Date: 19990225
Docket: C952334
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STEVE NORMAN

PLAINTIFF

AND:

CORPORATION OF THE CITY OF NEW WESTMINSTER

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE K. SMITH

Counsel for the Plaintiff:	Mark G. Perry
Counsel for the Defendant:	Gregory J. Nash David T. McKnight
Place and Date of Hearing:	Vancouver, B.C. May 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, and December 14, 15, 16, 17, 18, 1998, and January 8, 1999

[1] When a man believes that another is meddling with his private rights and the other believes that his interference is justified by a public good it can be expected that emotions will run high. Here, a dispute between the owner of a vacant residential lot in New Westminster and a neighbour who tried to stop him from building a house on it engendered much public controversy and two lawsuits, of which this is one. The first, a defamation action by Mr. Dupuis — the property owner — against Mr. Norman — the neighbour — was settled and Mr. Norman published an apology for his statements in a local newspaper. In this action Mr. Norman seeks damages against the City of New Westminster for an alleged libel. The background is as follows.

[2] Mr. Norman is an advocate for the preservation of heritage homes. He and his wife have, since 1979, lived at 218 Queen's Avenue, New Westminster in the Davidson House, one of a row of four stately Edwardian houses named after their original owners. Until 1994, Mr. Norman's neighbours in the Johnston House at 212 Queen's Avenue were the original owner's son — a lifelong resident of the House — and his wife. Between the Davidson and Johnston Houses lay the Johnstons' side-yard, a discrete municipal lot covered by lawn, shrubs, and trees.

[3] In the summer of 1994, the now-elderly Mr. and Mrs. Johnston decided to sell their home and to move from the

neighbourhood. Mr. Norman heard rumours that the purchaser, Mr. Dupuis, intended to build a house on the side-yard or to sell it as a building lot. This prospect distressed Mr. Norman so he mounted a public political campaign to attempt to have City Council thwart Mr. Dupuis' plans. His goal was to preserve the streetscape.

[4] Reacting to Mr. Norman's campaign, City Council asked the City's planning department to prepare a report on available alternatives for control of development in the 200 block of Queen's Avenue. The result was a report to Council dated November 4, 1994, signed by the Director of Planning, Mary Pynenburg, which contained statements about Mr. Norman that he says are defamatory.

[5] Ms. Pynenburg presented the report to Council at its *in camera* session on the afternoon of November 7, 1994. After discussing the report, Council resolved to publish it at the public Council meeting that evening, excepting Ms. Pynenburg's recommendation at the end that Council instruct her and her staff to consult with property owners in the 200 Block concerning their interest in pursuing the issue of development control.

[6] At the evening session, Council received the amended report without comment and released it to the public. This

event was reported in the Royal City Record/Now, a community newspaper that had been following and reporting on the controversy since September 12, 1994, when Mr. Norman first raised it publicly in a provocative speech to City Council in which he criticized the City's planning department for advising Mr. Dupuis that he was entitled to a building permit for the lot. Included in the newspaper story was a discussion of the statements in the report referring to Mr. Norman.

[7] The alleged defamation is pled in paragraph 3 of Mr. Norman's statement of claim as follows:

> 3. On or about November 4, 1994, in a report prepared by the City of New Westminster Planning Department, and signed by the Director of Planning, Mary Pynenburg, the Defendant falsely and maliciously published or caused to be printed and published of and concerning the Plaintiff and of him in the way of his occupation or business the following defamatory words:
>
> i) Recent conversations with the owner of 218 Queen's Avenue reveal that the implementation of a heritage conservation area for his block, as opposed to a development permit area, changes his request for the exploration of development options as it could restrict his ability to subdivide.
>
> ii) Given this information, the owner of 218 Queen's Avenue has requested further deliberation and consultation.
>
> iii) The house at 218 Queen's Avenue and the parcel of the land upon which it sits (ie. the building footprint) have been designated as a municipal heritage site. All of the property was not designated at Mr. Norman, the owner's, request in order not to preclude potential subdivision at the rear of the property, at some future date, should the need arise.

iv) Like 218 Queen's Avenue, 212 Queen's Avenue is an excellent example of the Arts and Crafts period and would be worthy of municipal heritage designation. However, when Steve Norman, the owner of 218 Queen's Avenue, was seeking municipal heritage designation, he did not want his entire property designated in the event that future subdivision may be open to him, should his financial circumstances change.

[8] In paragraph 5 of his statement of claim, Mr. Norman pled:

> 5. In their natural and ordinary meaning, the words were understood to mean:
>
> i) The Plaintiff acted in a hypocritical manner by advocating for the conservation of the 212 Queen's Avenue property through the use of a heritage designation when the Plaintiff had previously secured his right to subdivide his property;
>
> ii) The Plaintiff had changed his mind in regards to the request for a heritage conservation area because he had realized that such a designation could restrict his ability to subdivide his own property; and
>
> iii) The Plaintiff had requested further deliberation and consultation about development options because of regard for his own self-interest.

[9] Mr. Norman pled, as an alternative, an innuendo in identical terms.

[10] By its statement of defence the City denied that the words are defamatory either in their natural and ordinary meaning or by way of the alleged innuendo and, as well, pled justification, fair comment, and qualified privilege.

[11] In a subsequent pleading entitled "Further Particulars of the Plaintiff", Mr. Norman pled:

> 1. The plaintiff claims that the Defendant published the words set out in paragraph 3 of this Statement of Claim with actual malice, particulars of which are as follows:
>
> a) on or about September 11, 1994, after the Plaintiff had presented his concern regarding the potential construction of a house adjacent to his own house, Helen Sparkes, a City councillor, asked the Plaintiff, was it not the case that he was subdividing his property.
>
> b) on or about November 9, 1994, the Plaintiff pointed out to Mary Pynenburg, Director of Planning for the Defendant, that the statements contained in the November 4, 1994 Memorandum were false and defamatory, yet in a follow-up report dated November 16, 1994, the Defendant did not retract or clarify the defamatory statements.
>
> c) on or about November 14, 1994, New Westminster City Council did not disassociate itself from false and defamatory statements made by Mr. Peter Dupuis about the Plaintiff during a televised presentation to City Council.
>
> d) on or about December 12, 1994, at a meeting of City Council, a representative of the Defendant read into the record a letter from Mr. and Mrs. Johnston dated November 28, 1994; and
>
> e) in or about the month of January, 1995, the Defendant mailed copies of an apology published by the Plaintiff in the Royal City Record newspaper to certain residents of the City of New Westminster.

1. Are the words defamatory?

[12] A defamatory statement is a false statement about a man to his discredit: ***Scott v. Sampson*** (1882), 8 Q.B.D. 491 at 503,

that is, one that would "tend to lower the plaintiff in the estimation of right-thinking members of society generally": ***Sim v. Stretch***, [1936] 2 All E.R. 1237 (H.L.) per Lord Atkin at p. 1240.

[13] Whether words are capable of bearing a defamatory meaning, which is a question of law, depends upon the sense in which they may be understood against the background of events by the audience to which they are published: ***Jones v. Bennett*** (1968), 63 W.W.R. 1 (B.C.C.A.) at pp. 3, 20-21.

[14] Here, Mr. Norman's position was well-known to City Council and to residents of New Westminster who had been following the controversy in the media. He was known to be a steadfast proponent of heritage preservation generally and to be the leader of a public campaign to preserve the heritage streetscape of the 200 Block Queen's Avenue at the expense of prohibiting Mr. Dupuis from doing what he wished to do and was otherwise lawfully entitled to do with his own property. Against that background, the words complained of are capable of bearing the defamatory meaning he alleges, that is, that he was acting hypocritically in the manner pled.

[15] As the impugned words are capable of a defamatory meaning, they are presumed in law to be false and the defendant bears the burden of proving their truth: ***Macdonald v. Mail Printing***

Co. (1901), 2 O.L.R. 278 (C.A.) at pp. 280 - 281. The defendant has not met that burden here. Indeed, the falsity of the words and their defamatory effect have been established on the evidence.

[16] Mr. Norman did not change his mind about wanting the City to investigate the feasibility of heritage controls for the 200 Block of Queen's Avenue, as stated in the words reproduced at paragraph 3(i) of the statement of claim, either because a heritage conservation area would affect his own ability to subdivide or for any other reason. Further, he did not tell Ms. Pynenburg nor any other representative of the City that he was changing his request in this regard.

[17] While the words reproduced in paragraphs 3(ii), (iii), and (iv) of the statement of claim are literally true, the inferences and implications that would reasonably be drawn from them by their audience are false. They convey the injurious imputation that the plaintiff had a present interest in subdividing his own property and that he wanted to delay his fight to preserve the streetscape because he had learned that the result of his campaign might adversely affect his ability to subdivide. In fact, these considerations were not in Mr. Norman's mind at all.

[18] It is true that Mr. Norman had been influenced in his purchase of the property in 1979 by its potential for subdivision and sale of the vacant back part of the lot fronting on Manitoba Street. As well, in late 1992 and early 1993, he wished to have his home designated by municipal by-law as a heritage building and he did not wish to designate his entire lot if that would preclude future subdivision. He investigated his alternatives with City staff and was advised by the engineering department that he should apply to subdivide the lot so that he could designate the new front lot, on which sat the Davidson House. In accordance with that advice, he submitted an application to subdivide but he did not receive a timely response from City staff. Soon thereafter he learned that he could have the house designated without designating the entire lot upon which it sat. He therefore arranged for the passage of a municipal by-law designating the Davidson House as a heritage building — the first so-called "footprint" designation in the City.

[19] Thus, Mr. Norman's thoughts of subdivision were directly related to heritage preservation and not to profiting from the sale of a subdivided lot as implied by the statements in the report. Moreover, he abandoned any plans to subdivide when he learned that a footprint heritage designation was possible and, at the material time for present purposes, he did not turn his mind at all to the possible subdivision of his own lot.

Rather, his consuming desire was to persuade the City to do something quickly to prevent Mr. Dupuis from developing the vacant lot so that the heritage streetscape would not be impaired and he did not at any time resile from that position as is stated in the report.

[20] In the result, the impugned words were false and, both in their natural and ordinary meaning and in the innuendo alleged, were defamatory of Mr. Norman.

2. Fair comment

[21] Counsel for the defendant argued that the words reproduced in paragraph 3(i) of the statement claim constitute an expression of opinion on a matter of public interest and are therefore protected by the mantle of fair comment. He referred to the elements of the defence summarized in Raymond E. Brown, ***The Law of Defamation in Canada***, 2nd ed., vol. 1 (Toronto: Carswell, 1994) at p. 961:

> To satisfy the requirements of this defence, it must be shown that the words are (1) comment; (2) based upon facts that are true; (3) made honestly and fairly; (4) without malice; (5) on a matter of public interest.

[22] Counsel contended that, by using the words "Recent conversations . . . reveal" [his emphasis], Ms. Pynenburg was obviously stating her opinion, which he submitted was based on

an inference reasonably drawn from a conversation she had with Mr. Norman on the evening of November 2, 1994. That was her testimony and it is convenient at this point to comment on the issue of credibility.

[23] Ms. Pynenburg, the only witness called for the defence, appears to be a diligent and dedicated public servant. However, she was not an impressive witness. She was argumentative and evasive throughout her lengthy cross-examination. On several occasions she refused to admit the obvious. Moreover, her testimony was often inconsistent with the probabilities inherent in the then-existing circumstances and it found little support in other evidence. I found her evidence to be generally unreliable where it touches on the matters in issue here. Where her testimony conflicts with that of Mr. Norman, I accept Mr. Norman's testimony.

[24] The defence of fair comment does not avail the defendant here. Ms. Pynenburg's artfully worded phrase is not "comment". The statement is and was obviously intended to be understood as a statement of fact. Further, the facts upon which her conclusion was based were not true, that is, Mr. Norman said nothing to her that would justify an inference that he had changed his mind as she suggested. Moreover, for reasons I will come to next in my discussion of the defence of qualified

privilege, she did not make the statements honestly and fairly and without malice.

3. Qualified privilege

[25] Statements made on privileged occasions are protected because of the nature of such occasions, which is described by Lord Atkinson in ***Adam v. Ward***, [1917] A.C. 309 (H.L.) at p. 334 as follows:

> A privileged occasion is ... an occasion when 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.

[26] Counsel agree that there were two publications on November 7, 1994, and that both are within the plea in paragraph 3 of the statement of claim. They agree, as well, that the publication by Ms. Pynenburg to City Council *in camera* was on an occasion of qualified privilege. Although plaintiff's counsel argued that the later publication by Council to the public was not an occasion of qualified privilege, I am satisfied that it was. Counsel's submission was really that the words complained of were unconnected to the reason for the privilege and are therefore not protected. In view of the conclusion I have reached, it is not necessary to deal with this submission.

[27] The protection of the privilege prevails even if the statements are defamatory so long as the person making the statements believes them to be true and makes them honestly and without any indirect or improper motive: ***Gatley on Libel and Slander***, 8th ed. (London: Sweet & Maxwell, 1981), p. 185, para. 441. As observed by Lord Diplock in ***Horrocks v. Lowe***, [1974] 1 All E.R. 662 (H.L.) at p. 670, it is enough to defeat the claim of malice that the belief in the truth of the words is honestly held and it is not necessary that the belief be rationally derived.

[28] To destroy this protective cloak, Mr. Norman must prove actual malice in the publication. In ***Royal Aquarium and Summer and Winter Garden Society v. Parkinson***, [1892] 1 Q.B. 431, Lord Esher explained the meaning of malice in relation to occasions of qualified privilege at p. 443-44:

> The question is whether he is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion . . . .

I have concluded that Ms. Pynenburg stated what she knew to be untrue and that she therefore abused the occasion.

[29] Ms. Pynenburg testified that the genesis of the first two statements about which Mr. Norman complains was a conversation she had with him following a meeting of the City's Heritage

Advisory Committee on November 2, 1994. The relevant circumstances of that meeting are as follows.

[30] Mr. Norman believed, in the early stages of this controversy, that the ***Municipal Act*** permitted the City to designate the 200 Block Queen's Avenue as a Development Permit Area, which would require Mr. Dupuis to obtain City approval for any development on his lot. On October 12, 1994, he attended a meeting of the Heritage Advisory Committee and persuaded the committee to pass a resolution recommending that City Council instruct its staff to report on the advisability and feasibility of such a designation.

[31] The committee's resolution came before City Council on October 24, 1994, and Mr. Norman spoke in favour of the recommendation. In the meantime, on October 14, 1994, the provincial government had proclaimed the ***Heritage Conservation Statutes Amendment Act, 1994***, extensive new legislation dealing, among other things, with municipal controls over heritage properties in designated Heritage Conservation Areas. There was much uncertainty as to the meaning and application of these new laws and City staff were not yet familiar with the statute's specific provisions or their effects. Accordingly, City Council resolved to request the planning department to investigate the feasibility and advisability of a Development

Permit Area "or other means of protection to maintain the heritage integrity in the 200 Block Queen's Avenue."

[32] The Heritage Advisory Committee, some members of City Council, and representatives of the Queen's Park Residents' Association, including Mr. Norman, met on the evening of November 2, 1994. In the course of the meeting, Ms. Pynenburg's assistant, Ms. Spitale, gave an overview of the new legislation in which she mentioned that it gave City Council new tools to deal with heritage matters, including the creation of Heritage Conservation Areas. After the meeting ended, Mr. Norman asked Ms. Pynenburg about the status of her report to Council. She responded that the report was almost ready to be delivered to Council and he objected that he had not been consulted in its preparation. He told her that he wanted to review the report before she presented it to Council but she told him that she could not let him see it. It is common ground that Mr. Norman was visibly angry during this exchange.

[33] Ms. Pynenburg testified that she and Ms. Spitale speculated on their way home after the meeting as to the cause of Mr. Norman's apparent anger. She said that it is her experience that people commonly give her and her staff one reason for things when there is another real reason. She characterized these as "text and subtext". She said that she "sensed" that Mr. Norman's real concern was that he did not

want to lose his right to subdivide as that would reduce the value of his property. She said that she and Ms. Spitale wrestled again the next day with their puzzlement about Mr. Norman's anger and finally concluded that the source of the anger must have been in the new legislation. She said they then studied the legislation and deduced that Mr. Norman must have concluded that a Heritage Conservation Area designation under the new legislation would enable Council to prevent him from subdividing his own property. From that, she said, she drew the further inferences that he was changing his request for the City to pursue development-control options and that he therefore wanted further deliberation and consultation. She said that she felt that she should incorporate her conclusions in her report to Council out of fairness to Mr. Norman.

[34] I do not accept that Ms. Pynenburg followed that chain of reasoning and reached those conclusions. Her testimony in this regard strains credulity and is belied by other circumstances.

[35] The day following Ms. Pynenburg's conversation with Mr. Norman, Ms. Spitale sent a copy of the draft report to the City solicitor and asked for his comments on the section dealing with Development Permit Areas and Heritage Conservation Areas. It is apparent from the draft that Ms. Pynenburg and her staff saw no substantive difference between the two so far as they relate to the matter in dispute. Under both schemes, the owner

of a property designated in an Official Community Plan as a heritage property would require a permit to subdivide. Thus, if Ms. Pynenburg thought that Mr. Norman was resiling from his public stance because the new legislation had changed the law adversely to his subdivision interest, she must have also thought that he was mistaken. If that were so, she would have simply advised him of his mistake and would not have attributed a change of position to him that was based on what she knew to be a misconception on his part.

[36] Ms. Pynenburg attempted to explain this apparent flaw in her reasoning by saying that she believed that Mr. Norman did not understand that he could be refused a permit to subdivide even under the old legislation relating to Development Permit Areas. Thus, on her reasoning, he would have perceived the new legislation as a change adverse to his interests. Nothing in the evidence suggests that Mr. Norman turned his mind to this issue at the material times and nothing in the evidence provides a basis for Ms. Pynenburg's ostensible belief that he did. Moreover, if that was her opinion, why she would have written the words set out in subparagraphs 3(i) and (ii) of the statement of claim when she believed he was mistaken remains unexplained.

[37] Further, on the following day, November 3, 1994, Ms. Pynenburg attended an educational seminar on the new

legislation sponsored by the provincial government. She testified that she and her staff were unsure of the effects of the new legislation on heritage properties. Although she asked questions at the seminar, she did not ask whether, in the opinion of those who drafted the legislation, City Council had the right to deny subdivision to an owner of property within a Heritage Conservation Area. Given her uncertainty, if she thought that was Mr. Norman's concern she would likely have taken the opportunity to attempt to ascertain if his concern was well-founded.

[38] As well, Ms. Pynenburg did not contact Mr. Norman to ask him if her deduction that he had changed his mind about development controls was correct before she finalized the report and submitted it to Council. She surely knew that, in the circumstances, to attribute to Mr. Norman that he was resiling from his public advocacy of heritage preservation at Mr. Dupuis' expense because of his own private interests would make him appear to be hypocritical and would cause him great upset if she were wrong.

[39] Further, Mr. Norman spoke about Ms. Pynenburg's report at a meeting of the Heritage Advisory Committee on November 9, 1994. Mr. Norman was angry and was interrupted at one point by members of the committee because of his aggressive questioning of Ms. Pynenburg. Mr. Norman went through the report page by

page and identified several perceived errors and inadequacies to which Ms. Pynenburg responded. As well, he said that the statements about which he now complains were upsetting, embarrassing, and humiliating to him. Ms. Pynenburg responded that she made those statements to protect his interests. He said that the statements were inaccurate and misleading and that the statement that he had changed his mind about pursuing development-control options and the statement that he wanted further consultation were false. Ms. Pynenburg did not explain to him how she had deduced these things and she did not acknowledge nor express any regret for her error. Curiously, she made no response at all to these assertions.

[40] The following day, Ms. Pynenburg asked Ms. Spitale to prepare a report answering Mr. Norman's objections to the report. Ms. Spitale subsequently delivered a three-page memorandum dated November 16, 1994, that dealt with several matters raised by Mr. Norman but made no mention of his complaint about the inclusion of references to his state of mind in relation to develop controls and to his own property. After obtaining Council's approval, Ms. Pynenburg wrote to Mr. Norman on November 22, 1994, as follows:

> Dear Mr. Norman:
>
> Re: Planning Department Memorandum Dated November 16, 1994
>
> At the November 21, 1994 Council meeting, City Council instructed the Planning Department to provide you with a copy of a Planning Department Memorandum.

> In this memorandum, the concerns and questions you raised at the November 9, 1994 Heritage Advisory Committee with respect to one of our reports, *212 Queen's Avenue: Options For Consideration*, were addressed.
>
> Please find attached with this letter the above noted memorandum. I trust this responds to your concerns.

[41] Of course, the memorandum did not respond at all to Mr. Norman's major concern — the false and misleading statements about his state of mind concerning the prospect of development controls on the block and concerning the subdivision of his own property. When asked why the memorandum did not respond to this concern, Ms. Pynenburg answered that she thought Mr. Norman was satisfied with the explanation she gave orally at the meeting on November 9, 1994. However, she gave no explanation of these statements to Mr. Norman at that time; she merely stated that she included them in the report to protect his interests, an assertion that she knew he did not accept.

[42] There is other evidence that tends to support the conclusion that Ms. Pynenburg acted for reasons unrelated to the performance of her duties when she made the offending statements.

[43] First, knowing that Mr. Norman intended to address City Council at the public Council meeting on September 12, 1994, and to complain about her advice to Mr. Dupuis' notary public

that he was entitled to a building permit for the vacant lot, she told one of the Councillors that Mr. Norman had earlier applied to subdivide his own property. In the result, when Mr. Norman concluded his public attack on development of the vacant lot, the Councillor raised this fact, to Mr. Norman's embarrassment.

[44] Further, Ms. Pynenburg assisted Mr. Dupuis to discover that Mr. Norman had earlier applied to subdivide his own property and to obtain the details of that application. Then, in a speech to Council on November 14, 1994, which was covered in the local newspaper and televised on the local community channel, Mr. Dupuis criticized Mr. Norman and portrayed him as a hypocrite because he was "working diligently to subdivide his property" while railing against development of Mr. Dupuis' property. Mr. Dupuis said as well that he had no intentions with respect to development of his lot. By this time, Ms. Pynenburg had met with Mr. Dupuis' designer and builder to discuss an acceptable design of the proposed house. Yet she said nothing to Council, either at the meeting or later, to correct the impression left by Mr. Dupuis, an impression that reinforced the implication that Mr. Norman was a hypocrite.

[45] As well, Ms. Pynenburg stated in the report itself, in regard to a temporary development control under the new legislation:

> The intent of using a heritage control period is consistent with the request made by the owners of the 200 block of Queen's Avenue. However, it seems premature to explore this option at this point. If the owners of 212 Queen's Avenue [i.e., Mr. Dupuis] express an interest to pursue development options on Lot 3, this could be considered by Council.
>
> [Emphasis added]

Given Ms. Pynenburg's knowledge of Mr. Dupuis' plans, the statement was misleading and was calculated to defeat Mr. Norman's campaign and to make it appear that he was crying "Wolf".

[46] Further, Ms. Pynenburg stood mute when a letter from Mr. and Mrs. Johnston was read into the record at the public Council meeting on November 28, 1994. In the letter, the Johnstons denounced Mr. Norman for the anger and sorrow he had caused them by his "false accusations" and by his "creating a community reaction to an imaginary issue involving the potential development of the side lot". As Ms. Pynenburg well knew, the issue was not an imaginary one yet she said nothing to Council before, during, or after the meeting.

[47] Perhaps the most cogent evidence of Ms. Pynenburg's base motive is that of her actions when she saw the public apology made by Mr. Norman to Mr. Dupuis. The apology was published in the classified section of the Royal City Record/Now. It said nothing about the planning department or about Ms. Pynenburg.

Rather, Mr. Norman withdrew and apologized for statements made by him to the effect that Mr. Dupuis had not delivered a disclosure statement to the Johnstons when he purchased their home, as he was required to do to disclose that he was a real estate agent, and that he took unfair advantage of the Johnstons in the transaction. Ms. Pynenburg photocopied the apology and sent it anonymously and without any accompanying note to numerous individuals and organizations interested in heritage issues. That is, she sent it to the very people to whom, according to Mr. Norman, he was made to look like a hypocrite by the defamatory statements in the report.

[48] Many of the recipients complained to the City about receiving this document. When the complaints came before a public Council session in January 1995, the mayor commented that Ms. Pynenburg's action was "highly irregular and will be pursued". She directed the City Administrator to investigate. This was duly reported in the local newspaper under the large headline "Letter upsets mayor — staff on hot seat" and the sub-headline "Public apology goes around second time." The article, which was made evidence by consent, stated, in part:

> After the meeting, Pynenburg said the notice was sent out as a follow-up on a heritage matter and that it was not meant to cause offense.
>
> She said it was sent because of allegations that the planning department hadn't handled the infill housing issue fairly. "Allegations were made. The other side of the story was not as widely publicized."

[49] When this was put to her in cross-examination Ms. Pynenburg said that the article was not an accurate representation of what she had said and suggested that the reporter had an interest in not reporting it accurately. She said her purpose was to ensure that those interested in the controversy saw the apology so that it would "bring some closure to the event". She characterized her action as "information sharing".

[50] I found Ms. Pynenburg's testimony to be unconvincing. In my view, she gave the explanation attributed to her by the reporter. As there is no logical connection between the explanation and the contents of the apology, Ms. Pynenburg thus inadvertently disclosed her real motive, which was to embarrass Mr. Norman for some reason relating to his actions concerning the controversy over the use of Mr. Dupuis' lot.

[51] Finally, the City Administrator prepared letters of apology dated January 31, 1995, to be sent to all recipients of Ms. Pynenburg's mailing. The letters were prepared with a line for her signature and his. She signed all of them except the letter of apology to Mr. Norman, which she refused to sign. It went to Mr. Norman under the signature of only the City Administrator. Her refusal to sign the letter to Mr. Norman is indicative of her state of mind toward him.

[52] In the result, the plaintiff has proven actual malice on the part of Ms. Pynenburg in the publication of the defamatory statements.

4. Liability of City of New Westminster

[53] It is not disputed that Ms. Pynenburg made the statements in the course of performing her duties and responsibilities as an employee of the defendant City, and that the defendant is therefore liable vicariously. However, Mr. Nash argued, no damage was caused by the publication by Ms. Pynenburg to City Council *in camera*, and no actual malice of Council has been proven so as to destroy the qualified privilege otherwise protecting the publication by Council to the public.

[54] I do not accept that submission. When Ms. Pynenburg prepared and published the report to Council, she expected that Council would publish the report to the public. She testified, during her cross-examination about the efforts made by her and Ms. Spitale after the November 2nd meeting to divine the source of Mr. Norman's anger, that they discussed their refusal to show Mr. Norman the draft report and that the "only way out we could see was to recommend to Council that we go through the process of public consultation and get the report out of *in camera*" so that Mr. Norman and the neighbours supporting him could see it. She made that recommendation in the report and,

in my view, she knew and intended that Council would release the report to the public. As Ms. Pynenburg was the defendant's agent for the purpose of preparing the report, her malice must be imputed to the defendant and the cloak of qualified privilege is destroyed: see ***Egger v. Viscount Chelmsford***, [1964] 3 All E.R. 406 (C.A.) per Lord Denning M.R. at p. 411 and the authorities there cited.

5. General Damages

[55] There is no pleading of special damage. On proof of the libel, however, damage is presumed. Each defamation case is unique and, as the cases cannot be categorized and compared, awards in other cases are of little assistance.

[56] The principles upon which damages are to be assessed for defamation are summarized in ***Walker v. CFTO Ltd.*** (1987), 59 O.R. (2d) 104 (C.A.). Mr. Norman is entitled to general damages to compensate for the lessening of the esteem in which he is held in the eyes of the community because of the defamation and for the injury caused to his feelings. He led no evidence in aggravation of the damages. Considering Mr. Norman's actions and his position and standing in the community, the nature of the libel, the mode and extent of its publication, the effect of the libel on him and on his standing in the community as it can be ascertained from the evidence of

those witnesses who know him, and the conduct of the defendant including the failure to apologize and the continuing assertion of the truth of the libellous statements, a fit and just award of general damages is $10,000.

6. Punitive Damages

[57] It must be noted that the malice was that of the defendant's employee, Ms. Pynenburg, and that members of City Council were innocent of malice. In asserting the defence of justification, the defendant was relying on Ms. Pynenburg. The contention that the defendant deliberately failed to produce documents that would assist the plaintiff is based on suspicion and is not supported by the evidence. Accordingly, there is nothing in the conduct of the defendant that would warrant a punitive award.

7. Special Costs

[58] The argument advanced for an award of special costs is based largely on the alleged reprehensible conduct of Ms. Pynenburg, who is not a party to the action. I see nothing in the conduct of the defendant that would call for rebuke by an award of special costs. The action was hard-fought but was not defended improperly in any way that is apparent to me.

8. Increased Costs

[59] Increased costs are to indemnify the successful party and may be awarded if the Court concludes that assessment of costs under scales 1 to 5 would result in an injustice: ***Rules of Court***, Appendix B, s. 7. The usual starting point is to ascertain whether there is a substantial disparity between ordinary costs and 50% of what an award of special costs would be. The evidence does not permit such a finding here. Moreover, the law on costs has now evolved to the point where a discrepancy must be accompanied by some other reason in order to justify an order of increased costs: ***Kieta v. North American Air Travel Insurance Agents Ltd.*** (1998), 35 C.C.E.L. (2d) 157 (B.C.C.A.) at p. 167. Here, there has been no misconduct or burdensome tactics by the defendant during the proceedings and the case is not complex or of unusual importance. The plaintiff is therefore entitled to his ordinary costs on scale 3.

"K.J. Smith J."