SCC File No. 38374

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

LERNERS LLP

Appellant
(Respondent)

-and-

HOWARD PLATNICK

Respondent
(Appellant)

FACTUM OF THE APPELLANT
LERNERS LLP
(Pursuant to Rule 35(1) of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In 2015, Ontario passed legislation to promote free expression on matters of public interest by providing defendants with a process to have lawsuits that have the effect of limiting expression on a matter of public interest dismissed at an early stage. The new procedure requires a motion judge to make findings of fact about the merits of the case and to exercise his or her discretion to weigh the public interest in the expression against the public interest in avoiding harm caused by defamatory statements.

2. The motion judge's findings of fact ought to attract significant deference on appellate review. That is exactly what the Court of Appeal for Ontario failed to do in the present case.

3. Maia Bent, a partner at the appellant Lerners LLP, sent a message to her lawyer colleagues on a confidential online listserv forum hosted by the Ontario Trial Lawyers Association. The message informed Ms. Bent's colleagues of specific instances of questionable practices by the respondent Howard Platnick in connection with Dr. Platnick's expert evidence at automobile insurance benefits arbitrations.

4. Without Ms. Bent's consent, her message was shared by another lawyer, contrary to a written undertaking to keep messages posted to the listserv confidential. The leak led to the publication of Ms. Bent's message in Insurance Business Magazine without her consent. Following publication of the magazine article, Dr. Platnick sued Ms. Bent and Lerners for $16,300,000.

5. Ms. Bent successfully moved to dismiss the action. Justice Dunphy found that:

    (a) the impugned expression concerned a matter of public interest;

(b) Dr. Platnick had not established grounds to believe that Lerners and Ms. Bent had no valid defences; and

(c) the alleged harm suffered by Dr. Platnick did not outweigh the public interest in protecting Ms. Bent's expression.

6. The Court of Appeal allowed Dr. Platnick's appeal. Among other things, the Court held, without reference to any evidence, and contrary to undisputed evidence, that Ms. Bent should have anticipated that her message would be leaked by a lawyer who had signed a written undertaking to keep listserv messages confidential.

7. This appeal raises three issues:

(a) the scope of a motion judge's exercise of discretion in anti-SLAPP motions;

(b) the proper test to apply to the merits analysis of alleged SLAPP suits; and

(c) the standard of review an appeal court should apply to findings of fact made by a motion judge on an anti-SLAPP motion. [1]

8. Lerners submits that the Court of Appeal's lack of deference to the motion judge's findings of fact and exercise of discretion has significantly weakened the anti-SLAPP statutory regime. The decision below frustrated the legislation's express purposes of encouraging expression on matters of public interest, broadening participation in debates on matters of public interest, and discouraging the use of litigation to unduly limit expression matters of public interest.

9. Lerners submits that its appeal should be allowed, with costs.

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[1] This appeal is brought in conjunction with the Defendant Maia Bent's appeal to this Court. Lerners LLP supports Ms. Bent's appeal and has endeavoured not to repeat, any more than is necessary, the facts and arguments in Ms. Bent's factum.

B. Statement of Facts

1. The Parties

10. The Plaintiff/Respondent Howard Platnick is a physician who has for several years devoted himself almost exclusively to working for insurance companies, or the assessment companies they hire, to evaluate personal injury claims arising from motor vehicle accidents.[2]

11. The Defendant/Appellant Maia Bent is a partner with the Defendant/Appellant Lerners LLP. At all material times, Ms. Bent was President-elect or President of OTLA, an association of plaintiff-side personal injury lawyers. Part of OTLA's mandate is to advocate to the government and the media on issues relating to accident victims' rights.[3]

2. Background to Ms. Bent's Confidential Message

12. Dr. Platnick was retained by Sibley, an assessment company, to prepare an "Executive Summary Report" ("**ESR**") to determine whether a client of Ms. Bent's was "catastrophically impaired" and thus entitled to enhanced insurance benefits.

13. Dr. Platnick prepared an ESR based on a review of insurer assessor reports from an assessment team that actually saw Ms. Bent's client. Dr. Platnick did not. He concluded that Ms. Bent's client was not catastrophically impaired. Dr. Platnick's ESR stated that his finding was a "consensus conclusion" of the assessment team, even though, in fact, there was no such consensus.[4]

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[2] Appeal Decision at para. 6; Motion Decision at para. 11.
[3] Motion Decision at para. 6.
[4] Motion Decision at para. 14.

14. At the Financial Services Commission of Ontario ("**FSCO**") arbitration arising from the insurer's denial of catastrophic impairment status, Ms. Bent obtained disclosure of the complete claim file relating to her client. This disclosure revealed that material information favourable to her client's case had been excluded from the final reports submitted by the insurer to the arbitrator. Moreover, one of the insurer's assessors testified that he had never seen Dr. Platnick's ESR, and that he did not agree with the conclusions in the ESR. In other words, what Dr. Platnick had a presented as a "consensus decision" was anything but.[5]

15. Not surprisingly, the arbitration promptly settled on favourable terms to Ms. Bent's client.[6]

3. The Confidential Message to the Listserv

16. On November 10, 2014, Ms. Bent posted a confidential message to OTLA's restricted-access, confidential listserv.

17. Only lawyers who are members of OTLA may join the listserv. As a condition of access, a listserv participant must first sign an "Undertaking and Indemnity" in which, among other things, the lawyer undertakes to keep all listserv information, opinions and comments strictly confidential from all others, including OTLA members who are not listserv participants, the participant's law firm partners, associates and staff:

> I undertake to keep all LISTSERV information, opinions and comments strictly confidential from all others, including OTLA members who are not LISTSERV Members, including my law firm partners, associates and staff.
>
> I understand that other members of the OTLA rely on my undertaking to fellow members to maintain confidentially in their decision to use the LISTSERVs.

[5] Motion Decision at para. 16.
[6] Motion Decision at para. 17.

> […]
>
> It is further understood and agreed that my and all communications from or to me with reference to the foregoing shall be considered and deemed to be privileged.
>
> I undertake and agree that I will actively assert privilege in connection with any LISTSERV communication on the basis that such communications are subject to a claim for litigation privilege. [Emphasis added.][7]

18. Ms. Bent posted this message to the listserv:

> I am involved in an arbitration on the issue of catastrophic impairment where Sibley aka SLR Assessments did the multi disciplinary assessments for TD Insurance. Last Thursday, under cross-examination the IE neurologist, Dr. King, testified that large and critically important sections of the report he submitted to Sibley had been removed without his knowledge or consent. The sections were very favourable to our client. He never saw the final version of his report which was sent to us and he never signed off on it.
>
> He also testified that he never participated in any "consensus meeting" and he never was shown or agreed to the Executive Summary, prepared by Dr. Platnick, which was signed by Dr. Platnick as being the consensus of the entire team.
>
> This was NOT the only report that had been altered. We obtained copies of all the doctor's file[s] and drafts and there was a paper trail from Sibley where they rewrote the doctors' reports to change their conclusion from our client having a catastrophic impairment to our client not having a catastrophic impairment.
>
> This was all produced before the arbitration but for some reason the other lawyer didn't appear to know what was in the file (there were thousands of pages produced). He must have received instructions from the insurance company to shut it down at all costs on Thursday night because it offered an obscene amount of money to settle, which our client accepted.
>
> I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor's and Sibley's files. This is not an isolated example as I had another file where Dr. Platnick changed the doctor's decision from a marked to a moderate impairment.[8]

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[7] Undertaking and Indemnity, Ms. Bent's Record ("Bent Record"), Vol. IV, Tab 18-K, p. 47.
[8] Appeal Decision at para. 25.

19. In breach of the undertaking, a listserv participant shared the message with others. The message was eventually republished in the magazine.[9]

20. The magazine article expressly states that the message was provided to the author of the article by Rhona DesRoches, a member of the Fair Association of Victims for Accident Insurance Reform, an advocacy group.[10]

21. Notably, the motion judge found that substantially all of the damages alleged by Dr. Platnick arise from the unauthorized and unanticipated leak of the message to a broader audience by others and the "broken telephone" manner by which its contents were conveyed to his clients. The motion judge further found that neither avenue of damage was reasonably likely to be shown to have been caused by Ms. Bent:[11]

> The defendant clearly does not bear unlimited responsibility for every inaccurate or distorted repetition of her written communications disseminated by persons unknown to other persons unknown. Defamation is determined objectively by considering the words used as they would reasonably be understood by their audience, not by a consideration of how the words might subsequently be distorted through "broken telephone".
>
> There is no credible evidence to suggest that Ms. Bent published the email to anyone beyond the limited constituency of the defendant's colleagues who are OTLA members belonging to the Listserve. **The evidence establishes that members of that group had an acknowledged obligation to maintain confidentiality of the communications posted there and there is no credible basis to conclude that she should have reasonably foreseen a breach of that obligation in this instance,** the plaintiff's bald suggestion to the contrary notwithstanding. **There is no evidence of the confidentiality obligation being routinely ignored by members of the Listserve on other occasions** nor is there any pleading

[9] Motion Decision at paras. 25-27. The listserv participant who breached his or her undertaking has not been identified in this proceeding.

[10] Exhibit "1" to the Cross-Examination of Howard Platnick held June 8, 2016, Bent Record, Vol. XI, Tab 25, p. 27.

[11] Motion Decision at para. 3.

> (still less evidence) that Ms. Bent knew or ought to have known of a substantial risk of republication in violation of the confidentiality rules associated with membership in the OTLA Listserve.
>
> The uncontradicted evidence before me is that Ms. Bent was quite upset to learn of the leaking of the email and took immediate steps as an officer of the OTLA to conduct an investigation to locate the source of the leak. The source of the leak was located and a confession received as a result.
>
> **I cannot find on the record before me that there is any basis to conclude that Ms. Bent could have reasonably foreseen that the confidentiality obligations undertaken by recipients of the email would be breached and that the email would make its way into the broader insurance community** including the clients upon whom Dr. Platnick depended, still less that it would do so in the distorted "broken telephone" fashion claimed by Dr. Platnick in this case.[12] [Emphasis added.]

22. Critically, the plaintiff does not dispute the confidential nature of the listserv. Indeed, he relied on the confidential and private nature of the listserv to support his argument that the message, which he agreed was "destined […] solely for a select group of OTLA members," was not in the public interest.[13]

23. The importance of this factual finding, of the confidential nature of the listserv, and the Court of Appeal's improper consideration of it and imposition of a different finding based on an inference not grounded in any evidence in the record, is discussed in greater detail below.

4. Dr. Platnick's Lawsuit

24. Dr. Platnick sued Ms. Bent and Lerners for defamation, seeking damages of $16,300,000. He claims that Lerners is vicariously liable for the conduct of its partner. He does not claim that

[12] Motion Decision at paras. 28-31
[13] Motion Decision at para. 61.

Lerners actively participated in the composition and publication of the message, or that it was responsible for its publication outside of the listserv environment.

25. It is undisputed that Dr. Platnick's lawsuit has stifled Ms. Bent's expression, and that she no longer feels able to speak freely and openly about an important matter of public interest and of interest to the justice system, namely, the circumstances and manner in which insurance companies obtain "consensus" assessment opinions from physicians and the effect of those opinions on injured people seeking benefits from their insurers.[14]

5. Legislative History of the PPPA

26. The new procedure for challenging SLAPP suits has a clear legislative history. In 2010, the Attorney General's Anti-SLAPP Advisory Panel prepared a report that included recommendations that found their way into the 2015 legislation.

27. In the report, the Panel recognized the need to protect expression relating to matters of public interest. The Panel proposed a new procedure designed to quickly and inexpensively identify and dismiss claims that unduly limited an individual's right to freedom of expression on matters of public interest.[15]

28. In order to ensure that the new procedure did not unduly limit other interests that deserve vindication through the legal process, the Panel identified a two-pronged approach for distinguishing between claims that sought to unduly limit freedom of expression and claims that legitimately sought to vindicate a wrong suffered as a result of a defendant's expression.

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[14] Affidavit of Maia Bent, sworn April 25, 2016, para. 3, Bent Record, Vol. III, Tab 18 at p. 2.
[15] Anti-SLAPP Advisory Panel Report to the Attorney General ("Panel Report") at para. 18, Exhibit "A" to the Affidavit of Jonathan Gnark dated May 20, 2016, Bent Record, Vol. X, Tab 20-B at p. 46.

The first prong looked to the merits of the plaintiff's claim. The second sought to measure the public interest served by allowing the plaintiff's claim to proceed against the harm caused by the claim to the defendant's freedom of expression.[16]

29. This two-pronged approach was incorporated into the PPPA.

30. At second reading, the Attorney General described the legislation's purpose and intent:

> [TRANSLATION:] The purpose of the Bill is to protect freedom of expression…. It aims to achieve a significant balance, to the benefit of all parties to a dispute…. Balance is a constant theme: the need to strike a balance that will end abusive litigation while allowing legitimate actions.
>
> […]
>
> [The Bill] does not create a so-called "licence to slander". Instead, the Bill aims to protect expression on matters of public interest. What the Bill would do is let a court review lawsuits brought against such expression at an early stage. *It would then be up to the court to decide whether the expression at issue is likely to cause serious harm. If so, the court may allow the lawsuit to continue in the normal course of litigation.*
>
> I strongly believe that the law must defend reputation, but not at any cost and not in every case. I do not believe that a mere technical case – without actual harm – should be allowed to suppress the kind of democratic expression that is crucial for our democracy. [Emphasis added.][17]

31. At third reading, the Attorney General re-emphasized that the purpose of the legislation was not to dismiss actions involving "truly harmful defamatory attack[s]":

> This Bill would provide a process *for the courts to evaluate whether free expression on a matter of public interest should be subject to a lawsuit by having the courts make an evaluation in several steps.* First, the views expressed by a citizen must be on a matter of public interest and not simply a private quarrel or personal allegations. Second, there must be grounds to believe that the case can succeed on its merits. Finally, there must be some likely harm to the party that starts the lawsuit. [TRANSLATION:] Thus, a citizen cannot be silenced or punished for the simple reason that the person

[16] Panel Report at paras. 37-38, Bent Record, Vol. X, Tab 20-B, p. 61.
[17] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 1st Sess., No. 41A (10 December 2014), at pp. 1971-72 (Hon. Madeleine Meilleur).

> who is the target of the expression is not happy. The court must be satisfied that the harm done is more than the value of freedom of expression in the public interest. [Emphasis added.][18]

32. The legislation (the "**PPPA**") that passed in 2015 amended the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "**CJA**") to protect statements on matters of public interest from strategic litigation against public participation ("**SLAPP**") suits. The amendments created a process by which a defendant could seek, on a summary basis, to have the claim dismissed at an early stage.

6. Overview of the Legislation

33. The PPPA added sections 137.1 to 137.5 to the CJA. Subsection 137.1(1) sets out the purposes of the new provisions:

> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.[19]

34. As the Court of Appeal for Ontario held in *Pointes*, one of the related appeals, the new provisions are intended to prevent the use of litigation to "gag" those who would speak out or who have spoken out on matters of public interest.[20]

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[18] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 1st Sess., No. 112 (27 October 2015), at p. 6017 (Hon. Madeleine Meilleur).
[19] CJA, Section 137.1(1).
[20] *1704604 Ontario Ltd. v Pointes Protection Association*, 2018 ONCA 685 at para. 35 [*Pointes*].

35. To achieve the purposes set out in section 137.1(1), section 137.1(3) creates a new remedy – a defendant may move at any time after the proceeding is commenced for an order dismissing the proceeding. Section 137.1(3) includes a **mandatory** direction to the motion judge. The judge "shall", subject to section 137.1(4), dismiss the proceeding if the defendant can satisfy the judge that the proceeding arises from an expression that relates to a matter of public interest.[21]

36. Subection 137.1(4) provides for a merits-based assessment and balancing of interest for proceedings where the defendant has met the onus under subsection 137.1(3). If the defendant establishes that her expression was on a matter of public interest, the onus shifts to the plaintiff, who is required under subsection 137.1(4)(a) to **satisfy the motion judge** that there are grounds to believe that:

    (a) the proceeding has substantial merit; **and**

    (b) the defendant has no valid defence in the proceeding, **and**

    (c) the harm likely to be or that has been suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that a public interest permitting the proceeding to continue outweighs the public interest in protecting that expression.[22]

37. The plaintiff must satisfy the motion judge that he can meet all three of these conditions before the motion judge determines that the action shall not be presumptively dismissed under subsection 137.1(3). This is a high hurdle to meet, as Justice Doherty held in *Pointes*:

> The purpose of s. 137.1 is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. Plaintiffs who commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared

[21] CJA, Section 137.1(3).
[22] CJA, s. 137.1(4).

> from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.[23]

7. The Motion Judge's Decision

38. Ms. Bent brought a motion under section 137.1 of the CJA to dismiss Dr. Platnick's claim. Lerners participated in the motion in a limited fashion. All parties acknowledged that if the motion succeeded, the action would be dismissed against Lerners as well.

39. The motion judge held that:

> (a) Ms. Bent's expression related to a matter of important public interest, namely the integrity of the process for determining claims by persons injured in motor vehicle accidents and the honesty and reliability of medical reports filed by insurers in that process;[24]
>
> (b) Based on his assessment of the evidence before him, Dr. Platnick could not establish that there were grounds to believe that Ms. Bent had no valid defence of substantial justification or qualified privilege, either of which was a complete answer to the claim;[25] and
>
> (c) In balancing the competing public interests at stake, and considering the seriousness of the expression, the lack of malice, the inability to prove causation and foreseeability (due to the undertaking), the public interest weighed in favour of dismissing the action.[26]

40. As a result, the motion judge granted the motion and dismissed the action.

8. Court of Appeal for Ontario's Decision

41. The Court of Appeal allowed Dr. Platnick's appeal. It agreed that Ms. Bent's expression related to a matter of serious public interest. But it conducted a different evaluation of whether Dr.

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[23] *Pointes* at para. 45.
[24] Motion Decision at paras. 68-71.
[25] Motion Decision at paras. 113 and 118.
[26] Motion Decision at para. 129-135.

Platnick could establish grounds to believe that Ms. Bent had no valid defence, and it engaged (improperly) in a re-evaluation of the evidence to make findings of fact that expressly overturned the motion judge's factual findings concerning his assessment of the damages caused by Ms. Bent. Relying on these new findings of fact, the Court of Appeal also (improperly) overturned the motion judge's weighing of public interest in protecting Ms. Bent's free expression and the harm to Dr. Platnick caused by Ms. Bent's expression.

42. On the issue of the standard a plaintiff must meet to establish "grounds to believe" there are no valid defences, the Court of Appeal held that a plaintiff need demonstrate only that the record provides a reasonable basis for believing that there is no valid defence.[27]

43. Despite not characterizing them as errors of law or palpable and overriding errors of fact, the Court of Appeal reviewed the motion judge's findings and rejected many of them. In essence, the Court of Appeal engaged in a *de novo* assessment of the evidence and substituted its own view of the facts for the motion judge's findings. The Court of Appeal was clearly willing to give Dr. Platnick more than the benefit of the doubt on the issue of potentially valid defences.

44. On the issue of whether Dr. Platnick's alleged damages were reasonably foreseeable, the Court of Appeal rejected the motion judge's findings, even though they were rooted in the unchallenged and uncontradicted documentary evidence (including the undertaking). Instead, the Court of Appeal made different findings that were entirely, and admittedly, speculative:

> The motion judge effectively found, as a fact, that it was not reasonably foreseeable that Ms. Bent's allegations would spread beyond the recipients of the email, primarily because of the confidentiality requirements imposed on those obtaining the email: paras. 29 and 124. With respect, this finding is highly debatable, if not unreasonable. **I would have thought it almost inevitable** that an email sent to several hundred people involved in

[27] Appeal Decision at para. 48.

> acting for claimants injured in motor vehicle accidents, alleging serious improprieties on the part of a medical expert routinely used by insurers, would rapidly find a much broader audience.[28] [Emphasis added.]

45. The Court of Appeal's assumption essentially ignored that the participants on the listserv are lawyers who signed a written undertaking not to share its contents with non-participants. It also did not account for the plaintiff's reliance on the undertaking to support his argument that the message did not related to a matter of public interest. The suggestion that it is inevitable, and thus foreseeable, that a lawyer would breach a written undertaking, when there was no evidence of the confidentiality of the listserv ever having been violated before or since the message was leaked, was nothing more than speculation by an appellate judge that conflicted with the evidence and the factual findings of the motion judge.

PART II – QUESTIONS IN ISSUE

46. This appeal raises three issues:

(a) What is the proper interpretation of subparagraph 137.1(4)(a)(ii), and in particular the standard for a motion judge's "grounds to believe" that a defendant has no "valid defence" to the claim? Does this permit the motion judge to weigh evidence (as the motion judge did here) or must a motion judge accept a plaintiff's evidence if it "may be" accepted by a judge or jury (the Court of Appeal's standard)?

(b) When balancing the public interests under subparagraph 137.1(4)(b), should the motion judge consider the issues of causation and foreseeability in respect of the alleged harm to the plaintiff (as the motion judge did here), or is it sufficient for the plaintiff to establish a pecuniary loss, howsoever caused (the Court of Appeal's standard)?

(c) What is the scope for appellate review of a motion judge's findings of fact? Is it a hearing *de novo* (as performed by the Court of Appeal below) or should an appellate court

[28] Appeal Decision at para. 107.

apply the "palpable and overriding error" standard applicable to findings of fact in other motions?

PART III – STATEMENT OF ARGUMENT

A. The Issues and the Appellant's Position

47. Lerners submits that these questions should be answered as follows:

48. First, the standard for a motion judge's "grounds to believe" that a defendant has no "valid defence" should permit the motion judge to weigh evidence and make findings of credibility. An anti-SLAPP motion is not akin to a motion to strike a pleading as disclosing no cause of action – the statutory regime expressly contemplates the filing of documentary evidence and cross-examination on affidavits, which implies that the motion judge may make findings of credibility where evidence is contested as so often happens in other motions.[29]

49. Second, **causation and foreseeability of damages** should be considered as part of the assessment of harm to the plaintiff. A plaintiff should be required to do more than provide "potentially" credible evidence of harm caused by the publication of the impugned statement by the defendant – those questions should be ones of fact, to be determined by the motion judge, after weighing the evidence from both parties.

50. Third, a motion judge's findings of fact at an anti-SLAPP motion should receive the same deference that this Court has held applies to findings of fact on any motion, in keeping with the reasoning in *Housen v Nikolaisen*.[30] An appeal from a motion judge's decision to dismiss

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[29] CJA, s. 137.2(4).
[30] *Housen v Nikolaisen*, 2002 SCC 33 at para. 12 ["*Housen*"].

a defamation claim should not attract a unique standard of review that differs from the standard applicable to all other motions.

B. Standard of Review

51. It is well-established that the applicable standard of review on questions of law is correctness.[31] Lerners submits that the Court of Appeal erred by:

(a) Misdirecting themselves as to the interpretation of "grounds to believe" in subparagraph 137.1(4)(a) of the CJA;[32]

(b) Misdirecting themselves as to the interpretation of subparagraph 137.1(4)(b), and in particular the assessment of "the harm likely to be or have been suffered by the [plaintiff] as a result of the [defendant's] expression";[33] and

(c) Reaching conclusions of fact that directly contradicted findings of the motion judge, and for which there was no supporting evidence.[34]

C. "Grounds to Believe" Requires Motion Judges to Weigh Evidence

52. Both the motion judge and Court of Appeal found that the defendants had demonstrated that the action arises from an expression that relates to a matter of public interest:

> Like the motion judge, I view the [message] as relating to a matter of importance to the proper administration of justice in Ontario. The [message] relates to the process put in place by the legislature for the determination of claims made by persons injured in motor vehicle accidents. The [message] raises concerns about the integrity of that process and, in particular, the honesty and reliability of medical reports filed on behalf of insurers in the arbitration process. The integrity and reliability of that process has a direct impact on a significant segment of the public.
>
> The [message] is also directed at persons with a vital interest in ensuring the honesty and integrity of the arbitration process. That interest is part of their greater responsibility to fully and effectively represent the interests

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[31] *Ibid.* at para. 8.
[32] *Ibid.* at para. 36.
[33] *Ibid.*
[34] *R. v J.M.H.*, 2011 SCC 45 at para. 25

of clients advancing claims under the scheme.[35]

53. The onus then shifted to the plaintiff, who was required to satisfy the motion judge that:

(a) there are **grounds to believe** that,

(i) the proceeding has substantial merit, **and**

(ii) the defendants have no valid defence in the proceeding; **and**

(b) the harm likely to be or have been suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.[36]

54. The PPPA requires the plaintiff to lead evidence that will almost always be challenged and opposed by the defendant in order to satisfy the motion judge on the required elements. Based on the purpose of the new procedure, as set out in subsection 137.1(1), the motion judge adopted and applied this Court's test for "reasonable grounds to believe" in *Mugesera v Canada (Minister of Citizenship and Immigration)*:

> The first issue raised by s. 19(1)(j) of the *Immigration Act* is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: [citations omitted]. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: [citation omitted].[37]

55. In *Mugesera*, this Court held that the "reasonable grounds to believe" standard of proof only applied to questions of fact. For questions of law, the facts as found meet the requirements for

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[35] Appeal Decision at paras. 36-37.
[36] CJA, s. 137.1(4).
[37] 2005 SCC 40 at para. 114.

the relevant question of law – in that case, whether the established facts met the requirement of a crime against humanity.[38]

56. While the word "reasonable" is absent from the PPPA, that absence does not change the interpretation – it can hardly be said that a motion judge can be satisfied by "unreasonable" grounds to believe the proceeding has substantial merit.

57. It makes perfect sense to apply the same interpretation to the two statutes. The legislation, having chosen similar language in the statute at issue here, must be taken to have expected that it would be interpreted in the same way. It would be unreasonable for the same language to be interpreted differently.

58. The Court of Appeal, by contrast, did not agree with this approach. It pointed to the differences in the nature of the two determinations required under the two statutes:

> In *Mugesera*, the Immigration and Refugee Board (Appeal Division), after hearing 24 days of evidence, had to decide whether there were reasonable grounds to believe that Mr. Mugesera had committed war crimes and crimes against humanity. This involved determining whether there were reasonable grounds to believe that certain facts existed which, as a matter of law, would constitute such crimes. The description of the reasonable grounds to believe standard as requiring "compelling and credible information" was made in the context of a fact-finding exercise carried out after a hearing that lasted over three weeks. Mr. Mugesera's right to stay in the country hinged on that fact-finding.

[38] *Ibid*. at para. 116.

> **A motion judge conducting a s. 137.1 motion does not make findings of fact under s. 137.1(4)(a).** Instead, the motion judge assesses, at a preliminary stage and through the reasonableness lens, the merits of the plaintiff's claim and the validity of any defences advanced. The motion judge does so for the purpose of determining whether the lawsuit should be allowed to proceed through the normal process. In my view, the phrase "reasonable grounds to believe" used in the context of s. 137.1 calls for a less demanding inquiry than s. 19 of the *Immigration Act* required. [Emphasis added.][39]

59. But in drawing this distinction, the Court of Appeal took a wrong step. As explained below, the Court of Appeal's conclusion that a motion judge conducting an anti-SLAPP motion does not make findings of fact is an error that underpins its decision. Its conclusion is inconsistent with the plain wording of the legislation and a purposive interpretation of the new procedure.

1. The Statute Requires Motion Judges to Make Findings of Fact

60. The PPPA contemplates that the motion judge will make findings of fact. The procedure on an anti-SLAPP motion provides for the parties to file conflicting affidavits, and sets a presumptive limit of seven hours to cross-examine the adverse party's affiants.[40] Inherent in this procedure is the inevitable result that parties will adduce, and rely on conflicting evidence.

61. The Court of Appeal's watered-down interpretation of "grounds to believe" – whether the plaintiff's evidence "may be" accepted by a judge or jury – ignores this inevitable outcome. It would reduce every anti-SLAPP motion to an exercise of evaluating the plaintiff's evidence, without regard for conflicting evidence adduced by the defendant.

62. This one-sided approach to the evidence conflicts with the express purpose of the new procedure, which is to discourage the use of litigation as a means of unduly limiting express

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[39] Appeal Decision at paras. 47-48.
[40] CJA, s. 137.2(4)

on matters of public interest. It is only reasonable to conclude, based **on the legislative history and a plain reading of the legislation,** that the onus on the plaintiff must be higher than merely being able to adduce evidence that is potentially capable of belief.

63. The Court of Appeal's test, which does not permit a motion judge to make findings of fact, and requires only potentially credible evidence, is too easily met. It dilutes the screening function of the PPPA.

64. The present case is instructive on this point. The motion judge engaged in a thorough review of the evidence from both parties concerning justification, and made the following findings of fact, all of which were supported in the record before him:

(a) Dr. Platnick knew when he wrote his report that none of the assessing physicians had reviewed his conclusions when he submitted those conclusions as a "consensus";[41]

(b) Dr. Platnick knew that presenting his opinion as a "consensus report" would grant it greater weight than one that was not;[42]

(c) Dr. Platnick's report was on its face misleading;[43]

(d) Ms. Bent reported fairly and accurately on the facts reasonably known to her;[44] and

(e) With respect to the defence of qualified privilege, there was no evidence to support Dr. Platnick's allegation that Ms. Bent acted with malice.[45]

65. In keeping with this Court's interpretation of the same standard of proof in *Mugesera*, the motion judge concluded that these established facts supported a defence of justification and

[41] Motion Decision at para. 105.
[42] Motion Decision at para. 106.
[43] Motion Decision at para. 108.
[44] Motion Decision at paras. 111 and 112.
[45] Motion Decision at para. 117.

qualified privilege. The motion was granted because Dr. Platnick failed to satisfy the onus the PPPA placed on him to show his claim had substantial merit and there were no valid defences.

66. The Court of Appeal improperly rejected all of these findings. Instead, it made findings based on its lower evidentiary threshold. In so doing, it concluded that Dr. Platnick had established "grounds to believe" that the claim had substantial merit and Ms. Bent would not be able to defend her statements.

67. The Court of Appeal's approach is a problem not only from the perspective of standard of review (discussed below) – the application of this low bar for scrutiny of the plaintiff's evidence on anti-SLAPP motions undermines the legislature's intent by making it too easy for plaintiffs to satisfy it, even though it was intended to protect expression in the public interest.

2. Findings of Fact are Essential to Evaluating Possible Defences

68. When the impugned expression relates to a matter of public interest, the PPPA requires the plaintiff to satisfy the motion judge not only that there are grounds to believe the claim has substantial merit, but also to determine whether the defendant has no valid defence in the proceeding.[46]

69. An assessment of the validity of defences requires, or may require, the motion judge to make findings of fact. For example, a motion judge cannot determine whether there are grounds to believe that the defendant has a valid defence of qualified privilege without making findings of fact concerning the context in which the impugned expression was made.

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[46] CJA, s. 137.1(4)(a).

3. Professional Obligations of the Defendant

70. In this case, Ms. Bent arguably had a duty to send the message, or at least an interest in sending it, to other members of OTLA. Rule 2.1-2 of the Law Society of Ontario's *Rules of Professional Conduct* imposes a duty on lawyers "to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions."[47] The commentary to this rule states that lawyers are encouraged to share "knowledge and experience with colleagues and students informally in day-to-day practice".[48]

71. The *Rules of Professional Conduct* also require a lawyer to try to improve the administration of justice.[49] The commentary for this rule states that lawyers "should not hesitate to speak out against an injustice."[50]

72. These professional obligations form an important context to the message. Ms. Bent sent the message to the listserv participants to inform them of questionable conduct by an expert in an arbitration. She wrote, "I am disappointed that this conduct was not made public by way of a decision but I wanted to alert you, my colleagues, to always get the assessor's and Sibley's files."[51]

73. With this context in mind, the motion judge found, as a question of fact:

> **The public interest in educating OTLA members about the risk of relying upon selective "executive summary" reports that omit evidence favourable to claimants and potentially make misleading and false claims of being consensus reports is manifest. The didactic intent of the email sent by the President-elect of the OTAL is equally**

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[47] *Rules of Professional Conduct*, Rule 2.1-2.
[48] Paragraph 1 to the commentary to Rule 2.1-2, *ibid.*
[49] *Rules of Professional Conduct*, Rule 5.6-1.
[50] Paragraph 1 to the commentary to Rule 2.1-2, *ibid.* See also *Campbell v Jones*, 2002 NSCA 128 at paras. 58-59.
[51] Appeal Decision at para. 25.

> **manifest.** There is no evidence to suggest that Ms. Bent bears any responsibility for the subsequent and unanticipated republication of the email to a broader audience nor can malice reasonably be inferred from any of the evidence before me. [Emphasis added.][52]

74. These findings of fact are the foundation of the motion judge's determination that Dr. Platnick had not satisfied him that there were grounds to believe Ms. Bent had no valid defences. Applying his findings of fact to the law of defamation, and specifically the legal requirements to ground a qualified privilege defence, the motion judge identified a valid defence.

75. This conclusion should have been sufficient to require dismissal of Dr. Platnick's claim pursuant to subsection 137.1 of the CJA.

D. Motion Judge Must Consider Causation and Foreseeability in Determining Harm to the Plaintiff

76. Even if there are grounds to believe the claim has substantial merit and there are no valid defences, the plaintiff must still satisfy the judge that the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.[53]

77. In *Pointes*, the Court of Appeal described this balancing exercise as "the heart of Ontario's Anti-SLAPP legislation".[54]

78. The motion judge balanced the two competing interests by comparing the very important public interest in the proper administration of justice in Ontario (which weighs in favour of

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[52] Motion Decision at para. 116.
[53] CJA, s. 137.1(4)(b).
[54] *Pointes Protection Association* at para. 86.

dismissal of the claim) with the evidence of harm to the plaintiff **that is a result of the defendant's expression**.

79. In particular, the motion judge found, as a question of fact, that there was no compelling or credible evidence that Ms. Bent knew or ought to have known that a member of OTLA would breach his or her written undertaking and leak the message to non-members of the listserv. Because OTLA members would not retain Dr. Platnick, who acts exclusively for insurance companies, this finding of fact led to the conclusion that the harm suffered or to be suffered by Dr. Platnick that might reasonably be laid at the feet of Ms. Bent is "fairly low."[55]

80. The motion judge weighed the "fairly low" harm suffered by Dr. Platnick against the strong public interest in lawyers sharing information intended to improve the administration of justice with each other, among other interests. He concluded, as a question of fact, that Dr. Platnick had not satisfied him that the harm outweighed the public interest, and therefore that he had not satisfied his onus under subsection 137.1(4) of the CJA.

81. The Court of Appeal held that the motion judge should not have made findings of fact. In particular, the Court held that he should not have considered causation and foreseeability. Instead, the Court only considered whether Dr. Platnick had adduced "potentially credible" evidence of damage.[56]

82. The Court of Appeal's decision is not consistent with the structure and purpose of the PPPA. If a motion judge cannot scrutinize the plaintiff's evidence to determine whether the alleged harm was caused or reasonably foreseeable by the plaintiff, he or she will be required to allow

[55] Motion Decision at paras. 123-127.
[56] Appeal Decision at para. 108.

claims concerning expression relating to matters of public interest to continue, even if the harm alleged was not caused or reasonably foreseeable by the defendant.

83. The Court of Appeal's proposed restrictions on scrutinizing a plaintiff's evidence of harm eviscerates the anti-SLAPP regime and turns what was intended to be a robust filtering regime into a weak test that will not properly weed out litigation commenced to punish persons making important expressions that serve the public interest.

E. Deference to the Motion Judge's Findings of Fact

84. Throughout the decision below, the Court of Appeal engaged in a re-weighing of evidence substituted the motion judge's findings of fact with its own, and rejected important and material findings of fact without considering whether the motion judge made a palpable and overriding error.

85. In essence, the Court of Appeal treated the appeal as a hearing *de novo*. Among other things, it relied on speculation and assumptions about human behavior, for which there was no supporting evidence in the record, to contradict documentary evidence in the form of the undertaking and Ms. Bent's sworn, uncontradicted and unchallenged evidence that, to her knowledge, prior to this instance, no other communication to the listserv had ever leaked.

1. Palpable and Overriding Error Standard Applies to Findings of Fact

86. The Court of Appeal ignored the long-standing principle that appellate courts should not overturn a motion judge's findings of fact or findings of mixed fact and law absent a palpable and overriding error.[57]

[57] *Housen v Nikolaisen*, 2002 SCC 33 at paras. 10 and 28.

87. There should not be one test ("palpable and overriding error") for findings of fact or of mixed fact and law in ordinary appeals from motions and a different test for an anti-SLAPP motion.

88. The Court of Appeal's substituted findings of fact with respect to foreseeability and causation of damages are particularly egregious in this case, where Ms. Bent reasonably relied on her colleagues' signed undertaking to keep matters discussed on the OTLA listserv confidential, even from their law firm's partners and associates. The Court's finding that it was "almost inevitable" that the message would find a broader audience suggests that Ms. Bent should have expected one of her colleagues to breach his or her undertaking, in direct violation of Rules 5.1-6 and 7.2-11 of the *Rules of Professional Conduct*.

89. Rule 5.1-6 provides, "A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation."[58] The commentary to this rule states, very plainly, "Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility."[59]

90. Likewise, Rule 7.2-11 of the *Rules of Professional Conduct* provide, "A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted."[60]

91. The Court of Appeal's finding, without reference to any evidence in the record, that Ms. Bent should have assumed one of her colleagues would breach the governing rules of conduct and

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[58] *Rules of Professional Conduct*, Rule 5.1-6.
[59] Commentary to Rule 5.1-6 of the *Rules of Professional Conduct*, para. 0.1.
[60] *Rules of Professional Conduct*, Rule 7.2-11.

a written undertaking, is diametrically opposite to the accepted standard of review applicable to findings of fact.

2. Deference Required for Judge's Balancing of Public Interests

92. The same principle applies to the motion judge's balancing of the competing public interests, which is mandated by paragraph 137.1(4)(b). The determination whether the plaintiff has satisfied the judge that the public interest in permitting the claim to continue outweighs the public interest in protecting the impugned expression is, of necessity, a question of fact.

93. The Court of Appeal interfered with the motion judge's conclusion of fact on the balancing issue without first identifying a palpable and overriding error. It is evident from the Court's reasons that it would have made different findings of fact, and in fact did so, without first identifying an error by the motion judge that could justify appellate interference:

> In considering the public interest in protecting Ms. Bent's expression, the motion judge described a strong public interest in lawyers sharing information intended to improve the administration of justice: para. 132. I agree with his comments in this regard. However, much of the information relevant to the administration of justice concerns could have been equally effectively revealed without referring to Dr. Platnick, or at least without reference to the potentially very damning allegation in para. 5 of the email.
>
> Without diminishing the public interest in protecting comments made to promote the effective administration of justice, I am satisfied that the potential harm to Dr. Platnick outweighs the public interest in protecting Ms. Bent's expression. Dr. Platnick's allegation, **if eventually made out**, is a very serious one, both in terms of the financial harm caused and the damage to his reputation. For the reasons set out above, he has cleared the "merits" hurdle in s. 137.1(4)(a). The public interest requires that he be allowed to pursue his claim in the normal course. [Emphasis added.][61]

94. The highlighted phrase demonstrates that the Court of Appeal was not relying on evidence in the record to ground its conclusion, but rather decided that Dr. Platnick was entitled to proceed

[61] Appeal Decision at paras. 109-110.

with his claim with the hope that, “eventually”, he will be able to prove his allegations of damage attributable to Ms. Bent’s expression.

95. The Court of Appeal substituted the motion judge’s conclusions with its own, without first identifying proper grounds for doing so.

96. If allowed to stand as an example of the proper standard of appellate review applicable to an anti-SLAPP motion, the decision below will conflict with the Legislature’s intention by encouraging unsuccessful parties to appeal a motion judge’s decision to get a “second kick at the can”. This undermines the intention of the PPPA to provide an efficient, cost-effective means to dismiss SLAPP suits at an early stage.

F. Conclusion

97. The Legislature passed the PPPA to fix a specific problem – the harm to free expression caused by SLAPP suits. The new procedure is intended to stop, at an early stage, litigation designed to have a “chilling” effect on expressions relating to matters of public interest. That is exactly the effect Dr. Platnick’s action had on Ms. Bent’s expression.

98. The Court of Appeal applied a lower level of scrutiny to Dr. Platnick’s evidence than the PPPA warrants and reversed findings of fact in the absence of a palpable and overriding error.

99. These errors interpret section 137.1 of the CJA in a manner that improperly favours the interests of plaintiffs who bring actions over expressions relating to matters of public interest, contrary to the stated purpose of the legislation. Lerners submits that this Court should restore the balance intended by the Legislature, and confirm that on anti-SLAPP motions, motion

judges should weigh evidence and make findings of fact to which an appellate court should pay proper deference.

PART IV – SUBMISSIONS ON COSTS

100. Lerners requests costs in this Court and in the Court of Appeal. It also requests that the costs order of the motion judge in the Anti-SLAPP Motion be restored.

PART V – ORDER SOUGHT

101. Lerners asks that this Court grant the appeal, with costs.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

3. N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of July 2019.

Per: _____
Terrence J. O'Sullivan

Per: _____
Andrew Winton

PART VII – AUTHORITIES

Authorities

NO.	AUTHORITY	PARAGRAPH REFERENCE
1.	*1704604 Ontario Ltd. v Pointes Protection Association*, 2018 ONCA 685	34, 37, 77
2.	*Housen v Nikolaisen*, 2002 SCR 235, 2002 SCC 33	50, 51, 86
3.	*Mugesera v Canada (Minister of Citizenship and Immigration, [2005] 2 SCR 100, 2005 SCC 40)*	54, 55, 58, 65
4.	*R. v J.M.H.*, [2011] 2 SCR. 2011 SCC 45	51

Other Source Documents

NO.	DOCUMENT	PARAGRAPH REFERENCE
5.	Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 1st Sess., No. 41A (10 December 2014), at pp. 1971-72 (Hon. Madeleine Meilleur)	30
6.	Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 1st Sess., No. 112 (27 October 2015), at p. 6017 (Hon. Madeleine Meilleur)	31

PART VIII – STATUTES, REGULATIONS, RULES, ETC.

NO.	STATUTE, REGUGLATION, RULE, ETC.	SECTION, RULE, ETC.
1.	*Courts of Justice Act*, R.S.O. 1990, c. C.43	137.1(1) 137.1(3) 137.1(4) 137.1(4)(a) and (b) 137.2(4)
	Tribunaux judiciaires (Loi sur les), L.R.O. 1990, chap. C.43	137.1(1) 137.1(3) 137.1(4) 137.1(4)(a) and (b) 137.2(4)
2.	*Rules of Professional Conduct*,	2.1-2 5.1-6. 5.6-1 7.2-11
	Code de déontologie	2.1-2 5.1-6. 5.6-1 7.2-11
3.	Commentary to Rule 2.1-2 of the *Rules of Professional Conduct*	Para. 1
	Commentaire de la régle. 2.1-2 du *code de déontologie*	Par. 1
4.	Commentary to Rule 5.1-6 of the *Rules of Professional Conduct*	Para. 0.1
	Commentaire de la régle. 5.1-6 du *code de déontologie*	Par. 0.1
5.	Commentary to Rule 5.6-1 of the *Rules of Professional Conduct*	Para. 1
	Commentaire de la régle. 5.6-1 du *code de déontologie*	Par. 1

***Rules of Professional Conduct,* Rule 2.1-2**	***Code de déontologie,* code 2.1-2**
2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.	**2.1-2** L'avocat a le devoir de respecter les normes et la réputation de la profession juridique, et de favoriser la promotion de ses buts, organismes et institutions.

***Rules of Professional Conduct,* Commentary to Rule 2.1-2, para. 1**	***Code de déontologie, commentaire de la règle 2.1-2, par. 1***
[1] Collectively, lawyers are encouraged to enhance the profession through activities such as: (a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars and university lectures; (b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis; (c) filling elected and volunteer positions with the Law Society; (d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and (e) acting as directors, officers and members of non-profit or charitable organizations	[1] Tous les avocats sont encouragés à mettre la profession en valeur au moyen d'activités telles que : a) partager leurs connaissances et leur expérience avec leurs collègues et les étudiants sans formalité particulière dans l'exercice quotidien de leurs fonctions, ainsi qu'en collaborant aux revues et autres publications professionnelles, en appuyant les projets des facultés de droit et en participant à des débats entre spécialistes, à des séminaires de formation en droit et à des conférences dans les universités?; b) participer à des programmes d'aide juridique et de services juridiques communautaires ou fournir des services juridiques bénévolement?; c) être élus à des postes et occuper des postes bénévolement au sein du Barreau?; d) agir à titre d'administrateurs, de dirigeants et de membres d'associations juridiques locales, provinciales, nationales et internationales et faire partie de leurs comités et sections?; e) agir à titre d'administrateurs, de dirigeants et de membres d'organismes sans but lucratif et de bienfaisance.

***Rules of Professional Conduct,* Rule 5.1-6**	***Code de déontologie,* code 5.1-6**
5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.	**5.1-6** Un avocat doit rigoureusement et scrupuleusement respecter tous les engagements qu'il prend, ainsi que toutes les conditions fiduciaires qu'il accepte au cours d'une instance.

***Rules of Professional Conduct,* Commentary to Rule 5.1-6, para. 0.1**	***Code de déontologie, commentaire de la règle 5.1-6, par. 1***
[0.1] Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.	[0.1] Sauf réserves expresses, l'avocat est personnellement responsable de l'exécution de l'engagement.

***Rules of Professional Conduct,* Rule 5.6-1**	***Code de déontologie, règle 5.6-1, par. 1***
5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice.	**5.6-1** L'avocat s'efforce d'améliorer l'administration de la justice et encourage le public à la respecter

***Rules of Professional Conduct,* Commentary to Rule 5.6-1, para. 1**	***Code de déontologie, commentaire de la règle 5.6-1, par. 1***
[1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.	[1] L'obligation énoncée dans la règle ne se limite pas aux activités professionnelles de l'avocat; c'est une responsabilité d'ordre général, attachée à sa position dans la communauté. Ses responsabilités sont plus grandes que celles du simple citoyen. Il veille à ne pas affaiblir ni détruire la confiance du public envers les institutions ou autorités juridiques en tenant des propos irresponsables. Dans sa vie publique, l'avocat se montre particulièrement prudent à cet égard, car, de par sa profession, on aura tendance à accorder du poids et de la crédibilité à ses déclarations publiques. Toutefois, pour la même raison, il ne doit pas hésiter à dénoncer une injustice.

***Rules of Professional Conduct,* Rule 7.2-11**	***Code de déontologie,* code 7.2-11**
7.2-11 A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted.	**7.2-11** Un avocat ne doit pas prendre un engagement qu'il ne peut respecter et doit respecter tous les engagements qu'il prend, ainsi que toutes les conditions fiduciaires qu'il accepte.