S.C.C. File Nos. 38374 and 38376

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

BETWEEN:

MAIA BENT *et al.*

Appellants

-and-

HOWARD PLATNICK

Respondent

AND BETWEEN:

1704604 ONTARIO LIMITED

Appellant

-and-

POINTES PROTECTION ASSOCIATION *et al.*

Respondents

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 *Rules of the Supreme Court of Canada*)

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S.C.C. File Nos. 38374 and 38376

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

BETWEEN:

MAIA BENT and LERNERS LLP

Appellants
(Respondents)

-and-

HOWARD PLATNICK

Respondent
(Appellant)

-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, 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

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AND BETWEEN:

1704604 ONTARIO LIMITED

Appellant
(Respondent)

-and-

**POINTES PROTECTION ASSOCIATION,
PETER GAGNON, LOU SIMONETTI, PATRICIA GRATTAN, GAY GARTSHORE,
RICK GARTSHORE and GLEN STORTINI**

Respondents
(Appellants)

-and-

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Interveners

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I CONCISE OVERVIEW AND STATEMENT OF THE FACTS

1. These appeals involve the interpretation of statutory provisions in Ontario's *Courts of Justice Act* ("**CJA**") that are explicitly directed to stopping proceedings that unduly limit freedom of expression on matters of public interest.[1] The Ontario Legislature amended the CJA to target the abusive effect of strategic litigation that seeks to limit participation by the public on matters of public interest. While the appeals arise in the context of the Ontario legislation, British Columbia has also enacted provisions that are substantively identical to the CJA provisions.[2]

2. These submissions of the intervener British Columbia Civil Liberties Association ("**BCCLA**") focus on the proper interpretation of ss. 137.1(4)(b) of the CJA, which the Court of Appeal for Ontario held was in some ways "the heart of" the Ontario legislation.[3] The provision requires a responding party (i.e. the plaintiff alleging harm arising from an expression) to demonstrate that "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."

PART II CONCISE OVERVIEW OF POSITION ON THE QUESTIONS IN ISSUE

3. The only question in issue in these appeals on which the BCCLA takes a position is the application of ss. 137.1(4)(b) of the CJA. The BCCLA proposes an approach to the weighing exercise inherent in the provision, and also submits that:

(a) Protecting expression on matters of public interest is central to ss. 137.1(4)(b);

(b) The four indicia of a SLAPP suit relied on by the courts below cannot substitute for the weighing required by ss. 137.1(4)(b). There is no statutory basis for this

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[1] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1.
[2] *Protection of Public Participation Act*, S.B.C. 2019, c. 3.
[3] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 ("*Pointes*") at para. 86.

interpretation, which unjustifiably narrows the protection afforded to public interest expression under the CJA; and

(c) It is an error to unduly focus on monetary harm to a plaintiff.

PART III CONCISE STATEMENT OF ARGUMENT

A. The CJA and Protecting Expression on Matters of Public Interest

4. It is incontrovertible that the protection of expression on matters of public interest is an important value in our democratic society.[4] Expression on matters of public interest is "essential to the working of a parliamentary democracy such as ours" and fosters and encourages participation in social and political decision-making.[5] As this Court said in *R v. Sharpe*, "any attempt to restrict the right [to free expression] must be subjected to the most careful scrutiny."[6]

5. Section 137.1 of the CJA expressly emphasizes the importance of encouraging and promoting broad societal participation in discussions about public interest. The purposes of the CJA provisions as explicitly set out in ss. 137.1(1) are:

> (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.[7]

6. These purposes are solely focused on protecting expression on matters of public interest. They make no mention of other considerations, including the importance of vindicating reputation or protecting contractual rights.

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[4] *Switzman v. Elbling*, [1957] SCR 285 at p. 326; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at para. 54; *R. v. Sharpe*, 2001 SCC 2 at para. 22.
[5] *Harper v. Canada (Attorney General)*, 2000 SCC 57 at para. 20 citing *Switzman v. Elbling*, [1957] SCR 285 at p. 326.
[6] *R. v. Sharpe*, 2001 SCC 2 at para. 22.
[7] *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 137.1(1).

7. In enacting the CJA provisions, the Legislature chose to affect the balance of the two public interests at issue in these appeals by preferentially and broadly protecting expression on matters of public interest over harm that may be occasioned as a result of that expression. The interpretation of ss. 137.1(4)(b) of the CJA must comport with this statutory language.

B. The Four Indicia of a SLAPP Suit Are Not Relevant

8. In these appeals, the Court of Appeal relied on four indicia of a "SLAPP"[8] suit in applying ss. 137.1(4)(b).[9] Although the Court of Appeal said in *Platnick v. Bent* ("***Platnick***") that it rejected the idea that s. 137.1 only applies to SLAPP litigation, subsequent decisions demonstrate that consideration of the four indicia has improperly replaced the statutorily required weighing.[10]

9. Arguments about whether any particular lawsuit is a "SLAPP" lawsuit do not assist when applying the test in ss. 137.1(4)(b). Rather, such a focus unduly narrows the SPA's intended broader reach as expressed by ss. 137.1(1).[11]

10. Also, there is no basis in the legislation to use the four indicia of a SLAPP suit as a proxy for the weighing required by the express statutory language of ss. 137.1(4)(b). As noted by the respondents Pointes Protection Association *et al.* in their factum, the term "SLAPP" is not used in the CJA and this was a deliberate choice by the Legislature.[12] The specific wording used by the Legislature in the CJA provisions is broader.

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[8] "Strategic Lawsuit Against Public Participation".

[9] *Platnick v. Bent*, 2018 ONCA 687 ("*Platnick*") at paras. 96-100; *Pointes*, *supra* note 3 at paras. 85-101, 120-123.

[10] *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 at paras. 22-24; *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163 at para. 31-32.

[11] It is thus not surprising that the respondent Dr. Platnick and the appellant 1704604 Ontario Limited rely on the four indicia to argue that as plaintiffs they should succeed on appeal: Responding Factum of Howard Platnick re: Lerners LLP, Sept. 12, 2019 at paras. 8, 54; Factum of the Appellant, 1704604 Ontario Limited, Jul. 22, 2019 at paras. 70, 88.

[12] Factum of the Respondents Pointes Protection Association *et al.*, Sept. 16, 2019 at paras. 36-41.

C. Weighing Public Interests Under Subsection 137.1(4)(b)

11. As noted above, ss. 137.1(4)(b) of the CJA requires courts to consider whether "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."[13]

i. Weighing the Harm Connected to the Expression in Issue

12. Given the requirements in ss. 137.1(4)(b) for a plaintiff to establish likely or actual harm as well as the burden of proof, and considering the purposes of the legislation, there is a clear statutory presumption that if a plaintiff does not provide any evidence of actual or likely harm tied to the public interest in permitting the proceeding to continue, then the proceeding must be terminated.[14] Subsection 137.1(4)(b) is not reached unless the defendant has already shown that there is public interest in his or her expression and so if there is no demonstration of any countervailing harm, then the defendant's motion to dismiss the proceeding must succeed.

13. Further, the express wording of ss. 137.1(4)(b) shows that evidence of trivial or fleeting harm cannot satisfy the test; only harms that are "sufficiently serious" [emphasis added] can lead to a "public interest in permitting the proceeding to continue". Only where the public interest in preventing harm to the plaintiff by allowing their proceeding to continue outweighs the public interest in protecting the expression can a plaintiff satisfy ss. 137.1(4)(b).

14. Thus, the ss. 137.1(4)(b) analysis requires an assessment of the seriousness of the purported harm that is connected to the expression in issue. A court needs to consider the evidence to determine where, on a spectrum from low to high, the seriousness of the harm or likely harm lies.

15. While the Court of Appeal in *1704604 Ontario Ltd. v. Pointes Protection Association* ("***Pointes***") noted that non-monetary harm is covered by ss. 137.1(4)(b), it held that the harm suffered by a plaintiff "will be measured primarily by the monetary damages suffered or likely to

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[13] *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 137.1(4)(b).
[14] *Pointes*, *supra* note 3 at para. 99; *Platnick*, *supra* note 9 at paras. 120-123.

be suffered by the plaintiff as a consequence of the impugned expression" [emphasis added].[15] Undoubtedly, and perhaps most straightforwardly from the perspective of the weighing task, likely or actual harm in the form of monetary damages is a relevant form of harm. It cannot be correct, however, that the assessment of harm should always primarily be driven by pecuniary considerations. Potential or actual non-monetary harm can also be important, depending on the circumstances of each case. It is foreseeable that there will be situations where an expression could harm the non-pecuniary interests of a plaintiff. For example, the preservation of one's reputation or personal privacy has inherent value beyond the monetary value of a claim.[16]

16. Nothing in the language of the legislation indicates that it is limited to pecuniary damages. Specifically in the context of freedom of expression, this Court has been clear that protection of a person's reputation or privacy interests are also worthy of protection.[17] Further, that "'[p]ublic interest' includes both the concerns of society generally and the particular interests of identifiable groups" supports a conclusion that considerations about a plaintiff's pecuniary harm do not necessarily predominate in the ss. 137.1(4)(b) analysis.[18]

17. Weighing likely or actual pecuniary or non-pecuniary harm to the plaintiff is relatively straightforward. The factors identified by the Court of Appeal below in relation to damages – a plaintiff must provide persuasive evidence of damages; the motions judge must be able to make an informed assessment at least at a general or "ballpark" level about the nature and quantum of the damages suffered; and, a plaintiff must be able to establish the causal link between the defendant's expression and the damages claimed – are all also applicable to non-monetary harm.[19]

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[15] *Pointes*, *supra* note 3 at paras. 120-123. And see the focus of the court's assessment under ss. 137.1(4)(b) in *Platnick*, *supra* note 9 at paras. 101-110.

[16] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras. 117-21; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras. 79-80.

[17] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras. 117-21; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras. 79-80.

[18] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at p. 344.

[19] *Pointes*, *supra* note 3 at paras. 91-92; *Platnick*, *supra* note 9 at paras. 101-108.

ii. *Weighing the Public Interest in Protecting the Expression in Issue*

18. Once a court has determined that there will be likely or actual harm that is sufficiently serious and tied to a public interest in permitting the proceeding to continue, a court must then qualitatively evaluate where, on a spectrum from low to high, the importance of the specific public interest in protecting the expression in issue lies.

19. The Court of Appeal found that relevant considerations in determining the importance of the public interest in protecting the expression in issue included the motive for the expression (for example, was it motivated by malice), the mode of the expression (for example, does it contain crude language), the subject matter of the expression (for example, was it about issues such as the administration of justice) and the consequences of the plaintiff's claim (for example, is there evidence of actual "libel chill" generated by the plaintiff's claim).

20. In *Pointes*, the Court of Appeal held that the motivation of the speaker was relevant.[20] Similarly, in *Platnick*, the court held that the inquiry mandated by ss. 137.1(4)(b) required the court to consider, among other things, the motives of the defendant in making the impugned statement.[21]

21. The Court of Appeal in *Pointes* also said that the quality of the expression had an important role in measuring the extent of the public interest in protection the expression:

> Not all expression on matters of public interest serves the values underlying freedom of expression in the same way or to the same degree. For example, a statement that contains deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language may still be an expression that relates to a matter of public interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, vitriol, and obscenities [citations omitted].[22]

22. In *Platnick*, the Court of Appeal agreed with the motion judge's conclusion that there was a "strong public interest in lawyers sharing information intended to improve the administration of justice", which indicates it relied on the subject matter of the expression when assessing the

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[20] *Pointes*, *supra* note 3 at paras. 94-95.
[21] *Platnick*, *supra* note 9 at para. 97.
[22] *Pointes*, *supra* note 3 at para. 94.

public interest.[23] The court then downgraded the public interest in protecting the expression because it found that "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."[24] This statement appears to be the Court of Appeal's evaluation of mode (quality of expression) and or motivation.

23. This Court's jurisprudence in other freedom of expression contexts supports reliance on motive, mode and subject matter of the expression as a way to weigh the expression's importance.

24. The three "core values" of freedom of expression are: (1) the search for truth; (2) participation in political decision-making; and (3) diversity in forms of self-fulfillment and human flourishing.[25] The closer the public expression being weighed under ss. 137.1(4)(b) is to any one of these three core values, the harder it will be for a plaintiff to satisfy their burden. Such an inquiry requires consideration of the subject matter of the expression.

25. With respect to subject matter and mode, and to some extent motive as well, the majority in *R. v. Sharpe* held that "[w]hile some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society."[26] In her concurring opinion, Justice L'Heureux-Dubé looked at how freedom of expression had been treated under s. 1 of the *Charter* and held as follows:

> [T]he level of protection to which expression is entitled will vary with the nature of the expression. The more distant the expression from the core values underlying the right, the more likely action restricting it can be justified. Defamatory libel, hate speech and pornography are far removed from the core values of freedom of expression and have been characterized as low value expression, which merits an

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[23] *Platnick*, *supra* note 9 at paras. 109.
[24] *Platnick*, *supra* note 9 at paras. 109.
[25] *R v. Sharpe*, 2001 SCC 2 at para. 182; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877 at para. 25; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 at p. 976; *R. v. Vice Media Canada Inc.*, 2018 SCC 53 at para. 124.
[26] *R. v. Sharpe*, 2001 SCC 2 at para. 23.

attenuated level of constitutional protection. [Citations omitted.][27]

On this basis, in evaluating the public interest in protecting the expression in ss. 137.1(4)(b), the level of protection can vary depending on the nature of the expression.

26. This Court in *Grant v. Torstar Corp.* examined what constituted a matter of public interest in the context of the defamation defence of responsible communication.[28] In determining whether the expression was "responsible", one of the factors the Court considered important was the degree of the public importance of the communication's subject matter.[29] Chief Justice McLachlin noted that although the subject matter had already been deemed by the trial judge to be a matter of public interest, not all matters of public interest were of equal importance.

27. In *Denis v. Côté* (at issue was the interpretation of a statutory provision requiring a consideration of competing public interests, namely whether the public interest in the administration of justice outweighed the public interest in preserving the confidentiality of a journalistic source) the motivation of the journalistic source was relevant in weighing the importance of freedom of the press even though it was not a factor expressly listed in the legislation in issue.[30]

28. In addition to motive, mode, and subject matter, the Court of Appeal also held that the consequences of the plaintiff's claim such as evidence of actual "libel chill" generated by it are to be considered in determining the importance of protecting the expression in issue.[31] This factor helps put into effect the Legislature's conscious intention to *prima facie* protect expression on matters of public interest over a plaintiff's right to sue because of that expression. As this Court said in *WIC Radio Ltd. v. Simpson*:

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[27] *R. v. Sharpe*, 2001 SCC 2 at para. 181.
[28] *Grant v. Torstar Corp.*, 2009 SCC 61.
[29] *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 112.
[30] *Denis v. Côté*, 2019 SCC 44 at para. 49.
[31] *Pointes*, *supra* note 3 at para. 95.

> …"chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements [Emphasis in original].[32]

Considering evidence of libel chill means that the weighing involved in the ss. 137.(4)(b) analysis is firmly focused on the importance of protecting the public interest in freedom of expression. The weighing exercise required by s. 137.1 is not intended to be an equal balancing of the two public interests.

iii. *Weighing the Two Public Interests*

29. The last step under ss. 137.1(4)(b) is a weighing of the two public interests, namely protecting the plaintiff's right to vindication by proceeding with the litigation versus protecting the defendant's right to make the expression in issue. It adjudges if the actual or likely harm inflicted on the plaintiff is sufficiently serious that the public interest in his or her lawsuit continuing outweighs the public interest in protecting the expression.

30. If a court finds that the two public interests are equally balanced, then given the express statutory language of ss. 137.1(1) which *prima facie* favours the *Charter*-protected ss. 2(b) right of freedom of expression on matters of public interest over a plaintiff's right to vindication, the plaintiff's proceeding must be terminated. It is only if a court finds that the likely or actual harm to a plaintiff is sufficiently serious to outweigh the public interest in protecting the expression that a plaintiff can succeed under the last step of ss. 137.1(4)(b).

31. This final weighing analysis is qualitative and, if there is evidence of actual or likely harm to the plaintiff, can be difficult. The Court of Appeal was correct when it said that the evaluation cannot be reduced to an arithmetic-like calculation.[33] However, the weighing also cannot be short-circuited, either by supplanting it with an analysis of the four indicia of a SLAPP suit or by permitting a plaintiff's evidence of a potentially significant damages award to apparently overbear it. With respect, the Court of Appeal's reasons in *Platnick* appear to indicate that both of these outcomes occurred. The four indicia of a SLAPP suit were applied

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[32] *WIC Radio Ltd v. Simpson*, 2008 SCC 40 at paras. 2, 15.
[33] *Pointes*, *supra* note 3 at para. 96.

and the court summarily found that Dr. Platnick's allegations of significant pecuniary damages and damage to reputation outweighed the public interest in protecting the expression.[34]

32. It is respectfully submitted that the BCCLA's submissions about the analysis required by ss. 137.1(4)(b) permit the proper weighing to take place and appropriately respect the explicit purposes of the CJA provisions such that expression on matters of public interest is *prima facie* encouraged and litigation that unduly limits expression of matters of public interest is discouraged.

PART IV SUBMISSIONS ON COSTS

33. The BCCLA does not seek any costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2019.

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[34] *Platnick, supra* note 9 at para. 110.

PART VII TABLE OF AUTHORITIES

	AUTHORITIES	PARAGRAPH IN BCCLA FACTUM
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1.	*1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685	2, 8, 12, 15, 17, 20, 21, 28, 31
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3.	*Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166	8
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