submissions at para. 7);
>
> 3. MacIntosh-Wiseman showed "…disgraceful disregard for her fiduciary obligations to her partners and the Firm" (Fraser's written submissions at para. 7);
>
> 4. MacIntosh-Wiseman was "… a failure as a law partner, who could not or would not meet her obligations and fiduciary duties to her partners; whose own partners mocked her and were glad to be clear of her" (Fraser's written submissions at para. 34); and
>
> 5. MacIntosh-Wiseman was "… a failure in private practice, who habitually did not meet her obligations to her partners and carried on is such a fashion in a particularly disrespectful way toward the end of 2018, whose partners did not respect but rather mocked her, whose partners were glad to see her gone" (Fraser's submissions at para. 59).

[83] Respectfully, Fraser's subjective and conclusory opinions regarding how MacIntosh-Wiseman's financial performance should be described is neither material nor does it give rise to a genuine issue of material fact. Fraser's personal views of MacIntosh-Wiseman's value to the firm have no bearing on the question as to whether an ordinary, right-thinking member of society would consider the March 9, 2021 E-mail defamatory.

[84] *There is no genuine issue or dispute over the following material facts:*

1. *MacIntosh-Wiseman left Mac Mac & Mac as of April 1, 2019, when she began a two-year term as CEO of REN; and*

2. *At the time of her departure for REN (April 1, 2019), there were lingering, unresolved issues around the extent to which MacIntosh-Wiseman would remain involved in firm matters and firm files during her leave of absence.*

[85] There is no dispute MacIntosh-Wiseman left Mac Mac & Mac on April 1, 2019, to take up her new role as CEO of REN.

[86] As to how MacIntosh-Wiseman's departure should be characterized or labelled, Fraser alleges that:

1. MacIntosh-Wiseman's departure was not a leave of absence. On the contrary, it was a permanent and irrevocable decision to abandon the firm because MacIntosh-Wiseman would never be able to return. Thus, Fraser says, "MacIntosh-Wiseman 'jumped ship' before she was 'pushed' from the Former Firm partnership, under the pretense of a "leave". Her partners were glad to have her gone before having to make more difficult decisions in the face of her performance" (Fraser's written submissions at para. 5);

2. MacIntosh-Wiseman "jumped ship" because she was a failed partner who did not have a sustainable practice - and she knew it. When MacIntosh-Wiseman left for REN, he says, the die was cast. According to Fraser, any suggestion that MacIntosh-Wiseman was entitled to return to the firm after REN (or exercise an option to return) was illusory and false. Fraser says the partnership would not never have allowed MacIntosh-Wiseman back into the firm after her leave ended; and

3. A "majority of partners" shared this view (Fraser Affidavit sworn February 14, 2024, at paras. 100 – 102 and 107).

[87] Fraser further acknowledges that the firm publicly stated that MacIntosh-Wiseman's departure was a leave of absence – and not a permanent departure.

However, he says the partnership manufactured false narrative in which MacIntosh-Wiseman's departure would be "notionally styled" as a leave (Fraser affidavit sworn February 15, 2024, at paras. 92 and 95). Fraser also calls this public "messaging" a "façade" or "euphemism" (Fraser affidavit sworn February 15, 2024, at paras. 93 and 104). In reality, Fraser says, "… there was no legitimate intention on the part of the Partnership of her returning to the Firm as a practicing Partner after her term with the Pictou REN" (Fraser affidavit sworn February 15, 2024, at para. 105).

[88] This same argument is repeated in Fraser's Second Amended Statement of Claim as being the only contextual evidence relevant to properly understanding the circumstances surrounding MacIntosh-Wiseman's departure for REN. At paras. 17 – 20 of his Second Amended Statement of Claim, Fraser alleges:

> 17. At the end of MMM fiscal year 2018, the Defendant was (without partnership consent or approval) gone from the MMM firm pursuing matters of personal interest and not supporting firm or client needs for what cumulatively amounted to two (2) out of the last three (3) months, while over the same period of time other lawyers were taxed over capacity with work and could have used assistance.
>
> 18. The Defendant herself knew that her father's retirement was in the near future and that with him gone and his practice or his files no longer inflating or propping-up her billings, or effectively carrying her within the MMM firm, she would not have a sustainable practice and would not be able to continue with MMM in the long term (despite the firm's reasonable and relatively modest expectations).
>
> 19. Accordingly, the Defendant announced that she was looking to depart from the practice of law to take a position with a new Regional Enterprise Network and leave the firm beginning in 2019, styling it as a "leave".
>
> 20. The Defendant's departure from the practice of law being styled a "leave", was notional for all practical purposes. Her notional "leave," was her way of departing in recognition of the difficult reality that with her father's time continuing to practice being limited, she did not have a sustainable future in the private practice of law, with the MMM firm or otherwise. Accordingly, the Defendant announced that she was looking to depart from the practice of law to take a position with a new Regional Enterprise Network and leave the firm beginning in 2019, styling it as a "leave".

[89] Fraser says that he personally "did not like engaging in such false messaging", but went along with it "for the benefit of the Partnership, recognizing that the Defendant joining the Pictou REN was for all practical purposes her way of leaving the Former Firm" (Fraser affidavit sworn February 15, 2024, at para. 95).

[90] For the purposes of this motion, Fraser says that these disputed allegations raise a genuine issue of material fact that cannot be resolved in a motion for summary judgment.

[91] Respectfully, I disagree.

[92] Fraser relies upon the following evidence in support of these allegations regarding the "partnership's" perspective on MacIntosh-Wiseman:

> 1. Fraser's personal recollections of discussions with certain unnamed partners (Fraser affidavit sworn February 15, 2024, at paras. 93 and 101 – 102); and
>
> 2. A statement attributed to Gerald Green in December 2018 when MacIntosh-Wiseman was discussing the possibility of moving to REN. Fraser says that Mr. Green described MacIntosh-Wiseman's possible departure as the "solution to our problem" which Fraser says referred to MacIntosh-Wiseman's departure and a convenient way to rid the firm of an underperforming partner (Fraser affidavit sworn February 15, 2024, at para. 91).

[93] As a preliminary observation, Fraser offers no support for the proposition that MacIntosh-Wiseman's partnership interest was extinguished as of April 1, 2019. The undisputed facts are that:

> 1. MacIntosh-Wiseman's partnership interest remained intact until March 8, 2020, when she resigned; and
>
> 2. MacIntosh-Wiseman's resignation was retroactive and effective December 31, 2019 – not April 1, 2019.

[94] Fraser's arguments are not built on a legal reality but, rather, on what he characterizes as the effective, practical reality given the views of an unnamed majority of partners. In other words, even if MacIntosh-Wiseman may still have technically remained a partner, the plain truth was that she would never have been allowed to return. And, he continues, MacIntosh-Wiseman knew before taking up the job at REN that "departing the Firm under the pretense of a "leave" was not fully and unanimously supported by the Partnership, as I was clear in expressing in that [December, 2018] meeting that I was not pleased with what the Defendant was proposing and did not view it is [sic] in keeping with her Partnership obligations" (Fraser Affidavit sworn February 15, 2024, at para. 97).

[95] A party seeking to raise a genuine issue of material fact cannot rely on bare allegations with no evidentiary foundation. In this case, the supporting evidence

offered by Fraser in support of his allegations is incapable of supporting the claim of material facts in dispute.

[96] It is problematic that Fraser does not name the "majority of partners" who allegedly shared his views regarding MacIntosh-Wiseman, and supported describing MacIntosh-Wiseman's departure as "leave" when, in reality, she would not be permitted to come back. The fact that Fraser may have voiced concerns during a December 2018 partnership meeting is, respectfully, of no legal moment. It does nothing more than confirm that he did not support her departure. It does not provide any evidentiary support for the allegation that the "partnership" did not have a "legitimate intention" of allowing her to return.

[97] At best, a majority of unnamed partners may have privately hoped MacIntosh-Wiseman would not ask to return. However, even if that sort of speculative evidence was admissible (which it is not), it does not give rise to a genuine issue of material fact because bare assertions of the private future hopes of unnamed partners cannot be elevated into evidence in the support of the sort of effective, practical reality that Fraser seeks to develop as a genuine issue for trial.

[98] Setting aside the problematic nature of the evidence, the uncontroverted statements in Fraser's affidavit regarding MacIntosh-Wiseman's leave of absence are exactly the opposite of what he was saying in private e-mails to his partners as MacIntosh-Wiseman was leaving (i.e. not externally "messaging" MacIntosh-Wiseman's departure for the public). For example:

> 1. In an e-mail sent Sunday, March 31, 2019, at 4:53 p.m., Fraser asked his partners, "Whether or not Sarah [MacIntosh-Wiseman] is going to be working on files, <u>while on leave</u>" (*emphasis added*). In a responding e-mail sent at 2:59 p.m. on April 1, 2019, MacPhee (a managing partner) responds: "<u>Yes</u> for 2019. 2020 to be decided based on how 2019 goes" (*emphasis added*). There is no suggestion that the managing partner was glad to see MacIntosh-Wiseman go;
>
> 2. In Fraser's original e-mail sent Sunday, March 31, 2019, at 4:53 p.m., Fraser says that the firm should set a deadline for MacIntosh-Wiseman to notify the firm "whether she <u>is</u> coming back at the ended of the 2-year REN stint" (*emphasis added*). He does not say that MacIntosh-Wiseman needs to request the right to return, subject to partnership approval. He does not say that the partnership retained the right to deny her return or that, in fact, a majority had already decided she could not return. He does not say that the deadline for MacIntosh-Wiseman to decide whether she is returning is irrelevant because, regardless, she was not welcome back. In her responding

e-mail sent at 2:59 on Monday, April 1, 2019, MacPhee responds, “I would suggest September 1, 2020 but this is just a suggestion. Not married to it.” In a further e-mail sent at 10:38 a.m. on Thursday, April 4, 2019, Fraser comments:

> I understood a leave of absence was approved (hence the first question expressly saying "while on leave"), but as part of that Gerald indicated that the firm would want in advance of the 2 year mark confirmation of what Sarah's plan is then. If it remains then that Sarah is coming back at the two year mark and nothing had changed in terms of intention, that should be easy enough just to confirm. But if things change, in fairness to us we should have notice of that in advance of the two year mark. Sept 1, 2020 seems reasonable.
>
> [*Emphasis added*.]

[99] Moreover, during cross-examination, Fraser agreed that there was no suggestion MacIntosh-Wiseman would be expelled from the partnership in the spring of 2019 or that there was ever a motion to compel her resignation. Indeed, there is no admissible evidence that any unnamed “majority of partners” ever communicated to MacIntosh-Wiseman that her leave was only “notional” or that the partnership had reached the conclusion that there was no “legitimate intention” of allowing her to return.

[100] In short, this is not a question of weighing evidence because the evidence presented in support of a genuine issue of material fact cannot reasonably be given any weight. Respectfully, genuine issues of material fact cannot be generated through the views of unnamed persons or based on uncorroborated statements around an alleged communications strategy which is clearly contradicted by all the admissible contemporaneous evidence, including Fraser’s own communications at the time.

[101] In my view, Fraser’s affidavit evidence on this point is reminiscent of the following statement from the Nova Scotia Court of Appeal in *Risley v. MacDonald*, 2022 NSCA 76: “His [Risley, the party opposing summary judgment] position is contrary not only to the evidence put forward by Ms. MacDonald [the party moving for summary judgment], but by his own words as evidenced by all of the e-mail communications. A self-serving affidavit is not sufficient in and of itself to create a triable issue, in the absence of any supporting evidence (*Guarantee* , ¶31)” (at para. 70). In other words, bald present-day statements that are clearly contradictory to contemporaneous e-mails and unsupported by any other evidence cannot be

transformed into genuine issues of material fact sufficient to avoid summary judgment.

[102] As an aside, and having no bearing on this decision, I am compelled to observe a paradox embedded within Fraser's arguments. As indicated, Fraser says that as of April 1, 2019 (when MacIntosh-Wiseman left for REN), he and an unnamed "majority of partners" had reached a breaking point with her. They had finally determined that MacIntosh-Wiseman was a hopelessly disappointing law partner – and that she would never be allowed back. In other words, they had irrevocably decided that her departure for REN on April 1, 2019, was permanent. To use Fraser's language, MacIntosh-Wiseman simply "jumped" before she was "pushed".

[103] If that were so, and if Fraser and an unnamed "majority of partners" are seen to reflect the reasonable perspective of ordinary, right-thinking people, then MacIntosh-Wiseman's break from the firm was a foregone conclusion on the day she left for REN – and it had nothing to do with Fraser. In other words, upon receiving the March 9, 2021 E-mail, they would know the full context. They would know that any attempt by MacIntosh-Wiseman to blame Fraser was wrong. The March 9, 2021 E-mail could not have lowered the estimation of Fraser in their minds. If anything, it would have lowered their estimation of MacIntosh-Wiseman. In either event, this e-mail could not be defamatory.

[104] In any event, respectfully, there is no genuine issue of material fact that MacIntosh-Wiseman's departure for REN was a leave of absence. As of April 1, 2019, there is no genuine issue of fact that MacIntosh-Wiseman was a partner on leave who maintained the clear option to return as a partner upon completing her term at REN. On this, all parties agree that at no time did the firm ask MacIntosh-Wiseman to relinquish her partnership interest or move to expel her from the firm.

[105] *There is no genuine issue or dispute over the following materials facts:*

> 1. *On Saturday, March 30, 2019, MacIntosh-Wiseman sent an e-mail to the entire firm announcing her imminent departure for REN. The e-mail ended with a suggestion that she would still be at the firm working while on leave. That suggestion concerned Fraser.*
>
> 2. *On Sunday, March 31, 2019, Fraser sent an e-mail to the firm partners, including MacIntosh-Wiseman. In that e-mail, he questioned:*
>
> > *a. whether MacIntosh-Wiseman would be working on firm files during her leave and, if so, what were the corresponding expectations or terms (e.g. billable hours and compensation); and*

b. whether the firm should fix a deadline for MacIntosh-Wiseman to advise if she was returning.

3. *MacIntosh-Wiseman replied but only copied Fraser and MacPhee (a managing partner) on the responding -email.*

4. *MacIntosh-Wiseman and Fraser traded e-mails throughout the night. As time wore on, the tone became more heated. At 12:01 a.m. on April 1, 2019, Fraser sent a more personal e-mail rebuking MacIntosh-Wiseman for her failure to contribute as a law partner.*

5. *MacIntosh-Wiseman wrote MacPhee the next morning (April 1, 2019) that Fraser's e-mail caused her to consider resigning from the partnership. Later that same afternoon, Fraser apologized to MacIntosh-Wiseman for the timing of his e-mail and the manner in which it was delivered. He neither mentioned, nor apologized for, the essence of his message which was critical of MacIntosh-Wiseman's performance as a law partner. The conversation cooled and returned to a discussion around additional, potential terms that might apply while MacIntosh-Wiseman was on leave.*

[106] As indicated, MacIntosh-Wiseman took a leave of absence to work as the CEO of REN for a two-year term, beginning April 1, 2019.

[107] As of the date MacIntosh-Wiseman left for REN (April 1, 2019), two issues remained unresolved:

1. Whether MacIntosh-Wiseman could/should be working on firm files while she was at REN. If so, what terms would govern any such ongoing work in terms of compensation and firm expectations for MacIntosh-Wiseman; and

2. When MacIntosh should be required to notify the firm if she was not returning to Mac Mac & Mac.

[108] Those unresolved issues became the topic of an e-mail exchange between Fraser, MacIntosh-Wiseman, and MacPhee over the weekend leading up to MacIntosh-Wiseman's first day at REN (Monday, April 1, 2019). The exchange continued until Thursday, April 4, 2019. The evidence indicates that during this period of time, the parties communicated with one another by e-mail only. By way of summary:

1. At 4:36 p.m. on Saturday, March 30, 2019, MacIntosh-Wiseman sent an e-mail to the entire law firm confirming she was leaving as of April 1, 2019, but that her departure was not permanent. This initial e-mail concluded:

"I'll still be kicking around the office as well. Look forward to seeing you all around the coffee pot soon."

2. These concluding lines suggested to Fraser that MacIntosh-Wiseman would continue to work on firm files while on leave with REN. That possibility caused him some concern. By e-mail sent to his partners (including MacIntosh-Wiseman) at 4:53 p.m. on Sunday, March 31, 2019, Fraser raised questions including:

> a. "[W]hether or not [MacIntosh-Fraser] is going to be working on files while on leave"; and
>
> b. Setting a date "… by which [MacIntosh-Fraser] will advise whether she is coming back at the ended [sic.] of the of 2 year REN stint" and, as well, the possibility of "interim arrangements" to assist MacPhee completing existing work.

3. Fraser's questions prompted an immediate response from MacIntosh-Wiseman sent to Fraser (copy to MacPhee). She said that her ongoing involvement at the firm had been discussed with the firm's managing partners (Gerald Green and MacPhee) but agreed that nothing was put to paper;

4. In a reply e-mail sent at 6:03 p.m. on March 31, 2019, (copy to MacPhee), Fraser acknowledged that MacIntosh-Wiseman "…wanted some limited ongoing work, without much by way of specifics, but not agreement or discussion around it." Fraser also said that he did not want to undermine whatever MacIntosh-Wiseman "… may be after, if it did not prejudice us [i.e. the remaining partner] over the next two years" [i.e. MacIntosh-Wiseman's intended term at REN]. That said, Fraser affirmed that there was no agreement regarding any ongoing involvement on firm files; and that he "would rather have someone in the harness carrying a full file load";

5. Fraser's word choice triggered MacIntosh-Wiseman to reply about four hours later, at 10:12 p.m., repeating some of Fraser's word choice back to him, in quotations marks. She said that she "[had] not 'wanted' limited ongoing work. Nor [had she] been 'after' anything." She explained that she was motivated by a desire to help and suggested that Fraser speak with MacPhee, who had discussed these matters with MacIntosh-Wiseman. She concluded: "If [Fraser's] preference is that [MacIntosh-Wiseman] not continue to do work for the firm then it would be helpful to know that explicitly so that we can discuss next steps. If it is another issue (or issues) then let's be clear about exactly what lies at the root so we can figure out how to move forward, whether together or separately."

6. MacIntosh-Wiseman's use of quotation marks to highlight Fraser's words similarly triggered Fraser. He adopted the same strategy. In an e-mail sent at 12:01 a.m. on April 1, 2019, Fraser told her that there was nothing "loaded" in his "syntax". Nevertheless, he responded in kind by focussing on MacIntosh-Wiseman's use of the word "preference". He launched into a criticism of MacIntosh-Wiseman which was personal and pointed. He wrote:

> My "preference" is not you [MacIntosh-Wiseman] working effectively only one out of three months, as was the case when you were frittering off on your personal interests over the firm's at the end of 2018 (while others were drowning). My "preference" is not a variation of that frittering off that has been formalized for the next two years while the rest of us keep the lights on. Do not even begin the [sic] to put a glaze on any aspect of this as something you are undertaking for the firm." My "preference" would be you working, as my partner, taking file responsibility and pulling the same weight.

This e-mail is important to the allegations in this action because MacIntosh-Wiseman recalled this e-mail (and it forms the focus of) her subsequent March 9, 2021 E-mail that, in turn, lies at the heart of this dispute. I refer to this e-mail as the "**12:01 a.m. April 1, 2019, e-mail**".

Fraser agrees that his e-mail was a "blast" but insists that MacIntosh-Wiseman "deserved it", and that the e-mail "bluntly but fairly and accurately lays bare the full reality of matters to the Defendant" and that MacIntosh-Wiseman was "fairly and accurately called out for what she was. She deserved it. It was long over-due" (Fraser's written submissions, at paras. 6, 7, and 59). As indicated, Fraser distinguishes what he would describe as unvarnished, honest, straight-talk from MacIntosh-Wiseman's March 9, 2021 E-mail, which he alleges is a libellous lie.

7. Early the next morning (7:29 a.m.), MacIntosh-Wiseman responded by writing to MacPhee alone. She expressed surprise at Fraser's comments and asked that they be shared with the other partners. She concluded:

> I'll consider how to respond and circle back to you but it's clear that we'll be talking about me leaving the partnership while will include my $75,000.[6] Not exactly how I had wanted this to happen.

8. By the afternoon of Monday, April 1, 2021, the tone cooled. The e-mail exchange resumed at 2:44 p.m., when Fraser acknowledged that MacIntosh-Wiseman was probably in line with information received from the managing partners (MacPhee and Gerald Green), and he apologized for the timing of his

[6] This figure relates to the $75,000 which MacIntosh-Wiseman invested in the capital of the firm.

12:01 a.m. e-mail. He did not refer to or apologize for his criticisms of MacIntosh-Wiseman's performance as a partner. He said:

> I understand now and acknowledge that the comments in your coffee-pot e-mail were probably consistent with what messaging from Julie or Gerald would have caused someone in your shoes to think made sense. So for my raising issue with you around any premature messaging in the e-mail, I am sorry. Probbly [sic] not a material point now, but I still acknowledge and apologize on the point. This is not under any direction or duress from Julie. I owe you that acknowledgement and apology.

9. Shortly after this e-mail, MacPhee proposed a number of terms that would apply while MacIntosh-Wiseman was on her leave of absence. The discussion around MacPhee's recommended terms continued over the next few days. By e-mail dated April 4, 2019, and sent at 11:59 a.m., Fraser commented that: "The recommendations will be approved and I am not going to be hung up on that. I understand and respect Julie's thinking. The sun is not going to stop rising based on any of these decisions."

[109] There is no genuine dispute with respect to these material facts. The supporting evidence is contained in an uncontroverted, private, email exchange between the parties and the firm's managing partner. There is no suggestion that the emails are somehow ambiguous or inaccurate. Respectfully, any attempt to contradict the plain language of the emails would constitute self-serving, bald declarations which, as indicated, do not give rise to a genuine dispute of material fact (see paras. 94 – 101 above).

[110] I am compelled to address a further, subsequent piece of evidence filed by MacIntosh-Wiseman in rebuttal. On April 21, 2021, as Mac Mac & Mac was teetering on the edge of collapse, MacIntosh-Wiseman wrote an email to another partner (Mary Jane MacDonald) hoping to effectively alter or reverse her earlier decision to resign on March 8, 2020, with an effective date of December 31, 2019. She wrote:

> As you are aware, I departed the firm on March 31, 2019. I requested a formal withdrawal from the partnership, but was asked by the partnership to delay the formal processing of the withdrawal until December 31, 2019 for the singular reason that it would be an inconvenience to the partnership and accounting team to have to process the withdrawal part way through the year.
>
> For all intents and purposes, effective April 1, 2019 I no longer acted as a partner, nor was I involved in any partnership meetings, discussions or decisions.

(Rebuttal Affidavit of MacIntosh-Wiseman sworn February 23, 2024, Exhibit B)

[111] She asked the partnership to pass a motion indicating that her resignation was effective April 1, 2019, and not December 31, 2019, as she previously decided. There is no evidence that the partnership ever acted on MacIntosh-Wiseman's attempts to rescind or re-write her previous decision. The uncontroverted evidence is that MacIntosh-Wiseman resigned on March 8, 2020, effective December 31, 2019. Subsequent and self-serving attempts to alter that fact do not give rise to a genuine issue of material fact.

[112] *There is no genuine issue or dispute over the following materials fact:*

1. *The issues regarding additional, potential terms that might apply to MacIntosh-Wiseman's leave were never resolved.*

2. *After MacIntosh-Wiseman left for REN on April 1, 2019, and in meetings where MacIntosh-Wiseman was not present, Fraser admits that he and other partners privately mocked MacIntosh-Wiseman and exchanged insulting jokes about her work style.*

3. *On March 8, 2020, MacIntosh-Wiseman resigned from the partnership. Her resignation was retroactive and effective as of December 31, 2019.*

[113] As indicated, there is no genuine dispute that MacIntosh-Wiseman's departure from the firm on April 1, 2019, to work at REN was a leave of absence.

[114] Following MacIntosh-Wiseman's departure, Fraser states that he would participate with other partners in mocking MacIntosh-Wiseman and making jokes at her expense regarding her new role at REN. At paras. 105 – 106 of Fraser's affidavit sworn February 15, 2024, he says:

> … nearly all other Partners within the Former Firm joked and mocked the Defendant from time to time, in terms of her lack of work ethic and her tendencies to speak of planning and organizational endeavors in grandiose sounding or trendy or "fluffy" language, which sounded impressive but really conveyed very little or represented very little actually being done; the common theme of such jokes or mocking was that while the Defendant did not work appropriately or meet obligations as a lawyer, she seemed to be suited for the role she had assumed within the Pictou REN, when she publicly made statements or presentations which spoke to many plans and intended initiatives, while seeming to accomplish little that most of the world could see or appreciate in terms of something actually being done or undertaken with benefits and results achieved; a recurring theme of such

> jokes and mocking of the Defendant by her former Partners was that she had found her "niche" with her new job.
>
> Mary Jane Saunders joined the Partnership effective calendar-year 2020, but was invited to attend Partner meetings earlier and in her first Partnership meeting various Partners (including Joel Sellers, Eric Atkinson, Julie MacPhee and I) engaged in an instance of some of such mocking and joking about the Defendant and her tendencies (as described elsewhere herein); Mary Jane Saunders later told me, and I do verily believe it to be true, that she was shocked and surprised, as she previously thought everyone within the Partnership liked each other and got along, and that she was unaware of the problems with the Defendant as someone meeting Partnership.

[115] No issue was raised with respect to this evidence. MacIntosh-Wiseman was not present during the times when these insults about her were exchanged. She could neither confirm nor deny Fraser's admissions. But she also did not challenge or dispute these particular admissions on the part of Fraser. I also note that MacPhee was a partner at the relevant time. She filed a rebuttal affidavit but limited her evidence to certain aspects of MacIntosh-Wiseman's original affidavit. She did not speak to this aspect of Fraser's testimony.

[116] This evidence is relevant to a particular contextual issue: the nature of the audience ("***WIC Radio***" at para. 69). In this case, the audience that received the impugned March 9, 2021, e-mail were the partners and office manager in a law firm. These were the same people who, according to Fraser, would privately disparage MacIntosh-Wiseman for her work at REN. I return to this issue below.

[117] Neither party disputes that:

1. MacIntosh-Wiseman resigned from the firm on March 8, 2020; and
2. Her resignation was effective December 31, 2019.

[118] The parties do not agree as to precisely when, prior to March 8, 2020, MacIntosh-Wiseman made the final decision to resign from the firm. There is a related debate around whether MacIntosh-Wiseman continued to seek the opportunity to do work on firm files while also serving as CEO of REN. The competing evidence may be distilled as follows:

1. MacIntosh-Wiseman testifies that she made the final decision to resign within a few months or weeks after receiving Fraser's 12:01 a.m. April 1, 2019, e-mail and that these two events were directly linked. MacIntosh-Wiseman further testifies that she only formally resigned on March 8, 2020 (effective December 31, 2019), at MacPhee's request, "to avoid my resignation prematurely triggering year end mid-way through the fiscal year

under the Firm's Partnership Agreement" (MacIntosh-Wiseman Rebuttal Affidavit sworn February 23, 2024, at para. 10). MacPhee filed a rebuttal affidavit where she agreed with MacIntosh-Wiseman's recollections on this point (MacPhee Rebuttal Affidavit sworn February 23, 2024, at para. 10).

2. As indicated, Fraser argues that MacIntosh-Wiseman's departure for REN on April 1, 2019, was permanent and that she would never have been allowed to return. As such:

> a. Fraser's 12:01 a.m. April 1, 2019, e-mail had nothing to do with her leaving the firm. The die was cast. MacIntosh-Wiseman was leaving the firm for good. Surrendering her partnership interest was an inevitable, foregone conclusion; and
>
> b. The fact that MacIntosh-Wiseman resigned on March 8, 2020 (effective December 31, 2019), was a mere formality. MacIntosh-Wiseman was simply and belatedly accepting the practical reality that a "majority of partners" would not have accepted her return.

3. Fraser also testifies that MacIntosh-Wiseman's version must be rejected because he recalls MacIntosh-Wiseman continually asking about the possibility of working on firm files at the end of 2019 and early 2020. He says, for example, that during a partnership meeting in January or February 2020, MacIntosh-Wiseman was "… still trying to cling to the Firm in some way to get to do work for the Firm" (Fraser affidavit sworn February 15, 2024, at para. 28). This evidence contradicts the suggestion that MacIntosh-Wiseman had already decided to resign well before December 31, 2019. Interestingly, during this meeting of January or February 2020, Fraser refers to a limited verbal exchange with MacIntosh-Wiseman regarding the 12:01 April 1, 2019, e-mail. Fraser says that MacIntosh-Wiseman told him she was surprised and hurt by the e-mail. Fraser says he responded that there were a lot of things about MacIntosh-Wiseman's performance as a partner that concerned him. Fraser recalls that the conversation on that issue went no further and otherwise remained friendly. However, while MacIntosh-Wiseman may have been hurt, Fraser says that she did not mention a decision to leave the partnership.

[119] I agree that this is not the sort of factual dispute which can be resolved in a motion for summary judgment. However, respectfully, the precise date upon which MacIntosh-Wiseman might have subjectively settled, in her own mind, to resign is immaterial. Not every particle of controverted evidence gives rise to a genuine issue of material fact. Respectfully, the questions around precisely when MacIntosh-Wiseman decided in her own mind to resign (but failed to legally do so) is not

material to the claims. On this issue and for the purposes of this action, the relevant contextual evidence is limited to MacIntosh-Wiseman's actual, binding decision to resign on March 8, 2019. My reasons for this conclusion include:

1. The impugned March 9, 2021, e-mail is expressly and inextricably connected to actually resigning from the partnership and, in turn, the lingering effects of Fraser's 12:01 a.m. April 1, 2019, e-mail. It does not connect the 12:01 April 1, 2019, e-mail to her decision to take a leave of absence from the firm or accept a position at REN. Obviously, there could be no such connection because MacIntosh-Wiseman only received the 12:01 a.m. April 1, 2019, e-mail months after accepting the position at REN, only several hours before she began work at her new job.

2. The impugned March 9, 2021, e-mail is clearly connected not simply to taking a leave of absence but, more importantly, to severing her relationship as a partner in the law firm. MacIntosh-Wiseman says that she "walked away from not only a law practice that I loved and excelled at, but a partnership and firm that I considered family" (*emphasis added*). She deliberately separated the terms "partnership" and "firm" and further confirmed that she did not "walk away" until both events occurred (i.e. she had left both the firm and the partnership). She also states that Fraser's earlier 12:01 a.m. April 1, 2019, e-mail "started the snowball rolling through which my partnership and planned future disappeared almost overnight" (*emphasis added*).

3. Neither MacIntosh-Wiseman, nor Fraser, nor the remaining law partners at Mac Mac & Mac were in a position to consider that MacIntosh-Wiseman severed her relationship from the partnership until March 9, 2021, when the decision was finalized. The critical date confirming MacIntosh-Wiseman's departure from the partnership is her formal resignation on March 8, 2020. That is when MacIntosh-Wiseman left the firm and, not inconsequentially, could insist upon the return of her capital investment which all parties agree was $75,000. In assessing the relevant context for assessing whether the March 9, 2021, e-mail is *prima facie* defamatory, respectfully, it is immaterial to explore what MacIntosh-Wiseman's remaining partners might have privately wanted, or what MacIntosh-Wiseman subjectively felt prior to formally confirming her resignation from the partnership. Nothing coalesced and resulted in a decision to "walk away" from the partnership until MacIntosh-Wiseman formally resigned. Until that occurred, the parties' subjective hopes and beliefs could hold no sway over the views of a reasonable, ordinary, and right-thinking person considering whether the March 9, 2021, e-mail was defamatory or publicly placed Fraser in a false light.

4. It bears repeating that Fraser's arguments in this claim are premised entirely on the allegation that MacIntosh-Wiseman's departure for REN on April 1, 2019, must be viewed as a permanent and irrevocable decision to leave the partnership. As mentioned above, that is an unsupported bare declaration that cannot give rise to a genuine issue of material fact.

[120] *There is no genuine issue or dispute over the following materials facts:*

1. *In or around March 2021 MacPhee spoke to MacIntosh-Wiseman.*

2. *During this conversation, MacPhee said that Fraser told or implied to MacIntosh's former partners that:*

a. Fraser knew MacIntosh-Wiseman's long-term career intentions and had for some time;

b. Fraser and MacIntosh-Wiseman were on close social terms; and

c. MacIntosh-Wiseman backed away from managing partner duties in 2018 for reasons that were related to [MacPhee].

3. *This information prompted MacIntosh-Wiseman to write the impugned March 9, 2021, e-mail (Schedule A) to Fraser which lies at the heart of this action.*

[121] No party disputes these facts. However, Fraser alleges that there is an issue which relates to the discussion between MacIntosh-Wiseman and MacPhee. In his affidavit sworn February 15, 2024, Fraser describes his concerns with this evidence:

> With respect to paragraph 24 of the Wiseman Affidavit, I do not have disclosure or discovery to flush [sic] out the allegations therein in terms of what Julie MacPhee is alleged to have said or communicated to the Defendant. However, the Defendant did not contact me to determine whether what Julie MacPhee had allegedly said or communicated to the Defendant was true or not, or perhaps some distorted and inaccurate version of something different that may have been said, before sending her March 9, 2021 email to me [at para. 132].

[122] As indicated, I did not adjourn this motion although I provided directions with respect to, among other things, limited disclosure in advance of the motion to address Fraser's particular concern that he would be confronted with disclosure for the first time while being cross-examined.

[123] Fraser cross-examined MacIntosh-Wiseman on this issue. He elected not to cross-examine MacPhee. His cross-examination of MacIntosh-Wiseman on this

issue was brief. MacIntosh-Wiseman confirmed that this discussion with MacPhee likely occurred over the phone and not in person. She further said there were unlikely to be any e-mails regarding this exchange, but there would be texts. However, she continued, those texts would have been deleted by an automated setting on her phone.

[124] More importantly, in my view, Fraser's evidence does not raise a genuine issue of material fact with respect to the information which MacIntosh-Wiseman says she received from MacPhee, and which prompted her to write the March 9, 2021, e-mail. Recall that MacIntosh-Wiseman's March 9, 2021, e-mail begins:

> I have recently learned that you told/implied to my former partners: 1) that you know my long term career intentions, and have for some time; 2) that we are on close social terms; and 3) that I backed away from managing partner duties in 2018 for reasons that were related to Julie [MacPhee].

[125] Fraser's affidavit neither acknowledges, nor speaks to, nor denies, nor challenges that MacIntosh-Wiseman received this information from MacPhee regarding statements attributed to Fraser. He does not dispute saying or implying to MacPhee that, for example:

1. He knew MacIntosh-Wiseman's long-term career intentions and had for some time;

2. He and MacIntosh-Wiseman were on close social terms; and

3. MacIntosh-Wiseman backed away from managing partner duties in 2018 for reasons that were related to [MacPhee][7].

[126] Fraser's affidavit evidence is focussed on how MacIntosh-Wiseman responded to this information or how she characterized his actions in response to this information. In particular, MacIntosh-Wiseman cautioned Fraser that he did not have authority to speak on her behalf. The e-mail says:

> …you [Fraser] have no right to speak on my behalf or to hold yourself out as knowing my mind."
>
> …

[7] At para. 30A(h) of Fraser's Second Amended Statement of Claim, he refers to that portion of the March 9, 2021, e-mail in which MacIntosh-Wiseman says: "I have no idea what conversation you are referencing regarding my decision to step back from managing partner duties, but I can assure you that I discussed every aspect of that decision openly with Julie at the time, and in no way do I attribute my decision to anything negative related to Julie ...." At para 30B(viii) he states that these words are defamatory because they mean "the Plaintiff Fraser misrepresented or outright lied over Sarah MacIntosh Wiseman's stated reasons for previously walking away from managing partner duties within the former MMM firm". Although Fraser specifically identifies this issue in his pleadings, again, he does not provide evidence in which he denies passing this information along to MacPhee. Fraser's bald statements in a pleading are not evidence which can give rise to a genuine issue of material fact.

> I now understand that you used that one courtesy meeting as a basis to suggest to my former partners that I have confided my long term career intentions to you. Donn, I want to be crystal clear - you do not have any right to speak on my behalf, nor to leave an impression that you know my mind.
>
> …
>
> But I will not permit you to reference me in conversations that I am not part of, nor to give others the impression that you are informed to speak about my thoughts/plans, past or present.

[127] Upon receiving this e-mail from MacIntosh-Wiseman on March 9, 2021, Fraser immediately sent an e-mail to Bruce MacIntosh about it. Fraser does not deny passing along the specific information which MacPhee relayed to MacIntosh-Wiseman. Rather, Fraser claims that the information was "inappropriately disclosed…including from without prejudice communications". Fraser's e-mail goes on to say that he could not tell if there was a misrepresentation or if MacIntosh-Wiseman was drawing inappropriate conclusions based on whatever MacPhee said (MacPhee affidavit sworn January 9, 2024, Exhibit "Q").

[128] In the motion for summary judgment, Fraser only takes issue with that limited and specific issue (i.e. MacIntosh-Wiseman's response to the information received from MacPhee). Fraser says that: "I did not hold out that I had authority to speak on behalf of the Defendant, at the Partnership table or otherwise" (Fraser affidavit sworn February 15, 2024, at para. 133).

[129] Respectfully, in a motion for summary judgment, a responding party has an obligation to put their best foot forward. I appreciate that Fraser was not present when MacPhee attributed certain statements to him. However, if Fraser did not make the statements attributed to him (or if those statements were somehow misrepresented), it was incumbent upon him to provide evidence to that effect. He has not done so. Instead, he focussed on how MacIntosh-Wiseman used this information as a basis for warning and reminding him that he was not authorized to speak on her behalf.

[130] Fraser's evidence does not raise a genuine issue of material fact regarding what he told MacPhee and the fact that this conversation prompted MacIntosh-Wiseman to write the March 9, 2021, e-mail. These factual findings do not require a weighing of evidence or an assessment of credibility. Fraser has an obligation to put his best foot forward, with admissible evidence, to establish a genuine issue of material fact arises. His evidence on this point fails to do so.

[131] There is a final factual issue related to this period of time which bears mentioning. Fraser alleges that MacIntosh-Wiseman sent her March 9, 2021, e-mail at an acutely sensitive and volatile moment in the firm's history. Fraser says existing divisions within the partnership created an "extremely acrimonious state of affairs" and that the firm was "on the verge of imploding". And he says that he was at the centre of the controversy. The turmoil engulfed and eventually consumed the firm. By late September 2021, the partnership was dissolved. Mac Mac & Mac was no more.

[132] MacIntosh-Wiseman admits to being generally aware of personal conflicts among her old partners and that things were not good. But she says that she did not know the details.

[133] Any controversy around the extent of unrest within Mac Mac & Mac (or how close the firm was to total collapse) when MacIntosh-Wiseman sent her March 9, 2021, e-mail is immaterial to the threshold legal questions which are germane to this motion (*prima facie* defamation and publicly placing Fraser in a false light):

1. The uncontroverted evidence is that MacIntosh-Wiseman formally resigned as a partner on March 9, 2020, effective December 31, 2019. She no longer had any financial stake or legal interest in the firm; and

2. The claims against MacIntosh-Wiseman have nothing to do with the current state of Mac Mac & Mac. In the March 9, 2021, e-mail, MacIntosh-Wiseman does say:

> While I do not know the details of what is occurring at the firm, I do know that things are complicated…. Whatever is happening with the partnership in 2021 is not something that involves me.

However, none of these statements comprise the specific language that Mr. Fraser was, at law, required to identify to sustain his claims (see para. 30A of his Second Amended Statement of Claim).

3. Evidence around this issue (conflict within the firm on March 9, 2020) is relevant to other aspects of the claim including the allegation of malice and residual damages that might flow if MacIntosh-Wiseman is found liable. Indeed, Fraser properly incorporates this issue into his pleading for that specific reason. At para. 32 of his Second Amended Statement of Claim, Fraser alleges that:

> … the various publications and/or republications of the March 2021 Email, for which the Defendant is responsible, were with malice (including with *male fides* and improper intent or purposes, including vindictiveness and

> animosity toward the Plaintiff Fraser, an intent to harm the Plaintiffs and/or in furtherance of alignment with and/or support of other former partners in the former MMM firm in their disputes with the Plaintiffs, and/or with recklessness as to the propriety of the truth or accuracy of the content and any inference which might be drawn therefrom), and/or that content of the March 2021 Email would exceed any privilege that might otherwise be proven.

However, again, it is not relevant to the specific, preliminary legal issues in play here.

QUESTION 2: IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT THEN: DOES THE CHALLENGED PLEADING REQUIRE THE DETERMINATION OF A QUESTION OF LAW, EITHER PURE, OR MIXED WITH A QUESTION OF FACT?

[134] The answer to this question is "Yes, the challenged pleading does require the determination of a question of law". For present purposes and having regard to the material facts summarized above:

1. Does the March 9, 2021, e-mail constitute *prima facie* defamation?
2. Does the March 9, 2021, e-mail publicly place Fraser in a false light?

QUESTION 3: IF THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND IF THERE IS A RESIDUAL QUESTION OF LAW, DOES THE CHALLENGED PLEADING HAVE A REAL CHANCE OF SUCCESS?

[135] In assessing the residual questions of law, it is helpful to more precisely distill Fraser's allegations regarding the March 9, 2021, e-mail and address each individually. Fraser's legal claim is that the following allegations defamed him and publicly placed him in a false light:

1. Fraser's primary allegation is that the March 9, 2021, e-mail suggested that Fraser engaged in inappropriate, cruel and dishonest actions which poisoned MacIntosh-Wiseman's view of private practice; stripped her of the family legacy attached to Mac Mac & Mac (a firm that her ancestors founded); prompted MacIntosh-Wiseman to conclude that she would never again be law partners with Fraser; and otherwise destroyed MacIntosh-Wiseman's bright future as a lawyer in private practice (Second Amended Statement of Claim, paras. 30A and 30B(i) – (iv));

2. Fraser lied about or misrepresented MacIntosh-Wiseman to his law partners at Mac Mac & Mac and also purported to speak on her behalf when he lacked the authority to do so (Second Amended Statement of Claim, paras. 30A and 30B(v));

3. Fraser owed MacIntosh-Wiseman an apology for his inappropriate actions in connection with Mac Mac & Mac and has yet to offer that apology (Second Amended Statement of Claim, paras. 30A and 30B(v));

4. Fraser acted coyly, deceptively and/or deceitfully in his interactions with MacIntosh-Wiseman and inappropriately abused MacIntosh-Wiseman's trust for his own strategic purposes regarding matters unfolding at Mac Mac & Mac (Second Amended Statement of Claim, para. 30A and 30(b)(vi)); and

5. Fraser misrepresented or lied about MacIntosh-Wiseman's reasons for walking away from her role as managing partner with Mac Mac & Mac (Second Amended Statement of Claim, para. 30A and 30(b)(vii)).

[136] Fraser's pleading does not have a real chance of success with respect to these questions of allegation and related questions of law. I begin with several general observations and then comment on the specific allegations.

[137] As a preliminary matter and contrary to Fraser's allegations, the March 9, 2021 Email does not say or suggest that MacIntosh-Wiseman blamed Fraser for her both leaving Mac Mac & Mac as well as private practise altogether. Respectfully, the March 9, 2021 Email is clearly limited to her decision to exit the Mac Mac & Mac partnership – not the private practice of law entirely.

[138] Also contrary to Fraser's allegations, the March 9, 2019 Email does not solely blame Fraser or, more specifically, Fraser's 12:01 a.m. April 1, 2019 Email as the sole reason for her decision to resign from the Mac Mac & Mac partnership. MacIntosh-Wiseman states that his email "started the snowball rolling". Thus, MacIntosh-Wiseman's affidavit sworn January 9, 2024 similarly states that Fraser's 12:01 a.m. April 1, 2019 Email sent on the eve of her first day at REN "made me feel disrespected, and was directly responsible in the totality of the circumstances for my walking away from both the practice of law and from the Firm that my Grandfather had started, and that my father worked at for almost 5 decades" (at para. 14). In his own affidavit, Fraser rejects MacIntosh-Wiseman's affidavit as false but similarly refers to a broader factual context. Overall, Fraser's 12:01 a.m. April 1, 2019 Email initiated a decision-making process that unfolded within a broader context and culminated in MacIntosh-Wiseman's resignation on March 8, 2020.

[139] As to the residual question regarding defamation and publicly placing Fraser in a false light, the contextual analysis includes the nature of the audience which received the impugned publication. In addition to the statement of LeBel, J. at para. 69 of *WIC* referenced above, the Supreme Court of Canada also noted in *Crookes v Newton*, [2011] 3 SCR 269, that "[d]efamatory meaning in the words may be

discerned from "all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented" (para 39).[8] Similarly, in *Defamation Law: A Primer*, 2d ed (Toronto: Carswell, 2013), Raymond E Brown writes that "[t]he nature of the audience to whom the words are addressed is an important part of the context" of determining defamatory sense and meaning (57), and that "a court will take into consideration the expertise and knowledge of the audience to whom the words were, or were likely to be, conveyed, and the effect the words are calculated to produce on persons familiar with the subject matter of the publication" (61). And Peter A. Downard writes that "[w]here a publication is directed to a particular class of persons, the court may consider whether the words are reasonably capable of being defamatory in the view of reasonable members of that class. The sensibilities of the class may be such that the words would have no impact on reputation": *Law of Libel in Canada* at 43.

[140] In *Halifax County Condominium Corporation No. 38 et al. v. Meshal*, 2023 NSSC 288, the defendant brought a motion to set aside a default judgment finding her liable for defamation in two emails concerning the management of her condominium building. Norton J set aside the default judgment. While this case did not involve a motion for summary judgment and the facts are clearly distinguishable, Norton, J similarly found that an assessment into whether a communication was *prima facie* defamatory, which would require consideration of "the significance of the words in the particular community where the words were published" (at para. 62).

[141] In this case, after the hearing concluded, Fraser asked for the opportunity to provide further submissions on this issue. I did not re-open the hearing for submissions but did allow the parties to provide additional, highlighted caselaw for my consideration, which they did.

[142] The additional authorities submitted by Fraser generally confirm that the test for defamation is measured against the views of:

> 1. an "ordinary and reasonable person, and not a meaning by someone who may be naturally inclined either to attribute the best or worst" (Raymond E Brown, *Defamation Law: A Primer*, 2d ed (Toronto: Carswell, 2013), p. 5-3); or

[8] Citing, *inter alia*, *Botiuk v Toronto Free Press Publications Ltd*, [1995] 3 SCR 3, at para 62, and Raymond E Brown, *The Law of Defamation in Canada*, 2nd ed (Scarborough, Ont: Carswell, loose-leaf) at p 1-15).

> 2. a "'right-thinking" reasonable person. It has been said that for words to be actionable, they must damage a person in the eyes of "right thinking persons generally", and not merely a limited class" ((Raymond E Brown, *Defamation Law: A Primer*, 2d ed (Toronto: Carswell, 2013), p. 5-133 to 5-134);

[143] I agree that the test is objective and based upon the standard of an ordinary, reasonable and right-thinking person. However, respectfully, this does not mean that the nature of the audience is irrelevant or that an ordinary, reasonable, and right-thinking person would artificially sever any consideration as to the alleged defamatory communication from the nature of the audience.

[144] In this case, the March 9, 2021, e-mail was distributed among a small number of partners and office manager within a law firm who:

1. Personally know the individuals involved and of the subject of the publication; and
2. Had personal knowledge of, for example:
    a. MacIntosh-Wiseman's financial contributions as a partner in the years leading up to departing for REN and her subsequent resignation as a partner; and that her father, Bruce MacIntosh provided support by engaging her on certain of his files;
    b. The fact that MacIntosh-Wiseman did not enjoy the unanimous support of the partners at Mac Mac & Mac in the months leading up to her resignation; and
    c. The fact that MacIntosh-Wiseman and Fraser exchanged harsh words in the past.

[145] In short, they would be able to put MacIntosh-Wiseman's March 9, 2019, e-mail in its proper perspective – including MacIntosh-Wiseman's historical performance and including her and Fraser's exchanges during the period surrounding her leave of absence.

[146] As important, a reasonable and right-minded ordinary person would not see MacIntosh-Wiseman's comments in the March 9, 2019, e-mail as tending to lower Fraser's reputation having regard to the nature of this unique, small audience. The impugned comments relate almost entirely to a time when Fraser and MacIntosh-Wiseman were law partners and the time period leading up to MacIntosh-Fraser's resignation from the law firm.

[147] A law partnership is a cooperative but also a competitive environment. The same group of partners generate revenues but then must divide a finite pool of profits between themselves. In doing so, personal criticisms regarding a partner's work ethic, contributions to the firm, and relative value to the firm will inevitably, frequently, and necessarily arise.

[148] The uncontested fact is that MacIntosh-Wiseman's March 9, 2021, e-mail was not distributed beyond those persons and partners who would be familiar with the partnership environment and relevant context. A reasonable, right-minded ordinary person would not see the March 9, 2021, e-mail as tending to lower Fraser's reputation or as anything more than the sort of criticisms made by law partners about other partners or in defence of themselves. Certainly MacIntosh-Wiseman's March 9, 2021, e-mail is not more actionable than:

1. Fraser's 12:01 a.m. April 1, 2019, e-mail criticizing MacIntosh-Wiseman – regardless of whether the subjective beliefs expressed in this email were justified; or

2. Fraser's admitted participation (with other partners) in joking about and mocking MacIntosh-Wiseman's working style and efforts while she was CEO at REN. I note that this occurred during a time when MacIntosh-Wiseman was still their partner on a leave of absence. This same conclusion holds despite the fact that the subjective views of Fraser and the other partners who engaged in this mocking were not in a position to observe and evaluate MacIntosh-Wisman's work at REN.

[149] With respect to certain, more specific allegations, a reasonable and right-thinking ordinary person would readily know that:

1. Fraser lacked the authority to speak on MacIntosh-Wiseman's behalf. Any statement to the contrary would not diminish Fraser's reputation;

2. MacIntosh-Wiseman's observations regarding Fraser's carefully crafted apologies would not diminish Fraser's reputation because:

    a. Neither MacIntosh-Wiseman nor anyone else can legally demand an apology; and

    b. More importantly, Fraser's comments in his 12:01 a.m. April 1, 2019, e-mail may have been unnecessary and severe, but they are not defamatory in the confines of a law partnership, as discussed;

3. The March 9, 2021, e-mail does not say that Fraser acted coyly, deceptively and/or deceitfully in his interactions with MacIntosh-Wiseman

> and inappropriately abused MacIntosh-Wiseman's trust for his own strategic purposes regarding matters unfolding at Mac Mac & Mac (Second Amended Statement of Claim, para. 30A and 30(b)(vi)). At most, in the March 9, 2021, e-mail MacIntosh-Wiseman expresses her understanding and concern that Fraser "used one courtesy meeting as a basis to suggest to my former partners that I have confided my long term career intentions to you." Fraser does not deny making certain communications to his partners following a meeting with MacIntosh-Wiseman. The fact that MacIntosh-Wiseman would express concerns about that would not diminish Fraser's reputation in the eyes of a reasonable and right-minded, ordinary person.
>
> 4. MacIntosh-Wiseman denied Fraser's assertion about MacPhee being the reason for MacIntosh-Wiseman walking away from managing partner duties at the firm. Again, Fraser does not deny making these statements. The fact that MacIntosh-Wiseman felt compelled to provide her perspective on Fraser's version of these events would not diminish Fraser's reputation in the eyes of a reasonable and right-minded, ordinary person particularly given that MacIntosh-Wiseman had long left the firm, had not continuing involvement in the firm, and the issues were singularly related to her.

[150] Finally, as indicated, Fraser also alleges that MacIntosh-Wiseman's March 9, 2021, e-mail publicly placed him in a false light, a separate tort.

[151] The tort of publicly placing an individual in a false light has been recognized in Ontario but not in Nova Scotia. In *Candelora v. Feser*, 2020 NSSC 177 ("***Candelora***"), Arnold, J. refers to this tort but primarily for comparative purposes when attempting to assess how to approach the quantification of general damages for a violation of Nova Scotia's *Intimate Images and Cyber-Protection Act*, S.N.S. 2017, c. 7.

[152] Assuming the tort may be actionable in Nova Scotia, the claim involves an invasion of privacy, and one element of the tort is whether the plaintiff has been placed in a false light in a way which would be highly offensive to a reasonable person (*Candelora* at para. 26 quoting from *Yenovkian v. Gulian*, 2019 ONSC 7279 which summarizes the elements of the tort at para. 170). For the same reasons given above, the March 9, 2021, e-mail would not be highly offensive to a reasonable person in the unique circumstances of this case.

CONCLUSION

[153] The action is dismissed.

[154] I ask that the Defendant please prepare a draft Order for the Plaintiff's review with costs to be determined. The Order shall indicate that costs, if any, are to be determined. The process for finalizing the form of Order shall otherwise be in accordance with Civil Procedure Rule 78.04.

[155] If the parties are unable to agree on the issue of costs, I will accept written submissions on or before January 10, 2025.

Keith, J.

Schedule "A"
March 9, 2021 E-mail

Donn,

Please note that I am sending this email from my personal account to keep it private, but I do not intend to engage in this discussion further. I wanted to acknowledge your recent invitation for a beer, and to explain to you why I am going to decline.

I have recently learned that you told/implied to my former partners: 1) that you know my long term career intentions, and have for some time; 2) that we are on close social terms; and 3) that I backed away from managing partner duties in 2018 for reasons that were related to Julie. [In case you are wondering, no email exchanges have been provided to me, but the narrow fact that you made those communications to the partnership was shared with me.] Donn, none of those messages are accurate or truthful. Regardless, you have no right to speak on my behalf or to hold yourself out as knowing my mind.

When you asked me to meet for a beer in the Fall, I explained my preference to let bygones be bygones. Not because I had any change of perspective on your emails from March/April 2019, but because I did not see any value in discussing the matter. I still consider your emails to have been one of the most unkind, uncollegial, unprofessional and inaccurate exchanges I have ever had with anyone, let alone someone I had considered a friend and partner.

Let me be clear. The emails you sent at midnight the night before I started my partnership-supported leave were directly responsible for the fact that I walked away from not only a law practice that I loved and excelled at, but a partnership and firm that I considered family. The partnership and firm that my grandfather started; my father then led; and which I intended to practice with for the remainder of my career (excepting only my intended temporary two year leave). Your angry, late night email started the snowball rolling through which my partnership and planned future disappeared almost overnight. While I could have turned back to address the issue with you to its conclusion, I knew that the partnership had enough on its plate in dealing with the news of Gerald's health. His situation gave me

enough perspective to realize the right thing to do was to walk quietly away and let the partnership deal with that more important issue.

When you eventually reached out to speak with me around Christmas, almost two years later, the time for an apology had long since passed.

That said, as a courtesy to you, and out of respect for what I had considered to be a long standing relationship of mutual respect, I agreed to meet. I do not wish to hold you any ill will. To the contrary, I have considered it a personal and professional loss that our relationship ended as it had. I had always held you and your opinion in high regard. I accepted your apology in January, notwithstanding the fact that you carefully apologized only for the timing of your emails, not the content.

I now understand that you used that one courtesy meeting as a basis to suggest to my former partners that I have confided my long term career intentions to you. Donn, I want to be crystal clear - you do not have any right to speak on my behalf, nor to leave an impression that you know my mind. When you asked about my future plans, I gave you polite and evasive responses, as I had no desire to have a real discussion about my future plans with you. Nor did I see value in being blunt about the fact that I would never rejoin a partnership with you, given the disrespectful way you treated me.

I have no idea what conversation you are referencing regarding my decision to step back from managing partner duties, but I can assure you that I discussed every aspect of that decision openly with Julie at the time, and in no way do I attribute my decision to anything negative related to Julie. Julie and I have remained in contact and friends through that period, and to this day. We do not always share a common approach to issues, but we have always been able to discuss any differences openly, and respectfully.

While I do not know the details of what is occurring at the firm, I do know that things are complicated. But since you have reached out to ask to meet for another drink, I thought it best that I tell you that I know you have misrepresented our earlier discussions. I have no interest in debating my perspective with you, nor in holding grudges or ill will. Whatever is happening with the partnership in 2021 is not something that involves me. But I will not permit you to reference me in

conversations that I am not part of, nor to give others the impression that you are informed to speak about my thoughts/plans, past or present.

Donn, my statements that I hope you and Heather are well and that I miss the MMM crew were genuine. But I do not appreciate being used for strategic convenience in matters that are not related to me, nor in having anyone else purport to speak on my behalf. I am not sharing this email with the partnership, just as I had not communicated with them about our earlier meetings.

Sarah