

[50] Regarding the first of these defamatory meanings, Mr. Cousens asserts that “it is beyond controversy that the plaintiff has donated millions upon millions of dollars of his own personal wealth to fund the Sports Centre.” However, in my view, while it may be clear that Mr. Cousens has in fact donated millions of dollars to NDF, there appears to be a real question as to whether the Fortius Centre was funded by a “donation.”

[51] The basic facts of the transaction which lies at the core of this action are reasonably clear, but they bear repeating. Mr. Cousens sent approximately \$17.55 million by way of cash and securities to his charitable foundation, NDF. He characterized these asset transfers as “donations,” and he received tax receipts for them. In 2009, NDF was wound up, and as a part of the winding-up, NDF gifted all of its assets to Imladris, which itself was a registered charity that Ms. Krause characterized as “the plaintiff’s private family foundation.”

[52] Between 2009 and 2019, Mr. Cousens donated additional cash and securities to Imladris, totalling about \$4.5 million. Imladris subsequently lent funds to Fortius for the purpose of building the Fortius Centre, first at a 20% interest rate and then at a reduced rate of 5%, following a CRA audit.

[53] Mr. Cousens concedes that Imladris was paid back the funds that it had lent to Fortius by a charity called Charitable Impact Foundation (“CHIMP”), which will be described further below. Imladris received approximately \$29 million as payback.

[54] Mr. Cousens concedes that he did not donate the funds used to build the Fortius Centre directly to Fortius, but he asserts that he chose to structure his contribution to the Fortius Centre as loans from NDF and Imladris for “a variety of valid reasons.”

[55] In my view, whether Mr. Cousens arranged this transaction for “valid reasons” is not the point, at least with respect to justifying this particular defamatory statement. The point is that in public materials, Mr. Cousens stated that he made a

\$23 million donation “to create” the Fortius Centre, and this statement appears to have been untrue based on the admitted facts.

[56] On this issue, Ms. Krause states in her materials:

Second and more fundamentally, a donation to NDF is not a donation to Fortius. NDF did no charity. It used the money, under the plaintiff’s direction, to make a commercial business loan on very profitable terms.

[Emphasis in original.]

[57] Ms. Krause gave evidence that NDF did nothing but issue one donation receipt to Mr. Cousens, and then became financially inactive for five years before it dissolved. It did not make any gifts.

[58] Moreover, according to Ms. Krause, Fortius’ financial statements show that the actual funds used to construct the Fortius Centre were provided by lenders, such as Romspen Investment Corporation, which made a loan to Fortius in excess of \$20 million.

[59] In respect of the defamatory sting that Mr. Cousens lied in that he did not donate \$23 million to create the Fortius Centre, it is my view that Mr. Cousens has not met the burden of establishing that there are grounds to believe that the justification defence has no real prospect of success.

[60] With respect to the issue of whether Mr. Cousens’ \$23 million donation was part of a broader “tax fraud scam” or “scheme,” I will first consider whether this was a statement of fact or a comment.

[61] In *Lund v. Black Press Group Ltd.*, 2009 BCSC 937, this Court held:

[140] In making the distinction between comment and facts the test is whether the matter would be recognizable to the ordinary reasonable man as a comment upon true facts, and not as a bare statement of fact. A comment is a statement of opinion about facts: *Ross v. New Brunswick Teachers Assn.*, above, para. 57. The scope of the term “comment” is generously interpreted: *WIC Radio Ltd. v. Simpson*, above, at para. 30. Even words that at first appear to be statements of fact may properly be construed as comment in an editorial context where loose, figurative or hyperbolic language is used in the context of political debate, commentary, media