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Judge rules Marley not defamed at election meeting

BY JANE SEYD, NORTH SHORE NEWS OCTOBER 5, 2011

A B.C. Supreme Court judge has rejected a West Vancouver man's claim that he was defamed by comments made during a 2009 provincial all-candidates forum.

No reasonable person who attended the forum would have had their views of David Marley lowered by comments made by businessman Peter Kains, particularly since Marley immediately responded and had the last word, Justice Elaine Adair concluded.

Marley, who ran as an independent candidate in the 2009 provincial election, sued Kains - a friend and political supporter of Liberal MLA Ralph Sultan - for telling the audience at the debate that Marley was under investigation by the police and attorney general for his conduct during the 2008 civic elections.

But the judge didn't agree that Marley was harmed by that, saying Marley had an immediate opportunity to respond to Kains and it was unlikely anyone's opinion of Marley was lowered as a result.

The judge added it's clear Kains' comments did nothing to change the outcome of the election, noting Marley got only seven percent of the popular vote, compared to Sultan's 66 per cent. "The evidence is quite clear that Mr. Marley was never any threat - much less a serious threat - to Mr. Sultan, the candidate Mr. Kains was supporting," wrote Adair, adding even Marley had acknowledged Sultan's seat was "the safest Liberal seat in the province."

"At worst, Mr. Marley may have lost a few votes."

The judge also agreed with Kain's lawyer, Rodney Sieg, that all-candidates' meetings are covered by qualified privilege - meaning that generally people should be freer to question and comment on those standing for elected office, without risk of being sued.

The judge wrote the whole point of an allcandidates' forum is for voters to ask questions - sometime uncomfortable questions - and see how candidates respond. The judge said it's clear Marley, who had been active in politics for almost 40 years, understood that.

"Moreover, the content of Mr. Kains' question was reasonably appropriate in the context of a question period at an all-candidates forum prior to an election and did not exceed the scope of privilege," wrote the judge.

Contacted at his West Vancouver home, Marley said Tuesday he was disappointed in the decision. "I would have wished it to go the other way," he said.

Marley said he's still mulling over the decision and hadn't ruled out an appeal.

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Marley v. Kains,*
2011 BCSC 1306

Date: 20111003
Docket: S096526
Registry: Vancouver

Between:

David O. Marley

Plaintiff

And

Peter M. Kains

Defendant

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiff:	Don P. Baron
Counsel for Defendant:	Rodney Sieg and Lana Tsang
Place and Date of Trial:	Vancouver, B.C. September 12 to 16, 2011
Place and Date of Judgment:	Vancouver, B.C. October 3, 2011

Introduction

[1] In May 2009, the plaintiff, David Marley, was a candidate in the provincial election, running as an independent in the riding of West Vancouver-Capilano. On the evening of May 6, 2009, Mr. Marley attended an all-candidates forum at the Highlands United Church in North Vancouver. Mr. Marley estimated there were between 200 and 250 people in attendance. They included (in addition to the other candidates) Donna McMillan (Mr. Marley's wife), a number of Mr. Marley's friends and supporters and representatives of the local media. The moderator for the forum was Martin Millerchip, the editor of the North Shore News, a well-known community newspaper. The defendant, Peter Kains, was among the voters at the forum. Mr. Marley and Mr. Kains did not know one another personally.

[2] Mr. Kains lives and carries on business in the West Vancouver-Capilano riding. He intended to vote in the May 12, 2009 provincial election. He was the campaign fundraising chair for the Liberal candidate in West Vancouver-Capilano, Ralph Sultan, the incumbent. Mr. Kains had been involved in political fundraising for about 25 years. Since 2001, he had personally contributed thousands of dollars to the Liberal Party of British Columbia. Mr. Kains' habit over many years was to attend local candidates' meetings for every election at every level (municipal, provincial and federal) if he was able to do so. He explained that was why he attended the all-candidates forum on May 6, 2009. He also had a question he wanted to put to Mr. Marley, during the question period that was part of the forum.

[3] Prior to the all-candidates forum, Mr. Kains had picked up an envelope delivered to his place of business. The envelope, which was unaddressed, contained the first two pages of a letter dated January 20, 2009 and addressed to the attention of Sergeant Wright at the West Vancouver Police Department. The return address was on the top of the first page. However, parts of the text had been blacked-out or redacted. Mr. Kains did not know who had written the letter. But the text identified the author as someone who was a municipal councillor until November 2008 and then a candidate for mayor. As a result, Mr. Kains took it seriously. The letter indicated the author had a complaint against Mr. Marley in connection with the November 2008 municipal elections. The description of that complaint had not been redacted and mentioned an e-mail Mr. Marley had circulated on November 14, 2008.

[4] Mr. Kains took the pages he had received with him to the all-candidates forum. On the back of the first page, he sketched out some notes for the question he wanted to ask. He also made some notes on the second page. For the question period, names were drawn out of a hat. When his turn came, Mr. Kains stepped up to a microphone, pages in his hand, and said:

> Mr. Marley is being investigated at the direction of the Attorney General's office with respect to the November 08 civic elections in West Vancouver, which were an unseemly mess at best in

> terms of the revelations that came out afterwards, and don't you think, Mr. Marley, that it be incumbent on you to let the voters of West Van-Capilano be aware that you are under this serious investigation because there could be consequences if you are successful?

[5] Mr. Marley responded immediately, and said to those gathered at the forum:

> Well Mr. Kains, this comes as complete news to me. I would be very surprised if the Attorney General's ministry was investigating me with respect to the November 2008 election. I and the candidate that I supported, Mr. Michael Lewis, filed a complaint with the police in West Vancouver because of two groups, one of which is called West Vancouver Citizens for Good Government, and the another one, we don't know who he or it or they are, something called a Low Tax Low Growth organization, who were spending money to try to affect the outcome of that election without complying with the provisions of the Local Government Act. So the only investigation that I am aware of is the one that Councillor Lewis and I triggered. So I'm not aware of any investigation Mr. Kains and quite frankly I think that's quite underhanded of you to raise it at this public meeting without at least having raised it with me first.

[6] According to a DVD recording made at the meeting, the moderator then asked Mr. Marley:

> Moderator: (unclear) . . . I could go further David [Mr. Marley], if you want to ask him [Mr. Kains] what the basis for that question is, I can . . .
>
> Mr. Marley: No.
>
> Moderator: No. Okay. Three more questions.

The DVD recording shows Mr. Marley waving his hand dismissively as he said "no." Mr. Marley confirmed at trial that he waved away the opportunity offered to him by the moderator to explore the basis for Mr. Kains' question.

[7] Mr. Marley asserts that Mr. Kains' words were slanderous and defamed him, and that Mr. Kains said the words actuated by malice. Mr. Marley seeks substantial damages, including punitive damages, from Mr. Kains.

[8] In his defence, Mr. Kains denies that his words were defamatory. Mr. Kains says further that, if his words were defamatory, they were spoken on an occasion of qualified privilege, namely an all-candidates forum. In addition, Mr. Kains says that, if he is unable to make out the defence of qualified privilege, the court should recognize a new common law defence: responsible questioning. Mr. Kains denies any malice. Further, Mr. Kains denies that Mr. Marley has suffered any damages. He goes on to say that if Mr. Marley suffered any damages, it was a result of Mr. Marley's own actions after the all-candidates forum, including contacting the news media, and not as a result of anything said by Mr. Kains.

[9] Accordingly, I first must determine whether Mr. Kains is liable to Mr. Marley for defamation. If Mr. Kains is liable, then I must go on to address damages.

Background Facts

[10] Mr. Marley is now in his late fifties. He is trained as a lawyer, and he practiced for over twenty years as a litigator. Mr. Marley held a variety of unelected government positions in both Ottawa and Victoria, including director of legal services in Ottawa and an advisor to the former Attorney General Brian Smith. He was a principal in a public affairs consultancy, although, by May 2009, he had essentially retired from that work.

[11] Before the May 2009 election, Mr. Marley had about 38 years of political activity, starting in 1972. In early 2006, he co-founded a group called the "Interested Taxpayers Action Committee (or "ITAC"). Mr. Marley had gained a considerable public profile, at least locally, and was active in dealing with news media and local government. He appeared regularly before municipal council; he was quoted in local and community newspapers (particularly the North Shore News); and he had letters to the editor published.

[12] Mr. Kains was also active politically as a fundraiser and supporter of the provincial Liberal party, and its MLA in West Vancouver-Capilano, Mr. Sultan. He had never met Mr. Marley before the all-candidates forum on May 6, 2009. However, as a result of Mr. Marley's activities concerning local government matters, Mr. Kains knew of Mr. Marley. Mr. Kains testified that Mr. Marley was often mentioned in the North Shore News, often criticizing spending of the West Vancouver District council. Mr. Kains' perception of Mr. Marley was that he was a solid citizen who researched matters that he then brought to the public's attention.

[13] In the November 2008 municipal elections, one of ITAC's members, Michael Lewis, ran as a candidate for West Vancouver council. Mr. Marley supported Mr. Lewis' candidacy and served as Mr. Lewis' campaign manager. Mr. Lewis was successful in his bid for election to council. One of the mayoral candidates was Vivian Vaughan, who had been a councillor in West Vancouver between 2005 and 2008. Ms. Vaughan and Mr. Marley had become acquainted with one another, in part as a result of Mr. Marley's appearances before council.

[14] On November 14, 2008, the day before the municipal elections, Mr. Marley circulated a lengthy e-mail in support of Mr. Lewis, in which he said (among other things; *italics* and square brackets in original):

> Lastly, and most importantly, we need to elect people who have demonstrated integrity and who are prepared to stand up and speak out for the right things. If you want to know how someone will behave once elected, take a close look at how they act while seeking your vote. Against conventional wisdom [isn't that an oxymoron?] Michael Lewis refused to seek the endorsement of the *West Vancouver Citizens for Good Government*, an organization that for too long has seemingly held the keys to elected office in our community. He has spoke out loudly and repeatedly against attempts by a clandestine entity, the *Low Tax, Low Growth Association*, to influence the outcome of our election from the shadows. This group [or individual?] is spending a great deal of money to influence your vote and encourage a certain outcome in tomorrow's election. Who are these people? Or, perhaps, who is this person? What do they want in return for their anonymous spending on election advertising? Only Michael Lewis is asking. We need him on District council so he can keep asking the right questions and showing ethical leadership.

Mr. Marley urged the recipients of his e-mail to vote for Mr. Lewis and to forward his e-mail to "all you know resident in West Vancouver" with the request that they also vote for Mr. Lewis.

[15] Mr. Marley's e-mail contained a post-script that mentioned Ms. Vaughan. It states in part:

> On the matter of ethics, I was disappointed to read in today's *NS News* that Councillor Vivian Vaughan, candidate for mayor of West Vancouver, apparently sees nothing wrong with the *Low Tax, Low Growth Association* spending substantial monies in an anonymous attempt to influence the outcome of our election. Evidently, she is quite happy to see this activity continue so long as it appears to support her election bid. I suppose that I should not have been surprised by Councillor Vaughan's position given that, according to financial disclosure statements reported in the *NS News*, in 2005 she accepted $3,600 in campaign contributions from another clandestine organization, *Save Our Neighbourhoods*, which was attempting to influence the outcome of that election. . . .

[16] Mr. Marley's e-mail was forwarded to Ms. Vaughan by another individual, David Stephenson, who expressed concerns about the content of the post-script. In the evening on November 14, Ms. Vaughan sent an e-mail back to Mr. Marley, asserting that he had defamed her. Mr. Marley replied within a couple of hours, saying that he did not believe he had defamed Ms. Vaughan by mentioning the contribution from "Save Our Neighbourhoods." He said "I have expressed my opinion that this reflects poorly on your ethical sense. I believe that to be fair comment."

[17] Ms. Vaughan was not elected mayor.

[18] On November 17, 2008, Mr. Marley and Mr. Lewis formally lodged a complaint (the "Marley Complaint") with the West Vancouver Police Department concerning a possible breach of the ***Local Government Act***, R.S.B.C. 1996, c. 323, by "Low Tax, Low Growth" and "West Vancouver Citizens for Good Government." As Mr. Marley explained, there was initially some uncertainly about where the Marley Complaint should be directed. Should it be to the chief electoral officer? to the Ministry administering the ***Local Government Act***? Mr. Marley recalled being directed to the Attorney General's office, who in turn directed Mr. Lewis and him to the West Vancouver Police Department as the body handling investigation of such complaints.

[19] Mr. Marley and Mr. Lewis met with West Vancouver Police Constable Jarrett Chow. Mr. Marley left some documents from "Low Tax, Low Growth" and copies of some advertisements with Constable Chow. In turn, Constable Chow gave Mr. Marley a copy of his business card, on which the constable wrote a file number. Constable Chow forwarded the materials he received from Mr. Marley to West Vancouver Police Sergeant Wright, who then took over dealing with the Marley Complaint.

[20] Mr. Marley was concerned that the Marley Complaint be properly investigated. On December 1, 2009, Mr. Marley wrote to Mr. Sultan in his capacity as the MLA for West Vancouver-Capilano, confirming his previous advice to Mr. Sultan that he and Mr. Lewis had filed a

complaint. Mr. Marley wrote:

> As discussed, please forward this letter to BC Attorney-General Oppal, with your own covering note requesting that this matter be dealt with in a timely manner.

[21] On December 2, 2008, Mr. Marley had a letter hand-delivered to then Chief Constable Heed of the West Vancouver Police Department. In his letter, Mr. Marley stated that he had made a request through Constable Chow for a meeting with Chief Constable Heed to discuss the Marley Complaint, and repeated that request in a telephone conversation on November 19 with Sergeant Wright. Mr. Marley stated that he left a further request with Chief Constable Heed's assistant on November 28, and that, "[t]o date, neither Counsellor Lewis nor I have heard anything from your office in response to our request. To say that this is less than impressive is an understatement."

[22] Mr. Marley attached a copy of his letter to Mr. Sultan to his letter to Chief Constable Heed. He also mentioned that he and Mr. Lewis would be keeping a reporter with the Vancouver Sun up-to-date on the matter. Mr. Marley said further:

> In due course, we expect that Crown counsel, or perhaps a special prosecutor, will be appointed by the Attorney General to conduct a prosecution under the relevant provisions of the [***Local Government***] Act. At such time, we will be seeking a meeting with this individual so as to satisfy ourselves that this matter is going to be afforded the priority we believe it deserves.

[23] In early January 2009, Sergeant Wright contacted Ms. Vaughan. He told her that he was investigating the Marley Complaint. He contacted Ms. Vaughan because he understood that she had some involvement with the printing company who printed brochures for "Low Tax, Low Growth." Ms. Vaughan expressed doubts that a complaint such as the Marley Complaint was within the jurisdiction of the West Vancouver Police Department, but Sergeant Wright advised her that the Department had a legal opinion confirming it was the appropriate agency. Ms. Vaughan then indicated to Sergeant Wright that she had her own concerns about the November 2008 municipal elections and wanted an investigation into her complaints. They arranged to meet later in the month.

[24] Sergeant Wright and Ms. Vaughan met on January 22, 2009. Ms. Vaughan gave Sergeant Wright a letter addressed to him and dated January 20, 2009. This letter described the complaints about the November 2008 elections that she wished to have investigated. The first two pages of Ms. Vaughan's January 20, 2009 letter are, in fact, the two pages that Mr. Kains received, in redacted form, just before the all-candidates forum on May 6, 2009.

[25] Ms. Vaughan's letter begins:

> During your telephone call to me on Jan. 8th, you informed me that West Vancouver has obtained a legal opinion, allowing the police to investigate election complaints, even though these do not come under the criminal law. If I understand the situation correctly, the matter is now under the Attorney General's office, rather than the Community Development Ministry.

> REQUEST FOR INVESTIGATION
>
> I was a municipal councillor until November 2008, and was then a mayoralty candidate in the elections. I would appreciate it if the police could investigate my complaints, particularly with respect to the possible cumulative harm done to my campaign, and to the integrity of the municipal elections held on November 15th, 2008.

[26] On p. 1 of her letter, Ms. Vaughan then set out various parts of the "applicable legislation" she asserted were not complied with. None of the text on p. 1 was redacted in the copy of the letter Mr. Kains received.

[27] On p. 2 of her letter, Ms. Vaughan set out the details of her complaint against Mr. Marley under the heading "Complaint #2." None of this text was redacted on the copy of p. 2 received by Mr. Kains. This page also contains a description of her "Complaint #1" and the beginning of her description of "Complaint #3." All of the text concerning Complaints #1 and #3 was redacted on the copy of p. 2 received by Mr. Kains. In her complaint about Mr. Marley, Ms. Vaughan asserted that, by his November 14 e-mail, Mr. Marley became a "campaign organizer" and also defamed her, harming her reputation and campaign for mayor.

[28] As Sergeant Wright recalled at trial, he reviewed and discussed Ms. Vaughan's complaint about Mr. Marley with her. He did not believe that the complaint constituted an offence or that it was a matter for the police to investigate. However, he promised Ms. Vaughan to give the matter more attention to determine if there should be an investigation.

[29] In the following weeks, Ms. Vaughan sent additional correspondence to Sergeant Wright concerning her complaints about the November 2008 elections. In a letter dated January 28, 2009, Ms. Vaughan mentioned that:

> I was interested to hear your perspective on the intent of the new legislation, in selecting which complaints might be able to proceed. The North Shore News has already made the public aware of two complaints by Mr. Marley, and my letter listed another six.

[30] In a letter dated March 25, 2009, Ms. Vaughan added "supplementary allegations" to her complaint about Mr. Marley. At trial, Sergeant Wright could not recall whether or not he included this letter with the information he presented to the Crown, but he indicated that he would have considered it as part of his investigation.

[31] Until 2010, when a separate file was created for Ms. Vaughan's complaints, all of the material sent by Ms. Vaughan in connection with her complaints was kept by the West Vancouver Police Department in the same "key material envelope" or "KME" as the materials relating to the Marley Complaint.

[32] At trial, Sergeant Wright indicated that he submitted his report to Crown counsel around the end of April 2009. He recalled that he met with the Crown to discuss both the Marley

Complaint and Ms. Vaughan's complaints sometime after March 25, 2009 but before he completed his report to the Crown. Sergeant Wright recalled that he and the Crown discussed Ms. Vaughan's complaints and her views. His opinion in relation to Ms. Vaughan's complaints was that there had been no offence committed and no requirement for further investigation. That effectively concluded matters in connection with Ms. Vaughan's complaints, so far as the West Vancouver Police Department was concerned. Sergeant Wright's report to the Crown dealt only with the Marley Complaint.

[33] With respect to Ms. Vaughan's complaints, Sergeant Wright testified that he phoned Ms. Vaughan and left a voice-mail message for her concerning the handling of her complaints. However, Ms. Vaughan never received that message. As far as she was concerned, her complaints, including her complaint about Mr. Marley, were still being investigated, and she continued to send correspondence to Sergeant Wright, even after the provincial election on May 12, 2009. It was not until early December 2009 that Ms. Vaughan received confirmation from Sergeant Wright that, so far as he was concerned, matters in relation to her complaints had been concluded months before.

[34] Ms. Vaughan did not know Mr. Kains. She knew nothing about the redacted copy of pages 1 and 2 of her January 20, 2009 letter that Mr. Kains had received.

[35] Mr. Kains believed that he probably received the envelope containing the two pages of Ms. Vaughan's letter on May 6, 2009, the day of the all-candidates forum. He had been unable to attend other all-candidates meetings because he had been out of town. The envelope, unaddressed, had simply been left on the counter at his office. Mr. Kains did not know where the envelope came from.

[36] Mr. Kains testified that he had earlier met the Conservative candidate, who had been canvassing door to door. The two of them discussed that the Conservative candidate had been reprimanded by the Securities Commission. When he received the pages in the envelope, Mr. Kains thought that, since the Conservative candidate had revealed his problems, it was only fair that Mr. Marley do so too. Mr. Kains conceded that the only information he had about Mr. Marley was what was in the pages he had received. He conceded that he did not take any steps, after receiving the pages, to try and determine where they came from, or to contact the West Vancouver Police Department or Mr. Marley. However, he considered what was described in the pages to be a serious matter, and part of the purpose of the all-candidates forum was to provide voters with the opportunity to ask candidates questions. Mr. Kains recalled reading in the North Shore News about problems with the November 2008 elections, which, in Mr. Kains' memory, were most unseemly. Mr. Kains testified that, based on what he read in the pages he received, he believed there was an investigation of Mr. Marley, and, given Mr. Kains' involvement over many years with campaign fundraising, he considered the matter to be serious and shocking.

[37] Mr. Kains testified that he made the decision to attend the all-candidates forum on May 6 over dinner. He went to the Highlands United Church and sat in one of the pews, waiting for the meeting to start. Mr. Marley was the only candidate for whom Mr. Kains had a question, and Mr. Kains did not speak to anyone about his intention to pose a question. As I mentioned above, he wrote out some notes for his question on the pages from Ms. Vaughan's letter that he had received. In mentioning the Attorney General when asking his question, Mr. Kains was relying on what he had read in those pages.

[38] I have quoted above the words that Mr. Marley asserts are defamatory. Mr. Kains prefaced those words by stating:

> There are at least two other Liberal candidates who are under investigation, former cabinet ministers, and that is a matter of public record.

[39] Mr. Marley testified that he was surprised and shocked by Mr. Kains' question. He testified that the mention he was under investigation at the direction of the Attorney General came as a great shock to him. Nevertheless, Mr. Marley considered that he responded quite fully to Mr. Kains. The only investigation that Mr. Marley knew about concerned the Marley Complaint, and that was a full answer to Mr. Kains' question. Mr. Marley did not recall how much longer the meeting went on after Mr. Kains' question. In his evidence, Mr. Marley agreed that a person running for political office should expect to be asked some uncomfortable questions, and that it is proper to test the candidate's character. Mr. Marley also agreed that an all-candidates meeting is an important opportunity for voters to see what candidates have to say and also how a candidate answers questions. He agreed that voters would probably want to know if a candidate was under investigation.

[40] Ms. McMillan was present in the church when Mr. Kains asked his question. She testified that she was shocked, upset and "gob-smacked," and later she felt angry and embarrassed. Ms. McMillan recalled that, when Mr. Kains put his question, there was kind of an intake of breath throughout the church, and she gasped as well. She recalled later discussing with others what had happened, and that there was a general hubbub among Mr. Marley's supporters.

[41] However, Mr. Kains accepted Mr. Marley's response to his question, and that Mr. Marley did not know about any investigation other than of the Marley Complaint. Mr. Kains did not challenge Mr. Marley's response in any way. So far as any member of the public attending the forum was concerned, Mr. Marley had the last word.

[42] Moreover, the evidence is quite clear that Mr. Marley was never any threat – much less a serious threat – to Mr. Sultan, the candidate Mr. Kains was supporting. Mr. Marley frankly conceded this at trial. In his evidence, Mr. Marley described Mr. Sultan's seat as the safest Liberal seat in the province. In the election, Mr. Marley received less the 7% of the popular vote – as compared with over 66% for Mr. Sultan. Mr. Marley testified that Mr. Kains' remarks had no effect

on the outcome of the election. At worst, Mr. Marley may have lost a few votes. Mr. Marley accepted that Mr. Sultan had nothing to do with what Mr. Kains said at the all-candidates forum.

[43] On May 7, 2009, Mr. Baron, Mr. Marley's solicitor, wrote to Mr. Kains demanding publication of an apology and retraction in the May 10 edition of the North Shore News. That was not done.

[44] In a letter dated May 12, 2009, Mr. Kains wrote back to Mr. Baron, indicating that Mr. Kains would be able to provide Mr. Baron with documentation. The documentation Mr. Kains had in mind was the two pages he had received from Ms. Vaughan's January 20, 2009 letter. However, Mr. Kains never provided these documents to Mr. Baron.

[45] Instead, Mr. Kains asked a colleague, Mark Strongman, to follow up with a formal request to the West Vancouver Police Department for access to records under the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C. 1996, c. 165. The description of the information requested is in these terms:

> Details of an investigation of David O Marley + his involvement/interference in the last West Vancouver Municipal election.

[46] The West Vancouver Police Department responded by letter dated September 16, 2009, which said in part:

> I can confirm that there is an investigative file, WV08-14455, concerning an allegation of misconduct in the West Vancouver municipal election in 2008. Currently the file is being considered by Crown Counsel for charges. As such, no details of the file may be released . . . .

[47] When Mr. Kains read this, he took it at face value. He assumed – as it turned out incorrectly – that the investigative file related to an investigation <u>of</u> Mr. Marley. In fact, it related to the investigation of the Marley Complaint: in other words, an investigation requested <u>by</u> Mr. Marley. The file number was the number Constable Chow had written on the business card he gave to Mr. Marley on November 17, 2008, when Mr. Marley and Mr. Lewis made the Marley Complaint.

[48] In late July 2009, Mr. Baron rendered an account to Mr. Marley for $600 (excluding taxes) re "Campaign Legal Counsel." The time period covered is May 7 to May 11, 2009, and the description of the service is:

> All conferences, communications, enquiries and correspondence provided in investigating the basis of statements made by Peter Kains impugning the character of Mr. Marley at an all-candidates forum on May 6, 2009.

Mr. Marley relies on this account as proof of special damage.

[49] This action was filed on September 4, 2009. Shortly thereafter, Mr. Marley contacted the

editor of the North Shore News, Mr. Millerchip. At trial, Mr. Marley explained that he was concerned about a whisper campaign and that he wanted to let the people who had attended the all-candidates forum know that he was taking steps in relation to Mr. Kains' question. He explained that the only thing he could think of was contacting the North Shore News. Mr. Marley testified that he had also told Mr. Millerchip that he would let Mr. Millerchip know what he was doing.

[50] Mr. Millerchip put Mr. Marley in touch with a reporter, who interviewed Mr. Marley for an article that was published in the North Shore News on September 13, 2009. The headline was "West Van MLA candidate files slander suit."

[51] Mr. Marley could not recall if he gave the reporter a copy of the statement of claim. However, the article mentions:

> During the meeting's question period, Kains said Marley was being investigated by the attorney general's office in regard to West Vancouver's 2008 civic election.
>
> "Don't you think, Mr. Marley, that it would be incumbent upon you to let the voters of West Van-Capilano be aware that you were under this serious investigation?" said Kains, according to Marley's writ of summons.

On cross-examination, Mr. Marley agreed that, in fact, the North Shore News had not published anything about what Mr. Kains said at the all-candidates forum until Mr. Marley approached the newspaper in September 2009 in connection with the filing of this action.

[52] During the interview in September, Mr. Marley told the North Shore News reporter that he would let him know if there were any significant developments in Mr. Marley's action. Mr. Marley spoke to the reporter again for an article that was published in the North Shore News on December 4, 2009 under the headline "Questions raised over election suit." The article, which Mr. Marley agreed was a fair representation of what he had said to the reporter, began:

> INFORMATION that has come to light in a civil suit connected to the last provincial election raises questions about the world of municipal campaign funding, says a one-time provincial candidate [i.e., Mr. Marley] involved in the case.

[53] On December 5, 2009, Mr. Marley sent a lengthy e-mail message to about 200 individuals. Mr. Marley described and commented on aspects of both his claim against Mr. Kains and the statement of defence filed on behalf of Mr. Kains. Mr. Marley also commented on the Marley Complaint. He attached a copy of the December 4 article from the North Shore News to his message. The subject line of the message was "Turning over the rock." The content of Mr. Marley's e-mail appears to draw a link between Mr. Kains and the individual or individuals who were the subject of the Marley Complaint, although Mr. Marley denied that he believed there was in fact a link.

Discussion and Analysis

(a) Liability: Basic Principles

[54] A plaintiff in a defamation action 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 the plaintiff. See ***Grant v. Torstar Corp.***, 2009 SCC 61, at para. 28.

[55] Here, there is no issue concerning the second and third requirements, which are clearly met. The disagreement is over the first: are Mr. Kains' words defamatory?

[56] As Mr. Justice Cory noted in ***Botiuk v. Toronto Free Press Publications Ltd.***, [1995] 3 S.C.R. 3, at para. 62:

> [62] . . . What is defamatory may be determined from the ordinary meaning of the published words themselves or from the surrounding circumstances. In *The Law of Defamation in Canada* (2nd ed. 1994), R. E. Brown stated the following at p. 1-15:
>
> > [A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood. In determining its meaning, the court may take into consideration 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.

[57] The generally accepted test for identifying defamatory statements has often been referred to as setting a low threshold for establishing *prima facie* defamation, as Mr. Justice LeBel noted (although in *obiter*) in ***WIC Radio Ltd. v. Simpson***, 2008 SCC 40, [2008] 2 S.C.R. 420, at paras. 67-68.

[58] Mr. Justice LeBel (writing only for himself, although concurring in the result) observed (at para. 74) that "public figures may have greater opportunity to influence their own reputations for the better." He observed further (at para. 75) that "what may harm a private individual's reputation may not damage that of a public figure about whom more is known and who may have had ample opportunity to express his or her own contrary views."

[59] Mr. Sieg argues that, rather than being more vulnerable to potentially defamatory comments, Mr. Marley, by virtue of having a developed public profile, was in fact less vulnerable. I think there is some force in this argument. Mr. Kains did not know Mr. Marley, but knew of him through Mr. Marley's participation in local affairs and appearances in the North Shore News, and he considered Mr. Marley to be a "solid citizen." Moreover, in the context of the all-candidates forum, Mr. Marley had ample – and immediate – opportunity to put the record straight in response to Mr. Kains' question.

[60] Mr. Justice LeBel goes on to say, at para. 78:

> [78] Triers of fact should be mindful of ensuring that the plaintiff's reputation is actually threatened by the impugned statements before turning to the available defences. I do not mean to imply that damage to reputation must be proved, since actual harm to reputation is not required to establish defamation. However, before a *prima facie* case can be made out, there must be a realistic threat that the statement, in its full context, would reduce a reasonable person's opinion of the plaintiff.

Mr. Sieg also relies on this passage in support of his argument that Mr. Kains' words were not defamatory.

[61] Slander (which is oral defamation) requires proof of special damages, unless the impugned words were slanderous *per se*. There are four recognized categories of slander where damages are presumed to have been suffered from the very nature of the words, and thus are instances of slander *per se*: see R. E. Brown, ***The Law of Defamation in Canada*** (2nd ed. (loose-leaf)), at pp. 8-23 and 8-24. The two categories on which Mr. Marley relies are: (1) oral imputations calculated to disparage the reputation of the plaintiff in the way of his or her work, business, office, calling, trade or profession; and (2) accusations imputing the commission of a criminal offence. Moreover, Mr. Marley says that he has proved special damages in any event, namely the statement of account rendered to him by Mr. Baron for legal services.

[62] If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability. See ***Grant v. Torstar Corp.***, at para. 29. Mr. Kains relies primarily (although not exclusively) on the defence of qualified privilege. He abandoned the defences of justification and fair comment in closing submissions.

[63] The defence of qualified privilege is described by Mr. Justice Cory in ***Hill v. Church of Scientology of Toronto***, [1995] 2 S.C.R. 1130, at para. 143:

> Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. As Lord Atkinson explained in *Adam v. Ward*, [1917] A.C. 309 (H.L.), at p. 334:
>
> > . . . a privileged occasion is . . . an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[64] As McLachlin C.J.C. noted in ***Grant***, at para. 30:

> The defences of absolute and qualified privilege reflect the fact that "common convenience and welfare of society" sometimes requires untrammelled communications [citation omitted]. The law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends.

[65] The purpose of the immunity provided by the defence of qualified privilege is described in

The Law of Defamation in Canada, at pp. 13-15 to 13-19 (footnotes omitted):

> The protection ... is justified on the basis of public policy and utility, and in furtherance of the "common convenience and welfare" or "general interest" and "advantage" of society. ...
>
> The purpose of the immunity is not so much to protect the parties involved as it is to promote the public welfare. ... As Bankes J. in *Gerhold v. Baker* [[1918] W.N. 368 at 368-369 (C.A.)] said:
>
> > "It was in the public interest that the rules of our law relating to privileged occasions and privileged communications were introduced, because it is in the public interest that persons should be allowed to speak freely on occasions where it is their duty to speak, and to tell all they know or believe, or on occasions when it is necessary to speak in protection of some common interest."

[66] The factors to be considered by the court in deciding whether an occasion is one of qualified privilege were summarized by Williams J.A., speaking for the Court, in ***Moises v. Canadian Newspaper Co.*** (1996), 24 B.C.L.R. (3d) 211 (C.A.) as follows (at para. 19):

> [19] . . . There are a number of factors which a court must consider when deciding whether or not any given occasion is one of qualified privilege. In *Sapiro v. Leader Publishing Co.*, [1926] 2 W.W.R. 268 at 271, 20 Sask. L.R. 449 (Sask. C.A.), Lamont J.A. said:
>
> > In determining whether or not it is so privileged, the Judge will consider the alleged libel, who published it, why, and to whom, and under what circumstances. He will also consider the nature of the duty which the defendant claims to discharge, or the interest which he claims to safeguard, the urgency of the occasion, and whether or not he officiously volunteered the information, and determine whether or not what has been published was germane and reasonably appropriate to the occasion.

See also ***Shavluk v. Green Party of Canada***, 2010 BCSC 804, aff'd 2011 BCCA 286, at para. 76.

[67] In ***Grant***, McLachlin C.J.C. noted (at para. 34) that:

> . . . the defence of qualified privilege has seldom assisted media organizations. One reason is that qualified privilege has traditionally been grounded in special relationships characterized by a "duty" to communicate the information and a reciprocal "interest" in receiving it. The press communicates information not to identified individuals with whom it has a personal relationship, but to the public at large. Another reason is the conservative stance of early decisions, which struck a balance that preferred reputation over freedom of expression. In a series of judgments written by Cartwright J. (as he then was), this Court refused to grant the communications media any special status that might have afforded them greater access to the privilege: *Douglas v. Tucker*, [1952] 1 S.C.R. 275; *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203 . . . .

[68] Mr. Baron relies on ***Globe and Mail Ltd. v. Boland***, [1960] S.C.R. 203, and also ***Douglas v. Tucker***, [1952] 1 S.C.R. 275, to argue that Mr. Kains' defence of qualified privilege must fail.

[69] However, in ***Douglas v. Tucker***, Cartwright J. (as he then was) drew a distinction between statements published in newspapers – or "publication to the world" – and those made by voters to voters. He wrote, at p. 287:

> It has often been held that qualified privilege attaches to communications made by an elector to his fellow electors of matters regarding a candidate which he honestly believes to be true and which, if true, would be relevant to the question of such candidate's fitness for office. See, for example, Gatley on Libel and Slander, 3rd Edition, pages 250 and 251 and cases there cited. It is unnecessary on this appeal to decide whether such privilege is limited to publications made by an elector and to an elector or electors all of whom have a right to vote for the candidate about whom the communication is made and, if it is not so strictly limited, what is its extent. It is settled that whatever may be the extent of such a privilege it is lost if the publication is made in a newspaper.

[70] The legal effect of the defence of qualified privilege is to rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. Where the occasion is shown to be privileged, the good faith of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. See ***Hill***, at para. 144.

[71] However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice, or if the limits of the duty or interest have been exceeded. See ***Hill***, at paras. 145-146.

[72] The concept of malice was discussed in detail by Kirkpatrick J.A. in ***Smith v. Cross***, 2009 BCCA 529, at paras. 30 and following. At para. 34, Madam Justice Kirkpatrick noted the "helpful framework for the categories under which a finding of malice can be made" set out in ***Canadian Libel and Slander Actions*** (Toronto: Irwin Law, 2004) at p. 299 (*italics* in original):

> A defendant is actuated by malice if he or she publishes the statement:
>
> i) Knowing it was false; *or*
>
> ii With reckless indifference whether it is true or false; *or*
>
> iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; *or*
>
> iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.
>
> More than one finding can be present in a given case.

[73] With respect to the limits of the duty or interest, in ***Ward v. Clark***, 2001 BCCA 724, 95 B.C.L.R. (3d) 209, Esson J.A. (as he then was) wrote (at para. 56):

> The law was stated thus by Lord Atkinson in *Adam v. Ward*, [[1917] A.C. 309 (H.L.)] at p. 173:
>
> > These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

[74] Thus, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. See ***Hill***, at para. 147.

[75] In ***Grant***, the Supreme Court of Canada formulated a new defence to an action in defamation – the defence of responsible communication – while leaving the traditional defence of qualified privilege intact. See ***Grant***, at paras. 7 and 95. In this case, and in the event that I find the defence of qualified privilege is defeated, Mr. Sieg urges me to follow the lead in ***Grant***, and formulate another new defence: the defence of "responsible questioning."

(b) Were Mr. Kains' words defamatory?

[76] Mr. Baron submits that Mr. Kains words are defamatory, based on the test set out in ***Botiuk***, at para. 62, and by Mr. Justice LeBel in ***WIC***, at paras. 67-75. He submits further that the clear inference of Mr. Kains' words was that Mr. Marley was lacking in integrity or otherwise of bad character, and someone who was unfit to be a candidate for public office.

[77] In a different context, Mr. Kains' words may have been defamatory, passing the "low threshold" that the law requires. However, I find that, in the full context in which the words were spoken, they were not defamatory. In that context, I do not think there was any realistic threat that Mr. Kains' words would reduce a reasonable person's opinion of Mr. Marley. I will explain why I have come to this conclusion.

[78] The all-candidates forum included a period for voters to ask the candidates questions. The fact that a voter – Mr. Kains – directed a question to Mr. Marley cannot have come as a surprise to anyone. In particular, Mr. Marley cannot have been surprised that a question would be put to him: that was one of the reasons he was there. Mr. Marley, who had many years of active political involvement, understood very well that candidates could expect to have to field uncomfortable questions.

[79] Mr. Kains' words were uncomfortable for Mr. Marley. However, Mr. Marley kept cool in front of the audience and the camera. In responding, Mr. Marley was calm and matter-of-fact. In terms of its content, Mr. Marley's response to Mr. Kains was articulate and detailed. Mr. Marley did not have to await another opportunity to get his message out. Rather, he could – and did – provide a full response immediately after the question was posed, in front of the very people who had heard Mr. Kains' words. Everyone in the room would have heard Mr. Marley say that he would be very surprised if the Attorney General's ministry was investigating him and explain that the only investigation he knew about was one in relation to a claim he (and Mr. Lewis) had triggered. Mr. Marley's statements were not challenged by anyone. In front of the assembly, Mr. Kains accepted them.

[80] Mr. Marley was given the further opportunity by the moderator to probe Mr. Kains about the basis for his question. Mr. Marley waved that off, with an expressive gesture that implied to do so

would be a waste of his and everyone else's time, because Mr. Kains was not only "underhanded" but had no idea what he was talking about.

[81] Ms. McMillan had a strong reaction to Mr. Kains' question. However, in my view, that was simply a normal reaction in the face of a perceived attack on a loved one, even where the loved one is completely capable of fending off the attack and, indeed, crushing the attacker. There was no risk that Mr. Kains' question would tend to lower Ms. McMillan's opinion of Mr. Marley, or the opinions held by Mr. Marley's supporters. There is no evidence that any of them had the slightest doubt that what Mr. Marley said was true.

[82] Accordingly, in my view, Mr. Kains' words, in their full context, did not create a realistic threat to Mr. Marley's reputation in the eyes of a reasonable person.

(c) The Defence of Qualified Privilege

[83] My conclusion that Mr. Kains' words, in context, are not defamatory is sufficient to dispose of this action. However, even if had I concluded the words were defamatory, in my view, Mr. Kains' defence of qualified privilege ought to succeed.

[84] I will therefore say a few words respecting Mr. Baron's submission that Mr. Kains' words amounted to slander *per se*, even though I do not need to make a determination on that point. I would reject Mr. Baron's argument that Mr. Kains' words amount to accusations imputing the commission of a criminal offence. However, Mr. Baron advanced an alternative argument that the words were calculated to disparage Mr. Marley's reputation in the way of his "office." He relied on definitions of the word "office" in the ***Concise Oxford Dictionary*** (7th ed.) and ***Black's Law Dictionary*** (4th ed.) to argue that as a candidate for the provincial legislature, Mr. Marley held an office. However, it seemed wrong to treat someone who was a candidate for office as equivalent to the holder of an office, and I found Mr. Baron's argument unconvincing. However, it might be said that the words were calculated to disparage Mr. Marley in the way of his calling, in the sense that he was (or may be) unfit to stand as a candidate for political office. That would bring Mr. Marley within one of the accepted categories of slander *per se*. I will accept that conclusion for the purposes of the discussion of qualified privilege.

[85] I agree with Mr. Sieg's submission that incurring legal expenses in connection with a possible defamation claim cannot be sufficient special damages for the purpose of a slander claim, and would render the developed categories for slander *per se* largely meaningless. Neither Mr. Baron nor Mr. Sieg was able to cite any case authority to the effect that such legal expenses were an acceptable item of special damage.

[86] I turn then to the defence of qualified privilege, as it applies to the facts of this case.

[87] As I mentioned above, Mr. Baron submits that ***Boland*** and ***Douglas v. Tucker***, both of

which rejected the defence of qualified privilege, ought to govern in this case. Mr. Baron submits that an all-candidates forum is not an occasion to which the protection of qualified privilege applies.

[88] I do not agree. I have noted above the distinction made by Cartwright J. (as he then was) between statements made by voters and statements made in newspapers, where publication is "to the world." That distinction applies to an all-candidates forum.

[89] The all-candidates forum was an occasion when voters and candidates were speaking directly to other voters concerning matters regarding the candidates, their fitness for office and the election. I agree with Mr. Sieg's submission to the effect that one of the main purposes of an all-candidates meeting is to provide voters with the opportunity to ask candidates questions so that other voters attending the meeting can hear the answers in order to become better informed about the candidates and who to vote for. Mr. Kains, as a constituent in West Vancouver-Capilano, had, at the very least, an interest in posing his question to Mr. Marley, a candidate for election in that riding. Mr. Marley, as a candidate, had a corresponding interest and duty to listen to and respond to Mr. Kains' question. Moreover, the content of Mr. Kains' question was reasonably appropriate in the context of a question period at an all-candidates forum prior to an election and did not exceed the scope of the privilege.

[90] Mr. Marley asserts that when Mr. Kains spoke, he was actuated by actual or express malice, thus depriving him of the defence of qualified privilege. The onus to prove that malice was Mr. Kains' dominant motive is on Mr. Marley. In my view, Mr. Marley has not met that burden.

[91] In support of his assertion that Mr. Kains was actuated by malice, Mr. Marley points to Mr. Kains' connection with and support of Mr. Sultan, and the provincial Liberal party. However, it simply does not follow from these facts that, when Mr. Kains put his question to Mr. Marley, he did so for the dominant purpose of injuring him because of spite or animosity or for some other improper purpose. The two men were not personally acquainted with one another. To the extent that Mr. Kains knew something about Mr. Marley, he held a positive view of him – that he was a "solid citizen." Moreover, Mr. Marley was never any threat to Mr. Sultan. A voter cannot be disqualified on grounds of malice from putting a question – even an uncomfortable one – to a candidate at an all-candidates forum merely because the voter supports another candidate or another party.

[92] Mr. Marley then says that Mr. Kains made notes of his question before putting it to Mr. Marley – in other words, Mr. Kains wrote out a script in advance. Mr. Kains admitted this. However, I do not think that making notes can support a conclusion that Mr. Kains acted with a dominant purpose of injuring Mr. Marley, or for some other dominant purpose that is improper or indirect. People make notes of what they want to or intend to say at a public gathering for a whole host of innocent reasons, including so that they will remember when the time comes to speak. I

think this is a much more likely explanation for Mr. Kains "scripting" his remarks. It is not a demonstration that he harboured some animosity or spite or ill-will towards Mr. Marley.

[93] In argument, Mr. Marley was also critical of Mr. Kains for not approaching Mr. Marley privately and asking his question, and Mr. Marley relied on this in support of the argument that Mr. Kains was actuated by malice. Indeed, in answering Mr. Kains' question, Mr. Marley called Mr. Kains' behaviour "underhanded." However, candidates for political office cannot reasonably expect voters to pre-clear – or warn the candidate of – potentially uncomfortable questions in advance of an open question period at an all-candidates forum. The candidate may prefer it, but I would not find Mr. Kains' conduct to be actuated by malice because he did not.

[94] Mr. Marley also notes that Mr. Kains attended only one all-candidates forum, the last one before the election. However, Mr. Kains explained that he had been out of town when others were held. Moreover, Mr. Kains had a long-standing practice, going back over decades, of attending all-candidates meetings. His attendance on May 6, 2009 does not demonstrate actual malice towards Mr. Marley.

[95] Mr. Marley points out that of all of the candidates, he was the only one to whom Mr. Kains put a question. However, this is simply a neutral fact; it is not proof that Mr. Kains was actuated by malice towards Mr. Marley. The only information Mr. Kains had was about Mr. Marley. Other candidates had made disclosures. Mr. Kains had a question, relevant to that issue, for Mr. Marley.

[96] Finally, Mr. Marley says that Mr. Kains acted recklessly, in basing his question on a two-pages of a redacted document that arrived anonymously at Mr. Kains' office. However, Mr. Kains took the contents of the document seriously. The text described the letter's author – and maker of the complaint – as a former councillor and candidate for mayor. In fact, that was true. The letter was addressed to a specific officer with the West Vancouver Police Department. The text concerned the 2008 civic elections in West Vancouver. Mr. Kains' memory of those elections was that they were unseemly, and he considered what he read to be serious and shocking. As of May 6, 2009, the letter's author, Ms. Vaughan, believed that her complaints were being investigated. Had Mr. Kains contacted her in advance of the all-candidates forum, presumably that is what he would have been told. At trial, Mr. Kains asserted that he had confidence in the letter, and confidence in the facts, when he put his question to Mr. Marley.

[97] In that light, I am not persuaded that Mr. Kains acted recklessly in basing his question for Mr. Marley on the pages he had received anonymously. I agree with Mr. Sieg's submission that those pages provided a reasonable basis from which Mr. Kains could formulate a question for Mr. Marley at the all-candidates forum concerning the existence of an investigation.

[98] The result is that Mr. Marley has not met the onus he bears to prove malice.

[99] In the circumstances, it is unnecessary for me to address Mr. Sieg's alternative argument

concerning a new common law defence of “responsible questioning.”

[100] Finally, because I have concluded that Mr. Kains is not liable to Mr. Marley, I do not intend to address damages.

Summary

[101] In summary, I find that Mr. Kains’ words were not defamatory. Had they been, I would have given effect to the defence of qualified privilege.

[102] Mr. Marley’s action is, accordingly, dismissed. Unless there are relevant matters about which I am unaware, costs on Scale B will follow the event.

“The Honourable Madam Justice Adair”