SCC File No.: 38374

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

BETWEEN:

MAIA BENT

APPELLANT

AND:

HOWARD PLATNICK

RESPONDENT

AND BETWEEN:

LERNERS LLP

APPELLANT

AND:

HOWARD PLATNICK

RESPONDENT

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, GREENPEACE CANADA, CANADIAN CONSTITUTION FOUNDATION, ECOJUSTICE CANADA SOCIETY, WEST COAST LEGAL EDUCATION AND ACTION FUND, ATIRA WOMEN'S RESOURCE SOCIETY, B.W.S.S. BATTERED WOMEN SUPPORT SERVICES ASSOCIATION, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTER, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN BROADCASTING CORPORATION, BARBRA SCHLIFER COMMEMORATIVE CLINIC, Ad IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, CTV, a DIVISION OF BELL MEDIA INC., GLOBAL NEWS, a DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, ABORIGINAL PEOPLES TELEVISION NETWORK, POSTMEDIA NETWORK INC.

INTERVENERS

FACTUM OF THE INTERVENER
CANADIAN BROADCASTING CORPORATION
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

CANADIAN BROADCASTING CORPORATION
250 Front Street West
Toronto, ON M5V 3G7

Sean Moreman
Katarina Germani
Tel: (416) 205-6494

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, 26th Floor
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 788-3559

Fax: (416) 205-2723
Email: sean.moreman@cbc.ca
Email : katarina.germani@cbc.ca

Email:
guy.regimbald@gowlingwlg.com

Counsel for the Intervener,
Canadian Broadcasting Corporation

Agent for the Intervener,
Canadian Broadcasting Corporation

WINKLER DISPUTE RESOLUTION
2750-145 King Street West
Toronto, ON M5H 1J8

Howard Winkler
Eryn Pond
Tel: (416) 519-2344
Fax: (416) 915-6325
Email: hwinkler@winklerlawllp.com
Email: epond@winklerlawllp.com

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 369-4796
Fax: (613) 230-8842
Email: kperron@blg.com

Counsel for the Appellant,
Maia Bent

Agent for the Appellant,
Maia Bent

LAX O'SULLIVAN LISUS GOTTLIEB LLP
2750-145 King Street West
Toronto, ON M5H 1J8

Terrence J. O'Sullivan
Andrew Winton
Tel: (416) 598-3556
Fax: (416) 598-3730
Email: tosullivan@lolg.ca
Email: awinton@lolg.ca

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 369-4796
Fax: (613) 230-8842
Email: kperron@blg.com

Counsel for the Appellant,
Lerners LLP

Agent for the Appellant,
Lerners LLP

DANSON RECHT LLP
2000-700 Bay Street
Toronto, ON M5G 1Z6

Timothy S.B. Danson
Marjan Delavar
Tel: (416) 929-2200
Fax: (416) 929-2192
Email: danson@drlitigators.com
Email: marjan@drlitigators.com

Counsel for the Respondent,
Howard Platnick

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan
Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondent,
Howard Platnick

Maia Tsurumi
154 West 18th Avenue
Vancouver, BC V5Y 2A5
Tel: (604) 736-8703
Email: mtsurumi@legalanalysis.ca

Counsel for the Intervener,
British Columbia Civil Liberties Association

GOLDBLATT PARTNERS LLP
500-30 Metcalfe Street
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Agent for the Intervener,
British Columbia Civil Liberties Association

STOCKWOODS LLP
77 King Street West, Suite 4130
Toronto-Dominion Centre, TD North Tower
Toronto, ON M5K 1H1

Nader R. Hasan
Carlo Di Carlo
Tel: (416) 593-1668
Fax: (416) 593-9345
Email: naderh@stockwoods.ca

Counsel for the Intervener,
Greenpeace Canada

POWER LAW
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@powerlaw.ca

Agent for the Intervener,
Greenpeace Canada

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg
Simon Cameron
Tel: (416) 601-8200
Fax: (416) 868-0673
Email: agoldenberg@mccarthy.ca

Counsel for the Intervener,
Canadian Constitution Foundation

POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé

Tel: (613) 702-5566
Fax: (613) 702-5566
Email: dbosse@juristespower.ca

Agent for the Intervener,
Canadian Constitution Foundation

Ecojustice Environmental Law Clinic at the University of Ottawa
216-1 Stewart Street
Faculty of Law – Common Law
Ottawa, Ontario K1N 7M9

Joshua Ginsberg
Tel: (613) 562-5800, ext: 3399
Fax: (613) 562-5319
Email: jginsberg@ecojustice.ca

Counsel for the Intervener,
Ecojustice Canada Society

DENTONS CANADA LLP
250 Howe Street, 20th Floor
Vancouver, BC V6C 3R8

David Wotherspoon
Rajit Mittal
Tel: (604) 691-6429
Fax: (604) 683-5214
Email: david.wotherspoon@dentons.com

Counsel for the Interveners,
West Coast Legal Education and Action Fund, Atira Women's Resource Society, B.W.S.S. Battered Women Support Services Association, Women Against Violence Against Women Rape Crisis Center

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott

Tel: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliott@dentons.com

Agent for the Interveners,
West Coast Legal Education and Action Fund, Atira Women's Resource Society, B.W.S.S. Battered Women Support Services Association, Women Against Violence Against Women Rape Crisis Center

ST. LAWRENCE BARRISTERS LLP
144 King Street East
Toronto, ON M5C 1G8

Alexi N. Wood
Jennifer P. Saville
Tel: (647) 245-8283
Fax: (647) 245-8285
Email: alexi.wood@stlbarristers.ca

Counsel for the Intervener,
Canadian Civil Liberties Association

GOWLING WLG (CANADA) LLP
2600-160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Canadian Civil Liberties Association

BIRENBAUM LAW
55 Richmond Street West, Suite 1200
Toronto, ON M5V 3B1

Joanna Birenbaum
Tel: (647) 500-3005
Fax: (647) 968-0325
Email: joanna@birenbaumlaw.ca

Counsel for the Intervener,
Barbra Schlifer Commemorative Clinic

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

David R. Elliott

Tel: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliott@dentons.com

Agent for the Intervener,
Barbra Schlifer Commemorative Clinic

LINDEN & ASSOCIATES
200 Bay Street, Suite 2010
RBC Plaza, North Tower
Toronto, ON M4J 2J1

Iain A.C. MACKINNON
Tel: (416) 861-9338, ext: 231
Fax: (416) 861-9973
Email: imackinnon@lindenlex.com

Counsel for the Intervener,
Ad Idem/Canadian Media Lawyers Association, Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a Division of Corus Television Limited Partnership, Aboriginal Peoples Television Network, Postmedia Network Inc.

CONWAY BAXTER WILSON LLP
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor
Tel: (613) 691-0368
Fax: (613) 688-0271
Email: dtaylor@conway.pro

Agent for the Interveners,
Ad Idem/Canadian Media Lawyers Association, Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a Division of Corus Television Limited Partnership, Aboriginal Peoples Television Network, Postmedia Network Inc.

INDEX

PART I – OVERVIEW

1. This appeal and its companion address the proper interpretation of test under the so-called anti-SLAPP provisions of the *Courts of Justice Act*[1] enacted through Ontario's *Protection of Public Participation Act*[2] (the "PPPA").

2. Under these provisions, the PPPA accords special status to cases relating to expression made on matters of public interest, and requires courts to dismiss claims that limit debate on such matters at an early stage. To that end, the Ontario Legislature enacted a three-part test, each branch of which is intended to strike a balance between protecting expression on matters of public interest on the one hand, and vindicating legitimate harm suffered by plaintiffs on the other.

3. Under that test, the moving party (the defendant to the action - the "Defendant") must show the claim arises from an expression relating to a matter of public interest (the "Threshold Requirement"). The responding party (the plaintiff to the action - the "Plaintiff") is then required to satisfy the court there are reasonable grounds to believe that the claim has substantial merit, and there is no valid defence (the "Merits Based Hurdle"); and then, that the harm suffered is sufficiently serious that it outweighs the public interest in the expression itself (the "Public Interest Hurdle").

4. In interpreting the test, the Ontario Court of Appeal has stated the Merits Based Hurdle can be satisfied if the Plaintiff establishes the technical merit of its claim, and that the defences put in play "could go either way."[3] The Court also stated that the Public Interest analysis is to be looked at primarily through the lens of quantum of loss:

> [T]he plaintiff must provide a basis upon which the motion judge can make some assessment of the harm done or likely to be done to it by the

---

[1] *Courts of Justice Act*, RSO 1990, c C.43, s 137.1.
[2] *Protection of Public Participation Act, 2015,* SO 2015, c 23 [*PPPA*].
[3] *Bondfield Construction Limited v The Globe and Mail Inc.*, 2019 ONCA 166 [*Bondfield*]. See also *1704604 Ontario Ltd. v Pointes Protection Association*, 2018 ONCA 685 at para 84 [*Pointes*].

> impugned expression. This will almost inevitably include material providing some quantification of the monetary damages.[4]

5. The Court of Appeal confirmed the Plaintiff's burden under the test: "The word "satisfies" indicates that the defendant must establish both criteria on the balance of probabilities."[5] It is well understood that requiring something to be proven on the balance of probabilities requires the individual on whom the burden lies to prove the outcome is more likely than not.

6. The Court of Appeal's interpretation of the PPPA is now before this Court.

7. Canadian Broadcasting Corporation/Radio-Canada ("CBC/Radio-Canada") proposes the test outlined in the PPPA be reinterpreted in a way that gives full effect to the intent of the Legislature, and is more in keeping with the rules of statutory interpretation as understood by this Court.

8. A proper reading of the PPPA indicates that once the Threshold Requirement has been overcome, the Plaintiff must:

    a. clear both parts of the Merits Based Hurdle by
        i. satisfying a court that harm has been, or is likely to be, caused by the expression, and to what degree; and
        ii. satisfying a court that there is no valid defence; and
    b. if indefensible harm has been established, clear the Public Interest Hurdle by satisfying a court that such harm is so significant to the Plaintiff as to justify the action being allowed to continue.

9. With the requirement that harm be proven at the Merits Based Hurdle, the motions judge must assess the harm the Plaintiff seeks to have rectified through the litigation on an objective basis. Claims with no harm, objectively minor harm, or a type of harm not recognized by the courts do not meet the threshold of "substantial merit". On the other hand, claims with substantial

---

[4] *Pointes*, supra note 3 at 90.
[5] *Pointes*, supra note 3 at 50.

merit must then be examined subjectively to determine if the harm is sufficiently serious to the Plaintiff to require judicial redress.

10. Dealing with "harm" under the PPPA in this proposed manner is in keeping with the rules of statutory interpretation, as it recognizes the balance the Legislature sought to achieve at each step of the analysis.

11. While CBC/Radio-Canada is a member of the media and has intervened in an appeal arising from a case of defamation, the solution it proposes does not only apply in similar circumstances. Rather the proposed test serves *all* defendants faced with lawsuits that result in the stifling of free expression on matters of public interest, irrespective of the cause of action pleaded. This proposal is consistent with what the PPPA was intended to achieve: "[T]he proposed scheme should apply to anyone in any civil litigation."[6]

PART II – QUESTION IN ISSUE

12. Issues 1a and 1b as framed by the Appellant, Maia Bent, address the proper interpretation of both the Merits Based Hurdle and the Public Interest Hurdle under the PPPA. CBC/Radio-Canada's argument addresses both of these issues.

PART III – ARGUMENT

Background

13. In examining whether Ontario should adopt anti-SLAPP legislation, the Anti-SLAPP Advisory Panel stated that any such legislation must strike a balance between plaintiffs and defendants where the claim arises from an expression on a matter of public interest.[7]

14. The PPPA was passed with unanimous consent in the Ontario Legislature on October 28, 2015. The law was praised by all parties for providing an efficient means to protect expression on matters of public interest by weeding out claims with the potential to stifle that expression:

---

[6] *Anti-SLAPP Advisory Report*, *supra* note 6 at 62. See also *Pointes, supra* note 3 at 103.
[7] Ontario, Anti-SLAPP Advisory, *Anti-SLAPP Advisory Panel Report to the Attorney General* (Toronto: Attorney General of Ontario, 2010) at paras 36-38 [*Anti-SLAPP Advisory Report*].

> 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.[8]

15. During the debate on the Bill in the Ontario Legislature, former Attorney General Madeleine Meilleur confirmed that the competing interests of parties to the litigation are properly balanced under the PPPA:

> [T]his legislation provides some balance. […] It balances the protection of public participation and freedom of expression against the protection of reputation and economic interests.[9]

That stated objective is expressly reflected in the wording of the sections themselves.

The Proposed Interpretation of the Test

16. It is a settled rule of statutory interpretation that understanding the purpose of an enactment is essential to its proper interpretation: "The cardinal principle of statutory interpretation is that a legislative provision should be construed in a way that best furthers its objects."[10] Also, in her text on statutory interpretation, Ruth Sullivan explains that every part of an enactment should support the legislative purpose:

> It is assumed that every word of legislation, every feature of a legislative text, is there and takes the form it does because it contributes in some way to the scheme of the Act…[11]

17. As a result, each element of the test outlined in the PPPA should serve to balance the competing interests at play. The reformulation presently proposed by CBC/Radio-Canada does exactly that.

---

[8] "Bill 52, An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, Vol A (10 December 2014) at 1972 (Hon. Madeleine Meilleur) [*Bill 52 Meilleur*].
[9] "Bill 52, An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, Vol A (10 December 2014) at 1974 (Chris Ballard) [*Bill 52 Ballard*].
[10] *Novak v Bond*, [1999] 1 SCR 808 at para 63, 172 DLR (4th) 385 [*Novak*].
[11] Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law Inc., 2007) at 196.

Merits Based Hurdle

"Substantial Merit" and the Need to Establish Harm

18. In addressing the first part of the test, the Court of Appeal in *Pointes* outlined what it called the "merits-based" analysis as requiring a Plaintiff to show simply that its claim satisfies the essential elements of the cause of action pleaded:

> Section 137.1(4)(a)(i) refers explicitly to the "merit" of the "proceeding", which I take to be the merits of the claim the plaintiff must prove to succeed in the litigation.[12]

19. The Court of Appeal went on the explain its view that the PPPA did not intend to create new substantive law, but was merely procedural in nature:

> Significantly, the Act does not, except in a minor way, alter the substantive law as it relates to claims based on expressions on matters of public interest. There are no new defences created for those who speak out on matters of public interest. The law of defamation remains largely unchanged. Similarly, nothing in the Act affects the substantive law applicable to 170 Ontario's breach of contract claim.[13]

20. The Court below in *Platnick* then stated that in motions brought in the context of defamation claims, damages are presumed; the Plaintiff is only required to show the words were published, were about it, and were defamatory:

> To succeed in a libel case, a plaintiff must establish three things in addition to establishing that the defendant made the statement complained of:
>
> - the words complained of were published to at least one other person;
> - the words complained of referred to the plaintiff; and
> - the words complained of, in their natural and ordinary meaning or in some other meaning pled by the plaintiff, are defamatory: *Grant v. Torstar*, at para. 28.[14]
>
> If the plaintiff establishes the three facts set out above, the falsity of the statements and **the damages caused to the plaintiff are presumed** [emphasis added]. [15]

---

[12] *Pointes, supra* note 3 at 70.
[13] *Pointes, supra* note 3 at 46.
[14] *Grant v Torstar Corp*, 2009 SCC 61 at para 28 [*Grant*].
[15] *Platnick v Bent*, 2018 ONCA 687 at para 52 [*Platnick*].

21. Requiring the Plaintiff only to show that it can establish the essential elements of the claim is at odds with the appropriate balance the Anti-Slapp Advisory Panel had in mind when it suggested the legislation to the Attorney General: "[T]he fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed."[16]

22. The Report further contemplates that the PPPA does something more than reinforce the status quo: "[I]t is important that the new legislation should be distinct from the existing rules. This will help to encourage courts to apply its remedies in the spirit of the statute."[17]

23. Furthermore, simply requiring technical merit does nothing to address the fact that these claims are often the favourite tool for those who engage in strategic lawsuits:

> The form that SLAPP lawsuits take also makes it difficult for them to be dismissed. **Many SLAPP suits are characterized as defamation, a strict liability tort.** The significance of a strict liability tort is that the focus in the action is not the determination of whether an action is defamatory, but whether there is a defence to defamation. **This means that such lawsuits have the effect of automatically drawing the defendant into the lawsuit because it shifts the burden of proof to the defendant to show that their actions were not defamatory. This is further assured by the fact that the determination of whether words are defamatory is easily made.** The threshold of defamation may vary, depending upon the exact definition adopted, but **the case law shows that the threshold of Canadian courts is very low** [emphasis added][18].

24. Given that the PPPA is intended to strike a balance between parties, the better interpretation is one that requires a plaintiff in actions relating to expression on matters of public interest to show something more than plaintiffs in cases that do not raise those issues to ensure its claim will be permitted to proceed; namely, proof of harm arising from the expression itself at this stage of the analysis.

25. This requirement to prove harm in addition to technical merit was made clear by the Attorney General when she commented on the Bill in the Legislature: "I do not believe that a mere

---

[16] *Anti-SLAPP Advisory Report*, *supra* note 6 at 37.
[17] *Anti-SLAPP Advisory Report*, *supra* note 6 at 14.
[18] Susan Lott, "Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada" (2004) at 42-43.

technical case – **without actual harm** – should be allowed to supress the kind of democratic expression that is crucial for our democracy" [emphasis added].[19]

26. As a result, where the PPPA requires proof of "substantial merit", the proper interpretation includes an analysis of the harm that is said to have been suffered by the Plaintiff, including causation, and quantum where it can be reasonably proven.[20]

27. This stage of the analysis may be satisfied by proof of either monetary or non-monetary harm. Black's Law Dictionary defines "substantial" as meaning something more than nominal."[21] Therefore, claims with no harm, or harm that would only be compensated by nominal damages, or with of a type of harm not recognized by the Court should be dismissed at the first stage of the analysis, as they do not merit judicial intervention.

28. CBC/Radio-Canada acknowledges that requiring proof of harm at the first stage of the analysis modifies the common law of defamation by eliminating the presumption of damages in this context. Such an interpretation is consistent with the balance the PPPA seeks to achieve and in fact, was contemplated when the Bill was debated in the Legislature:

> The mechanism of [an anti-SLAPP motion under section 137.1] is something quite unique, **because it changes hundreds of years of defamation law and libel law** [emphasis added].[22]

29. As was found by the motions judge in *Able Translations*, this Court should not attempt to resist the will of the Legislature, when its intention was clearly laid out during the debates:

> Section 137.1 of the CJA is a new enactment that alters the pre-existing framework of defamation law as evolved over time by both common law and statute…My role as a judge is not to fight a rear-guard action against legislation validly enacted to amend the common law when the intent and purpose of the legislation is clearly expressed.[23]

---

[19] *Bill 52 Meilleur, supra* note 8 at 1972.
[20] *Pointes, supra* note 3 at 86-91.
[21] *Black's Law Dictionary*, 6th ed, *sub verbo* "substantial".
[22] "Bill 52, An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess (5 March 2015) at 2635 (Jagmeet Singh) [*Bill 52 Singh*].
[23] *Able Translations Ltd. v Express International Translations Inc.*, 2016 ONSC 6785 at para 44 [*Able*].

30. At this stage of the proposed test, the Plaintiff "sets the table" as to what harm it wishes to vindicate through the litigation. The motions judge will then determine, when viewed objectively, whether the claim merits the court's intervention. Once the judge has determined the Plaintiff has suffered sufficient harm arising from the expression that might warrant judicial intervention, the PPPA then requires the judge to assess whether there are reasonable grounds to believe, on the balance of probabilities, that the defendant to the action has "no valid defence".

"No Valid Defence" Requires a Likelihood of Failure

31. The Court Below acknowledged that this branch of the test must be satisfied by the Plaintiff on the balance of probabilities.[24] However, it went on to state that the Plaintiff can satisfy the "grounds to believe" requirement at the Merits Based Hurdle as long as its position falls "within the range of conclusions reasonably available on the motion record."[25]

32. In a subsequent case arising from an action in defamation, the Court of Appeal has furthered the confusion in the standard to be applied at the defences stage of the analysis:

> A determination that a defence "could go either way" in the sense that a reasonable trier could accept it or reject it is a finding that a reasonable trier could reject the defence. This is as far as [the Plaintiff] had to go to meet its onus…[26]

33. This Court has confirmed that there is only one civil burden:

> …[T]here is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.[27]

34. In cases of a "draw", a party cannot be said to have satisfied the civil burden. As a result, this element of the test requires the Plaintiff to show there are grounds to believe the Defendant is "likely to fail" if the matter were to proceed to trial.

---

[24] *Platnick,* supra note 15 at 43.
[25] *Platnick,* supra note 15 at 44.
[26] *Bondfield, supra* note 3 at 15.
[27] *F.H. v McDougall,* 2008 SCC 53 at para 49 [*McDougall*].

Public Interest Hurdle

35. The second phase of the analysis requires the motions judge to evaluate whether the "harm suffered or likely to be suffered by the Plaintiff is sufficiently serious that it outweighs protecting the public interest in the expression at issue".[28]

36. In attempting to understand this branch, the Court of Appeal in *Pointes* states that the harm to be evaluated "will be measured primarily by the monetary damages suffered or likely to be suffered by the plaintiff as a consequence of the impugned expression".[29]

37. However, courts in Canada have found that free speech is not well-suited to being measured in financial terms: "An unwarranted or unnecessary stifling of freedom of expression…is not something that can be measured monetarily".[30] Balancing the importance of free expression on matters of public interest against monetary loss that is said to have been suffered risks putting a "price tag" on the constitutional rights of Canadians to express themselves on matters of public interest.

38. A plain reading of s. 137.1(4) (b) presumes that the harm in question has already been proven by this stage of the analysis. The section then requires the Plaintiff to satisfy the motions judge on the balance of probabilities that the impact of the harm it says it has suffered, or is likely to suffer, has had on it is so significant that it outweighs the public interest in protecting the expression.

39. The subjectivity of the analysis at this stage was recognized by the Court of Appeal when it said it is appropriate to consider the motivation of the Plaintiff in bringing the action in evaluating the competing interests under the test.[31] Therefore, it is open to a motions judge to find that a claim that seeks to vindicate harm that is of limited significance to the Plaintiff has been brought for an improper purpose, and that it does not clear the Public Interest Hurdle.

---

[28] *PPPA, supra* note 2 at 137(1) (4) (b).
[29] *Pointes, supra* note 3 at 88.
[30] *Provincial Rental Housing Corp v. Hall, et al.*, 2005 BCCA 36 at 57.
[31] *Platnick, supra* note 15 at 97.

40. This position recognizes that different plaintiffs will experience harm in different ways, and that a loss of a certain value may be "sufficiently serious" to one, but hardly noticeable to another. Take for example a loss of a million dollars which may be fatal to a start-up entrepreneur, while only an immaterial nuisance to a multi-billion dollar conglomerate.

41. The Court of Appeal in *Pointes* stated that exceptionally, there may be instances where non-monetary harm is at issue.[32] In these cases, the proposed subjective analysis also holds since the courts are very accustomed to evaluating the impact of harm on any particular plaintiff on a case-by-case basis:

> [N]ot all defamatory imputations carry equal weight. The defamatory sting of a statement can range from a passing irritant to a blow that devastates the target's reputation and career. The apprehended harm to the plaintiff's dignity and reputation increases in relation to the seriousness of the defamatory sting.[33]

42. Focussing on the significance of the harm the Plaintiff is actually seeking to have redressed rather than the dollar value of the claim at this stage of the analysis ensures that claims that were meant to be struck by the Legislature do not improperly slip through in the name of "balanced interests".

43. Based on the foregoing, CBC/Radio-Canada submits this reinterpretation of the test under the PPPA should be adopted by this Court.

PART IV - SUBMISSIONS ON COSTS

44. CBC/Radio-Canada seeks no order as to costs and asks that no costs be ordered against it.

PART V - ORDER SOUGHT

45. CBC/Radio-Canada takes no position on the disposition of the Appeal.

---

[32] *Pointes, supra* note 3 at 88.
[33] *Grant, supra* note 14 at 28.

ALL OF WHICH RESPECTFULLY SUBMITTED THIS 22nd day of October, 2019.

Sean A. Moreman
Katarina Germani
Canadian Broadcasting Corporation
250 Front Street West
Toronto, Ontario M5V 3G7

Counsel for the Intervener,
Canadian Broadcasting Corporation

Guy Régimbald
Gowling WLG (Canada) LLP
2600-160 Elgin Street
Ottawa, Ontario K1P 1C3

Ottawa Agent for Counsel for the Intervener,
Canadian Broadcasting Corporation

PART VI - TABLE OF AUTHORITIES & LEGISLATION

Jurisprudence	**Paragraph References**
Able Translations Ltd. v Express International Translations Inc., 2016 ONSC 6785	29
Bondfield Construction Limited v The Globe and Mail Inc., 2019 ONCA 166	4, 32
F.H. v McDougall, 2008 SCC 53	33
Grant v Torstar Corp., 2009 SCC 61	20, 41
Novak v Bond, [1999] 1 SCR 808	16
Platnick v Bent, 2018 ONCA 687	20, 31, 39
Provincial Rental Housing Corp. v Hall, et al., 2005 BCCA 36	37
1704604 Ontario Ltd. v Pointes Protection Association, 2018 ONCA 685	4-5, 11, 18-19, 26, 36, 41
Legislation	
Courts of Justice Act, RSO 1990, c C.43	1
Protection of Public Participation Act, 2015, SO 2015, c 23	1-2, 6-8, 10-12, 14-15, 17, 19, 22, 24, 26, 28, 30, 43
Secondary Sources	
Anti-SLAPP Advisory Report	1, 13, 21-22, 28
"Bill 52, An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest", 2nd reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl, 1st Sess, Vol A (10 December 2014)	14
"Bill 52, An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest", 2nd reading, Ontario, Legislative Assembly, Official Report of Debates (Hansard), 41st Parl, 1st Sess (5 March 2015)	28
Ruth Sullivan, *Statutory Interpretation*, 2nd ed (Toronto: Irwin Law Inc., 2007)	7, 10, 16
Susan Lott, ''Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada"	23