RESPONSIBLE COMMUNICATION AND PROTECTION OF PUBLIC PARTICIPATION: ASSESSING CANADA'S NEWEST PUBLIC INTEREST SPEECH PROTECTIONS

Hilary Young*

I. INTRODUCTION

Canadian defamation law has long been criticized for insufficiently protecting freedom of expression.[1] Unlike in the U.S., constitutional free speech protections do not extend to Canadian defamation law. And while few countries go as far as the United States in protecting free speech, Canada also does not compare favourably to countries such as England and Australia when it comes to protecting public interest speech from liability in defamation. For example, England recently changed its defamation law to require proof of serious harm to reputation.[2] No such requirement exists in Canada. Australia caps general damages in defamation.[3] Canada does not.

One should not exaggerate problems with Canadian libel law; it has a number of speech-protecting elements and a recent study showed that Canadian defamation actions succeed only 28% of the time.[4] Nevertheless,

* Associate Professor, University of New Brunswick (Canada). The author wishes to thank Colleen Thrasher for her excellent research assistance. This work is funded in part by the Social Sciences and Humanities Research Council of Canada and by the Harrison McCain Foundation.

1. *See, e.g.*, LAW COMM'N OF ONTARIO, DEFAMATION LAW IN THE INTERNET AGE: CONSULTATION PAPER 15 (2017), http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf.

2. Defamation Act 2013, c-26, § 1(1) (Eng.).

3. *See, e.g.*, *Defamation Act 2005* (Vic) s 35(1) (Austl.) and *Defamation Act 2005* (NSW) s 35(1) (Austl.), each of which sets a cap of $250,000 on non-economic damages. These amounts have been increased to reflect inflation and as of July 1, 2014 were $355,000. State of New South Wales, GOV'T GAZETTE 2243, 2307 (2013).

4. Hilary Young, *The Canadian Defamation Action: An Empirical Study*, 95 CAN. BAR REV. 591, 605 (2018).

there has been widespread agreement about the need to make defamation law more free speech-friendly – particularly where matters of public interest are concerned.[5]

Recently, courts have been making incremental changes to the common law in order better to protect speech. First, in *WIC Radio v. Simpson*, the Supreme Court of Canada expanded the defence of fair comment on matters of public interest. Then, in *Grant v. Torstar* (*Grant*), the Court created a new defence of Responsible Communication on Matters of Public Interest (responsible communication), modeled on England's *Reynolds* defence.[6] In *Crookes v. Newton*, the Supreme Court held that hyperlinking is not publication for the purposes of defamation law, thereby restricting the scope of liability for online publications.[7]

Provincial legislators too have acted to better protect certain speech. In 2015, Ontario enacted its Protection of Public Participation Act (PPPA).[8] It amends the Courts of Justice Act[9] so as to allow proceedings to be dismissed at an early stage if they limit freedom of expression on matters of public interest.

This article assesses two of these new Canadian laws, both of which focus on protecting speech on matters of public interest: responsible communication and the PPPA's anti-SLAPP provisions. The former was adopted by the Supreme Court of Canada in 2009 and seeks to protect speech on matters of public interest – especially journalism. The latter, as just stated, is a procedural mechanism for having actions dismissed at an early stage if they are grounded in expression on a matter of public interest. The article considers the cases and commentary to date in assessing whether the laws' stated goals are being met. Given the symposium's focus on "weaponized defamation" (defined as the "use of defamation and privacy torts by people in power to threaten press investigations"[10]), the article pays particular attention to how these laws protect, or fail to protect, journalism. Its focus is, however, broader than weaponized defamation, in that

5. The Law Commission of Ontario is pursuing a defamation law reform project that emphasizes the need for changes to defamation law. LAW COMM'N OF ONTARIO, *supra* note 1, at 15. The emphasis on matters of public interest is apparent in Ontario's Protection of Public Participation Act, S.O. 2015 c 23 (Can.), for example, discussed in detail below.

6. Grant v. Torstar Corp., [2009] 3 S.C.R. 640 (Can.).

7. Crookes v. Newton, [2011] 3 S.C.R. 269 (Can.).

8. Protection of Public Participation Act, S.O. 2015 c 23 (Can. Ont.).

9. Courts of Justice Act, R.S.O. 1990, c C.43 (Can. Ont.).

10. *See Global Fake News and Defamation Symposium: Concept Note*, SOUTHWESTERN LAW SCHOOL, https://www.swlaw.edu/curriculum/honors-programs/law-review-journals/journal-international-media-entertainment-law/global (last visited Feb. 11, 2018).

responsible communication and the PPPA provisions are not limited to "those in power" or to "press investigations." But it is also narrower in that it considers only defamation, not privacy.

Both mechanisms are useful tools for protecting speech on matters of public interest, but each has flaws, either inherently or that have developed through their application, that prevent them from better achieving their aims. Responsible communication, although flexible and broad in principle, has been narrowly applied. As a result, communication is found not to be responsible when it arguably is. In addition, the defence is being treated as applicable only to journalists, which is, in my view, a misreading of the Supreme Court of Canada's *Grant* decision. As a result, the potential of the responsible communication defence to protect speech on matters of public interest is not being met.

Ontario's PPPA has been successful in getting some SLAPP suits dismissed. However, the serious consequences of a successful PPPA motion mean that courts are sometimes interpreting its provisions unduly narrowly. In addition, it seems that proceedings are rarely dealt with expeditiously, diluting the advantage of the PPPA over a summary judgment motion, for example.

II. THE CANADIAN LEGAL LANDSCAPE

A. General

To understand Canada's attempts at achieving a better balance between protecting reputation and protecting speech on matters of public interest, it is necessary to consider how Canadian law differs from that in other jurisdictions. Canadian defamation law is almost exclusively civil (as opposed to criminal)[11] and is largely based on English common law. As such, defamation is considered primarily a private law wrong for which the appropriate remedy is damages and perhaps injunctive relief rather than criminal sanctions. This differentiates it from civil law jurisdictions in

11. There is a crime of defamatory libel in Canada per the Criminal Code, R.S.C. 1985, c C-46 §§ 297-300 (Can.). However, relative to civil libel it is rarely used and has been criticized as inconsistent with constitutional free speech protections. For example, in 1984 the Law Reform Commission of Canada recommended abolishing criminal libel offences. LAW REFORM COMM'N OF CANADA, DEFAMATORY LIBEL: WORKING PAPER NO. 35, 61 (1984).

Europe and elsewhere.[12] Other than Quebec, each province and territory (defamation law being a matter of provincial law) has its own libel and slander statute,[13] but the statutes are not complete codes. Rather, they tend to override or clarify the common law on matters such as limitations periods and specifying certain privileged occasions.[14] There is enough similarity between provinces and territories, however, that I refer throughout this article to Canadian defamation law. (Quebec law is civil rather than common law and is not discussed further).

Whereas U.S. defamation law is subject to the 1st Amendment, the Canadian common law of defamation law is not subject to the *Charter of Rights and Freedoms*' protection of freedom of expression.[15] This is because the common law is not considered government action.[16] That said, the common law must evolve in order to reflect *Charter* values, including freedom of expression.[17] Recent defendant-friendly changes to the law have been justified on the grounds of compliance with *Charter* values.[18]

Canadian defamation law, however, remains plaintiff-friendly. Plaintiffs need only establish the three traditional defamation elements: that the statement was about the plaintiff; that it was published to a third party; and that the statement was such as to make an ordinary person think less of the plaintiff.[19] As discussed below, there is no public figure doctrine. The elements are often straightforwardly made out. Instead, cases tend to turn on defences, for which the defendant has the onus of proof. These include truth, qualified and absolute privilege, fair comment, and responsible communication.[20] Falsity is presumed. This onus means that even those with a valid defence may lose or may have to settle because they lack resources to litigate.

---

12. For a comparison of defamation law regimes, see Silvano Domenico Orsi, *Defamation: Tort or Crime? A Comparison of Common Law and Civil Jurisdictions*, 9 DARTMOUTH L.J. 19 (2011).

13. *See, e.g.*, Libel and Slander Act, R.S.O. 1990, c L-12 (Can.), Defamation Act, R.S.N.B. 2011, c 139 (Can.), Defamation Act, R.S.N.W.T. 1988, c D-1 (Can.). Note that in Québec, defamation is governed by its Civil Code of Québec, S.Q. 1991, c 64 arts. 1457, 2929 (Can.).

14. *See, e.g.*, Libel and Slander Act, R.S.O. 1990, c L-12 at s. 3, 6. (Can.).

15. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) § 2(b); RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Can.).

16. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

17. *See* Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, paras. 85-98 (Can.).

18. *See, e.g.*, Grant v. Torstar Corp., [2009] 3 S.C.R. 640, paras. 44-55 (Can.); WIC Radio Ltd. v. Simpson, [2008] 2 S.C.R. 420, para. 79 (Can.); Crookes v. Newton, [2011] 3 S.C.R. 269, paras. 32-33 (Can.).

19. *Grant*, [2009] 3 S.C.R. para. 28.

20. Weaver v. Corcoran, 2017 BCCA 160, para. 103 (Can. B.C.).

Damages are presumed from a finding of liability and are at large.[21] There is no cap on general damages,[22] and average damages awards were recently found to be about $60,000 Canadian[23] (about U.S. $48,000 at the time of writing), although the median was much lower.[24] Litigating is, of course, also quite costly. The significant economic consequences of defamation can therefore create a chilling effect on speech, either before speaking or afterwards, in terms of retractions.[25] Further, in Canada, as in the United Kingdom, losing parties are generally required to pay a significant portion of the successful parties' costs.[26] Although this disincentivizes frivolous lawsuits, it also increases parties' risk, and therefore presumably increases the chilling effect.

B. Laws Protecting Speech on Matters of Public Interest

Like most jurisdictions, Canada has rejected the *New York Times Co. v. Sullivan* (*Sullivan*) absolute malice rule. That is, Canada has no public figure doctrine comparable to that in the U.S., where public figure plaintiffs can only succeed in defamation by showing the defendant published with knowledge that the statement was false or was recklessness as to falsity.[27] Instead, Canadian law tends to provide additional protection for speech on matters of public interest. In other words, it provides favourable treatment based on the subject matter of the communication rather than on the kind of plaintiff.

---

21. "It has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large." *Hill*, [1995] 2 S.C.R., para. 164.

22. *Id.* paras. 167-69.

23. Young, *supra* note 4, at 612.

24. *Id.* at 613.

25. The chilling effect of defamation law has been recognized by various courts. *See, e.g.*, Halton Hills (Town) v. Kerouac, 80 O.R. 3d 577, para. 27 (Can. Ont. Sup. Ct. J.) ("A law that restricts free speech, even slightly and for noble purposes, has some chilling effect. The chill is greater than the metes and bounds of the restriction itself, since the risk of prosecution or litigation will surely discourage speech near the boundaries of what is permitted."); *see also* Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para. 39 (Can.).

26. British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71, paras. 19-20 (Can.).

27. For the rule, see New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), as modified by later cases such as Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974). For Canada's rejection, see Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, para 137 (Can.). The United Kingdom rejected the absolute malice rule in Derbyshire Cty. Council v. Times Newspapers Ltd., [1993] A.C. 534 (HL) 538 (Eng.). India has adopted it, however, in R. Rajagopal v. State of Tamil Nadu, AIR 1995 SC 264, para. 26 (India).

The law protects speech on matters of public interest through the common law defamation defences of fair comment and responsible communication, and through Ontario's PPPA motion to dismiss. Fair comment protects statements of opinion that relate to matters of public interest if they could be held by anyone given the underlying facts and if they were not malicious.[28] It is a well-established defamation defence and it is not discussed further.

While fair comment protects *opinion*, until 2009, there was no defence for fair *factual* statements on matters of public interest. As a result, unless qualified or absolute privilege applied, defendants had to prove the truth of factual allegations in order to successfully defend a defamation action. This often proved difficult, even if the statement was, in fact, true. As the Supreme Court of Canada noted in *Grant*:

> A journalist who has checked sources and is satisfied that a statement is substantially true may nevertheless have difficulty proving this in court, perhaps years after the event. The practical result of the gap between responsible verification and the ability to prove truth in a court of law on some date far in the future, is that the defence of justification is often of little utility to journalists and those who publish their stories.[29]

Although any defendant may have difficulty proving truth years after the fact, the law was thought to be especially harsh for journalists. First, journalism raises special evidentiary difficulties in that it sometimes relies on sources with whom a journalist has no ongoing relationship or who may not be willing to be named.[30] A journalist may have good reason to be convinced that the source's information is accurate but cannot prove it years later in court, especially if the information came from a confidential source.

Second, the defence of qualified privilege has tended to be denied to journalists. Qualified privilege protects speech where there is an obligation to communicate it and a corresponding duty to receive it. The privilege is lost if communication is broader than to those to whom there was a duty to convey it. Courts tended to hold that there is no duty on journalists to communicate to the "world at large," even on matters of broad public interest,[31] although even before *Grant* this was changing.[32]

---

28. *See* WIC Radio Ltd. v. Simpson, [2008] 2 S.C.R. 420, para. 28 (Can.).

29. Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para 33 (Can.).

30. *See id.* para. 34.

31. In Globe and Mail Ltd. v. Boland, [1960] S.C.R. 203, 208 (Can.), the Supreme Court of Canada held that journalists have no special duty to convey matters of public interest (in that case, a candidate's fitness for election) to the public and there was therefore no qualified privilege to do so. *Id.* at 208. *See also* Douglas v. Tucker, [1952] 1 S.C.R. 275, 288 (Can.). Referring to English law Weaver et al. note that: "[a]bsolute and qualified privilege-defenses in which truth need not be

Given these difficulties, people may choose not to communicate about matters of public interest rather than risk liability. This chilling effect applies both to ordinary citizens and to journalists. The Supreme Court acknowledged that:

> [T]o insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate . . . [The need to prove truth] may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.[33]

In *Grant*, in 2009, the Supreme Court of Canada created a new responsible communication defence modeled on the United Kingdom's *Reynolds* defence. It has two elements: the publication must be on a matter of public interest and publication must have been responsible in the circumstances.[34] The public interest element uses the same definition of public interest that is found in the defence of fair comment. Public interest refers to matters "inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens."[35] As Eric Descheemaeker notes (in relation to the *Reynolds* defence), "public interest" is a category that has been around for years and *Reynolds* does not change its meaning.[36] The same is true of *Grant*.

The second element relates to whether the defendant acted responsibly in publishing, given the steps that were taken to verify any allegations. The

---

shown traditionally have been narrow and have mainly allowed the media to reproduce official documentation rather than to encourage investigative reporting in the interests of free speech." Russell Weaver et al., *Defamation Law and Free Speech:* Reynolds v. Times Newspapers *and the English Media*, 37 VAND. J. TRANSNAT'L L., 1255, 1271 (2004).

32. According to Shavluk v. Green Party of Can., [2010] B.C.S.C. 804, para. 81 (Can. B.C.); (*aff'd* by Shavluk v. Green Party of Can., [2011] B.C.C.A. 286, para. 19 (Can. B.C.)):

> [A] more recent line of cases can be seen to have expanded the scope of the [qualified privilege] defence in cases of wide dissemination of matters of true public interest, see for example *Stopforth v. Goyer*, 1979, 23 O.R. (2d) 696, 97 D.L.R. (3d) 369 (Ont. C.A.); *Parlett v. Robinson* (1986), 1986, 5 B.C.L.R. (2d) 26 (B.C. C.A.), leave to appeal ref'd [1986] S.C.C.A. No. 322.; *Ward*, *supra*; and *Campbell v. Jones*, 2002 NSCA 128 (CanLII), 220 D.L.R. (4th) 201 (N.S. C.A.)

The court in *Shavluk* found there was a qualified privilege in relation to a press release on a matter of public interest. *Shavluk*, [2010] B.C.S.C. para. 82.

33. *Grant*, [2009] 3 S.C.R. para. 53.

34. *Id.* para. 126.

35. *Id.* para. 105.

36. Eric Descheemaeker, *A Man Must Take Care Not to Defame His Neighbour: The Origins and Significance of the Defence of Responsible Publication*, 34 U. QUEENSLAND L. J. 239, 240 (2015).

Supreme Court in *Grant*, like the House of Lords in *Reynolds*, provided a non-exhaustive list of indicia of responsible communication:

> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
>
> (d) the status and reliability of the source;
>
> (e) whether the plaintiff's side of the story was sought and accurately reported;
>
> (f) whether the inclusion of the defamatory statement was justifiable;
>
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
>
> (h) any other relevant circumstances.[37]

Grant therefore created a standalone fault-based defence. (The Court dismissed the idea that responsible communication would be a form of qualified privilege, as it initially was in the United Kingdom.)[38] Like *Reynolds*, *Grant* was hailed as a boon for freedom of expression, especially for journalists.[39] It was explicitly meant to shift the balance of defamation law toward greater freedom of expression.[40] And although the defence was said to apply to "anyone," it was clear that like the *Reynolds* defence, the *Grant* defence was especially valuable to journalists.

An additional law to protect public interest speech was enacted in Ontario in 2015. The Protection of Public Participation Act allows certain claims, essentially strategic lawsuits against public participation, or "SLAPPs,"[41] to be dismissed at an early stage of proceedings. Ontario was

---

37. *Grant*, [2009] 3 S.C.R. para. 126.

38. In Reynolds v. Times Newspapers Ltd. [1999] UKHL 45, [2001] 2 AC 127 (HL) (appeal taken from Eng.), the defence was initially a subset of qualified privilege, though that was changed in Jameel & Another v. Wall Street Journal Europe [2006] UKHL 44, [2007] 1 AC 359 (HL) 365-66 (appeal taken from Eng.). In Canada, *Grant*, [2009] 3 S.C.R. para. 95, made it clear from the outset that the defence was not a subset of qualified privilege.

39. "The decisions in *Grant* and *Quan* [*Grant*'s companion case] represent an important advancement of freedom of speech in Canada and a major change in the law of defamation." Richard Dearden & Wendy Wagner, *Canadian Libel Law Enters the 21st Century: The Public Interest Responsible Communication Defence*, 41 OTTAWA L. REV. 351, 353 (2009-10). Referring to *Reynolds* rather than the *Grant* version of responsible communication, Andrew Kenyon states: "[i]t offers a 'whole new defence', arguable in almost all media cases, which is 'revolutionary' and a 'massive change.'" Andrew T. Kenyon, *Lange and* Reynolds *Qualified Privilege: Australian and English Defamation Law and Practice*, 28 MELB. U. L. REV. 406, 423 (2004).

40. *Grant*, [2009] 3 S.C.R. para. 65.

41. The Uniform Law Conference of Canada defines a SLAPP as: "a lawsuit initiated against one or more individuals or groups that speak out or take a position in a public debate on an

not the first province to enact anti-SLAPP legislation; Quebec's code of civil procedure has a *de facto* anti-SLAPP mechanism[42] and British Columbia briefly had an anti-SLAPP law, but it was repealed.[43] Now, however, other than Quebec, Ontario is the only province that has an anti-SLAPP law. (Although Canada has ten provinces and three territories, 39% of Canadians live in Ontario.)[44] The law reflects the recommendations of the Attorney General of Ontario's Advisory Committee on SLAPPs.[45] In particular, legislators rejected an approach grounded in the plaintiff's intent (which was taken in the short-lived British Columbia anti-SLAPP law) in favour of one grounded in whether the speech is on a matter of public interest.

The PPPA amends the Courts of Justice Act to include the following:

> **137.1** . . . .
>
> . . . .
>
> (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. 2015, c.23, s.3.
>
> . . . .

---

issue of public interest. The purpose of SLAPPs is to limit the freedom of expression of the defendants and neutralize their actions by resorting to the courts to intimidate them, deplete their resources and reduce their means of action." Vincent Pelletier, STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS) REPORT 2008, UNIF. LAW CONFERENCE OF CANADA: ANNUAL MEETINGS para. 4 (Aug. 2008), http://www.ulcc.ca/en/annual-meetings/235-2008-quebec-city-qc/civil-section-documents/448-strategic-lawsuits-against-public-participation-slapps-report-2008. This definition was adopted by the Attorney General of Ontario's Anti-SLAPP Advisory Panel. *See* MINISTRY OF THE ATTORNEY GENERAL, ANTI-SLAPP ADVISORY PANEL REPORT TO THE ATTORNEY GENERAL (2010), https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html.

42. Code of Civil Procedure, C.Q.L.R. c C-25.01, art 51 (Can. Que.) states:

> The courts may, at any time, on an application and even on their own initiative, declare that a judicial application or a pleading is abusive.
>
> Regardless of intent, the abuse of procedure may consist in a judicial application or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. It may also consist in a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, *particularly if it operates to restrict another person's freedom of expression in public debate* (emphasis added).

43. Protection of Public Participation Act, S.B.C. 2001, c 19 (Can. B.C.), (repealed 2001).

44. STATISTICS CANADA, POPULATION BY MARITAL STATUS AND SEX, BY PROVINCE AND TERRITORY (QUEBEC, ONTARIO, MANITOBA, SASKATCHEWAN) (2011), http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil01b-eng.htm.

45. *See* MINISTRY OF THE ATTORNEY GENERAL, *supra* note 41.

(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.[46]

To summarize, the PPPA provides for proceedings to be dismissed where they involve expression on matters of public interest, there are no grounds to believe the case has merit, including no defences, and the harm to the responding party is serious enough to outweigh the public interest in protecting the expression by dismissing the proceeding. The onus of proving that the matter involves expression on a matter of public interest falls on the moving party (i.e., the defendant), while the onus of proving that there are no grounds to believe the case has merit and that the harm to the responding party outweighs the public interest in protecting speech falls on the responding party (i.e., the plaintiff). The underlying action need not be a defamation action, so long as it involves a threat to expression on a matter of public interest.

Given that the responsible communication defence and PPPA are quite new, I examine how they are being applied to date and whether they seem to be achieving their aims.

III. HOW EFFECTIVE ARE THESE NEW MECHANISMS AT ACHIEVING THEIR AIMS?

A. Responsible Communication

In the eight years since *Grant*, there have been 34[47] determinations on the merits as to whether the responsible communication defence applies. It was made out in only 7/34 (21%) and failed in 27/34 (79%).[48] This is

46. Courts of Justice Act, R.S.O. 1990, c C.43 (Can. Ont.).

47. Because the article is number-heavy, I have dispensed with the usual rules requiring certain numbers to be spelled out while using numerals for others. I use numerals for numbers related to analyzing the case law unless at the beginning of a sentence.

48. I identified all the responsible communication cases reported in CanLII, Westlaw and Quicklaw between the time *Grant* was decided and Nov. 1, 2017. I then excluded those for which there was no determination on the responsible communication issue (e.g. interlocutory decisions).

broadly consistent with low success rates noted in England. At the time of *Jameel v Wall Street Journal Europe* (*Jameel*), Andrew Scott noted that the defence succeeded in only 3/20 cases.[49]

Twenty-one percent is a low success rate for responsible communication considering that, according to a larger empirical study of Canadian defamation actions, defendants succeeded 72% of the time between 2003-2013.[50] Thus, the low success rate in arguing responsible communication cannot be attributed to low defendant success rates generally. Instead, defendants are succeeding by arguing defences such as qualified privilege, as well as arguing that pleadings are insufficient, etc.[51] (That said, the rate of success in arguing responsible communication does not take into account the fact that a defendant may still have avoided liability through another defence. A direct comparison to defendant success rates overall is therefore misleading.)

Mounting a responsible communication defence can be expensive, since each of the listed indicia of responsible communication is generally addressed, adding considerable complexity to a case.[52] This, combined with the low success rate, could deter defendants from pleading it, thereby minimizing its utility. The low success rate and high cost could even chill speech, particularly in newsrooms where lawyers are often involved in decisions whether and how to publish.[53]

There were 34 cases. Since these figures are based only on decisions reported in these online databases, unreported decisions are not included. Jury decisions in particular are less likely to be reported, so some caution is warranted in assessing these figures. That said, the reported cases represent the common law of defamation. They are the cases that judges will rely on in applying the defence to future cases.

49. *See* Andrew Scott, *The Same River Twice?* Jameel v Wall Street Journal Europe, 12 COMM. L. 52, 54 (2007).

50. *See* Young, *supra* note 4, at 605. (The time frame for the cited study does not correspond exactly to the time frame for the present analysis, so caution is warranted, but there is overlap in the cases considered for each).

51. *Id.* at 625-26.

52. There is no analysis of the cost of mounting a responsible communication defence in Canada, but in England, media attorney Mark Stephens noted that mounting a Reynolds defense can be expensive, costing from £100,000 to £200,000. *See* Stephen Bates, *Libel Capital No More: Reforming British Defamation Law*, 34 HASTINGS COMM. & ENT. L. J. 233, 250 (2011-12). Although there is no reason to think that the actual cost is the same in Canada, in both countries the responsible communication defence is similar and complex, adding significant expense to litigation.

53. The extent to which lawyers are involved in publishing decisions in Canadian newsrooms is unclear, but there is anecdotal evidence of this in Canada and other jurisdictions. In his book on the Jian Ghomeshi scandal, reporter Kevin Donovan writes about consulting with a lawyer before deciding to publish the story. KEVIN DONOVAN, SECRET LIFE: THE JIAN

Now consider how the success rates break down. Traditional media had greater success with the defence. 5/7 cases (71%) in which the defence succeeded involved traditional media. Where the defence failed, only 7/27 cases (26%) involved traditional journalists. This may suggest that the defence works reasonably well for journalists but not for non-journalists. Viewed in terms of how often journalists succeed with the defence, however, the numbers are less promising. The defence was applied to 13 traditional journalism communications.[54] It succeeded in 5/13 (38%). Recall that the overall success rate for defendants is 72%, so 38% does not seem high.

It is unsurprising that journalism fared better than non-journalism in responsible communication assessments given the existence of professional standards of conduct for journalists. Another reason, however, is uncertainty regarding the scope of the defence. It is unclear whether responsible communication only applies to journalism (broadly defined) or applies to all kinds of communications.[55] On the one hand, citing the House of Lords in *Jameel v Wall Street Journal Europe*, the Supreme Court of Canada said responsible communication applies to "anyone who publishes material of public interest in any medium."[56] *Jameel* interpreted *Reynolds* as more than a journalism defence.[57] The Court also insisted on calling the

---

GHOMESHI INVESTIGATION 92-95 (Jill Ainsley ed.) (2016). In the UK, Weaver et al. interviewed British libel lawyers, one of whom stated: "[at] The Guardian, although defamation litigation expenses have declined, total lawyer bills have actually increased because of extra Reynold-related pre-publication expenses." Weaver et al., *supra* note 31, at 1298.

54. Traditional journalism here refers to print and broadcast media where journalists are expected to adhere to professional standards and where there is editorial oversight.

55. Another way of framing the question is whether it only applies to those who publish to the world at large. The "world at large" issue comes from the qualified privilege defence, where it was often held that the media had no duty to publish to the world at large and the citizenry had no corresponding interest in receiving such communications. As a result, qualified privilege did not apply. The defence created in Reynolds v. Times Newspapers Ltd. [1999] UKHL 45, [2001] 2 AC 127 (HL) (appeal taken from Eng.) was a new type of qualified privilege that *did* apply to publications to the world at large. However, Grant v. Torstar Corp., [2009] 3 S.C.R. 640 (Can.) made clear that the responsible communication defence was *not* a form of qualified privilege but rather a standalone defence. The "world at large" issue is therefore not obviously relevant to the scope of the responsible communication defence.

56. *Grant*, [2009] 3 S.C.R. para. 96.

57. Jameel & Another v. Wall Street Journal Europe [2006] UKHL 44, [2007] 1 AC 359 (HL) para. 54 (appeal taken from Eng.): "Lord Nicholls [in *Reynolds*] was speaking in the context of a publication in a newspaper but the defence is of course available to anyone who publishes material of public interest in any medium. The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information".

defence "responsible communication" rather than "responsible journalism."[58]

On the other hand, the Supreme Court used journalistic criteria to assess whether communication was responsible. For example, one criterion relates to whether the subject was given an opportunity to comment on the statement before publication.[59] The Court used almost exclusively journalistic examples and gave as a reason in support of the new defence that journalists tend not to be able to avail themselves of qualified privilege.[60]

Some courts have therefore interpreted *Grant*'s reference to "anyone," and its insistence that this is not just a journalism defence to mean that the defence also applies to new forms of citizen journalism such as blogging, which is explicitly mentioned in *Grant*, or to communications to the world at large, but not literally to all communications. Examples of this interpretation include *Foulidis v. Baker*:

> [70] In my view, there are several related reasons why [responsible communication] is not available to the defendant. This case does not involve either traditional media or new media dissemination of information. It involves communication which is almost antiquated in nature: a letter, delivered by hand. The letter was not published generally, as is the case with media publication, but to a select and focused few. Further, in a case of widespread media publication, the defence of qualified privilege is often unavailable. . . . In my view, it adds unnecessary complexity to this area of the law to hold that this important new defence is available to a non-media defendant to whom the defence of qualified privilege has been found to apply.[61]

The same reasoning was applied in rejecting the defence in *Bernstein v. Poon*: "While I would not definitively rule that the defence of responsible communication is the exclusive preserve of so-called 'public communicators,' it is clear that the defence can most readily be associated with communications relating to matters of public importance where the timeliness of the communication is a factor."[62] In denying the availability

58. *Grant*, [2009] 3 S.C.R. paras. 96-97.

59. *See id.* paras. 116-17.

60. *See id.* para. 34.

61. Foulidis v. Baker, 2012 ONSC 7295 (Can. Ont.). This case was appealed to the Ontario Court of Appeal, but the RCMPI determination was not appealed. Foulidis v. Baker, 2014 ONCA 529 (Can. Ont.).

62. Bernstein v. Poon, 2015 ONSC 155, para. 153 (Can. Ont.).

of the defence to a municipal councillor, the Ontario Court of Appeal stated:

> It was in the context of the limited defences available to journalists that the Supreme Court accepted the possibility of a chilling effect and concluded the extension of further protection was justified on the basis of the importance of freedom of expression in public debate. No such limitation constrains a municipal councillor's defence, however, because councillors have long had resort to the defence of qualified privilege.[63]

Not all courts agree, however, that the scope of the defence is narrow. In *Wang v. British Columbia Medical Association* the court found, in the alternative, that responsible communication applied to a doctor's report.[64] The scope of the defence was not discussed. There are other cases in which responsible communication was applied to non-journalistic communications and, although it did not succeed, this was not because the kind of communication fell outside the scope of the defence.[65] That said, when the scope of the defence is actually discussed, the cases all conclude that it is limited to journalism, citizen-journalism, or to publications to the world at large.

I have discussed elsewhere the issue of whether responsible communication applies to non-journalism, or to publications that are not to the world at large,[66] concluding that the defence applies to all kinds of communications. For present purposes, it is enough to note that courts tend to interpret the scope of the defence narrowly.

Even when courts are willing to apply responsible communication to non-journalistic publications, they tend to rigidly apply the journalistic criteria from *Grant* in assessing whether publication was responsible in the circumstances. This is despite the Supreme Court warning against a "checklist" approach, noting that this was a problem with the *Reynolds* version of the defence. Rather, *Grant* stated that the indicia are merely illustrative.[67]

---

63. Gutowski v. Clayton, 2014 ONCA 921, para. 23 (Can. Ont.)

64. *See* Wang v. British Columbia Med. Assoc., 2013 BCSC 394 (Can. B.C.) (*aff'd*, 2014 BCCA 162 (Can. B.C.)).

65. *E.g.*, Hunter v. Chandler, 2010 BCSC 729 (Can. B.C.), which involves oral conversations.

66. Hilary Young, *'Anyone. . . in Any Medium'?: The Scope of Canada's Responsible Communication Defence*, *in* COMPARATIVE DEFAMATION AND PRIVACY LAW 24 (Andrew Kenyon ed., 2016).

67. *See* Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para. 71-74, 122 (Can.); *see also* Jameel & Another v. Wall Street Journal Europe (no 2) [2006] UKHL 44, [2007] 1 AC 359 (HL) para. 33, per Lord Bingham, para. 56, per Lord Hoffman (appeal taken from Eng.); Eric Barendt,

It is difficult to state how often an inappropriate checklist approach is taken to the responsible communication defence because the application of each of the criteria to the facts is not necessarily inappropriate. What is usually meant by a "checklist" approach is that all the listed criteria are considered and, generally, failure to satisfy one means that the defence fails. Applying most or all of the criteria without considering their relevance to communicating responsibly in a particular case is also a kind of checklist approach. That is, the criteria are assumed to be relevant, and are discussed without stating the relevance of the criterion to communicating responsibly in the circumstances.

The clearest examples relate to the application of the "whether the plaintiff's side of the story was sought and accurately reported" criterion. It has often been said to be especially important to whether communication is responsible.[68] Failing to seek and report on the plaintiff's side of the story can be fatal to the defence. For example, in *Taseko Mines Limited v. Western Canada Wilderness Committee* (*Taseko*), the court stated that: "The defence of responsible communication would not apply. Taseko's side of the story was not reported by the Wilderness Committee or Mr. Biggs."[69] The implication is that this criterion is determinative.[70] Yet there are circumstances, within and outside traditional journalism, in which it is not irresponsible not to seek or report the plaintiff's side of the story.[71]

Balancing Freedom of Expression and the Right to Reputation: Reflections on Reynolds *and Reportage*, 63 N. IR. LEGAL Q. 59, 61 (2012) ("The courts treated the factors itemised by Lord Nicholls in Reynolds, to be considered when determining whether the media defendant had satisfied the requirements of "responsible journalism", as hurdles for it to clear.").

68. "It has been said that this is 'perhaps the core *Reynolds* factor' (*Gatley*, at p. 535) because it speaks to the essential sense of fairness the defence is intended to promote, as well as thoroughness. In most cases, it is inherently unfair to publish defamatory allegations of fact without giving the target an opportunity to respond: *see, e.g.*, Galloway v. Telegraph Group Ltd., [2004] EWHC 2786 (QB) (BAILII), at paras. 166-67, *per* Eady J. Failure to do so also heightens the risk of inaccuracy, since the target of the allegations may well be able to offer relevant information beyond a bare denial." Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para 116 (Can.).

69. Taseko Mines Ltd. v. Western Canada Wilderness Committee, 2016 BCSC 109, para. 177 (Can. B.C.).

70. A similar example can be found in Wan v. Lau, 2016 ONSC 127, para. 37 (Can.). There, the court stated that taking "steps to obtain Mr. Wan's side of the story" is a "requirement inherent in the word 'responsible' as it applies to [the responsible communication] defence." And in Nazerali v. Mitchell, 2016 BCSC 810, para. 158 (Can. B.C.), the British Columbia Supreme Court stated: "That no attempt was made by the defendants to contact the plaintiff before publication to hear his responses to the assertions to be made in the Articles is sufficient to defeat it."

71. In Loutchansky v Times Newspapers [2002] QB 321, paras. 29-30 (Eng.), the English Court of Queen's Bench stated that the relevant *Reynolds* criterion does not amount to a blanket

Given the overtly partisan nature of the publication in *Taseko* (promoting the environment and environmentalism), it is not obvious that an environmental activist group only publishes responsibly where it seeks and publishes the views of a mine that the group is critical of. Unlike traditional journalists, the activists are not and should not be expected to be neutral.

Another example of applying the criteria as a checklist is found in *Kazakoff v. Taft* (*Kazakoff*).[72] It involved a dispute about a deer cull. The plaintiff had received a conditional discharge on a criminal charge related to tampering with deer traps. The defendant was the mayor of a town who posted the following about the plaintiff in the reader comments section of an online media site:

> . . . I wouldn't be so quick to believe convicted felons who have extreme positions on animal rights issues and who do not respect the decisions of democratically elected local governments doing what the majority of their constituents want . . .[73]

The court assessed the responsible communication defence and found it was not made out. In its analysis the court listed the criteria of responsible communication from *Grant*, stated that the list was not exhaustive, then reasoned as follows:

> Each of these factors weighs against the defence of responsible communication in this case. Describing the plaintiff as a "convicted felon" was a serious allegation. There was no public importance in doing so. There was certainly no urgency regarding the communication. Rather it was a "knee-jerk" reaction after the defendant "skimmed" the e-know post. The source of the information relied upon by the defendant was his "vague recollection" of what had occurred during the plaintiff's court preceding which turned out to be wrong. The plaintiff's side of the story was not sought. I have found that there was no justification for the

rule that in all circumstances the information must be verified and the other side's version of events sought. In an earlier proceeding involving Nazerali and Mitchell, the British Columbia Supreme Court stated: "A failure to seek the 'other side of the story' from the proposed subject of a publication in advance may be a relevant factor, but is not one that in itself always precludes the availability of the defence." *Nazerali*, 2016 BCSC para. 25. "Failure to report the plaintiff's explanation is a factor to be taken into account. Depending upon the circumstances, it may be a weighty factor. But it should not be elevated into a rigid rule of law." Reynolds v. Times Newspapers Ltd., [1999] UKHL 45, [2001] 2 AC 127, 203 (HL) (appeal taken from Eng.) per Lord Nicholls. For example, if it is clear that the plaintiff would decline to comment, then the defendant should not have to ask for a comment simply to satisfy a judge she acted responsibly.

72. Kazakoff v. Taft, 2017 BCSC 737 (Can. B.C.).

73. *Id.* para. 49.

> defamatory statement. There was no public interest in the statement let alone in the fact that it was made.[74]

It is not clear, however, why many of these things are relevant to whether the defendant communicated responsibly. The *Grant* urgency criterion relates to journalism being a perishable commodity and recognizes that there is a cost to delaying publication in order to continue to verify allegations.[75] None of this is relevant to an individual commenting on a media site. It could be argued that there was urgency in that comments will not be read if published long after the article itself has been published, but the fact remains that waiting would not have resulted in the defendant doing more verification. This is not journalism. As the court noted, it was a "knee-jerk" reaction.

Second, the source of the information is likely relevant to responsibleness here (the defendant formed his own view of the facts without recourse to an external source), but not in the same way it is when journalism is involved. Journalists are meant to be even-handed and accurate, and they must therefore try to ensure that the sources they rely on are reliable and unbiased. There is arguably no similar expectation that citizens commenting on news stories will ensure their sources are reliable before publishing.

The same is true of the criterion regarding seeking and reporting on the plaintiff's version of events. This is just not something that non-journalists do very often, nor should they be expected to in order to contribute to debate on matters of public interest. The role of citizens and journalists is fundamentally different in this respect.

None of this is to suggest that the defendant published responsibly in *Kazakoff*. The point is that the court considered largely irrelevant criteria in assessing whether communication was, in fact, responsible. It viewed the criteria as a checklist.[76]

---

74. *Id.* para. 165.

75. *See* Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para. 113 (Can.).

76. *Kazakoff*, 2017 BCSC 737 is not unique, however. See also Daboll v. DeMarco, 2011 ONSC 1, para. 44 (Can.), in which the court held that the statements (newspaper ads alleging criminality on the part of the plaintiff, the defendant's former lawyer) were not communicated responsibly in part because the plaintiff's side of the story was not sought. It is odd to imagine what could have been gained by seeking the plaintiff's side of the story. The plaintiff could have clarified that the statements were inaccurate, but the defendant was a former client with a grudge, not a reporter seeking a balanced account of reality. In theory, the defendant might have chosen not to publish, but the point is that it is odd to apply journalistic criteria to non-journalistic publications in determining whether they were communicated responsibly.

Some courts apply the *Grant* criteria in a more nuanced way than in the examples above.[77] Nevertheless, an inappropriate checklist approach is sometimes taken, to the defendant's disadvantage.

To date, it appears that responsible communication, although a welcome development in Canadian law, is not the game-changer it was predicted to be. Its application to non-journalists is unclear, despite the Supreme Court suggesting that the defence applies to all communications on matters of public interest. In addition, the way courts determine whether a communication is reasonable is grounded in journalistic criteria, which some courts apply rigidly.

Although this symposium is primarily concerned with threats to journalistic publications on matters of public interest, it is also important to protect public interest speech by non-journalists. It is therefore problematic that communications on matters of public interest are not being protected solely because they are not journalistic, or because they do not comply with journalistic practices but might otherwise be responsible in the circumstances, when this is contrary to the Supreme Court's decision in *Grant*. Even where publications are journalistic the defence rarely succeeds. And assuming the English experience is mirrored in Canada, it is expensive and time consuming to argue.

What we cannot tell from the cases, however, is whether the law is affecting the chilling effect on speech. It may be that the defence gives people, especially journalists, the confidence to publish controversial facts on matters of public interest in the first place. This is because the existence of the defence may make such publications less likely to be the subject of litigation at all. Qualitative studies in the United Kingdom and Australia

---

77. A good example is Lougheed Estate v. Wilson, 2017 BCSC 1366, paras. 422-23 (Can.). The court stated:

> . . . Mr. Janke took no steps to solicit Mr. Wilson's side of the story before publishing the letter. It bears repetition that the Court recognized in *Grant* that this "core factor" is particularly crucial in the due diligence analysis since it speaks to the essential sense of fairness the defence is intended to promote. That proposition has resonance here since Mr. Wilson did have information that could have illuminated or resolved a number of the apparent inconsistencies in his campaign return.
>
> . . . I have some sympathy for the position that Mr. Janke assumed from the blanket denials in the press that Mr. Wilson was unlikely to have anything to say to him. Nevertheless, he did not make any effort to confirm that was the case. While I accept that a blogger operates under resource limitations the mainstream press do not, Mr. Janke could have taken steps to email or otherwise contact Mr. Wilson without ever leaving his desk.

The court applied the "seeking the plaintiff's side" criterion as one of a number of factors in concluding that the publication was not reasonable. It noted the importance of getting the plaintiff's side but did not suggest it was always required. It was relevant to the facts of this case because the blogger was purporting to be objective, was trying to state facts accurately, was wrong about some facts, and could have clarified the matter by contacting the plaintiff.

suggest their equivalent defences have at least some effect.[78] More study is needed in Canada although there is some evidence that Canadian journalists are taking comfort from responsible communication and are crafting their publications with the defence in mind.[79] For non-journalists or journalists without the benefit of considerable legal advice, the effect of responsible communication on publication decisions is likely to be minimal.

B. PPPA

The PPPA is less than three years old and no appellate level cases have yet been decided. (As this article goes to press, a decision of the Ontario Court of Appeal in six PPPA cases is expected but has not yet been released.) Nevertheless, it is possible to make some initial observations about how the law is being applied from the 20 cases decided to date.[80] Recall that the law creates a presumption in favour of dismissal whenever a claim is based on expression on a matter of public interest.[81] In order to displace the presumption, the responding party must show that there are grounds to believe that the case has substantial merit and that the harm to

78. In the UK, for example, there is evidence that traditional media will not always feel able to publish everything. Weaver et al., *supra* note 34, at 1285. ("But the English media frankly admitted that defamation laws had a significant effect on their coverage."). As to whether Reynolds v. Times Newspapers [1999] UKHL 45, [2001] 2 AC 127 (HL) (appeal taken from Eng.) has changed the media's willingness to publish, evidence from the UK is mixed. "Some in the English media believe that Reynolds had a fairly significant effect on English law and have adjusted their reporting accordingly. Others are less convinced and remain more careful about their reporting." Further, "As a BBC solicitor stated, we are now 'hot on getting a response' from the subject of an article", Weaver et. al., *supra* note 34, at 1291, 1306. *See also* Andrew Kenyon, Lange *and* Reynolds *Qualified Privilege: Australian and English Defamation Law and Practice*, 28 MELB. U. L. REV. 406, 408 (2004).

79. Two examples relate to the Jian Ghomeshi and Rob Ford stories broken by the Toronto Star. For both stories, the journalists attempted to ensure that they met the requirements of responsible communication before publishing. *See, e.g.*, Amy Dempsey, *Rob Ford Offered 14 Chances to Comment on Crack Story, Toronto Star Tells Press Council*, THE STAR: GTA (Sept. 9, 2013), https://www.thestar.com/news/gta/2013/09/09/rob_ford_offered_14_chances_to_comment_on_crack_story_toronto_star_tells_press_council.html; *Toronto Star's Attempts to get Mayor Rob Ford's Side of the Story*, SCRIBD, https://www.scribd.com/doc/166901279/Toronto-Star-s-attempts-to-get-Mayor-Rob-Ford-s-side-of-the-story (last visited Feb. 15, 2018).

80. As of April 12, 2018 there are 18 cases reported in CanLII, Westlaw and Quicklaw and I was able to find information from the media about 2 unreported cases. There may actually be more than 20 as there may be other unreported cases, but it is unlikely that there are many more.

81. Protection of Public Participation Act, S.O. 2015 (Can. Ont.), at s. 3 creating s. 137.1 of the Courts of Justice Act, R.S.O. 1990, c C-43 (Can. Ont.)

them in dismissing the claim outweighs the harm to freedom of expression in allowing it to proceed.[82]

To assess whether the law is achieving its aims, consider the purposes section of the PPPA:

> (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.[83]

The PPPA has been described as "very defendant friendly." For our purposes, the question is whether the law seems to be achieving its stated aims of combatting or preventing suits that inappropriately deter or punish expression on matters of public interest. This, in turn, depends on which parties are availing themselves of the mechanism, under which circumstances, how long the cases are taking to be heard, and how courts interpret the legislation.

1. Success Rates on the Motion to Dismiss

Of the 20 cases decided to date, the motion succeeded and the claim was dismissed in 10 (50%), while the motion failed in 10 (50%). The first 3 motions (in terms of decision date) were denied, and commentators have noted that the PPPA was interpreted quite restrictively in the first few cases.[84] After Justice Dunphy's decisions in *Able Translations v. Express*

---

82. Brian Radnoff, *A "SLAPP" in the Face to Defamation Plaintiffs*, THE LAWYER'S DAILY: CIVIL LITIGATION (Apr. 10, 2017, 8:40 AM), https://www.thelawyersdaily.ca/articles/2839. Note that it is extremely unlikely that a challenge to the PPPA, based on constitutionally protected fair trial rights, would succeed. The Canadian *Charter of Rights and Freedoms* (Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.)) provides few fair trial protections in the civil litigation context. A serious deprivation of life, liberty or security of the person, contrary to principles of fundamental justice, would be required per s.7 of the *Charter*. This has so far tended only to be the case with situations such as legal aid for certain child custody matters. *See* New Brunswick (Minister of Health and Cmty. Serv.) v. G (J), [1999] 3 SCR 46 (Can.).

83. *Id.* at 137.1(1).

84. *See, e.g.*, Justin Safayeni et al., *Ontario's Anti-SLAPP Law: Off to a Good Start, but Important Concerns Remain*, CENTER FOR FREE EXPRESSION: BLOG (May 19, 2017), https://www.cfe.ryerson.ca/blog/2017/05/ontario%E2%80%99s-anti-slapp-law-good-start-important-concerns-remain#_ednref8.

International Translations[85](*Able Translations*) and *Platnick v. Bent*[86] (*Platnick*), however, there was a "change of course."[87] PPPA motions began to be interpreted in a more defendant-friendly way.

Unfortunately, it is not possible to compare these figures to rates for other anti-SLAPP provisions or to summary judgment motions or other similar proceedings because these statistics do not exist – at least not for Canadian actions. The figures should nevertheless be relevant to assessing whether the PPPA provision is meeting its goals and they also provide a benchmark for future study.

2. Nature of the Underlying Claim

Most of the motions involved underlying claims of defamation, either solely or in addition to another cause of action (17/20 = 85%), with 14 (70%) being defamation only. The other causes of action raised in these cases were breach of contract, intentional infliction of nervous shock, intrusion upon seclusion, malicious prosecution, breach of confidence and unjust enrichment.

14/19 categorizable cases[88] (74%) involved new media communications (email and internet), either solely or in addition to offline publication. 7 of those involved social media. 7 of those (37%) involved social media; 26% of PPPA cases to date involve communications on Facebook (5/19) and 21% involved Twitter (4/19) (2 cases involved both). One concerned comments on an online news story, another related to a blog, others to online news stories themselves. Two further cases were about emails. So while there are PPPA cases involving a wide range of expression (pamphlets handed out at a parade, a report, a print magazine, email), new media communications figure prominently. There are too few cases to determine whether PPPA motions in respect of new media expression are more or less likely to succeed.

3. The Parties

10/19 categorizable cases (53%) had at least one corporate plaintiff. 6/19 (32%) had at least one corporate defendant. One of these was a not-

85. Able Translations Ltd. v. Express Int'l Translations Inc., 2016 ONSC 6785 (Can. Ont.).

86. Platnick v. Bent, 2016 ONSC 7340 (Can. Ont.).

87. *Id.*

88. The twentieth, Accruent LLC v. Mishimagi, 2016 ONSC 6924 (Can. Ont.), provided insufficient information to tell whether the underlying expression was online or not. The same is true of whether the parties were corporate or not and whether it involved journalism.

for-profit community group.[89] To the extent that SLAPPs are often thought of as being brought by more powerful parties to silence weaker ones, this division makes sense. Corporations are often more powerful than individuals and they are well represented among the plaintiffs. That said, a power differential is not required under the PPPA and nor are corporations the only powerful entities.[90] For example, in two cases the plaintiffs were city councillors.[91]

In only three of the reported anti-SLAPP cases were a traditional journalist or journalism organization the moving party. Several other cases involved journalism, but the parties involved were not journalists. For example, *Hughes v. Truyens* (unreported) involved comments on a small newspaper's website but the site itself was not sued, nor was its parent company, Postmedia.[92] Similarly, *Thompson v. Cohodes* concerned comments the defendant made in an interview with the Business News Network, but the plaintiff sued the interviewee, not the interviewer.[93] In *Niagara Peninsula Conservation Authority v. Smith*,[94] the defamatory words were found in a report, and the report's author was sued. Although Postmedia published an article about the report, it was not sued. In *Accruent v. Mishimagi* (*Accruent*), the relevant publication was a press release, but the defendant was a former employee, not a journalist.[95]

Only in *Bondfield Construction v. The Globe and Mail* (*Bondfield*),[96] *Montour v. Beacon Publishing*[97] (*Montour*), and *Armstrong v. Corus* (*Armstrong*) were anti-SLAPP motions brought by a media organization or journalist. In *Montour*, a small Ottawa-based magazine publisher was sued in relation to an article in Frontline Safety & Security Magazine. The

89. *See* 1704604 Ontario Ltd. v. Pointes Protection Association et al., 2016 ONSC 2884 (Can. Ont.).

90. Klepper v. Lulham, 2016 QCCS 5579, para. 92 (Can. Que.) ("Clearly not all SLAPP actions involve a corporation suing an individual for millions of dollars in order to silence him or her. A SLAPP can exist in a multitude of different situations, such as the present one").

91. *See* McLaughlin v. Maynard, 2017 ONSC 6820 (Can. Ont.); Armstrong v. Corus Entertainment (unreported), *see* Patrick Maloney, *Judge Rules London Coun. Bill Armstrong's Libel Lawsuit Can Proceed to Trial*, LONDON FREE PRESS: NEWS, Sept. 6, 2016 at 9:42 PM).

92. Julius Melnitzer, *Ontario's Anti-SLAPP Law Can't Protect Defamation Defendant From 'Intemperate' Online Comments, Small Claims Court Says*, FINANCIAL POST: LEGAL POST (Nov. 8, 2016, 9:35 AM), http://business.financialpost.com/legal-post/ontarios-anti-slapp-law-cant-protect-defamation-defendant-from-intemperate-online-comments-small-claims-court-says.

93. Thompson v. Cohodes, 2017 ONSC 2590 (Can. Ont.).

94. *See* Niagara Peninsula Conservation Authority v. Smith, 2017 ONSC 6973 (Can. Ont.).

95. Accruent LLC v. Mishimagi, 2016 ONSC 6924 (Can. Ont.).

96. Bondfield Construction Co. v. The Globe and Mail, 2018 ONSC 1880 (Can. Ont.).

97. Montour v. Beacon Publ'g Inc., 2017 ONSC 6361 (Can. Ont.).

motion to dismiss failed. In *Armstrong*, a city councillor sued other politicians and a radio station for airing commentary about the councillor's criminal conviction for sexual assault.[98] This motion to dismiss also failed. In *Bondfield*, Canada's leading newspaper was sued. The motion to dismiss succeeded, although the judge seemed reluctant to dismiss.

Although we do not know what percentage of defamation actions is brought against journalists generally, there is some reason to think it is in the same ballpark as 16% (3/19).[99] I had hypothesized that there would be relatively few PPPA motions by journalists. I had assumed plaintiffs would be less likely to target media companies with SLAPP suits because such companies are less likely to be intimidated and less likely to lack the resources to defend themselves. (This may be true of the Globe and Mail, but perhaps not of smaller media companies.) In addition, I reasoned that media companies are less likely than non-journalists to defame in the first place, given their professional responsibilities. On the other hand, given the PPPA's focus on expression on matters of public interest, it is perhaps not surprising that journalism is well-represented among the PPPA motions to dismiss. Whether they defame less or not, empirical research shows that there are now fewer defamation actions brought in relation to journalism than non-journalism.[100]

4. Costs

The PPPA contains statutory presumptions with regard to costs. Section 137.1(7) of the CJA creates a presumption that the moving party (defendant) receives full indemnity costs if successful on the motion. Section 137.1(8) creates a presumption that the responding party (plaintiff) does not receive costs even if successful on the motion.[101] Both sections, however, allow for judicial discretion to depart from the presumption when "appropriate in the circumstances." In 10 cases, there was a reported

98. *See* Maloney, *supra* note 91.

99. In my empirical study of Canadian defamation actions, I found that 19% of defamation actions between 2003-13 involved journalism. Young, *supra* note 4, at 604. A direct comparison cannot be made to the present figures, however, because a) the time frame is different; and b) my empirical study considered journalistic publications, not whether the party was a journalist or media organization. If we considered journalistic publications, many more than two of the sixteen would have been journalistic.

100. Between 1973-1983, half of defamation actions involved journalism and half did not. Between 2003-2013, however, only 19% of defamation actions involved a journalistic publication. *Id.*

101. Courts of Justice Act, R.S.O. 1990, c C.43 ss.137.1(7) and 137.1(8) (Can. Ont.).

decision on costs. Of these, the motion failed in 3 and succeeded in 7. In each of the 3 unsuccessful motions, there were no costs awards against the unsuccessful defendant. In each of the 7 cases in which the motion was successful and the proceeding was dismissed, costs were awarded to the successful defendant on a full indemnity basis.[102] In other words, courts are adhering to the statutory presumptions, notwithstanding their discretion to depart from them.

5. Statutory Interpretation: Public Interest

For the purposes of the PPPA, "public interest," means the same thing as it means in other defamation contexts, such as fair comment and responsible communication.[103] For example, in *Levant v. Day* (*Levant*) the court stated that in interpreting "public interest" for the purposes of the anti-SLAPP provisions, courts have turned to the definition in *Grant* (in the context of responsible communication):

> [105] To be of public interest, the subject matter "must be shown to be one of inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached", . . . Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.[104]

"Public interest" is a broad category. It is clearly not limited to government matters. The Ontario legislature must have intended for the PPPA to apply broadly and this is part of what makes it so defendant-friendly.

Although courts have tended to apply the broad interpretation of public interest to the PPPA, there are exceptions. In *Levant*, the court cited the above definition but went on to find that where a statement amounts to "a defamatory personal attack thinly veiled as a discussion on matters of public interest" it does not satisfy the public interest requirement of the anti-SLAPP provisions.[105] The allegedly defamatory statement in that case

---

102. In one case, however, this amounted to only $1,588.64 since the moving party was self-represented. McLaughlin v. Maynard, 2018 ONSC 263, para. 17 (Can. Ont.).

103. *See, e.g.*, Montour v. Beacon Publ'g Inc., 2017 ONSC 4735, para. 16-7, 29 (Can. Ont.); McLaughlin v. Maynard, 2017 ONSC 6820, para. 11 (Can. Ont.).

104. Levant v. Day, 2017 ONSC 5956, para. 22 (Can. Ont.) (citing Grant v. Torstar Corp., [2009] 3 S.C.R. 640, para. 105 (Can.)).

105. *Levant*, 2017 ONSC para. 23.

was an accusation that prominent lawyer and media figure, Ezra Levant, was profiting from donations his media organization was collecting for forest fire relief by benefitting from the charitable donations tax deduction. Regardless of Mr. Day's motives for making the allegations, they plainly involve a matter of public interest, as that concept has long been understood. The court in *Levant* seems to have misapplied a statement in *Able Translations*, where the court noted that where a matter was not, in pith and substance, one of public interest but rather a thinly veiled attack, courts could deal with it as such. But in that case the communication in question was found to be on a matter of public interest.[106]

Misapplications of a "public interest" test are not unique to the PPPA,[107] but this particular approach whereby personal attacks negate public interest does appear to be unique to this legislation. To date, only *Levant* appears to apply it. However, in *Accruent*, the court seems also to have misinterpreted the public interest test. Although the only reported decision is on costs, and it does not set out the facts in detail, the expression in question seems to have been criticism of ongoing court proceedings,[108] which is plainly expression on a matter of public interest. Yet the court held there was no public interest in the expression in that case.

Further, at least one judge has expressed some sympathy for the argument that the test of public interest should be narrower in the anti-SLAPP context than in the responsible communication context.[109] He correctly applied the law of public interest, but the consequences under the PPPA of a communication being on a matter of public interest (namely, that there is then a presumption that the case will be dismissed) may make it more likely that courts interpret public interest narrowly.

6. Statutory Interpretation: Grounds to Believe the Proceeding has Merit & there are No Valid Defences

Under subsection 137.1(4) of the Act, a proceeding on a matter of public interest will not be dismissed if there are "grounds to believe" the

106. Able Translations Ltd. v. Express Int'l Translations Inc., 2016 ONSC 6785, para. 25 (Can. Ont.).

107. *See, e.g.*, Daboll v. DeMarco, 2011 ONSC 1 (Can. Ont.). Here, the relevant publication concerned a lawyer's criminal conduct. This is a matter of public interest but the court found "that there was no 'public interest' in targeting Mr. Daboll in this fashion that would be sufficient to give rise to the defence of fair comment or responsible communication."

108. *See* Accruent LLC v. Mishimagi, 2016 ONSC 6924, paras. 7, 9 (Can. Ont.); *see also* Safayeni, *supra* note 84.

109. Montour v. Beacon Publ'g Inc., 2017 ONSC 4735, para. 21 (Can. Ont.).

proceeding has merit and there are no valid defences.[110] One issue the courts have had to address is what "grounds to believe" means. Does it mean mere suspicion? . . . That there is a triable issue? . . . That there are reasonable grounds to believe? The higher the threshold, the more likely the proceeding will be dismissed.

Initially, courts held that the threshold "must be a low one" given the consequences of granting the motion.[111] This changed, however, with Justice Dunphy's decisions in *Able Translations* and *Platnick*. He interpreted "grounds to believe" to mean "reasonable grounds to believe."[112] He clarified that this standard requires "credible and compelling evidence."[113] He rejected a "frivolous and vexatious" test as filtering too few claims, and a "balance of probabilities" test as setting too high a threshold at this early stage of proceedings. The latter, he suggested, would turn motions under the PPPA into "compressed (and expensive) summary judgment dry-runs."[114] An intermediate standard, which he called the "Goldilocks" approach,[115] would give effect to the intention of the legislature.

This "reasonable grounds to believe" standard was widely applied, both to the substantial merit and lack of defences parts of the test.[116] It has also been criticized, however. In *Rizvee v. Newman* (*Rizvee*), Justice Fitzpatrick noted that Justice Dunphy's reason for adopting a "reasonable grounds to believe" threshold included the fact that this was a fast-track proceeding where one shouldn't expect the same quality of evidence as at a trial on the merits.[117] Yet Fitzpatrick J. observed that motions under the PPPA, including *Rizvee*, tended to look like summary judgment motions.[118] (In *Rizvee*, affidavits were filed, there was cross-examination on them and there

110. Courts of Justice Act, R.S.O. 1990, c C.43, s. 137.1(4) (Can. Ont.).

111. 1704604 Ontario Ltd. v. Pointes Prot. Ass'n,, 2016 ONSC 2884, para. 50 (Can. Ont.).

112. Able Translations Ltd. v. Express Int'l Translations Inc., 2016 ONSC 6785, para. 45 (Can. Ont.).

113. *Id.* para. 48.

114. *Id.*

115. Platnick v. Bent, 2016 ONSC 7340, para. 86 (Can. Ont.).

116. *See, e.g.*, Rizvee v. Newman, 2017 ONSC 4024, paras. 72-44 (Can. Ont.); Niagara Peninsula Conservation Auth. v. Smith, 2017 ONSC 6973, para 45 (Can. Ont.) ("I agree with my colleagues on the interpretation of subsection 137.1 (4). I think that as far as a. and b. are concerned, the use of 'grounds to believe' means that the plaintiff does not have to prove its case on the preponderance of the evidence at this point. On the other hand, the use of the terms 'substantial merit' and 'no valid defence' means that it is not enough for the plaintiff to show only that there is a genuine issue that requires a trial or that its case is not frivolous or hopeless.").

117. *Rizvee*, 2017 ONSC para. 58.

118. *Id.* para. 59.

were two days of oral argument.)[119] If this trend continues, which he thought it would, he saw no reason not to require parties to put their best foot forward, as with summary judgment motions.[120] Three of the most recent cases have followed Fitzpatrick J and applied the balance of probabilities rather than "reasonable grounds to believe".[121] This is an issue likely to be addressed by the Ontario Court of Appeal.

Whether the standard is reasonable grounds to believe or a balance of probabilities, it is still sometimes unclear what evidence is required to meet that standard. For example, in *United Soils v. Mohammed* (*United Soils*), the court discussed in obiter whether the moving party had to have independent evidence to support her defences. It said that requiring such evidence "is to undermine the intention and policy behind the legislative changes that are the basis for this motion,"[122] because it would require Mohammed to expend significant resources. Thus, "compelling and credible evidence" does not require defendants to provide independent evidence of their defences. Given that the onus is on the plaintiff, this seems sensible. In *1704604 Ontario Ltd. v. Pointes Protection Association et al.* (*Pointes Protection*), the court had held that the defendant had to have at least filed a statement of defence in order for the plaintiff to show there

119. *Id.* para. 117.

120. "I expect that the extended timeline and process for these s. 137.1 motions will become more the norm than the exception given that the outcome could be the end of the litigation similar to summary judgments. If so, then I suggest that the standard civil burden of the balance of probabilities, or something approaching that standard, should apply." *Id.* para 59. Later, at para. 82, Fitzpatrick J. states, "[f]or the reasons set out above, if I am correct that these motions will evolve such that the timeline and process rivals those for summary judgments then I suggest that the balance of probabilities, or something approaching that standard, should apply for this burden of proof on the plaintiff also . . . In my view, the balance of probabilities is the appropriate and obvious threshold."

121. McLaughlin v. Maynard, 2017 ONSC 6820, para. 15 (Can. Ont.) ("Most judges have followed Mr. Justice Dunphy's conclusion in that case that the burden of proof . . . should be between the accepted civil standard and the 'frivolous and vexatious' test applied to the striking of pleadings. In the recent decision of Rizvee v. Newman, 2017 ONSC 4024, Mr. Justice Fitzpatrick opined that the standard civil onus should apply. I prefer Mr. Justice Fitzpatrick's opinion on the issue of onus, given that section 137.1 was enacted after the Supreme Court of Canada's decision in F. H. v. McDougall, 2008 SCC 53 (CanLII)."). The balance of probabilities standard was also applied in Heritage Reforestation Inc. v. Mcinnes, 2018 CanLII 6675 (Can. Ont. SCSM) at para. 22 and Bondfield Construction Co. v. The Globe and Mail, 2018 ONSC 1880 (Can. Ont.) at para. 33.

122. United Soils Mgmt. Ltd. v. Mohammed, 2017 ONSC 4450, para. 48 (Can. Ont.).

was no viable defence,[123] but given that the court's "low threshold" was abandoned by subsequent courts, this is likely not good law in 2018.[124]

7. Statutory Interpretation: Balancing Test

The last hurdle for plaintiffs is to show that the harm to them from the expression outweighs the public interest in protecting that expression, per s. 137.1(4)(b). This section of the CJA does not use the "grounds to believe" language used in s. 137.1(4)(a), but Justice Dunphy interpreted the burden as being the same: "reasonable grounds to believe." He considered that the legislature could not have intended to require the plaintiff to prove injury on a balance of probabilities given the "summary nature of the proceeding," but that "a 'low threshold' is clearly not the appropriate test either."[125] Thus, there must be "credible and compelling evidence of harm that appears reasonably likely to be proved at trial."[126] Further, the court should consider "practical limitations" on available evidence due to the fact that this is a "fast-track summary proceeding."[127]

The first step in the analysis, not surprisingly, is to identify the relevant harms and their severity.[128] The harm from expression (usually harm to reputation) has sometimes been assessed by focusing on pecuniary losses. However, it now seems clear that for defamation, where special damages are rare and general damages are presumed from liability, factors relevant to the assessment of general damages should be considered.[129] These are set out in *Hill v. Church of Scientology* and include the conduct of the parties, the nature and extent of publication, the nature and composition of the audience, and whether there was an apology or retraction.[130]

123. 1704604 Ontario Ltd. v. Pointes Prot. Ass'n, 2016 ONSC 2884, para. 50 (Can. Ont.).

124. *See* Thompson v. Cohodes, 2017 ONSC 2590, para. 17 (Can. Ont.) (The defendant had not yet filed a statement of defence. The court held that there were no valid defences, but on the merits, not because no statement of defence had been filed.).

125. Able Translations Ltd. v. Express Int'l Translations Inc., 2016 ONSC 6785, para. 83 (Can. Ont.).

126. *Id.*

127. *Id.*

128. *See, e.g.*, *id.* para. 82.

129. Thompson v. Cohodes, 2017 ONSC 2590, para. 32 (Can. Ont.). This approach is more consistent with the law of defamation. It would be "unduly strict for a court on a PPPA motion to require that the plaintiff show evidence of specific damages or harm." Safayeni, *supra* note 84.

130. Hill v. Church of Scientology, [1995] 2 S.C.R. 1130, para. 182 (Can.).

Justice Dunphy also suggests that one should consider the public interest in giving people an opportunity to vindicate their reputations, even where the harm is minimal.[131]

In terms of the public interest in protecting expression, the courts have, of course, acknowledged the importance of freedom of expression on matters of public interest.[132] Then courts tend to consider the public interest in the particular *kind* of expression at issue. According to one judge, the public interest in particular expression itself should not be dissected. Rather, the degree to which the expression "cleaves" or "strays" from the relevant matter of public interest should be assessed.[133] For example, in *Platnick* the expression was framed as "information intended to improve the administration of justice," "finding the correct balance between victims' rights and the public . . . in the accident compensation system" and "the role of experts in the system".[134] Each of these was said to be in the public interest and each was said to be "strongly engaged" by the expression in question.[135]

In another case, the court cited the fact that the allegations related to matters that allegedly happened more than a decade ago in finding a lower public importance in protecting the expression.[136]

Courts will also consider any evidence of a chilling effect on expression,[137] and any malice. Dunphy J. thought there was minimal public interest in protecting "expression born of malice."[138] Caution is warranted here. Malice will likely already have been considered at the defences stage. Further, it is not obvious that the harm from malicious speech is necessarily greater or that public interest in speech is necessarily diminished by malice.[139] Where the relevant values to be balanced are harm to reputation

131. Platnick v. Bent, 2016 ONSC 7340, para. 129 (Can. Ont.).

132. *Id.* para. 131.

133. Able Translations Ltd. v. Express Int'l Translations Inc., 2016 ONSC 6785 para. 84 (Can. Ont.).

134. *Platnick*, 2016 ONSC para. 132.

135. *Id*. at 132.

136. Thompson v. Cohodes, 2017 ONSC 2590, para. 40 (Can. Ont.).

137. *Platnick*, 2016 ONSC para. 133; Bondfield Construction Co. v. The Globe and Mail, 2018 ONSC 1880, paras. 79-83 (Can. Ont.).

138. *Platnick*, 2016 ONSC para. 134.

139. Justice LeBel, in a concurring opinion in WIC Radio, explained why malice alone was not enough to defeat fair comment but rather must be the *dominant motive*: "[a]rguments between ideologically-opposed participants in a public debate often breed bitterness, but such debate remains valuable and worthy of protection in a democratic society." WIC Radio Ltd. v. Simpson, [2008] 2 S.C.R 420, para. 106 (Can.). A similar argument could be made with regard to

(or other harm from expression) and the public interest in protecting speech, the defendant's motives may or may not be relevant.

Interestingly, in one case it was suggested that the *plaintiff's* motives should factor into the balancing.[140] In *Rizvee*, the court found that the defamation action was partly intended to warn and to chill speech. Intent to chill speech was not included in the PPPA, as it is in some anti-SLAPP legislation, because it is often difficult to prove. Nevertheless, where courts do find an intent to chill speech, that can be taken into account at the balancing stage. There is a public interest in not letting people get away with trying to chill speech. (In *Bondfield*, the judge did not consider intent at the balancing stage but instead indicated that he was reluctant to dismiss given that the case did not appear to involve intent to silence. Although the judge did ultimately dismiss, it is problematic to rely on a lack of intent to silence given that the legislature chose not to require intent to silence.)[141]

To this point I have discussed *what* to balance, and on what *standard* evidence of that harm is required. As for *how* to balance, "[t]here is very little guidance in s. 137.1(4)(b) of the CJA as to how the weighing of the harm likely to have been suffered by the plaintiff is to be conducted relative to the public interest in allowing the claim to proceed and the public interest in protecting the expression."[142] Courts have held that balancing should take into account the PPPA's objectives.[143] Beyond that, there is little of a general nature that can be said. Reputational harm and public interest in freedom of expression are apples and oranges, especially since one primarily affects the plaintiff while the other affects many more people, though each of them less severely – often imperceptibly. That said, courts are often called on to apply such balancing tests.

8. Complexity of Proceedings

The PPPA includes mechanisms to try to ensure that these motions are quick and not unduly expensive to pursue, such as putting a hold on all

considering malice at the balancing stage. I think it is going too far to say, as Dunphy J. did, that there is minimal public interest in protecting "expression born of malice." *Platnick*, 2016 ONSC para. 134. Consider, for example, a whistleblower who reveals important facts on a matter of public interest solely to claim a reward. That would be a malicious purpose, but the public interest in the information would be undiminished. If the information were true, there would be a justification defence, but this is nevertheless a counterexample to Judge Dunphy's proposition.

140. Rizvee v. Newman, 2017 ONSC 4024, para. 121 (Can. Ont.).

141. *Bondfield*, 2018 ONSC 1880 para. 87.

142. *Platnick*, 2016 ONSC para. 120.

143. Able Translations Ltd. v. Express Int'l Translations Inc., 2016 ONSC 6785, para. 84 (Can. Ont.).

related proceedings,[144] limiting cross-examination on documentary evidence[145] and requiring the motion to be heard within 60 days.[146] If one of the problems of SLAPPs is that they deter people from speaking out because of the costs (financial and otherwise) of defending an action, then costly anti-SLAPP motions make it harder for the legislation to achieve its goals.

In reality, though, proceedings under the PPPA tend to be fairly complex. This is perhaps unsurprising given what's at stake. As noted above, Justice Fitzpatrick observed that anti-SLAPP motions tended to look like summary judgment motions: "Despite the intention of the legislation, I expect that the extended timeline and process for these s. 137.1 motions will become more the norm than the exception given that the outcome could be the end of the litigation similar to summary judgments."[147] As a result, counsel believe that they must effectively put their best foot forward on an anti-SLAPP motion. One referred to the motion as "summary judgment-like."[148]

Similarly, at a recent conference of Canadian media lawyers, no one could point to a case that had been heard within 60 days, as required by the legislation.[149] Rather, it often takes six months or more if for no other reason than that earlier court dates are not available. For example, in *Papa v. Zeppieri* the court adjourned a PPPA motion for eight months in part because it required two days to argue.[150]

Given the effect of dismissing a claim, it is understandable that judges want sufficient evidence and that parties will feel the need to put their best foot forward. But the more anti-SLAPP motions looks like summary judgment motions, the less utility they have, since summary judgment motions have always been available to SLAPP victims. (That said, the significant onus on the plaintiff on a PPPA motion still makes this preferable to summary judgment for many defendants.) To give effect to the legislation's intent, judges should try to come as close as possible to the

144. Courts of Justice Act, R.S.O. 1990, c C.43, s. 137.1(5) (Can. Ont.).

145. *Id*. at s. 137.2(4).

146. *Id*. at s. 137.1(2).

147. Rizvee v. Newman, 2017 ONSC 4024, para. 59 (Can. Ont.).

148. Personal e-mail communication with Nader Hassan, lawyer with Stockwoods Barristers (Dec. 16, 2017) (on file with author).

149. Canadian Media Lawyers Association National Conference, Toronto, November 4, 2017.

150. Kim Zarzour, *Ruling on Richmond Hill Anti-SLAPP Legislation Case Delayed*, YORKREGION.COM (Oct. 9, 2016), http://www.yorkregion.com/news-story/6900998-ruling-on-richmond-hill-anti-slapp-legislation-case-delayed/.

60-day limit and should not impose too high an evidentiary burden.[151] But it is not clear whether the 60-day limit is feasible or whether judges can be made to dismiss claims based on limited evidence.

IV. CONCLUSION

At this early stage of PPPA litigation, there is reason for cautious optimism. Courts are generally applying the legislation in accordance with its purposes, despite the discomfort of some judges in dismissing claims. "On a fair review of the available decisions, the legislation has been interpreted consistent [sic] with the manner in which it was drafted. It was drafted as defendant friendly legislation, and it has been interpreted as such."[152]

Costs decisions and application of a broad public interest test are particularly in line with legislative intent. That said, there is reason for concern, especially in terms of the time and expense of PPPA motions. Not only is the 60-day limit not being met, but it is often not even close to being met. Another potential reason for concern is judges applying a lower threshold on the plaintiff than the PPPA suggests because of concerns about dismissing claims. This goes hand in hand with the complexity issue. The more evidence and argument on a PPPA motion, the more judges will be able to justify applying a summary judgment-like standard to PPPA motions.

Given the symposium theme it is also worth noting that journalists seem to be using the PPPA mechanism.

The Ontario Court of Appeal will soon rule in appeals of six of the twenty cases decided to date. The outcome will determine how the PPPA is to be interpreted going forward.

As for the responsible communication defence, appellate court guidance would be helpful on several fronts, but especially the application of the defence to non-journalists. In the meantime, however, both responsible communication and the PPPA are helping to shift the balance between protection of reputation and protection of free speech appropriately toward the latter.

---

151. *See* Safayeni, *supra* note 84 ("These proceedings are not meant to be an alternative form of summary judgment").

152. Radnoff, *supra* note 82.