THE BALANCE SHIFTS:

THE ONTARIO *PROTECTION OF PUBLIC PARTICIPATION ACT,* FREE SPEECH AND REPUTATION PROTECTION

BY PETER A. DOWNARD[1]

A 'gagging' writ ought to have no effect.
- Lord Reid[2]

It has long been accepted by the courts that a cause of action for abuse of process may lie where a person has commenced a lawsuit for the purpose of silencing the defendant, rather than obtaining redress for any real damage to the plaintiff's reputation or other legitimate interests.[3] The common law has not, however, developed a remedy that is actually effective to deal with such cases. The tort of abuse of process requires a finding of bad faith, a very high evidentiary burden.[4] An issue of bad faith is rarely capable of resolution on a summary procedural basis.

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Peter was one of three appointed members to the Attorney General of Ontario's Advisory Panel on Strategic Litigation Against Public Participation ('SLAPP'). The other appointed members were Mayo Moran, Dean of the University of Toronto Faculty of Law, and Brian Rogers, a well known media law expert. The Advisory Panel was very ably assisted by John Gregory and Melissa Kim of the Ministry of the Attorney General, among others. The views expressed in this paper are those of the author, however, and should not be attributed to either the Advisory Panel or any member of the Ontario government.

2 *Attorney-General v. Times Newspapers Ltd.*, [1973] All E.R. 54 at 65, per Lord Reid (H.L.).

3 *Goldsmith v. Sperrings Ltd.*, [1977] 2 All E.R. 566 at 586, per Scarman L.J. (C.A.); *Wallersteiner v Moir*, [1974] 3 All E.R. 217 (C.A.); *Attorney-General v. Times Newspapers Ltd.* [1973] 3 All E.R. 54 at 65 (H.L.); *Dionisio v. Lucas et al.*, 2006 CanLII 9597, at para. 16, per Ground J. (Ont.S.C.J.).

4 Some intended "chilling effect" on the speech of the defendant alone is not sufficient to constitute an improper purpose for the purpose of the tort: *Metropolitan Separate School Board v. Taylor* (1994), 21 C.C.L.T. (2d) 316 (O.C.J. (Gen. Div.); *Beckingham v. Sparrow* (1977), 2 C.C.L.T. 214 (Ont.S.C.(H.C.J.).

The expense and procedural complexities of civil litigation have posed significant disincentives to almost anyone who seeks to hold to account a person misusing the civil court process for the purpose of silencing an opposing voice.

Where unmeritorious litigation is brought on the basis of the defendant's speech on a subject of public interest, the lack of an effective remedy has a negative impact that transcends the interests of the parties. It has been recognized that in addition to wrongfully punishing the exercise of freedom of speech, such litigation may stifle public debate on matters of public interest by other members of the public. It has also been argued that such litigation makes an improper use of the public resources of our civil court system.

Such cases have come to be referred to as 'SLAPP' litigation. 'SLAPP' is an acronym for 'Strategic Litigation Against Public Participation'. It has come to be widely perceived that in the absence of an effective remedy, such cases have been repeatedly brought to punish the defendant for speaking out, to make the defendant stop its criticism, to intimidate others into silence, to give credibility to threats of suit against critics, to deplete the financial resources of critics and, more broadly, to silence public debate on matters of public interest.[5] The law, it has been said, has favoured unmeritorious plaintiff's cases, to the detriment of citizens, free speech and the courts. It has been argued that the mere threat of such litigation has been capable of producing these effects.

Ontario's *Protection of Public Participation Act, 2013* (the "PPPA") (at **Tab A**) attempts to recalibrate the skewed legal balance described above. The legislation received first reading in June, and has very recently received second reading. All parties have stated their support for the legislation. It will now go to committee, and could possibly be in force within a few months.

The wrongful purpose must also be capable of being characterized as harassment beyond the trouble and expense ordinarily encountered in litigation: *Broxton v. McClelland*, [1995] EMLR 485 at 497-98, per Simon Brown L.J.; *Wallis v. Valentine*, [2002] EWCA CIV 1034 at paras. 31-32, per Sir Murray Stuart-Smith; *Hussein v. William Hill*, [2006] EWHC 25 at paras. 49, per Tugendhat J. (Q.B.). It has also been repeatedly held that the plaintiff must also show a definite act or threat in furtherance of the wrongful purpose, in addition to the commencement of the action itself: see *NR Developments Ltd. v. Thomas*, 2006 BCCA 99 (CanLII) (B.C.C.A.).

5 *Anti-SLAPP Advisory Panel Report to the Attorney General of Ontario* (2010) (the "*Advisory Panel Report*") (at **Tab B**), para. 37 (available online at http://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf).

1. THE LEGISLATIVE PURPOSE

The PPPA states its purposes expressly:

> 137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,
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> (a) to encourage individuals to express themselves on matters of public interest;
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> (b) to promote broad participation in debates on matters of public interest;
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> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
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> (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.

2. THE PRELIMINARY MERITS REVIEW

The PPPA seeks to achieve these purposes primarily by procedural means. The PPPA's modifications of substantive law are minimal. Instead, the PPPA introduces a procedural mechanism which aims to purge from the court system at an early stage actions which limit free expression and are plainly unmeritorious under established substantive law.

The procedural mechanism introduced by the PPPA takes the form of a preliminary review of the merits of litigation. The preliminary merits review dispenses with the need for an inquiry into the subjective motivation of the plaintiff in bringing the action. As discussed above, the common law's focus on determining the actual motive of the plaintiff has prevented the law of abuse of process from having any significant effect in this area.

The preliminary review process may be invoked where a legal action arises from expression made by the defendant that relates to a matter of public interest:[6] in other words,

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[6] PPPA, s. 137.1 (2), (3), (4).

where the action may have an adverse *effect* on expression on matters of public interest, regardless of what the plaintiff's intention may be.[7]

Under the PPPA, relevant "expression" will include any communication, verbally or non-verbal, public or private, whether or not it is explicitly directed at a person or entity.[8] It is reasonable to expect, however, that the courts will also have regard to the very substantial freedom of expression jurisprudence of the Supreme Court of Canada, which, for example, excludes from protection conduct that is an act of violence[9] or a threat of violence.[10]

The definition of "public interest" regarding matters of speech is also well defined in Canadian law. In the defamation context in particular, it has been held that a communication will relate to a matter of public interest if, read broadly and as a whole, it relates to a subject in which a segment of the community would have a genuine interest in receiving information.[11] The potential subject matter is thus wide-ranging, including politics, science and the arts, the environment, religion or morality.[12] The Supreme Court has also made clear, however, that the public interest does not extend to matters of mere curiosity or prurient interest, or in which the person concerned has a reasonable expectation of privacy.[13]

The preliminary merits review is set out in section 137.1 (3) and (4) of the PPPA:

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

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7 PPPA, s. 137.1 (2), (3), (4).

8 *Advisory Panel Report*, paras. 22, 34.

9 *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927 at paras. 41-42, 55, per Dickson C.J., Lamer and Wilson JJ.; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at paras. 36-38, per Dickson C.J.C.; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 60, per La Forest J.; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 at para. 31, per the Court; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 112, per Rothstein J

10 *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia*, [2009] 2 S.C.R. 295 at para. 28; *R. v. Kawaja*, 2012 SCC 69 at para. 70, per McLachlin C.J.; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 112, per Rothstein J

11 *Grant v. Torstar Corporation*, 2009 SCC 61 at para. 102, per McLachlin C.J.

12 *Grant v. Torstar Corporation*, 2009 SCC 61 at paras. 102, 106, per McLachlin C.J. See also *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 at para. 30 per Binnie J.; *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 at 198, per Lord Denning M.R. (C.A.).

13 *Grant v. Torstar Corporation*, 2009 SCC 61 at paras. 102, 105, per McLachlin C.J.

> 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
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> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
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> (a) there are grounds to believe that,
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> (i) the proceeding has substantial merit, and
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> (ii) the moving party has no valid defence in the proceeding; and
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> (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 preliminary merits review is to be conducted on the basis of the existing substantive law.[14] In defamation cases - by far the most common cause of action among cases alleged to be 'SLAPPs' - the Supreme Court of Canada has held that the protection of reputation has "*quasi*-constitutional status" in Canadian law.[15] It is closely linked to individual security and the capacity of persons to participate in democratic society.[16] The modern law recognizes and has responded to the importance of freedom of expression under the *Charter*, but at the same time the Supreme Court has repeatedly stated that the values of individual reputation, emotional

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[14] See *Advisory Panel Report*, para. 27: "In the Panel's view, Canadians' constitutional freedom of expression, and the recognized importance of constitutional values for the development of the law applicable in civil litigation, provide a firm foundation for the procedural remedy recommended in this Report. The Panel proposes a new procedure to better enforce a body of existing rights, which will better protect and promote freedom of expression on matters of public interest while having regard to the values at stake on both sides of cases involving such expression."

[15] *Editions Ecosociete Inc. v. Banro Corp.*, 2012 SCC 18 at para. 57, per LeBel J.

[16] *Bou Malhab v. Diffusion Metromedia CMR Inc.*, 2011 SCC 9 at para. 18, per Deschamps J.; *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 58, per McLachlin C.J.; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 72, 107 and 117, per Cory J.

security and privacy protected by civil responsibility for libel should be given equal weight.[17] The proper substantive result in any particular case requires the striking of a balance that respects these principles. The PPPA does nothing to change that.

Thus, under the PPPA, the fact that a legal action may have an adverse effect on the ability of persons to participate in discussion on matters of public interest is not itself sufficient to invoke a remedy. The PPPA recognizes that just as legal formalities and tactics should not be used to wrongfully muzzle free expression, the protection of expression should not be a cover for expression that wrongfully harms reputational, business or personal interests of others.[18]

(1) FIRST STAGE: "GROUNDS TO BELIEVE" IN SUBSTANTIVE MERIT

Where the preliminary review process is invoked, the analysis is in two stages. First, the plaintiff is required to satisfy the court that there are "grounds to believe" the litigation has substantive merit in law and fact.[19] The plaintiff does not have to demonstrate that the action is certain to succeed, but only "grounds to believe" that it should.

The PPPA seeks to redress the past imbalance of power between plaintiff and defendant, however, by requiring the plaintiff to show that there are grounds to believe *both* that the plaintiff's claim has substantial merit and that the moving party has no valid defence. This onus shift is particularly necessary in defamation cases. To prove a case in defamation, a plaintiff need establish only three elements: first, that the words complained of are defamatory, in the sense that the words would tend to lower the reputation of a person in the estimation of reasonable persons; second, that the defamatory words refer to the plaintiff; and third, that the words have been published to a third party. These elements being established, the law presumes

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17 *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 2, per Binnie J.; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 107 and following, and at para. 121, per Cory J.; *Grant v. Torstar Corp*., 2009 SCC 61 at para. 3, per McLachlin C.J.; *Bou Malhab v. Diffusion Metromedia CMR Inc.*, 2011 SCC 9 at para. 16, per Deschamps J.; *Crookes v. Newton*, 2011 SCC 47 at paras. 31-32, per Abella J., and para. 54, per Deschamps J.

18 See *Advisory Panel Report*, para. 27: "The fact that a legal action may have an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff's action from proceeding. The protection and promotion of such expression should not be a cover for expression that wrongfully harms reputational, business or personal interests of others."

19 PPPA, s. 137.1 (2).

the words are false, and that the plaintiff has suffered general damages.[20] The onus then shifts to the defendant to establish a substantive defence. In practice, that is often where the lion's share of litigation lies. A requirement that a plaintiff establish only "grounds to believe" that the plaintiff has a valid *prima facie* case could not reasonably be expected to achieve the PPPA's purposes.

As stated above, at the first stage of the analysis, the plaintiff will have to demonstrate that there are "grounds to believe" that the words complained of are defamatory;[21] that the defamatory words refer to the plaintiff;[22] and that the words have been published to a third party.[23] In addition, the plaintiff will have to demonstrate that there are grounds to believe that none of the defences available at law should apply.[24]

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20 *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, 2009 SCC 61 at para. 28 (S.C.C.), per McLachlin C.J.C.; *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, [2008] 2 S.C.R. 420 (S.C.C.) at para. 1, per Binnie J.

21 A statement is thus defamatory if it tends to lower the reputation of the plaintiff in his or her community in the estimation of "reasonable" persons: *Botiuk v. Toronto Free Press Publications Ltd*., [1995] 3 S.C.R. 3 at 24, per Cory J. The issue is considered from the perspective of , "the ordinary, reasonable, fair-minded reader": *Bou Malhab v. Diffusion Metromedia CMR Inc*., 2011 SCC 9 at para. 41, per Deschamps J.; see also para. 104-05, per Abella J. (dissenting on other grounds).

22 Since an action for defamation is based upon injury to the plaintiff, it is essential that the words complained of refer to the plaintiff as a single person: *Bou Malhab v. Diffusion Metromedia CMR Inc*., 2011 SCC 9 at paras. 48, 57, per Deschamps J. If the plaintiff's name is not expressly stated, the words may be found to refer to the plaintiff where the defendant uses a nickname, or other symbolic reference, such as initials: *Hayward v. Thompson*, [1981] 3 All E.R. 450 at 457 (C.A.), per Lord Denning M.R.; *Pepin v. Taylor*, [2002] EWCA Civ 1522 (Eng. C.A.). If the words on their face do not refer to the plaintiff directly or indirectly, a reference may be established if it is shown that one or more persons who read the words reasonably understood that they referred to the plaintiff by reason of extrinsic facts: *Morgan v. Odhams Press Ltd*., [1971] 2 All E.R. 1156 at 1159 (H.L.), per Lord Reid.

23 Publication is an essential element of the tort: *Editions Ecosociete v. Banro Corp*., 2012 SCC 18 at paras. 34, 57, per LeBel J. A person may utter all the defamatory words he or she wishes without incurring liability if the words are not heard and understood by a third person: *Presutti v. Varone*, 2009 ONCA 436 (CanLII).

24 In a nutshell, there are eight types of defences.

First, the defamation complained of may be proven to be true, or "justified". The burden on the defendant is to prove the substantial truth of the "sting", or main thrust, of the defamation.

Second, the defendant may show that the defamation was published in circumstances that confer legal immunity on the defendant, regardless of the defendant's intentions toward the plaintiff. These circumstances are referred to as occasions of absolute privilege. They include statements by politicians in legislative assemblies statements of judges, counsel and witnesses in the course of legal proceedings, and formal complaints to administrative tribunals.

Third, the defendant may establish that the defamation was a report, in a newspaper or broadcast, which is privileged pursuant to statute. Provincial defamation statutes provide for a privilege applicable to fair and accurate reports of court proceedings, legislative or other governmental functions, official information releases and certain public meetings.

Fourth, the defendant may show that the defamation was published in circumstances recognized at common law as an occasion of qualified privilege. An occasion of qualified privilege exists if the defendant had a duty to publish or a legitimate interest in publishing the defamation, and the person or persons to whom the

Although the preliminary merits review may be invoked at any time after the proceeding is commenced,[25] it may reasonably be expected that the defendant's chosen defences will be apparent on the record when the motion is heard, either on the basis of the moving defendant's court material or a cross-examination of the defendant by the plaintiff. If the defendant seeks to defend on the basis of fair comment, for example, the plaintiff will have to show that there are grounds to believe an essential element of the defence will not be established.[26] For example, the plaintiff may adduce evidence that there are grounds to believe that an important fact upon which the defendant has purported to base an alleged comment is false.[27] If the defendant seeks to defend on the basis of the defence of responsible communication available for mass media publications- for example, in the case of a defamatory Internet blog posting - the plaintiff may adduce evidence that the plaintiff did not act responsibly, again for example, by adducing evidence that the plaintiff took no steps to be fair to the plaintiff prior to publication.[28] If the defendants seeks to defend on the basis that the statement was true (a defence of 'justification'), the plaintiff will have to adduce grounds to believe the statement is untrue.[29] And so on.

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defamation was published had a legitimate interest or a duty to receive it. The qualified privilege will be defeated if the plaintiff shows that the defendant's dominant motive was malicious, or that the defendant's conduct exceeded the limits of the privileged occasion.

Fifth, a defence is available for "responsible communication" of defamatory statements of fact in mass media on matters of public interest. The defence will apply if, first, the material relates to a matter of public interest, and second, has been published responsibly. Material of public interest is published responsibly if it is based upon information that a reasonable person would accept as reliable, and the defendant has acted fairly toward the plaintiff prior to publication: *Grant v. Torstar Corp.*, 2009 SCC 61.

Sixth, if the defamatory statement is a statement of comment rather than a statement of fact, the defendant may establish a defence of fair comment.

Seventh, the defendant may show that the plaintiff consented to the publication of the libel. Although consent is rare, it may be inferred from a prior agreement or conduct of the plaintiff.

Eighth, the plaintiff's action may be barred by statute. This may be so if the defendant can establish that the plaintiff has failed to comply with a mandatory statutory requirement regarding notice to be provided to the defendant by the plaintiff prior to the commencement of an action, or that the plaintiff has failed to commence the action within a statutory limitation period.

25 PPPA, s. 137.2 (1).

26 To establish a defence of fair comment, the defendant must establish that the statement of comment was (1) on a matter of public interest; (2) based on fact; (3) recognizable as comment rather than a statement of fact; and (4) fairly made, in the sense that a person could honestly express that opinion on the proved facts. If these elements are established the plaintiff may still defeat the defence by establishing that the defendant was actuated by malice: *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420.

27 *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 at para. 31 per Binnie J. ("If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available").

28 *Grant v. Torstar Corp*., 2009 SCC 61 at paras. 116-17, per McLachlin C.J.

29 The burden on a defendant pleading justification is to prove the substantial truth of the "sting", or main thrust, of the defamation: *Cusson v. Quan*, (2007), 87 O.R. (3d) 241 at 252 (Ont. C.A.), per Sharpe J.A. revd on

(2) SECOND STAGE: SUBSTANCE OVER TECHNICALITY

If the "grounds to believe" test is met, the court will move on to the second stage of the analysis. If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the court may conclude that its negative impact on freedom of expression is clearly disproportionate to any valid purpose the litigation might serve. In such circumstances, the action may be dismissed on that basis.

The second stage of the analysis, like the first stage, will have to be carried out having regard to the existing substantive law. The court will have to have due regard to the teaching of the Supreme Court of Canada, discussed above, that the court should seek to assign equal weight to the fundamental values served by the protection of reputation and freedom of expression. The court will undoubtedly have regard to all other relevant and important values, such as the principle of access to justice. The aim of the PPPA is to set right a skewed balance of interests in the pre-existing law, largely arising from procedural technicalities and external economic considerations.

Although it will be for the courts to interpret and apply the PPPA, it is reasonable to expect that the courts will not lightly dismiss actions at the second stage of the analysis, and will only do so where the actual harm complained of is insignificant having regard to the existing substantive law.[30] This might be so, for example, if a technically valid defamation claim is brought over a publication on a subject of public interest which has been made to such a small number of people, or to such a hostile reception by its audience, that the harm caused to the plaintiff can only have been nominal. From the plaintiff's perspective, an established mass media defendant may be less likely to benefit from this second stage analysis if it has published a statement that is actionable in law, having regard to the breadth of publication of the defamation and the public stature of the defendant.[31] Those are considerations which generally increase the damages caused by defamation.

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other grounds, 2009 SCC 62 (S.C.C.); *Reynolds v. Times Newspapers Ltd*., [1999] 3 W.L.R. 1010 at 1015 (H.L.) per Lord Nicholls.

30 *Advisory Panel Report*, para. 37.

31 *Advisory Panel Report*, para. 64.

It should also be noted that not only actions commenced after the PPPA comes into force may be subject to a preliminary merits review. The PPPA expressly provides that it applies to proceedings commenced before the day the PPPA comes into force.[32]

(3) THE AUTOMATIC STAY

A primary concern about 'SLAPP' litigation is that it may be all about making the defendant endure the economic cost and inconvenience of modern civil litigation, regardless of the legal result. The PPPA addresses that problem by requiring that upon the filing of a motion for preliminary review, no party may take any further steps in the proceeding until the motion, including any appeal of the motion, has been finally disposed of.[33]

In order to minimize the delay of meritorious litigation, however, the PPPA includes several balancing provisions. The PPPA requires that the motion be heard no later than 60 days after notice of the motion is filed with the court.[34] Cross-examinations prior to the hearing are limited to one day for each party, subject to the discretion of the court.[35] An appeal from the disposition of the motion lies directly to the Court of Appeal, without leave. The PPPA further directs that the appeal shall be heard as soon as practicable after it is perfected.[36]

The PPPA also provides for an automatic stay of proceedings in the administrative tribunal context.[37]

(4) REMEDIES

As stated above, courts are usually reluctant to make a finding of bad faith on a summary basis. The PPPA generally dispenses with that analysis. In the rare case where a court is prepared to conclude that the plaintiff has in fact brought the proceeding in bad faith or for an improper purpose, however, the PPPA authorizes the judge to award the defendant such damages

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32 PPPA, s. 137.5.

33 PPPA, s. 137.1 (5).

34 PPPA, s. 137.2 (4), (5).

35 PPPA, s. 137.2 (2).

36 PPPA, s. 137.3.

37 PPPA, s. 137.4.

as may be appropriate.[38] Since the preliminary merits review is an adjunct to the general system of civil procedure, a court could also direct the trial of an issue as to bad faith within the context of deciding the motion.

As to costs, where the moving party is successful and the action is dismissed, the PPPA provides that the moving parties is entitled to costs on a full indemnity basis, subject to the discretion of the court to make a different order if the court considers it appropriate to do so.[39] Similarly, the PPPA provides that where the motion is not successful there should be no order as to costs, again subject to the court's discretion to make an order as to costs if the court thinks fit.[40]

3. MOVING FORWARD

As stated above, the PPPA does not alter the substantive law of defamation. It will also be obvious that effective advocacy on preliminary review proceedings under the PPPA is going to require that counsel have a thorough appreciation of modern defamation law. It is also likely, however, that the PPPA will have a significant impact entirely outside of the court system, by deterring the commencement of litigation that otherwise would be brought. The PPPA's ultimate effect, both in and outside of the court, can be expected to lead to a greater focus on reputation protection and management through non-litigious means, while leaving untouched the continued role of the court where the right to speak is abused with truly harmful results.

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38 PPPA, s. 137.1 (9).

39 PPPA, s. 137.1 (7).

40 PPPA, s. 137.1 (8).