# Supreme Court of Canada Clarifies Test for Anti-SLAPP Motions

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The Supreme Court of Canada has released two decisions interpreting the test on a motion to dismiss under s. 137.1 of the *Courts of Justice Act,* known as the anti-SLAPP legislation (strategic lawsuits against public participation).

The direction provided by the Supreme Court is likely to change the approach taken by parties involved in motions to dismiss under s. 137.1 of the *Courts of Justice Act* and the manner courts adjudicate those motions.

These anti-SLAPP provisions were intended to mitigate lawsuits against individuals or organizations as an indirect tool to limit freedom of expression and deter parties from participating in public affairs.

*1704604 Ontario Limited v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes*") and *Bent v. Platnick*, 2020 SCC 23 (*"Bent*") are the first Supreme Court decisions to analyze the legislation, and have refined the test previously articulated by the Ontario Court of Appeal.

## The Legislation

Section 137.1 of the *Courts of Justice Act* is intended as a screening mechanism for lawsuits that unduly limit expression on matters of public interest. The section allows defendants to move at any stage of the proceeding for an order to dismiss the action. The legislation sets out a distinct test for such motions:

> **Order to dismiss**
>
> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

> **No dismissal**
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

The defendant has the initial burden to satisfy the motion judge that the proceeding arises from an expression relating to a matter of public interest ("the threshold burden").

If the defendant is successful at this stage, the onus shifts to the plaintiff, who must establish that there are grounds to believe the proceeding has substantial merit, that the defendant has no valid defence (the "merits-based hurdle"), and that the public interest in permitting the action to continue outweighs the public interest in protecting the expression ("the public interest hurdle").

**Section 137.1(3) – The Threshold Burden**

The Supreme Court stated that this step involves a two-part analysis. The defendant must demonstrate that: (1) the proceeding arises from an expression made by the defendant, and (2) the expression is related to a matter of public interest.

Justice Côté confirms that this threshold is established on a balance of probabilities. The burden on the defendant at this stage is not onerous.

Though "expression" is expressly defined in the statute, the Court goes on to elaborate on the other terms in the section, including the phrase "arises from". The Court concludes that this phrase implies an element of causality.

However, Justice Côté emphasizes that this analysis must be subjected to a broad and liberal interpretation. As such, motions under s. 137.1 are not limited to those directly concerned with defamation suits.

## Section 137.1(4) – The Merits-Based Hurdle

Once the burden shifts to the plaintiff for the merits-based hurdle, Justice Côté states that there must be a basis in the record and the law (including the context of the proceeding) to determine whether there are "grounds to believe" that the underlying proceeding has substantial merit and that there is no valid defence.

This standard requires something more than mere suspicion, but less than proof on a balance of probabilities. Section 137.1(4)(a) as a whole is fundamentally concerned with the strength of the underlying proceeding.

Importantly, in the assessment of s. 137.1(4)(a), the Supreme Court has departed from the Court of Appeal's application of the standard of proof. Justice Côté writes that the assessment under s. 137.1(4)(a) must be made from the motion judge's perspective.

While the Court of Appeal stated that the application of the standard depended on a "reasonable trier", the Supreme Court has ruled that this improperly excludes the express discretion of the motion judge conferred in the provision. As such, the test at this stage must be a subjective determination of the motion judge.

### *i) Substantial Merit*

Justice Côté writes that the use of the word "merit" in this context fundamentally calls for a determination of the prospects of success of the underlying action. The burden is on the plaintiff to ensure that legitimate claims are allowed to continue. The Court articulated the analysis at this stage of the test as follows:

> […] to discharge its burden under s. 137.1(4)(a)(i), the plaintiff must satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success.

The Supreme Court has maintained that the motion judge should engage in a limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence at a later stage, so as to avoid sliding into a *de facto* summary judgment motion.

### *ii) No Valid Defence*

Similarly, at this stage, the Court states that the motion judge must assess the strength of *any* defences put in play by the defendants as part of the prospect of success of the underlying claim. Justice Côté writes that the word "no" is absolute.

Thus if any defence is valid, the plaintiff has not met its burden. The plaintiff must show that none of the defences put in play are not legally tenable or supported by evidence that is reasonably capable of belief.

**Section 137.1(4)(b) – Public Interest Hurdle**

The Supreme Court has articulated this stage as the "crux" of the analysis on a s. 137.1 motion. This step serves as a backstop for motion judges to dismiss even technically meritorious claims.

The burden is on the plaintiff to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is a result of the expression, and that the corresponding public interest in allowing the proceeding outweighs the deleterious effects on expression and public participation.

Justice Côté first conducts an analysis of the term "harm", as the section requires the harm suffered by the plaintiff as a result of the defendant's expression to be weighed against the public interest in protecting the expression.

Either monetary or non-monetary harm can be relevant, and one type of harm is not more important than the other. The alleged harm need not be synonymous with the damages alleged. A fully developed damages brief is not necessary, and the plaintiff does not need to definitively prove harm or causation at this stage.

Instead, the plaintiff must provide evidence for the motion judge to draw an "inference" of likelihood of an existence of harm and the relevant causal link.

Next, the motion judge must weigh the harm against the public interest in protecting the expression. Justice Côté emphasizes that the weighing exercise can be informed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* jurisprudence, in addition to further factors enunciated by the Court of Appeal in *Platnick v. Bent,* 2018 ONCA 687 referred to as "indicia of a SLAPP suit".

These indicia include: (1) a history of the plaintiff using litigation or the threat of litigation to silence critics"; (2) a financial or power imbalance that strongly favours the plaintiff; (3)

a punitive or retributory purpose animating the plaintiff's bringing of the claim; and (4) minimal or nominal damages suffered by the plaintiff.

However, Justice Côté cautions that the weighing of public interest is not simply an inquiry into the hallmarks of a SLAPP. Therefore, the only factors that might be relevant in guiding this exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: "the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression".

Justice Côté lists several other factors that a motion judge may consider in the analysis in paragraph 80 of *Pointes* (in addition to the indicia of a SLAPP suit), which include the history of the litigation, broader or collateral effects on other expressions, disproportion between the resources being used in the lawsuit and the harm caused, and whether the expression or the claim might provoke hostility against an identifiable vulnerable group. However, the relevance of these factors is limited to the extent that they are tethered to the text of s.137.1(4)(b).

**Application: *1704604 Ontario Limited v. Pointes Protection Association***

In *Pointes,* a dispute arose between land developers ("170 Ontario") and a group opposing a subdivision in Sault St. Marie (PPA). 170 Ontario was granted approval for a subdivision from the Sault St. Marie Region Conservation Authority (SSMRCA), and PPA opposed the approval on environmental grounds.

170 Ontario's application was eventually approved, and PPA brought an application for judicial review. While the judicial review was pending, 170 Ontario sought approval from City Council, who refused the application. 170 Ontario appealed to the Ontario Municipal Board.

The application for judicial review was settled on an Agreement with terms including that, in any subsequent proceedings before the Ontario Municipal Board, PPA would not advance the position that the resolutions were illegal, invalid or contrary to environmental legislation. However, during the Ontario Municipal Board proceedings, the president of PPA testified that the proposed development would result in significant environmental damage. As a result, 170 Ontario sued PPA alleging breach of contract.

PPA brought a motion under s. 137.1, and the judge dismissed the motion. The Court of Appeal allowed PPA's appeal and dismissed the action.

The Supreme Court concluded that 170 Ontario's breach of contract action arose from an expression, meeting the threshold burden.

On the merits-based hurdle, the Supreme Court agreed with the Court of Appeal that 170 Ontario's action lacked substantial merit. There was nothing in the plain language of the Agreement which foreclosed PPA from advancing an argument that did not pertain to the SSMRCA's decision. As such, 170 Ontario's appeal was dismissed.

**Application: *Platnick v. Bent***

Ms. Bent is a lawyer at an Ontario law firm and was president-elect of the Ontario Trial Lawyers Association ("OTLA"). The plaintiff, Dr. Platnick, is a medical doctor who performed medical assessments primarily for insurers in motor vehicle accident cases.

Dr. Platnick initiated a defamation suit after Ms. Bent sent an email to an OTLA Listserv email to 670 members making statements about Dr. Platnick, including that the doctor misrepresented and changed medical reports. Eventually, the email was leaked and published in a magazine.

Ms. Bent brought a motion to dismiss Dr. Platnick's action under s. 137.1. The motion judge granted the motion. The decision was overturned by the Court of Appeal, reinstating Dr. Platnick's action.

The Supreme Court allowed Dr. Platnick's defamation suit to proceed and dismissed the appeal. The Court was split 5-4 in its decision.

Though it was agreed that the claim satisfied the threshold burden, the dissent (written by Justice Abella) disagreed with the majority with respect to whether the defence of qualified privilege was valid.

According to the majority, an occasion of qualified privilege exists if a person making a communication has an interest/duty to publish the information in issue and the recipient has a corresponding interest or duty to receive it. Privilege is defeated where the speaker is reckless as to the truth of the words or where the scope of the occasion of privilege is exceeded.

The majority stated that the specific references made to Dr. Platnick in the email from Ms. Bent were not necessary to the discharge of the duty giving rise to the privilege.

In addition, the Listserve contained an express prohibition on potentially defamatory remarks. As such, the majority concluded that OTLA acknowledged that posting

potentially defamatory materials was neither necessary nor relevant to the duty encompassed in the occasion.

Finally, the majority pointed out that the record revealed a lack of investigation and reasonable due diligence by Ms. Bent prior to making her allegations to corroborate an allegation of professional misconduct. Ms. Bent did not attempt to communicate or consult with Dr. Platnick.

As the Court has a heightened expectation of reasonable due diligence on lawyers, the majority stated that Ms. Bent's privilege was defeated on the ground that she was indifferent as to the truth of her statements.

In the dissent, Justice Abella writes that the defence of qualified privilege had a real prospect of success. Justice Abella notes that it would defeat the purpose of qualified privilege to withhold the availability of the defence because Ms. Bent chose to identify Dr. Platnick by name, as generic accounts of misconduct do not require the protection of qualified privilege.

Further, the dissent emphasized that Ms. Bent's email provided appropriate information to appropriate people, as the Listserve was intended to be confidential to members of OTLA, who practice plaintiff personal injury law.

The dissenting judges concluded that Ms. Bent was duty-bound to identify Dr. Platnick to her colleagues, who had a corresponding interest and duty to receive the email.

Further, there was nothing in the record to support a finding of malice either due to recklessness or any other basis. Any harm inflicted on Dr. Platnick was caused by unforeseen and unforeseeable circumstances (referring to the subsequent leak of the email to a magazine).

The dissent viewed the email as proper administration of justice, concluding the appeal should have been allowed.

**Conclusion**

In clarifying the test on a motion to dismiss pursuant to s. 137.1, the Supreme Court has confirmed that motions under this section are heavily contextual and fact-specific.

It is evident that such motions are not restricted to defamation actions, but can be pursued in any proceeding arising from an expression on a matter of public interest.

It will be interesting to see if the lower courts will modify their approach to anti-SLAPP motions including implementing the Supreme Court's direction regarding the proper burden of proof in s. 137.1(4)(a).