SCC File No.: 38374

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

B E T W E E N :

MAIA BENT

APPELLANT
(Respondent)

- and -

HOWARD PLATNICK

RESPONDENT
(Appellant)

A N D B E T W E E N :

LERNERS LLP

APPELLANT
(Respondent)

- and -

HOWARD PLATNICK

RESPONDENT
(Appellant)

- and -

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INTERVENERS

REPLY FACTUM
(HOWARD PLATNICK, RESPONDENT)

(Pursuant to the Order of The Honourable Justice Rowe, dated September 20, 2019)

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PART I – OVERVIEW

1. By Order dated September 20, 2019, The Honourable Justice Rowe granted leave to intervene to ten parties. While none of the interveners take a position on the merits of the herein appeal, nine of them are critical of the decision of the Ontario Court of Appeal and take positions contrary to that of the respondent. The respondent relies upon his two factums filed in response to the Bent and Lerners' appeals and has endeavoured not to repeat, any more than is necessary, the submissions, the corresponding references and acronyms therein.

PART II – STATEMENT OF ARGUMENT

2. The British Columbia Civil Liberties Association ("BCCLA") ignores the fact that the harm targeted by the *PPPA* was the serious damage caused by the strategic nature of SLAPP actions. It further ignores the fact that in enacting the *PPPA*, the legislature did not alter the substantive law of defamation, but to the contrary, affirmed it. By affirming the law of defamation, the legislature confirmed the importance of providing access to justice to *bona fide* libel victims to vindicate their names. This law repudiates any type of hierarchy of rights. Therefore, it is entirely misconceived to argue, as BCCLA does in paragraphs 6, 7 and 28 of its factum, that since s. 137.1 of the *Courts of Justice Act* does not mention taking into account the importance of vindicating reputation, it follows that the *PPPA* created a hierarchy of rights by enacting a legislative preference in favour of freedom of expression over protecting reputation. As discussed and referenced in paragraph 15 of Dr. Platnick's responding factum to Ms. Bent, the BCCLA is re-arguing the very point rejected by this Court in *WIC Radio Ltd. v. Simpson*[1] when the Canadian Civil Liberties Association ("CCLA") argued that the *Charter* requires a presumption in favour of expressive activity over protecting a person's reputation. In rejecting this argument, this Court held that the *Charter* [and the common law of defamation], is also about protecting the dignity and worth of individuals, whose reputation may be their most valued asset. The argument advanced by the BCCLA is additionally misconceived because the constitutionally protected right to freedom of expression and the parallel common law right, never included the right to defame. This is why in *WIC Radio* this Court held that:

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[1] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, paras. 2, 29-30 (previously cited as *Simpson v. Mair*) [*WIC Radio*].

> "This Court's task is not to prefer one over the other by ordering a "hierarchy" of rights …, but to attempt a reconciliation. An individual's reputation is not to be treated a regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest".[2]

3. The BCCLA quotes a different passage from *WIC Radio* in paragraph 28 of its factum to support its submission of a hierarchy of rights in favour of "expression" over "reputation". However, as clearly demonstrated above, *WIC Radio* expressly stands for the opposite conclusion. In the passage cited by the BCCLA, this Court held that "chilling" false and defamatory speech "is not a bad thing", distinguishing such speech from legitimate public interest speech. The distinction is important.

4. The interveners, like the appellants, are seeking to use the *PPPA* as a pretext for this Court to reverse itself on longstanding precedent, by creating a hierarchy of rights whereby freedom of expression takes priority over protecting reputation. They want this Court to repudiate the important and necessary progress it has made over many years in reconciling the tension between two competing values of vital importance to <u>all</u> Canadians. Like the appellants, these interveners wish this Court to turn back the clock to a different era. They seek to reintroduce into the bloodstream of this debate, concepts long rejected by this Court – concepts that are counterintuitive and contrary to the public interest. The hierarchy of rights sought by these interveners (and the appellants), should continue to be rejected on public policy grounds alone. Canadians do not want such critically important rights given to them by this Court to now be taken away.

5. In advocating for a hierarchy of rights over a reconciliation of rights, the interveners, like the appellants, make the fundamental mistake of treating all speech equally, without any qualitative analysis and without any appreciation of what is excluded from free expression, namely, false and defamatory speech. At the same time, the interveners acknowledge the *dicta* of this Court in cases such as *Sharpe, Keegstra*, *Lucas*, *Butler* and *Thomson Newspapers*,[3] in finding that the nature of

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[2] *WIC Radio, supra*, para. 2.

[3] *R. v. Sharpe*, 2001 SCC 2, para. 181 [*Sharpe*], *R. v. Keegstra* [1990] 3 S.C.R. 697 [*Keegstra*], p. 765, *R. v. Lucas* [1998] S.C.J. No. 28, para. 34, [*Lucas*], *R. v. Butler* [1992] 1 S.C.R. 452, p. 500, [Butler], *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 SCR 877, para. 91 [*Thomson Newspapers*].

the expressive activity is a critical contextual factor in determining the level of protection it will receive, which must be equally balanced against the vitally important value of protecting reputation. All the *PPPA* does is to state the obvious, namely, that true SLAPP actions are far removed from the core values for protecting reputation as stated in paragraphs 49-53 of the respondent's factum in Bent. Therefore, the anti-SLAPP legislation provides for a procedural, screening mechanism to address such actions.

6. The BCCLA got it exactly right in paragraph 1 of its factum. The impugned legislation was "explicitly directed" at the "abusive effect of strategic [SLAPP] litigation". There can be no interpretation of the facts-at-bar that are capable of allowing anyone to conclude that Dr. Platnick's libel action is an abusive strategic lawsuit, explicitly directed to unduly limit the speech of the appellants or to use the words of the CCLA at paragraphs 2 and 7 of its factum a "meritless action" with the "intended effect of silencing" or to "bully" "into silence" the appellants, who are among the most experienced, skilled and tenacious trial lawyers in the country. In every sense, Dr. Platnick's libel action (an action that he desperately attempted to avoid), is a *bona fide,* genuine and honest libel action engaging the core reasons for why this Court held that protecting reputation was a legal right of vital importance. These critical public interest factors militate overwhelmingly against the interveners' position.

7. While in paragraph 21 of its factum, the CCLA relies on *Grant* for the proposition that an overly narrow characterization of the expression may inappropriately defeat the purpose of s. 137.1, this Court in the same case also warned against characterizing the subject matter too broadly as this might render the "public interest" test "a mere rubber stamp and bring unworthy material within the protection of the defence".[4]

8. In paragraph 26 of its factum, the CCLA conflates s. 137.1(1), (2) and (3) which address the defendant's onus to establish "public interest", with the three step test under s. 137.1(4). The "quality" of the expression is highly relevant in a libel action and whether it meets the preliminary, procedural, anti-SLAPP screening test. According to the CCLA, the fact that the expression is defamatory and untruthful (the quality of the expression), which devastates another person's life, is entirely irrelevant. Likewise, for the purpose of an anti-SLAPP motion, the CCLA would make

[4] *Grant v. Torstar Corp.*, 2009 SCC 61, para. 107 [*Grant*].

no distinction between child pornography and hate mongering on the one hand, and legitimate political speech on the other. The Ontario Court of Appeal did not at all add new elements to the meaning of public interest as stated by the CCLA in paragraph 29 of its factum.

9. Likewise, the Ontario Court of Appeal did not invite Courts to impose a "moral taste test" as stated in paragraph 30 of the CCLA factum. To the contrary, the Court of Appeal was clearly focussed on a "harms test". There is no "morals" test applicable to defamatory lies. It is the measurable harm that defamatory lies cause that was relevant to the Court of Appeal. As stated and referenced in Dr. Platnick's responding factum to Ms. Bent, this Court in *Botiuk* stated that "… a charge of dishonesty would **undoubtedly** cause a **crushing** injury".[5] This is about harm, not morals.

10. This said, at paragraph 28 of its factum, the CCLA does however concede that if the impugned statement is untrue (as here) or motivated by malice (as here), the judge should let the action proceed to trial. It is hard to imagine how an action brought by an innocent libel victim demanding that the truth be told and requesting that the defamatory lies be corrected could possibly be said to be an action without merit and intended to chill freedom of expression. It would be a damning indictment of our Canadian values and justice system to allow the dissemination of defamatory lies with impunity without giving libel victims the opportunity to vindicate the truth.

11. While the CBC correctly acknowledges that Ontario's anti-SLAPP legislation was intended to strike a balance between freedom of expression on matters of public interest and protection of reputation by vindicating legitimate harm suffered by plaintiffs, the test it advocates for, in reality, repudiates this balance for a hierarchy of rights in favour of freedom of expression.

12. CBC also conflates the s. 137.1 analysis, by merging the substantial merits test under s. 137.1(4)(a)(i) (step one) with the harms/balancing test under s. 137.1(4)(b) (step three). CBC urges this Court to modify the common law of defamation by eliminating the presumption of damages, thereby removing the harms test expressly stated in s. 137.1(4)(b) and arbitrarily and needlessly inserting it into s. 137.1(4)(a)(i), contrary to the expressed language of the legislature. Entirely apart from the fact that the evidence confirms that the substantive law of defamation has

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[5] *Botiuk v. Toronto Free Press Publications Ltd.* [1995] S.C.J. No. 69, para. 92 [*Botiuk*].

remained unaltered, and in fact affirmed, the suggestion to modify the common law of defamation by moving the harms test in s. 137.1(4)(b) into s. 137.1(4)(a)(i) is nonsensical. If that is what the legislature had intended, it would have said so. The legislature specifically addressed the issue of harm and made a very clear and unambiguous legislative choice to address it in step three of the s. 137.1(4)(b) analysis. Moreover, notwithstanding that anti-SLAPP motions by nature are brought at the early stage of the proceedings, prior to the plaintiff having had an opportunity to develop a proper evidentiary record, CBC is not only asking the Court to require the libel victim to establish harm, but also read into the section, "significant" harm (see paragraph 8 (b)). While Dr. Platnick meets the highest criteria of serious harm, the test advocated by CBC is untenable and disproportionate to the circumstances of an anti-SLAPP motion.

13. CBC, as a member of the media, believes in a hierarchy of rights that not only favours freedom of expression, but seriously diminishes the public interest in protecting a person's reputation against a false defamatory assault. The responsible communication defence articulated by this Court in *Grant* provides journalists significant protection, provided that they act fairly and responsibly. The suggestions made in paragraph 37 of CBC's factum that balancing the importance of free expression against the monetary loss suffered by a libel victim places a "price tag" on the constitutional rights of Canadians, is misconceived and misleading. In the case-at-bar, Dr. Platnick was falsely accused of changing the conclusion of another doctor's report without her knowledge or consent, from a catastrophic impairment to a non-catastrophic impairment. The Court of Appeal properly concluded that this was an "unambiguous allegation of dishonesty and professional misconduct" that was "not accurate in any sense". It was effectively an allegation of fraud. As stated above, it is this exact type of spurious and incendiary statement that this Court in *Botiuk* held would "undoubtedly cause a crushing injury". The "crushing injury" robbed Dr. Platnick of the core values articulated by this Court and the House of Lords reproduced at paragraphs 49-53 of Dr. Platnick's responding factum to Ms. Bent. As a result of this violation, libel victims like Dr. Platnick will suffer enormous financial loss. The monetary damage is the manifestation of the actual reputational harm caused by the libel. CBC is putting the cart before the horse. It is the destruction of Dr. Platnick's reputation that caused him to be blacklisted. As a result of being blacklisted, an extremely successful business that he had built over 20 years was effectively wiped out overnight.

14. A serious problem with many of the interveners' submissions is that they are academic and theoretical, resulting in a consistent failure to appreciate the context within which an anti-SLAPP motion is being argued. This has been fully addressed in Dr. Platnick's principal factums. The Court of Appeal articulated a practical test that recognized that anti-SLAPP motions are an expedited, preliminary, procedural, screening process to screen out abusive SLAPP actions. They are not to determine legitimate libel actions on their merits at a very early stage of the proceedings before the plaintiff has had an opportunity to develop a proper evidentiary record. Dr. Platnick's case illustrates this perfectly. Critical evidence, not in his possession or control, was not available to him in the 25 days he was given to file his responding record. The fresh evidence motion will illustrate this point in a very concrete and practical way. The Court of Appeal had to develop a test that was sensitive to the danger of dismissing meritorious cases before a proper evidentiary record could be developed, otherwise the result would be to make a mockery out of the principles that have led this Court to conclude that protecting reputation is a constitutional value of vital importance to all Canadians.

15. In paragraph 28 of its factum, CBC quotes (in bold) from an opposition member of the Ontario legislature, who erroneously stated that the anti-SLAPP legislation "… changes hundreds of years of defamation law and libel law". CBC relies on this quote to urge the Court to modify the common law of defamation. This is highly misleading. Firstly, it ignores the government's official position and the statements from the Attorney General of Ontario in introducing the legislation, as well as the totality of the legislative debates which confirmed that the substantive law of defamation remained intact. Secondly, it ignores the Anti-SLAPP Advisory Panel Report to the Attorney General and commentary from those who drafted the legislation, which also confirmed that the substantive law of defamation was not impacted by the impugned legislation. Thirdly, if such a dramatic change was intended, it would be done through an amendment to the *Libel and Slander Act*, rather than a procedural/administrative statute such as the *Courts of Justice Act*. Fourthly, a review of this backbencher's entire speech confirms that his focus was on dismissing classic SLAPP actions.

16. The Media Coalition correctly acknowledges that the legislation attempts to balance the competing interests between freedom of expression and protection of reputation, but then ignores entirely the context of the discussion as stated in paragraph 14 above and elsewhere. In effect, the

Media Coalition asks this Court to toughen up the test with the practical effect of legislating a hierarchy of rights. In the context of a preliminary, procedural, screening motion, where the purpose of the legislation is to screen out abusive, meritless, strategic SLAPP actions while ensuring that legitimate, *bona fide* libel actions proceed to trial, the Court of Appeal struck the right balance. If it is within the range of conclusions reasonably available on the screening motion for a reasonable trier to conclude that the plaintiff has a real chance of establishing the libel and the defendant had no valid defence, then the plaintiff has met the onus under s. 137.1(4)(a).[6] Given the enormous implications of dismissing an action at such an early stage of the proceedings, thereby denying a libel victim his or her day in Court, a determination that a defence "could go either way"[7] is perfectly appropriate and proportional to the screening occasion and context. For the Media Coalition to argue in paragraph 10 of its factum that this "merely becomes a speed bump and not a hurdle" is untenable. The test stated by the Court of Appeal is very much a serious "hurdle" for a libel victim to meet that is proportional to the occasion. It is to be remembered, that even if an anti-SLAPP motion is dismissed, thereafter, following productions and discovery, either party can bring a summary judgment motion. For the reasons stated in paragraphs 60 and 61 of Dr. Platnick's responding factum to Ms. Bent and paragraphs 62 and 63 of his responding factum to Lerners, the urging by the Media Coalition for this Court to apply a "credible and compelling information" test, a test developed for cases where evidence has been adduced at the hearing or trial on the merits, and following credibility findings of live witnesses, to a preliminary, procedural, screening motion, entirely lacks credibility and is profoundly unfair and unjust.

17. In paragraph 18 of its factum, the Media Coalition effectively argues that a judge presiding over an anti-SLAPP screening motion with a gatekeeper role, should have the same role and power as a Justice presiding over a summary judgment motion. This argument is not credible. These are two completely different procedures with two entirely different purposes and objectives; one is a preliminary screening motion on a limited evidentiary record with no determination of the merits of the case and the other is a determination of the case on the merits on the basis of a fulsome and tested evidentiary record. In the case-at-bar, the appellants made the tactical and strategic decision

[6] *Platnick v. Bent*, 2018 ONCA 687, para. 44, AR, Vol. 1, tab 9 [Appeal Decision].
[7] *Bondfield Construction Company v. The Globe and Mail et al*, 2019 ONCA 166, para. 15.

to abandon their summary judgment motion for an anti-SLAPP motion. This tactical choice came with corresponding legal consequences.

18. In paragraph 20 of its factum, the Media Coalition argues that The Advisory Panel Report and the legislature "rejected" the approach taken by the Court of Appeal under s. 137.1(4)(b) (step three), that it was relevant to determine whether the action was a SLAPP action or not. This submission is entirely without merit. As fully addressed and referenced in Dr. Platnick's principal factums, the exact opposite is true. To suggest that in the context of anti-SLAPP legislation and the harm the legislature was targeting, that it is irrelevant whether the action is a SLAPP action or a legitimate, *bona fide* libel action, stretches boundaries of credulity. So important is this point, that it was the one issue the respondent took issue with the Court of Appeal – not because the Court of Appeal was incorrect about its importance under s. 137.1(4)(b), but as discussed in paragraph 54 of Dr. Platnick's factum responding to Lerners, it is also a vitally important factor under s. 137.1(4)(a)(i) (step one). In paragraph 22 of its factum, the Media Coalition submits incorrectly that the "purpose" of the libel action "has no role" under s. 137.1(4)(b). The entire purpose of the *PPPA* was to target and screen out abusive strategic SLAPP actions, whilst ensuring that legitimate *bona fide* libel actions proceed to trial. To suggest that a finding that the "purpose" of the lawsuit was legitimate and *bona fide*, is irrelevant as to whether the action proceeds to trial or not is a deeply disturbing proposition and appropriately rejected by the Ontario Court of Appeal. It undermines the entire purpose and objective of the impugned legislation.

19. The "likely to succeed at trial" test advocated by the Centre For Free Expression interveners does not proportionally respond to the inherent evidentiary limitations facing plaintiffs on anti-SLAPP motions as illustrated in Dr. Platnick's Fresh Evidence Motion. These interveners go so far as characterizing the test stated by the Court of Appeal as "meaningless" and tilted firmly in favour of plaintiffs. This submission is untenable. To force a plaintiff to establish that he or she is "likely to succeed [in defeating the defendants' defences] at trial", including on the critical issue of proving malice, prior to the exchange of Affidavits of Documents and production of the Schedule "A" documents, prior to examinations for discovery, prior to even being able to bring a motion to obtain critical evidence and documents from non-parties not in the possession or control of the plaintiff, illustrates the danger of such an approach. It is for this reason that the Court of Appeal was correct in delineating the difference between a trial or summary judgment where ample

time and procedures guarantee a full evidentiary record and an anti-SLAPP screening motion held within 60 days (and in the case-at-bar, where Dr. Platnick was only given 25 days to file his responding materials), which in no way allows for the filing of a proper evidentiary record.[8]

20. The "real chance of success" standard is in fact a high standard in the context of a preliminary, procedural, anti-SLAPP screening motion. This is not at all "an easy step" for a plaintiff. It is a very serious, measured and proportionate step. It is critical to set a standard that not only takes into account the inherent deficiencies in the plaintiff's ability to develop a proper evidentiary record so early in the proceedings, but also takes into account the fact that if the defendant's anti-SLAPP motion succeeds, a libel victim is forever deprived of one of the most sacrosanct pillars of our justice system, namely, access to justice and the right to a fair hearing, which must allow a litigant a reasonable opportunity to develop a proper evidentiary record. These are public interest principles of vital importance that far outweigh the judicial expediency advocated by the appellants and interveners. Reference by the Centre For Free Expression interveners to the "likely to succeed" standard in the context of a security for costs motion is not credible, as the nature of the two proceedings are prodigiously different. Losing a security of costs motion does not produce the drastic and draconian result the appellants seek with the dismissal of Dr. Platnick's entire cause of action. The same can be said about the injunction comparison, whether interim or permanent. The consequences of losing a security of cost or interim/permanent injunction motion will be temporary in the whole scheme of the affected party's life. The consequences of Dr. Platnick having his case dismissed will drastically and permanently affect the rest of his life. As the Court of Appeal stated, a judge must appreciate the "very significant consequences to the plaintiff" if the anti-SLAPP motion is allowed. The "courtroom door will be closed on the plaintiff even though the claim may have ultimately succeeded on the merits".[9]

21. The "either way" standard does not give plaintiffs a 'free pass'. It recognizes that the plaintiff has established, based on evidence, that there is a serious issue to be tried and determined on the basis of a tested evidentiary record. It ensures that meritorious libel actions are not arbitrarily or prematurely dismissed. The interveners may wish to emphasize that the burden on

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[8] *1704604 Ontario Ltd. v. Pointes Protection Assn*. [2018] ONCA 685, paras. 73, 76-78, 82 [*Pointes*].
[9] *Pointes, supra* at para. 98.

the plaintiff must reflect the strong statutory language of promoting expression on matters of public interest, but it must also reflect the clear and unambiguous intention of the legislature that the anti-SLAPP legislation must not be used to arrest legitimate *bona fide* libel actions at such an early stage of the proceedings. But for Greenpeace, the interveners either ignore or pay lip service to the real harm targeted by the legislature, namely, true SLAPP actions which represent a serious threat to expression on matters of public interest.

22. The Centre For Free Expression interveners make an interesting submission in paragraph 31 i. of their factum with respect to securing a hearing date and timetable that exceeds the 60-day timeframe prescribed by s. 137.2(2). This was precisely the argument made on behalf of Dr. Platnick and rejected by Dunphy J., which is addressed in Dr. Platnick's principal factums. It is submitted that provided the parties are before a Superior Court Judge within the 60 days, the Court ought to rely on the Court's inherent jurisdiction and discretion to fix a timetable appropriate to the case and not be tied to an arbitrary 60-day period. This said, the Court of Appeal correctly warned that an anti-SLAPP motion must not be allowed to slide into a *de facto* summary judgment motion. They are two very distinct procedures.

23. The reference to American law at paragraph 14 of the Centre For Free Expression interveners' factum, relies solely on the wording of US anti-SLAPP statutes and not on how the Courts have interpreted that wording. A review of the jurisprudence, however, demonstrates that American Courts have interpreted these statutes in a manner similar to the Ontario Court of Appeal's. For example, and as argued in paragraph 55 of the respondent's responding factum to Lerners, in the District of Columbia (cited by these interveners), the test of "likely to succeed" has been interpreted as whether the trier of fact could reasonably find that the claim is supported in light of the evidence produced.[10] Similarly, the California wording ("a probability that the plaintiff will prevail on the claim")[11] has been interpreted by that state's Court of Appeal as simply requiring the plaintiff to make "a *prima facie* showing of facts which would, if proved at trial,

[10] *Libre by Nexus v. Buzzfeed, Inc.*, 311 F. Supp. 3d 149 (D.D.C. 2018) (U.S. Dist.Ct.), at pp. 153, 158-160.
[11] *California Code Civ. Proc.*, s. 425.16, paras. (a) and (b).

support a judgment in plaintiff's favor".[12] Colorado's new statute is modeled after California's.[13] Kansas's legislation has not yet been judicially considered in full, but the Court of Appeal, like that in California, has ruled, at least regarding the first part of the plaintiff's onus, that it is only to "support a *prima facie* case".[14] As submitted in the respondent's responding factum to Lerners, in Washington State, a leading case relied on by a number of American Courts held that a defamation suit must proceed to trial unless it is a "sham" or "frivolous", and anti-SLAPP legislation cannot be interpreted to "create a truncated adjudication of the merits of a plaintiff's claim for fear of running afoul of a plaintiff's right to redress from the Courts for a non-frivolous claim.[15] Similarly, the Massachusetts Supreme Court cautioned that apparently strict statutory language employed in anti-SLAPP legislation must be read with its purpose in mind, otherwise, Courts risk *de facto* creating a new absolute privilege category over all matters of public interest.[16] In essence, these various American Courts applied the same "reasonable range of outcomes" test set by the Court of Appeal in the case-at-bar, notwithstanding the use of statutory language such as "likely to succeed".

24. In response to the submission made by the Canadian Constitution Foundation ("CCF"), as stated in paragraph 61 of Dr. Platnick's responding factum in Lerners, it can be credibly argued that the impugned legislation does have a sufficient degree of ambiguity to attract an interpretation that is consistent with *Charter* principles and values. This said, the legislature did state its commitment to *Charter* values by confirming that the substantive law of defamation remained fully intact. That law recognizes the importance of protecting reputation through a careful balancing and reconciliation of two vitally important legal rights. The legislature was clear in stating that its objective was to screen out abuse SLAPP actions and to ensure that legitimate libel actions proceed to trial. In this sense, it is not applying *Charter* values *per se* as a tool of statutory interpretation, but applying the law of defamation that has been developed by this Court in a

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[12] *Wilcox v. Superior Court (Peters)*, 27 Cal. App. 4th 809 (1994), at pp. 3-7, 9-11, 14 (US Law Justicia printed pages).
[13] Colorado Freedom of Information Coalition, "Polis signs anti-SLAPP, media literacy bills into law": https://coloradofoic.org/polis-signs-anti-slapp-media-literacy-bills-into-law.
[14] *T&T Financial of Kansas City v. Taylor*, 408 P. 3d 491 (Kan. Ct. App. 2017)
[15] *Davis v. Cox* 351 P.3d 862 (2015), paras. 30-36.
[16] *Duracraft Corporation v. Holmes Products Corporation*, 427 Mass. 156, 168 *(Mass. 1998)* (Supreme Judicial Court), pp. 161-163, 166-167.

manner that is consistent with *Charter* principles and values. By applying the current law of defamation, all *Charter* rights and values are engaged. It deserves emphasis that freedom of expression is neither absolute nor is it the only right engaged in these proceedings. The right to free expression does not give one a free pass to defame. Moreover, this Court has repeatedly confirmed the vital importance of protecting reputation.

25. The respondent agrees with the West Coast Legal Education and Action Fund and the Barbra Schlifer Commemorative Clinic interveners that suing a survivor of gender based violence for reporting, disclosing or seeking basic assistance and support is a classic SLAPP action. Such an action is *prima facie*, objectionable. However, this is not the case to determine whether reporting a disclosure of gender based violence ought to be an expressed category of qualified privilege under the s. 137.1 analysis, or whether a sexual assault litigant ought to be relieved of any obligation to file an affidavit to support her or his anti-SLAPP motion or otherwise testify. This is far too important an issue, with significant implications, to be determined without an evidentiary record, without having been addressed in any Court below and without any adversity of interest between any party or intervener before the Court. Dr. Platnick agrees with these interveners' position on gender based violence, but, as just stated, it is far too important an issue to be raised for the first time, in the Supreme Court of Canada, by an intervener. New categories of qualified privilege and Court-sanctioned evidentiary immunity for victims of sexual violence ought to be determined in the context of a fully developed evidentiary record and in an adversarial context involving actual parties in a case before the Court that raises such important issues directly.

26. The cases of *Whitfield v. Whitfield*[17] and *D'Addario v. Smith*[18] relied on by the West Coast Legal Education and Action Fund ("West Coast") interveners are cases on point. Both cases are very fact specific. There were no interveners in those two cases. In *Whitfield*, leave to appeal to the Supreme Court of Canada was denied. It would be odd, having had leave denied, to now engage the issues in the herein appeal without the presence of any of the *Whitfield* parties or the evidentiary record in that case. No leave was sought from the Court of Appeal's decision in

[17] *Whitfield v. Whitfield*, 2016 ONCA 581 [*Whitfield*].
[18] *D'Addario v. Smith*, 2018 ONCA 163 [*D'Addario*].

D'Addorio. Further, it appears that in substance, these interveners are arguing for an absolute privilege not a qualified privilege.

27. In paragraphs 15 and 32 of its factum, the West Coast interveners argue that perfect justice cannot be achieved when balancing competing values. Therefore, they argue that the anti-SLAPP screening test must be established in such a way that in all cases involving sexual assault victims, there is a greater individual and societal benefit from encouraging survivors of gender based violence to report, "than to accept a respondent's plea for reputational rehabilitation". This is precisely the danger of adjudicating such an important and complex issue, theoretically, without a tested evidentiary record involving the actual parties to the dispute. The West Coast interveners' argument about the unattainability of securing perfect justice, ignores the last sentence reproduced in paragraph 13 of their factum, where Justice McLachlin (as she was then) in *R. v. O'Connor*,[19] stated, "What the law demands is not perfect justice, but fundamentally fair justice". The s. 137.1(4) test must be fair and reasonable for all parties to the anti-SLAPP motion. While well-intended, the effect of these interveners' submission about unattainability of perfect justice in balancing competing values, means that respondents, like Dr. Platnick, become unavoidable road kills without ever having their day in court. This is a wholesale denial of "fundamentally fair justice". Conversely, the reconciliation of competing rights through a careful balancing exercise as stated in *Grant* does achieve "fundamentally fair justice".

28. The respondent rejects the terminology "reputational rehabilitation" used by the West Coast interveners. Such a characterization diminishes the "crushing" injury caused by a charge of dishonesty and professional misconduct against [in the case-at-bar] a doctor whose reputation for integrity and trustworthiness is the cornerstone of his professional life. What Dr. Platnick seeks is to have his day in court in order to vindicate his name.

29. In paragraph 19 of its factum, the Barbra Schlifer Commemorative Clinic relies on the decision of *Rizvee v. Newman* for the proposition that the Ontario Superior Court dismissed Ms. Newman's anti-SLAPP motion which, inferentially dealt with sexual and domestic violence. In fact, the opposite is true. Ms. Newman's anti-SLAPP motion was granted and the plaintiff's action was dismissed. Further, the case was not about sexual and domestic abuse, but rather regrettable

[19] *R. v. O'Connor* [1995] 4 S.C.R. 411, para. 193 [*O'Connor*].

political discord between two individuals seeking the Liberal nomination in a Milton riding and its aftermath.

30. Unlike the other interveners, Greenpeace Canada argues that as a public interest advocacy group, it has interests both in the promotion of expression on matters of public interest, and in the protection of reputation, because both of these public interests are implicated in its environmental advocacy work. Greenpeace Canada has been stymied by abusive, meritless litigation to silence it by well-funded industrial adversaries, but it has also been the target of defamation by those same well-funded corporate interests seeking to tarnish its public advocacy credentials. As such, Greenpeace Canada understands that arguing for a hierarchy of rights with freedom of expression at the top, as the appellants and the other interveners do, is contrary to the purpose of anti-SLAPP legislation, which is to protect public interest advocacy, albeit not at the expense of denying redress for defamatory campaigns advanced against them. Greenpeace Canada provides the Court with objective insight missing in the *facta* of the other interveners. The respondents support Greenpeace Canada's *a priori* argument that the only way s. 137.1 can be purposively applied without resulting in negative unintended consequences, is to make the analysis of whether the plaintiff's action is a true SLAPP, the centerpiece of the Court's analysis – something which the Court of Appeal has wisely done.

31. Dr. Platnick challenges the interveners, as he does the appellants, to identify for the Court, the type of non-SLAPP libel action that will survive a preliminary, procedural, anti-SLAPP screening motion. Motion judges need practical judicial guidance, not abstract, esoteric, theoretical concepts. In the case-at-bar, it is indisputable that the egregious, incendiary and explosive libel that destroyed Dr. Platnick's life was absolutely false and deeply offensive to core values articulated by this Honourable Court on why protecting reputation is a constitutional value of superordinate importance. If this type of libel action cannot survive the anti-SLAPP screening process, nothing will. Therefore, the interveners, like the appellants, must apply their respective interpretation of s. 137.1 to the facts-at-bar and answer this important question **– based on their respective proposed test, describe the type of libel action that would survive an anti-SLAPP motion**?

PART III – SUBMISSIONS ON COSTS

32. Dr. Platnick does not seek costs from the interveners.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October, 2019.

Timothy S. B. Danson **Marjan Delavar**

PART IV – AUTHORITIES

NO.	AUTHORITY	PARAGRAPH(S)
1	*1704604 Ontario Ltd. v. Pointes Protection Assn.* [2018] ONCA 685	19, 20
2	*Bondfield Construction Company v. The Globe and Mail et al*, 2019 ONCA 166	16
3	*Botiuk v. Toronto Free Press Publications Ltd.* [1995] S.C.J. No. 69	9
4	*D'Addario v. Smith*, 2018 ONCA 163	26
5	*Davis v. Cox* 351 P. 3d 862 (2015) (Wash. S.C.)	23
6	*Duracraft Corporation v. Holmes Products Corporation*, 427 Mass. 156, 168 (Mass. 1998) (Supreme Judicial Court)	23
7	*Grant v. Torstar Corp.*, 2009 SCC 61	7, 27
8	*Libre by Nexus v. Buzzfeed, Inc.*, 311 F. Supp. 3d 149 (D.D.C. 2018) (U.S. Dist. Ct.)	23
9	*R. v. Butler* [1992] 1 S.C.R. 452	5
10	*R. v. Keegstra* [1990] 3 S.C.R. 697	5
11	*R. v. Lucas* [1998] S.C.J. No. 28	5
12	*R. v. O'Connor* [1995] 4 S.C.R. 411	27
13	*R. v. Sharpe*, 2001 SCC 2	5
14	*T&T Financial of Kansas City v. Taylor*, 408 P. 3d 491 (Kan. Ct. App. 2017)	23
15	*Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 SCR 877	5
16	*Whitfield v. Whitfield*, 2016 ONCA 581	26

NO.	AUTHORITY	PARAGRAPH(S)
17	*WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (subname *Simpson v. Mair*, 2008 SCC 40)	2
18	*Wilcox v. Superior Court (Peters)*, 27 Cal. App. 4th 809 (1994)	23
NO.	**STATUTE, REGULATION, RULE**	**SECTION(S)**
19	*Courts of Justice Act*, R.S.O. 1990, c. C. 43 tribunaux judiciaires (Loi sur les), L.R.O. 1990, chap. C.43	s. 137.1* (*included in the *PPPA* / inclu dans le *PPPA*)
20	*Protection of Public Participation Act, 2015*, S.O. 2015, c. 23 *protection du droit à la participation aux affaires publiques (Loi de 2015 sur la)*, L.O. 2015, chap. 23 - Projet de loi 52	s. 3 (adding ss. 137.1 and 137.2 to the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 Art. 3 (en ajoutant arts. 137.1 et 137.2 a *la Loi sur les tribunaux judiciaires*, L.R.O. 1990, chap. C.43)
21	*California Code Civ. Proc.*, s. 425.16	Paragraphs (a) and / et (b)