

**MORE THAN FREEDOM OF EXPRESSION:  
THE SUPREME COURT OF CANADA WEIGHS IN WITH  
POINTES AND PLATNICK**

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## I. Introduction

If you were to ask most lawyers to provide a quick summary of the decisions of the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*<sup>1</sup> and *Bent v. Platnick*,<sup>2</sup> they would likely say that the decisions addressed the proper application of Ontario's *Protection of Public Participation Act, 2015*.<sup>3</sup> While this would be correct as far as it goes, it would fail to describe those aspects of the decisions that, like an iceberg, lie beneath the surface. Among others, the decisions raise issues related to the possible impact on a defendant of an unsuccessful motion, expert evidence, the drafting of settlement agreements, the terms and conditions for websites and online forums, and introducing fresh evidence on appeal. Every lawyer should, therefore, have some understanding of these two decisions.

## II. Background

On November 3, 2015, Ontario's *Protection of Public Participation Act, 2015* received Royal Assent, and became ss. 137.1 through 137.5 of the *Courts of Justice Act* (the "*CJA*").<sup>4</sup> The legislation was intended to discourage Strategic Litigation Against Public Participation, or "SLAPPs". Its stated purpose was to: (a) encourage individuals to express themselves on matters of public interest; (b) promote broad participation in debates on matters of public interest; (c) discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and (d) reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.<sup>5</sup>

Soon after its enactment, defendants were bringing motions pursuant to s. 137.1 of the *CJA* to have cases against them dismissed. Eventually six such cases made their way to the Ontario Court of Appeal, and were heard by a five-judge panel.<sup>6</sup> Of these, *Pointes* and

1. 2020 SCC 22, 449 D.L.R. (4th) 1, 72 Admin. L.R. (6th) 1 (S.C.C.) (*Pointes*).
2. 2020 SCC 23, 449 D.L.R. (4th) 45, 5 C.C.L.I. (6th) 1 (S.C.C.) (*Platnick*).
3. *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23.
4. *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (*CJA*).
5. *CJA*, s. 137.1(1).
6. *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 426 D.L.R. (4th) 233, 46 Admin. L.R. (6th) 70 (Ont. C.A.), additional reasons 2018 ONCA 853, 50 C.C.L.T. (4th) 211, 23 C.P.C. (8th) 350, affirmed 2020 SCC 22, 449 D.L.R. (4th) 1, 72 Admin. L.R. (6th) 1 (S.C.C.); *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1, 23 C.P.C. (8th) 363 (Ont. C.A.); *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, 82 C.C.L.I. (5th) 191 (Ont. C.A.), additional reasons 2018 ONCA

*Platnick* made their way to the Supreme Court of Canada, which released its decisions on September 10, 2020.

### III. The Structure of the Legislation and its Interpretation by the Supreme Court of Canada

*Pointes* was a unanimous decision of the court, and is the case in which the Supreme Court of Canada laid out the general principles that apply to the construction and application of s. 137.1 of the *CJA*.

Pointes Protection Association (“Association”) was a ratepayers’ association that opposed the efforts of 1704604 Ontario Ltd. (“Developer”) to build a suburb in Sault Ste. Marie. The Developer needed to obtain approval of the development from both City Council and the local Conservation Authority. After the Conservation Authority approved the development, the Association brought a judicial review application to overturn that approval. Meanwhile, the Developer was appealing City Council’s rejection of its application before the Ontario Municipal Board (“OMB”). While the judicial review application and the OMB appeal were still pending, the parties settled the judicial review application, which was dismissed without costs. As part of their settlement, the Association and its executive members agreed they would not: (1) seek similar relief to that claimed in the judicial review in any further court proceedings; and (2) argue in any other subsequent legal proceeding that the approval of the Conservation Authority was illegal or invalid, or that the Conservation Authority acted beyond its jurisdiction.

At the OMB hearing, a member of the Association executive, who had signed the settlement agreement, sought to testify that the proposed development would result in the loss of wetland area and environmental damage. The Developer objected to the evidence, but the OMB permitted the evidence insofar as it was relevant to the planning merits and not to the conservation merits, which were within the purview of the Conservation Authority. The OMB upheld the Council rejection of the Developer’s application. Shortly after,

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851, 83 C.C.L.I. (5th) 308, 23 C.P.C. (8th) 309, affirmed 2020 SCC 23, 449 D.L.R. (4th) 45, 5 C.C.L.I. (6th) 1 (S.C.C.); *Veneruzzo v. Storey*, 2018 ONCA 688, 23 C.P.C. (8th) 352, 295 A.C.W.S. (3d) 893 (Ont. C.A.); *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 427 D.L.R. (4th) 236, 23 C.P.C. (8th) 381 (Ont. C.A.), additional reasons 2018 ONCA 852, 23 C.P.C. (8th) 402, 297 A.C.W.S. (3d) 712; and *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690, 428 D.L.R. (4th) 568, 23 C.P.C. (8th) 404 (Ont. C.A.), additional reasons 2018 ONCA 854, 23 C.P.C. (8th) 417, 297 A.C.W.S. (3d) 486.

the Developer brought a breach of contract action, seeking \$6 million in damages.

The Association brought a motion under s. 137.1 to dismiss the Developer's action. Applying the framework set out below, the court dismissed the Developer's suit. By contrast, the moving party in *Platnick* was unsuccessful in dismissing the plaintiff's defamation claim, with a 5:4 judgement.

*Platnick* arose in the context of litigation under the *Statutory Accident Benefits Schedule* ("SABS")<sup>7</sup> under the *Insurance Act*.<sup>8</sup> The appellant in the Supreme Court of Canada, Maia Bent, was a lawyer who represented parties making claims under the SABS. Dr. Howard Platnick was a general practitioner who frequently provided reports that were used in SABS proceedings. Ms. Bent had sent an email to a confidential Listserv<sup>9</sup> of the Ontario Trial Lawyers' Association ("OTLA"), alleging that Dr. Platnick had changed the findings of expert reports in the context of litigation. The email came to the attention of an insurance trade magazine which then published it. Dr. Platnick sued Ms. Bent and others for defamation, and Ms. Bent brought a s. 137.1 motion.<sup>10</sup>

These decisions represent the first opportunity for the Supreme Court of Canada to consider the statutory regime under s. 137.1 of the *CJA*. In essence, the section provides a framework for balancing two competing policy interests; namely, the public interest in allowing meritorious lawsuits to proceed; and the public interest in protecting expression on matters of public interest.<sup>11</sup>

To dismiss a proceeding under s. 137.1, motion judges must undertake a series of inquiries to determine whether the deleterious effects on expression and public participation outweigh the public interest in allowing the underlying proceeding to continue.

### **1. The Moving Party Must First Meet a Threshold**

A defendant seeking to dismiss an action must first satisfy the threshold set out in s. 137.1(3) of the *CJA*. At this stage, the moving party (defendant) must establish, on a balance of probabilities,<sup>12</sup> that the proceeding is caused<sup>13</sup> by one of its expressions relating to a matter of public interest.<sup>14</sup>

7. *Statutory Accident Benefits Schedule*, O. Reg. 34/10, as amended.

8. *Insurance Act*, R.S.O. 1990, c. 18.

9. An automated mailing list manager, which allows a sender to reach all subscribers through a single email.

10. *Platnick*, *supra*, footnote 2, at paras. 7, 207-208.

11. *Pointes*, *supra*, footnote 1, at para. 18.

12. *Pointes*, *supra*, footnote 1, at para. 23.

In both *Platnick* and *Pointes*, the court unanimously found that the defendants' remarks were expressions related to a matter of public interest, and the lawsuits were caused by those remarks. In doing so, the court confirmed that the anti-SLAPP regime is not limited to defamation actions, but can extend to other lawsuits involving causes of action arising from an expression.<sup>15</sup>

## **2. If the Moving Party Meets the Threshold, Then the Burden Shifts to the Plaintiff**

Once a moving party (defendant) satisfies the initial burden under s. 137.1(3), then the responding party (plaintiff) must show three things under s. 137.1(4). First, that there are grounds to believe the underlying proceeding has *substantial merit*. Second, that there are grounds to believe the moving party has *no valid defence*. Third, that *the harm suffered* by the plaintiff is sufficiently serious to outweigh the public interest in protecting the defendant's expression.

### **a. The Plaintiff Must Show That the Proceeding Has Substantial Merit**

To show "substantial merit", the plaintiff must satisfy the motion judge that there are grounds to believe the underlying claim is legally tenable, supported by evidence, and reasonably capable of belief, such that the claim has a real prospect of success.<sup>16</sup> The "real prospect of success" standard is a new burden of proof intended to give parties the widest latitude possible with the pleadings, at an early stage of the action. In *Pointes*, the court differentiated this standard from existing burdens; it is a less stringent standard than the "strong *prima facie* case" standard for a mandatory interlocutory injunction, and the "no genuine issue requiring trial" standard for summary judgment. It is more stringent than the "some chance of success" standard on motions to strike.<sup>17</sup> By doing so, the court was careful not to set a standard that would make it very difficult to defend a s. 137.1 motion. The higher the standard, the greater the protection of expression. The lower the standard, the easier it would be for lawsuits to proceed. Balancing these policy considerations, the Supreme Court chose a middle course. Applying the "reasonable prospect of success" standard, the court found that the Developer in

13. *Pointes, supra*, footnote 1, at para. 24.

14. *Pointes, supra*, footnote 1, at paras. 26-30.

15. *Pointes, supra*, footnote 1, at paras. 7-14 and 24.

16. *Pointes, supra*, footnote 1, at para. 54.

17. *Pointes, supra*, footnote 1, at paras. 50-51.

*Pointes* had failed to establish that its proceeding had substantial merit; meanwhile in *Platnick* both the majority and minority found that Dr. Platnick met the merits-based hurdle.

In *Pointes*, the Developer's claim had no "reasonable prospect of success" because the Developer's breach of contract claim was based on an interpretation of minutes of settlement that did not flow from the words of the agreement.<sup>18</sup>

By contrast, in *Platnick*, the majority found substantial merit in Dr. Platnick's defamation action.<sup>19</sup> Ms. Bent alleged that Dr. Platnick, who had been retained by insurers, had misrepresented the findings of various doctors in two personal injury cases. In one case, Dr. Platnick's report presented the "consensus conclusion" of the underlying medical professionals' findings, even though, according to Ms. Bent, two of the medical professionals had refused to sign off on the report or make changes that would support Dr. Platnick's conclusions.<sup>20</sup> In the other case, Ms. Bent alleged that Dr. Platnick's report changed the conclusions of another medical professional's assessment, to support a finding favourable to the insurer.<sup>21</sup>

The majority found that these were clear allegations of professional misconduct, which would tend to lower Dr. Platnick's reputation in the eyes of a reasonable person.<sup>22</sup> Ms. Bent's OTLA Listserv note was leaked, and an industry magazine subsequently republished it.<sup>23</sup> In the weeks after Ms. Bent sent the impugned email, Dr. Platnick received "mass cancellations" from clients, amounting to a claimed financial impact of \$578,949.<sup>24</sup> Altogether, there was a basis in law and the evidence that Dr. Platnick's claim for defamation had a reasonable prospect of success.<sup>25</sup> Where the minority disagreed with the majority was in considering the next criterion: whether the plaintiff could show that the moving party had no valid defences to the claim.<sup>26</sup>

#### **b. The Plaintiff Must Show There Are No Valid Defences**

In addition to establishing that the claim has "substantial merit", the plaintiff must also show that the defences, put in play by the

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18. *Pointes, supra*, footnote 1, at paras. 105-107.

19. *Platnick, supra*, footnote 2, at paras. 90-91.

20. *Pointes, supra*, footnote 1, at para. 201.

21. *Pointes, supra*, footnote 1, at paras. 191-195.

22. *Pointes, supra*, footnote 1, at para. 97.

23. *Pointes, supra*, footnote 1, at para. 30.

24. *Pointes, supra*, footnote 1, at para. 98.

25. *Pointes, supra*, footnote 1, at paras. 97-100.

26. *Pointes, supra*, footnote 1, at paras. 218-220.

defendant, have no real prospect of success.<sup>27</sup> The “no valid defence” requirement also engages an analysis of whether the claim is legally tenable and supported by evidence that is reasonably capable of belief. In *Pointes*, as the court found that the Developer’s claim had no substantial merit, it did not consider the “no valid defence” threshold.<sup>28</sup>

In *Platnick*, Ms. Bent raised two defences: justification, and qualified privilege. As the main thrust of the statements was not substantially true, the majority found that there was a basis in the record and the law to support a finding that the defence of justification had no real prospect of success.<sup>29</sup> The minority did not consider justification, as they concluded that Ms. Bent had a valid defence of qualified privilege.<sup>30</sup> The majority disagreed, finding that Ms. Bent’s expressions exceeded the requirement that statements made should not go beyond the purpose intended of the privilege. The purpose of Ms. Bent’s note was to warn other plaintiffs’ counsel about the risk of misleading reports, and to encourage colleagues to request the insurer’s full file.<sup>31</sup> The majority pointed out that it was unnecessary for Ms. Bent to name Dr. Platnick in the email.<sup>32</sup> By contrast, the minority found that Ms. Bent had a duty to report to the Listserv members any concerns about “selective and misleading expert reports which disadvantage the very individuals [OTLA members] advocate for and represent”.

The minority also stressed the existence of a confidentiality clause governing use of the Listserv, which required subscribers (all lawyers, who had a duty to keep their undertakings), to keep the communications confidential. The majority found that the confidentiality clause was of no assistance, because the Listserv agreement – of which the confidentiality clause was a part – contained a general prohibition on members sending potentially defamatory content via the Listserv.<sup>33</sup> The OTLA Listserv expressly prohibited subscribers from using the forum to send, re-send, or disseminate defamatory or potentially defamatory materials. It also expressly restricted communications to issues stemming from ongoing files in relation to existing or contemplated litigation, and for seeking advice in connection with those issues. Accordingly, the

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27. *Pointes*, *supra*, footnote 1, at para. 103.

28. *Pointes*, *supra*, footnote 1, at para. 112.

29. *Platnick*, *supra*, footnote 2, at paras. 107-120.

30. *Platnick*, *supra*, footnote 2, at para. 220.

31. *Platnick*, *supra*, footnote 2, at para. 8.

32. *Platnick*, *supra*, footnote 2, at paras. 129-130.

33. *Platnick*, *supra*, footnote 2, at paras. 131 and 240-243.

majority found that while the Listserv contained a confidentiality clause, there were reasons to doubt that Ms. Bent's communications to Listserv members were privileged.<sup>34</sup> Furthermore, the majority found that by failing to conduct due diligence to check the truth of her remarks, Ms. Bent made the statements recklessly or with malice and therefore could not rely on the defence of qualified privilege.<sup>35</sup>

### 3. Finally, the Court Weighs the Public Interest

If the responding party (plaintiff) clears the merits-based hurdle, it must then satisfy the motion judge that the harm caused by the defendant's expression is "sufficiently serious" that the public interest in allowing the claim to proceed outweighs the public interest in protecting the defendant's freedom of expression. At this stage, the court can assess the quality and motivation behind the expression, and whether the lawsuit should be allowed to proceed to trial.

As noted in *Pointes*, courts will be guided by s. 2(b) Charter jurisprudence, when considering the public interest in protecting a party's right to free expression.<sup>36</sup> The consideration under s. 137.1(4)(b) requires court to weigh: "the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression."<sup>37</sup> In weighing those elements, a court will consider the following non-exhaustive list of factors:

- (i) the importance of the expression,
- (ii) the history of litigation between the parties,
- (iii) broader or collateral effects on other expressions on matters of public interest,
- (iv) the potential chilling effect on future expression either by a party or by others,
- (v) the defendant's history of activism or advocacy in the public interest,
- (vi) any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and
- (vii) the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable

34. *Platnick, supra*, footnote 2, at para. 124.

35. *Platnick, supra*, footnote 2 at paras. 131-137.

36. *Pointes, supra*, footnote 1, at para. 77.

37. *Pointes, supra*, footnote 1, at para. 79.

group or a group protected under s. 15 of the Charter or human rights legislation.<sup>38</sup>

In *Pointes*, the court found that the harm to the Developer (plaintiff) would primarily be financial.<sup>39</sup> Although the court made allowances for the early stage of the proceedings, the evidence put forward to back up the alleged harms was quite weak, and the court found that the harm alleged “lies at the low end of the spectrum”. By comparison, in *Platnick*, the majority found that the harm to Dr. Platnick (plaintiff) personally, to his finances, and to his professional reputation “lies close to the high end of the spectrum”.<sup>40</sup> The public interest in protecting free expression was at the high end of the spectrum in *Pointes*, and that guided the court’s analysis.<sup>41</sup> The minority in *Platnick* similarly found that the protection of free expression was the overriding policy interest.<sup>42</sup> The majority, however, discounted the importance of protecting the expression, because it included a personal attack on Dr. Platnick’s professional reputation.<sup>43</sup> Nonetheless, the majority found that the public interest in protecting the expression lay in the middle of the spectrum.<sup>44</sup>

#### **IV. A Motion under Section 137.1 of the *CJA* can be an Effective Answer to an Action, but does it have Side Effects?**

While the burden a plaintiff must satisfy in order for its case to proceed is high, if the plaintiff does meet that burden, the defendant is left in the unenviable position that there has been a judicial determination that there are “grounds to believe” that the defendant has “no valid defence”. While the Supreme Court of Canada emphasized in *Pointes* that the s. 137.1 process is not a “determinative adjudication of the merits of the proceeding”,<sup>45</sup> an unsuccessful moving party is likely to feel that it has been left in a vulnerable position, able only to defend itself with defences that have been held to lack validity.

When a patient goes to the doctor because of some nagging issue they have had, they are usually relieved when the doctor can identify

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38. *Pointes*, *supra*, footnote 1, at para. 80.

39. *Pointes*, *supra*, footnote 1, at para. 114-116.

40. *Platnick*, *supra*, footnote 2, at paras. 144-162.

41. *Pointes*, *supra*, footnote 1, at paras. 125-127.

42. *Platnick*, *supra*, footnote 2, at para. 264.

43. *Platnick*, *supra*, footnote 2, at paras. 164-169.

44. *Platnick*, *supra*, footnote 2, at paras. 164-169.

45. *Pointes*, *supra*, footnote 1, at paras. 37 and 50.

the problem and provide them with reassurance that the condition is treatable. However, as the doctor is writing out the prescription, a worrisome question crosses the patient's mind: "But, are there side-effects?"

The benefits of a potentially successful s. 137.1 motion are obvious. The termination of potentially crippling litigation at its earliest stages, especially if brought by a well-funded plaintiff against an individual,<sup>46</sup> can save a defendant significant cost and emotional distress. But if the motion fails to bring the proceeding to an end, is the defendant worse off than before? While the Supreme Court of Canada stressed multiple times, in both *Pointes* and *Platnick*, that a plaintiff's success on a s. 137.1 motion is not determinative nor conclusive of the merits of the underlying claim,<sup>47</sup> the question is whether the necessary factual and legal findings required to decide the motion will have some residual effect as the case proceeds. The experience of litigation under the *Patented Medicines (Notice of Compliance) Regulations*<sup>48</sup> ("PM(NOC) Regs."), before they were significantly amended in 2017, suggests that such findings can have a residual influence. In other words, a defendant's unsuccessful motion under s. 137.1 of the *CJA* may indeed have side effects.

### 1. The PM(NOC) Regs

These regulations apply only in the case of pharmaceutical patents. To understand the jurisprudence under these regulations, it is necessary to have some understanding of the context in which they arise.

A drug may be the subject of one or more patents dealing with the compound itself, ways of making the compound, or ways of making a dosage form of the drug (among other things). When a pharmaceutical company applies for permission to market a drug, it must submit evidence gathered during clinical trials demonstrating that the drug is both safe and effective. These clinical trials typically

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46. See, for instance, *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, 53 C.C.L.T. (4th) 1, 23 C.E.L.R. (4th) 11 (Ont. C.A.), leave to appeal refused 2019 CarswellOnt 16393, 2019 CarswellOnt 16394 (S.C.C.), leave to appeal refused *United Soils Management Ltd. v. Kayt Barclay*, 2019 CarswellOnt 16395, 2019 CarswellOnt 16396, [2019] S.C.C.A. No. 153 (S.C.C.) were both dismissed on October 10, 2019 with costs on a solicitor and client basis).

47. *Pointes*, *supra*, footnote 1, at paras. 37, 50; *Platnick*, *supra*, footnote 2, at paras. 4, 48 and 176.

48. *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 as amended.

involve tens of thousands of people, some of whom receive the drug, and some of whom receive a placebo. Neither the patient nor the clinician knows which drug the patient receives. These clinical trials are very expensive, and can take years to complete. The application for permission to market the drug in Canada is called a New Drug Submission (“NDS”). After examining the evidence submitted, Health Canada may request additional data, or it may approve the drug for sale in Canada. The approval is called a Notice of Compliance (“NOC”). The manufacturer also files a list of all the patents it has that relate to the drug (“Patent list”).

Later, another manufacturer might decide to market its own version of the drug. It could, if it wished, do its own full clinical trials and file its own NDS. However, it might choose to rely on the data submitted by the first manufacturer to show the safety and efficacy of the drug and then file more limited data showing that its version, when administered to patients, acts in the same way as the approved version of the drug. The submission relying on the clinical data on file for the approved version of the drug is called an Abbreviated New Drug Submission (“ANDS”).

Part of the ANDS is a document called a notice of allegations (“NOA”) in which the submitting party addresses each of the patents in the Patent list. With the factual and legal basis for the allegation, the second party may allege that, among other things, its version of the drug will not infringe a listed patent, that the patent is invalid, or that it does not seek to have its NOC issued until the patent expires. As part of filing its ANDS, the second applicant must serve its NOA on the party that filed the Patent list.

Prior to the 2017 amendments,<sup>49</sup> the party receiving the NOA had a short time to commence an application for judicial review to prohibit the Minister of Health from issuing an NOC to the party that filed the ANDS. The judicial review application did not decide whether the patent(s) would be infringed or whether they were valid. Instead, its sole purpose was to determine if the party that filed the ANDS was entitled to receive an NOC, notwithstanding the patents in the Patent list. If the allegations raised by the second party were unjustified, then the Minister was prohibited from issuing an NOC; however, in that case the party that filed the ANDS could commence a new action for a declaration of invalidity or of non-infringement, or both raising its allegations anew. If the allegations in the NOA were found to be justified, the first party could commence an action

49. The effect of the amendments was to substitute a requirement to bring an action, instead of a judicial review application, to determine the issues. This should reduce multiple proceedings.

for infringement of its patent(s). The result was multiple cases involving the same parties and the same patents.

## 2. The Apotex and Teva Litigation Concerning Sildenafil<sup>50</sup>

It is beyond the scope of this article to do a quantitative analysis of the frequency in which the outcome of subsequent litigation differed from the outcome in the PM(NOC) proceedings. However, one case in particular suggests that the outcome of a judicial review application did influence subsequent litigation in which the validity of the patent was in play, despite a long and consistent line of jurisprudence to the effect that a PM(NOC) proceeding could not, as a matter of law, result in a final determination as to the validity or infringement of a patent.<sup>51</sup>

Apotex filed an ANDS for sildenafil in 2005, and Pfizer brought a judicial review application. In September 2007 a prohibition order was issued.<sup>52</sup> Subsequently Apotex brought an action to impeach the sildenafil patent. It ultimately succeeded in striking claims in the Pfizer defence in that action of *res judicata*, issue estoppel, collateral estoppel, comity, and abuse of process based on the outcome of Pfizer's judicial review application.<sup>53</sup> While the Apotex impeachment action was ongoing, another generic drug maker, Teva Canada (previously known as Novopharm), was involved in its own PM(NOC) litigation with Pfizer. Initially Teva Canada's allegations were found not to be justified,<sup>54</sup> and this was affirmed in the Federal Court of Appeal.<sup>55</sup> Teva Canada, however, succeeded in having a ground of invalidity found to be justified in the Supreme Court of Canada<sup>56</sup> in November 2012. Notwithstanding the

50. Sildenafil is the active ingredient in the drug marketed by Pfizer under the brand name Viagra.

51. *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*, 2014 FCA 13, 117 C.P.R. (4th) 163, (*sub nom.* *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*) 456 N.R. 177 (F.C.A.) at para. 17.

52. *Pfizer Canada Inc. v. Apotex Inc.*, 2007 FC 971, 61 C.P.R. (4th) 305, 319 F.T.R. 48 (Eng.) (F.C.), affirmed 2009 FCA 8, 72 C.P.R. (4th) 141, [2009] 4 F.C.R. 223 (F.C.A.).

53. *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*, 2011 FCA 77, 332 D.L.R. (4th) 757, 93 C.P.R. (4th) 42 (F.C.A.).

54. *Pfizer Canada Inc. v. Novopharm Ltd.*, 2009 FC 638, 76 C.P.R. (4th) 83, 352 F.T.R. 35 (Eng.) (F.C.), affirmed 2010 FCA 242, 88 C.P.R. (4th) 405, [2012] 2 F.C.R. 69 (F.C.A.), reversed 2012 SCC 60, (*sub nom.* *Teva Canada Ltd. v. Pfizer Canada Inc.*) [2012] 3 S.C.R. 625, 351 D.L.R. (4th) 503 (S.C.C.).

55. *Pfizer Canada Inc. v. Novopharm Ltd.*, 2010 FCA 242, 88 C.P.R. (4th) 405, [2012] 2 F.C.R. 69 (F.C.A.), reversed 2012 SCC 60, (*sub nom.* *Teva Canada Ltd. v. Pfizer Canada Inc.*) [2012] 3 S.C.R. 625, 351 D.L.R. (4th) 503 (S.C.C.).

jurisprudence that a PM(NOC) proceeding could not determine issues of infringement or validity, the Supreme Court of Canada's judgment included a declaration that the sildenafil patent was invalid.<sup>57</sup> Pfizer promptly brought a motion to the Supreme Court of Canada to amend the judgment, which was amended to remove the declaration of invalidity in June 2013.<sup>58</sup>

The day after the decision of the Supreme Court of Canada in *Teva*, Apotex brought a motion for summary judgment to declare the sildenafil patent invalid in its impeachment action based on the *Teva* decision, notwithstanding its previously successful argument that the outcome of the PM(NOC) proceedings against it did not create an issue estoppel. At the time that the summary judgment motion was heard, the case was due to be tried within a week. Nevertheless, the Federal Court granted summary judgment based on the Supreme Court of Canada's decision in *Teva*.<sup>59</sup> Pfizer appealed, and by the time of the hearing of the appeal, the Supreme Court of Canada had amended its reasons and judgment in *Teva* to remove the declaration of invalidity. On the appeal against Apotex, Pfizer argued that it had had insufficient time to put forward evidence in response to Apotex's motion for summary judgment. The Court of Appeal rejected this argument, not only because it had not been raised as a ground of appeal, but also because the issue of invalidity based on defective disclosure had been flagged in the pleadings in the Apotex impeachment action months before the motion, and Pfizer should have been preparing for the circumstances that ultimately came to pass.<sup>60</sup>

56. *Pfizer Canada Inc. v. Novopharm Ltd.*, 2012 SCC 60, (*sub nom.* *Teva Canada Ltd. v. Pfizer Canada Inc.*) [2012] 3 S.C.R. 625, 351 D.L.R. (4th) 503 (S.C.C.) (a complicating factor is that in its initial reasons and judgment, the Supreme Court of Canada held the sildenafil patent to be invalid, and issued a declaration to this effect, despite the jurisprudence to the effect that a PM(NOC) proceeding cannot, as a matter of law, result in a final determination as to the validity or infringement of a patent. Pfizer brought a motion to rectify this, which ultimately succeeded in June 2013 (see *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*, 2014 FCA 13, 117 C.P.R. (4th) 163, 456 N.R. 177 (F.C.A.) at paras. 16-18).

57. See the entry for November 8, 2012 in Supreme Court of Canada Docket 33951, *Pfizer Canada Inc. v. Novopharm Ltd.*, 2012 SCC 60, (*sub nom.* *Teva Canada Ltd. v. Pfizer Canada Inc.*) [2012] 3 S.C.R. 625, 351 D.L.R. (4th) 503 (S.C.C.).

58. Bulletin of Proceedings, Supreme Court of Canada, June 14, 2013, at 1098-1099.

59. *Apotex Inc. v. Pfizer Ireland Pharmaceuticals*, 2012 FC 1339, 122 C.P.R. (4th) 223, 431 F.T.R. 1 (Eng.) (F.C.), affirmed 2014 FCA 13, 117 C.P.R. (4th) 163, 456 N.R. 177 (F.C.A.).

60. *Apotex v. Pfizer*, *supra*, footnote 51, at para. 27.

A case can be made that the factual situation and the timing of events in *Teva* and the Apotex impeachment action were highly unusual. Nevertheless, a finding of invalidity in a form of proceeding that the jurisprudence made clear could not, as a matter of law, result in a final determination as to the validity or infringement of a patent had a decisive influence on the outcome of subsequent litigation to determine that patent's validity.

In litigation where a defendant has brought an unsuccessful motion under s. 137.1 of the *CJA*, it may be necessary to take extra measures to ensure that the principle that such a motion "is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence"<sup>61</sup> is carried into practice. In a case such as *Platnick*, which is to be tried by a jury,<sup>62</sup> at the start of the trial the judge should indicate to all parties that any mention of the motion or its outcome (in written material filed during trial or oral statements made during the trial) would result in a mistrial. Mitigating the effects of an unsuccessful motion when a judge alone tries the case will be more difficult, even if the case in question never makes it all the way to the Supreme Court of Canada and receives wide publicity. Trial judges in such cases will have to make an extra effort to put anything that happened before the start of the trial out of their minds.

Before bringing a s. 137.1 motion, counsel will need to consider carefully with their clients the potential negative impact of an unsuccessful motion on the balance of the case.

### V. Issues Concerning Recurring Experts

Sometimes, the issues in the case are sufficiently specific or unique that potential experts may well have never given expert evidence before. For example, in a product liability case one issue might be whether the failure of the final product was due to some defect in the raw materials, or whether it was due to some error in the way those raw materials were processed to make the final product. On the other hand, there are cases that present issues that come up repeatedly. Such cases include psychological state of mind in family or criminal law cases, fire investigations, and as in *Platnick*, the issue of whether a claimant under the *SABS* has suffered "catastrophic impairment".

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61. *Pointes, supra*, footnote 1, at para. 37.

62. *Bent v. Platnick* (Responses to Applications for Leave to Appeal and Notice of Application for Cross-Appeal) at para. 68, 2018 CarswellOnt 22534 (S.C.C.).

These cases raise particular issues that are not present in the “one-off” expert evidence scenario.

There are plenty of texts and articles on the role of the expert witness,<sup>63</sup> and the duties owed to the court or tribunal where expert evidence is given. Most of these articles discuss problems associated with expert opinion evidence and propose solutions. Even though many of these solutions have since been implemented (such as codes of conduct for experts), the challenge to mitigate these problems remains. The foundation of the jurisprudence describing and explaining these duties is found primarily in two important Supreme Court of Canada decisions: *Mohan*<sup>64</sup> and *White Burgess*.<sup>65</sup>

Expert evidence is admitted as an exception to the general rule that ready-formed inferences are not helpful to the trier of fact and might even be misleading. It is only where special knowledge or skill are necessary to draw true inferences from facts stated by witnesses, which a judge or jury would not be able to do as they lack the special knowledge or skill. In such a case, a witness is therefore allowed to state his or her opinion about such matters, provided they have the requisite expertise.<sup>66</sup>

*Mohan* set out four criteria to be used in determining whether tendered expert evidence should be admitted:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule; and
- (d) a properly qualified expert.<sup>67</sup>

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63. See John Sopinka, Sidney Lederman and Alan W. Bryant, *The Law of Evidence*, 5th ed. (Toronto: LexisNexis Canada, 2018), Chapter 12 Opinion Evidence (*Sopinka*); Glenn R. Anderson, *Expert Evidence*, 3rd ed. (Toronto: LexisNexis Canada, 2014); David M. Paciocco, “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts” (2009), 34 Queen’s L.J. 565, (*Paciocco*); W. Ian C. Binnie, “The Changing Role of the Expert Witness” (2010), 49 Sup. Ct. L. Rev. (2d) 179; Peter Wells and Samantha Gordon, “Issues in the Preparation and Presentation of Expert Evidence” (2015), 44 Adv. Q. 1; Peter Wells and Samantha Gordon, “Issues in the Preparation and Presentation of Expert Evidence: An Update” (2016), 45 Adv. Q. 4.

64. *R. v. Mohan*, 1994 SCC 80, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419 (S.C.C.) (*Mohan*).

65. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, 383 D.L.R. (4th) 429 (S.C.C.) (*White Burgess*).

66. *White Burgess*, *supra*, footnote 65, at paras. 14-15.

67. *Mohan*, *supra*, footnote 64, at p. 20 g-h.

Relevance requires not only logical relevance to a fact at issue in the case, but also requires the court to engage in a cost-benefit analysis of its impact on the trial process.

Evidence that is otherwise logically relevant may be excluded . . . if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.<sup>68</sup>

The requirement of necessity requires more than that the evidence be of assistance to the trier of fact. The tendered expert evidence must provide information that is likely to be outside the experience and knowledge of a judge or jury.<sup>69</sup>

Assuming there is no exclusionary rule, the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify. Expert evidence that advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.<sup>70</sup>

The *Mohan* admissibility test is applied in a two-step process. In the first step, the evidence is tested against the four criteria, with relevance being tested only based on its logical relevance. The second step of the process involves the cost-benefit analysis to determine if the proffered expert evidence is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from its admission.<sup>71</sup> The determination of whether the expert is appropriately qualified includes the determination of whether the expert is able to carry out his or her duty to the court of tribunal.<sup>72</sup> This duty is to be fair, objective and non-partisan. If the court or tribunal has good reason to doubt the expert's ability to fulfil this duty, the evidence is to be excluded.<sup>73</sup>

The recurrence of similar legal issues with different factual situations tends to create a group of lawyers who specialize in such a legal issue. In some cases, this and other factors may cause the bar to

68. *Mohan, supra*, footnote 64, at p. 21 b-d.

69. *Mohan, supra*, footnote 64, at p. 23 f-h.

70. *Mohan, supra*, footnote 64, at p. 25 g-j.

71. *White Burgess, supra*, footnote 65, at paras. 19-24.

72. *White Burgess, supra*, footnote 65, at para. 53.

73. *White Burgess, supra*, footnote 65, at paras. 46-47.

be segregated into groups that only represent one side in such disputes. For instance, the fact that Crown Attorneys who are employees of the government prosecute criminal cases means that with few exceptions, one group of lawyers routinely prosecute criminal cases and another group of lawyers defend them. In the personal injury field, the trend has been for lawyers to represent either plaintiffs, or defendants through the insurance companies that provide the defence. In many instances, such cases are also dealt with in specialist courts or tribunals, which tend to become a sort of self-contained ecosystem.

The problem of a divided bar, where one group of lawyers generally represent only one side of a dispute, is that over time a degree of antipathy toward lawyers and experts on the other side may develop. An advocate is necessarily partisan, but they are expected to bring a degree of professional objectivity and detachment to their task. Professional objectivity and detachment are lost when the advocate identifies too closely with the interests of their client.<sup>74</sup>

74. This antipathy between plaintiff-side and defendant-side participants in *SABS* cases can be seen in the facta filed by the parties in *Platnick*. In Ms. Bent's factum, Dr. Platnick is described as follows:

Dr. Platnick is a general practitioner ("GP") who has devoted his medical practice to working for insurance assessment firms. He made about \$1,000,000 a year for ten years writing paper-review reports of specialist insurer assessors, which insurers rely on to deny victims of MVAs access to enhanced benefits. He is a cog in the billion-dollar automobile insurance machine . . . Like Ms. Bent, many judges have recognized the serious and systemic nature of the issue of unfair and biased insurer assessor reports and have criticized insurance assessment firms who direct specialist assessors to make substantive changes to their reports; and the hired guns, like Dr. Platnick, who work for them and whose reports are partisan, who act as judge and jury, and who advocate for the insurer rather than being impartial [*Platnick, supra*, footnote 2 (*Factum of the Appellant* at paras. 4-5, available online in Supreme Court of Canada Docket 38374.)]

In response, Dr. Platnick's factum contains the following, after noting that the case is to be tried by a jury.

The jury is entitled to find that Ms. Bent knew exactly what she was doing. She wanted to get Dr. Platnick and she got him. The jury is entitled to find on the totality of the evidence, including making critical credibility findings from live witnesses, that Ms. Bent had every intention of spreading her communication or had a complete reckless disregard as to whether it would get out. The jury is entitled to find that Ms. Bent ought not to have named Dr. Platnick personally, that she had an agenda or an ulterior motive and was driven by ill-will, spite and a deliberate or reckless disregard or indifference to the truth. [*Platnick, supra*, footnote 2 (*Factum of the Respondent* at para. 69, available in Supreme Court of Canada

When a lawyer or an insurance adjuster retains an expert, they are likely to consult that expert again if their first experience was a good one. Among a bar or insurance segment with recurring legal issues, this means that experts also tend to be retained on a recurring basis. Over time, it is natural for the lawyer or adjuster and the expert to form a strong working relationship, which eventually incorporates the expert into the team.<sup>75</sup> As Justice Cunningham noted in the context of the *SABS* system: “The problem is obvious. An expert retained by an insurer who supports claimants is unlikely to be retained again. For this culture shift to be successful, the government will need to be proactive. The government will need to reach out to health professional associations and the insurance industry in order to educate experts on their duty to provide fair, objective and non-partisan evidence.”<sup>76</sup>

The primary responsibility for ensuring that the proffered expert evidence satisfies the common law requirements for admissibility is on the lawyer who puts it forward. It is the particular duty of the lawyer who is gathering such evidence to ensure that the expert understands that their primary duty is to the tribunal or court where their evidence is to be given. Lawyers cannot assume that an expert in pathology or chemistry will know what is expected of them or the current state of the law. As Justice Arnold put it in *Medimmune*:

It is obvious that this process entails a risk of loss of objectivity on the part of the expert even if the expert is striving to remain independent and impartial. It is therefore crucial that the lawyers involved should keep the expert's need to remain objective at the forefront of their minds at all times. If they cause or allow the expert to lose his objectivity, they are doing both the expert and their client a disservice. They are doing the expert a disservice because he may be subject to criticism during cross-examination and in the court's judgment as a result. They are doing the

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Docket 38374.]

75. Ontario, Ministry of the Attorney General, *Inquiry into Pediatric Forensic Pathology in Ontario*, vol 1 (Toronto: Queen's Printer for Ontario, 2008) (the Hon Stephen T. Goudge) at 16 [*Goudge Report*]. One example can be found in the *Goudge Report* at page 16 of volume 1. The Commissioner observed: “Dr. Smith failed to understand that his role as an expert in the criminal justice system required independence and objectivity. In one case Dr. Smith inappropriately furthered a police investigation by agreeing to discuss his report of post-mortem examination with the deceased child's mother despite knowing that she was a suspect in the child's death and that the police would be intercepting his conversation with the suspect”.
76. Ontario, Ministry of Finance, *Ontario Automobile Insurance Dispute Resolution System Review: Final Report* (Toronto: Queen's Printer for Ontario, 2014) (the Hon. Douglas Cunningham), at <https://www.fin.gov.on.ca/en/autoinsurance/drs-final-report.pdf> (*Cunningham Report*).

client a disservice because partisan expert evidence is almost always exposed as such in cross-examination, which is likely to reduce, if not eliminate, the value of the evidence to the client's case.<sup>77</sup>

The secondary responsibility for ensuring that expert evidence is admissible is on the adjudicator or judge to whom the evidence is proffered, as they have a gate-keeper function to perform.

It is worth looking at the nature of Dr. Platnick's work as an expert in *SABS* cases (as described in *Platnick*) to appreciate how far the practice of adducing expert evidence in *SABS* cases<sup>78</sup> had come to deviate from the requirements of *Mohan* and *White Burgess*. It is beyond the scope of this article to get into a detailed description of the *SABS* process which has been a subject of two system reviews since 2014.<sup>79, 80</sup> The current *SABS* came into effect in September 2010, and has been amended more than 20 times since it was enacted.<sup>81</sup>

Dr. Platnick is an Ontario medical doctor and general practitioner who worked as a family physician from 1988 to 2011.<sup>82</sup> In 2007, Dr. Platnick received a certification in impairment and disability rating based on the *American Medical Association Guides to the Evaluation of Permanent Impairment*, 4th ed.<sup>83</sup> for catastrophic determination from the American Board of Forensic Professionals.<sup>84</sup>

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77. *Medimmune Limited v. Novartis Pharmaceuticals UK Limited, Medical Research Council*, [2011] EWHC 1669 (Pat) at para. 111.

78. *Platnick*, *supra*, footnote 2 (Affidavit of Howard Platnick, sworn September 30, 2016, at para. 5-6) (the practice of preparing "catastrophic impairment" determination reports appears to be common in *SABS* cases, and to have continued even after Ms. Bent's Listserv email was widely published).

79. *Cunningham Report*, *supra*, footnote 76.

80. Ontario, Ministry of Finance, *Fair Benefits Fairly Delivered: A Review of the Auto Insurance System in Ontario* (Toronto: Queen's Printer for Ontario, 2017) (David Marshall), at <https://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.pdf> [*Marshall Report*]. Mr. Marshall had previously been the president and CEO of Ontario's Workplace Safety and Insurance Board [Ontario, Ministry of Finance, *News Release* (8 October 2015), "Ontario Appoints Advisor on Auto Insurance and Pensions" at <https://news.ontario.ca/en/release/34482/ontario-appoints-advisor-on-auto-insurance-and-pensions>].

81. *SABS*, *supra*, footnote 7.

82. *Platnick*, *supra*, footnote 2, at paras. 6, 12 and 187.

83. American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th ed. (Chicago Ill.: American Medical Association, 1993). The Forward to the Guides states that "the book applies only to permanent impairments, which are defined as adverse conditions that are stable and unlikely to change. Evaluating the magnitude of these impairments is the purview of the physician, while determining disability is usually not the physician's responsibility".

In one case, Ms. Bent represented a Dr. Carpenter in a claim that included a claim of “catastrophic impairment”.<sup>85</sup> A “Catastrophic impairment” designation under the *SABS* entitles a designated claimant to enhanced medical and other benefits. The determination is made based on the criteria and guidelines set out in, or incorporated into the *SABS*. Dr. Carpenter’s insurer arranged for a series of independent medical examinations by various medical professionals through an assessment company named Sibley & Associates (“Sibley”) with the assessments to be sent to Sibley. The medical experts retained to examine Dr. Carpenter were from outside Ontario, and unfamiliar with Ontario’s *SABS* regime and its criteria. Sibley also retained Dr. Platnick as a “lead physician” to prepare a final report for them that would make an ultimate determination of whether Dr. Carpenter warranted a catastrophic impairment designation. Dr. Platnick’s communications with the examining experts were all conducted through Sibley.

Dr. Platnick submitted his “Catastrophic Impairment Determination” report to Sibley. It contained statements such as “I would conclude that” or “I was not able to identify”. Dr. Platnick wrote that, based on a calculation set out in his report, “I would conclude” that Dr. Carpenter “does not meet the catastrophic level based upon the *SABS* and utilizing the OCF-19 Form”. Two of the professionals who had examined Dr. Carpenter were Dr. Mark Rubens, a psychiatrist, and Dr. Myles Genest, a psychologist. Both had concluded that Dr. Carpenter had a catastrophic impairment. Both Dr. Rubens and Dr. Genest had advised Sibley that they did not agree with Dr. Platnick’s assessment.<sup>86</sup>

At Dr. Carpenter’s arbitration hearing before the Financial Services Commission of Ontario (“FSCO”), a neurologist retained by Sibley gave evidence. During his cross-examination, this expert stated that Dr. Platnick’s final report omitted portions of his concluding assessment, without his knowledge or consent. The next day the arbitration involving Dr. Carpenter was settled on terms that included Dr. Carpenter receiving a catastrophic impairment designation, a reinstatement of benefits, and payments of past medical and rehabilitative expenses with interest. The insurer also agreed to indemnify Dr. Carpenter in full for fees and disbursements.<sup>87</sup>

84. *Platnick, supra*, footnote 2 (Affidavit of Howard Platnick sworn May 20, 2016 at para. 3, Supreme Court of Canada Appeal Record in case 38374).

85. *Platnick, supra*, footnote 2, at paras. 10-18.

86. *Platnick, supra*, footnote 2, at paras. 196-201.

87. *Platnick, supra*, footnote 2, at para. 202.

The first question that Sibley and the insurer it represented should have asked was whether Dr. Platnick was a properly qualified expert when it came to reviewing and forming conclusions that were contrary to those of a psychiatrist and a psychologist. The fact that Dr. Platnick had training and experience in performing assessments under the *SABS* by itself was insufficient to qualify him to express an opinion on matters of psychiatry or psychology.<sup>88</sup> Opinions on matters of domestic law are generally inadmissible.<sup>89</sup>

Secondly, in effect Sibley had engaged Dr. Platnick to herd the medical facts into a form that could conveniently be presented to the FSCO adjudicator. This is the function of advocacy and not expert evidence. Expertise in the *SABS*, and how to present the findings of the physicians who examined Dr. Carpenter was the job of whomever the insurance company retained to represent it at the hearing. The presence in his report of phrases such as “I would conclude” were red flags to the adjudicator that the evidence failed to meet the minimum requirements for admissibility as Dr. Platnick had taken on the task of providing the conclusion that was the adjudicator’s responsibility. As stated in *Mohan*, “Expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is *essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.*”<sup>90</sup> Dr. Platnick was effectively set up for failure because those who instructed him did not keep his proper role or his interests in mind in the way Justice Arnold described that they should in *Medimmune*.

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88. Compare to *Cooper & Beatty v. Alpha Graphics Ltd.* (1980), 49 C.P.R. (2d) 145, 4 A.C.W.S. (2d) 360, 1980 CarswellNat 810 (Fed. T.D.) at paras. 68-69, 164-165 where a patent agent, Richard Parsons, with “a special interest, but no professional qualifications, in such things as lithography, map printing and the technical aspects of colour television” was called to give opinion evidence “in light of the prior art set forth the [sic] [Agreed Book of Prior Art], the process disclosed in the patent in issue [which concerned a specific method of making a printed image] was not obvious or previously disclosed in another patent”. His evidence was not accepted on the basis that “Parsons’ expertise does not lie in the area of the subject matter of the patent in issue, but rather in the construction of patents dealing with similar subjects” and that he lacked the relevant expertise.

89. *Assn. of Chartered Certified Accountants v. Canadian Institute of Chartered Accountants*, 2016 CF 1076, 2016 FC 1076, 149 C.P.R. (4th) 272 (F.C.) at paras. 29-33; Sopinka, *supra*, footnote 63, §12.181.

90. *Mohan*, *supra*, footnote 64, at 25 (g)-(j).

It becomes more problematic when the expert is expected to assist with any investigation, as is the case with forensic pathologists (among others).<sup>91</sup> This problem, of course, is not restricted to forensic pathologists. Forensic auditors and disputed document examiners also frequently assist in investigations. It is very difficult for an expert who assists in investigations over the years to avoid becoming an integral part of the investigative team. Once that happens, their ability to maintain the necessary objectivity is at risk of becoming impaired.<sup>92</sup>

Another issue with recurring experts is that over time some develop a taste for the intellectual challenge of a cross-examination, and become more focused on their expertise in giving testimony than in their field of study.<sup>93</sup> However stimulating this may be for the

91. *Goudge, supra*, footnote 75 (it is worth considering Justice Goudge's comments on Dr. Smith's practice of giving evidence in his Executive Summary (at vol. 1, 16-19, 26-27) and in particular Dr. Smith's evidence in respect of Sharon Reynolds. Sharon Reynolds, a 7½-year-old child, was found dead in June 1997 with dozens of penetrating wounds on her. The defence theory was that she had been attacked by a pit bull. Dr. Smith, despite having only seen one or two cases each of stab wounds and of dog bites, was adamant that Sharon had been stabbed, and her mother was charged with her murder. Eventually concerns over his conclusions became so great that a second autopsy was conducted, and eventually the Crown withdrew the charges.)

92. See Paciocco, *supra*, footnote 63 at 574-581 (under the heading "Adversarial Bias," he refers to a survey in which 70% of the medical experts canvassed reported being asked by lawyers to change their expert reports, and one-third complied. In the case of Dr. Carpenter, Justice Abella in *Platnick* (at para. 201) notes that three experts who examined Dr. Carpenter were asked by Sibley to revise their reports. Two refused while the third after "receiving these revisions from Sibley, he revised his report, removed the relevant finding of impairment, and agreed to defer to the conclusion of the 'lead physician', Dr. Platnick").

93. K.W. Brown, "The whole truth and nothing but . . . The soil scientist as an expert witness" (Sept./Oct. 1991) *Soils* 39. In this article Dr. Brown offers the following advice to soil scientists:

There are two prerequisites to look for in an effective expert witness. First, one must be qualified in the subject of interest or its underlying issue. Second, one must be adept at playing the 'mind games' that develop in the deposition and in the court room.

and

With some experience, an expert will be able to see ahead to where the questions are leading. The opposing attorney's goal is to try to lead an expert to say something that will be detrimental to one's opinions. Including in one's answers information that will damage or negate the theory the opposing attorney is pursuing should minimize their 'attack'. However, even if an expert thinks he or she can spar effectively with the attorney, do not be impolite or discourteous. Always behave as a

witness, it does not assist the court or tribunal in addressing the issues before it.

The problem we have is that expert opinion evidence is necessary, but by definition involves subject matter that is likely to be outside the experience and knowledge of a judge or jury. This makes it much more difficult for the trier of fact to judge the quality of the information being provided to them. If a physicist were to testify about the flavour of quarks, how would the trier of fact be able to tell whether the evidence they were hearing was true, or even made sense? It is unfair to label recurring experts who usually testify on one side of an issue as “jukebox” experts or “hired guns”.<sup>94</sup> When that happens, it is the lawyers and other representatives for a party who put the nickel in the slot and choose the tune. While the cases, and in particular *White Burgess*, describe the gatekeeper function that the court or tribunal has, it is important to note that lawyers have a professional responsibility to ensure that they do not encourage “jukebox” expert evidence.<sup>95</sup> At minimum, lawyers should not try to slip evidence that fails to satisfy the *Mohan* and *White Burgess* criteria past the gate.

In the 2014 Annual Review of Civil Litigation, Justice Archibald put forward a detailed checklist of questions to be asked about expert opinion evidence being tendered in evidence.<sup>96</sup> While he called it “The Soft Science Test”, the checklist is equally relevant to all expert opinion evidence, even the so-called “hard sciences” such as chemistry and physics. Not only is the checklist useful for judges to use in performing their gatekeeper function, it is also useful for lawyers who are considering obtaining expert evidence and also as a guide for cross-examination of an opposing party’s expert.

What *Platnick* demonstrates is that even with the directions in the jurisprudence, expert evidence that does not satisfy the *Mohan* and *White Burgess* criteria is still being admitted. Perhaps one thing that would limit the admission of expert evidence that fails to meet these criteria would be routine use of checklists, such as the checklist described by Justice Archibald. Checklists became routine in aviation more than 70 years ago, and are starting to make a positive impact in surgical outcomes. One study involved a checklist

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professional regardless of who has made the error.

94. See Paciocco, *supra*, footnote 63 at p. 566.

95. See Law Society of Ontario, *Rules of Professional Conduct* (Toronto: Law Society of Ontario, 2019) Chapter 5, at <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-5>.

96. The Hon Todd L. Archibald, *2014 Annual Review of Civil Litigation*, Chapter 1.

for insertion of a chest tube. Before the checklist, about 30% of the time one of five essential steps: washing hands; cleaning the site; draping the patient; donning surgical hat, gloves, and gown; and applying a sterile dressing was skipped or missed. After the checklist was implemented, infection rates fell from 4% of cases to zero.<sup>97</sup> In a study of the World Health Organization Surgical Safety Checklist, researchers found that 76% of operating staff agreed the checklist improved safety, 68% agreed it improved error prevention and 93% *would want the checklist used if they were having surgery*.<sup>98</sup>

There is no magic solution for all problems with expert opinion evidence, and particularly the problems associated with recurring issues and experts. Lawyers and judges must make a greater effort to ensure that such evidence is thoroughly examined and tested, both before it is tendered and also before it is admitted. Greater use of checklists would ensure that no essential issue was skipped or missed.

## VI. Filing Additional Evidence on Appeal

In *Pointes*, the court stressed the importance that courts take notice of “the limited record, the timing of the motion in the litigation process, and the potential of future evidence arising”.<sup>99</sup> But what if, instead of seeking to adduce newly discovered evidence, a party seeks to admit evidence that could have been presented to the trier of fact? The Supreme Court of Canada was faced with this very question in *Platnick*. The majority and minority differed on the proper application of the test for admitting such evidence, and in the process, showed the risk that parties face if they fail to put their best foot forward at the first instance.

The leading case on admitting fresh evidence on appeal is *R. v. Palmer*.<sup>100</sup> That case involved drug trafficking charges. After trial, a key Crown witness recanted his testimony. There was also evidence that the witness had received a large payment from the police just a week after the trial judgement was released.<sup>101</sup> The defendants appealed, and sought to admit the evidence. The court established a four-part test to determine whether to admit the evidence on appeal:

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97. E. Barlow, “A simple checklist that saves lives” (Fall 2008), *Harvard Public Health*, at <https://www.hsph.harvard.edu/news/magazine/fall08checklist>.

98. J.R. Treadwell, S. Lucas, A.Y. Tsou, “Surgical checklists: A systematic review of impacts and implementation” (2014), 23 *BMJ Quality & Safety* 299 at 301, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3963558/#R15>.

99. *Pointes*, *supra*, footnote 1, at para. 37.

100. (1979), [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, 50 C.C.C. (2d) 193 (S.C.C.) (*Palmer*).

101. *Ibid.* at para. 3.

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonably capable of belief, and
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

*Platnick* is the latest SCC decision to consider the *Palmer* test, and the approach taken by the court shows that leave to admit fresh evidence ought to be granted “sparingly”. Dr. Platnick sought to introduce several kinds of new evidence. These included pleadings and discovery transcripts from parallel proceedings, a letter from one of the doctors whose report was allegedly changed (the “Dua Letter”), and letters from the industry magazine publisher that reprinted Ms. Bent’s letter (the “KMI Letters”).<sup>102</sup>

The majority allowed the Dua Letter and KMI Letters to be admitted, while the minority would not have allowed any of the evidence to be admitted. Both decisions reflect the principle from *Pointes* that a court should consider the policy considerations underlying s. 137.1 motions when making any necessary determinations. *Platnick* is a warning to parties and their counsel of the importance of being diligent and pro-active in their efforts to bring evidence on a s. 137.1 motion. Recourse to the *Palmer* test should only be a last resort. Prudent counsel for a plaintiff in a case that arguably involves an expression on a matter of public interest will assume that a s. 137.1 motion will be forthcoming, and ensure that the necessary evidence is in hand, or can be quickly gathered before the statement of claim is served on the defendant.

The bulk of the *Palmer* analysis in both decisions related to the KMI Letters. The following section compares the approaches taken by the majority and minority in *Platnick* in their analysis of the *Palmer* criteria in relation to the KMI Letters.

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102. *Platnick*, *supra*, footnote 2, at paras. 31, 41-46.

**1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases**

As noted by the majority, the question on the due diligence analysis is when the party could have obtained the evidence, rather than mechanically reviewing the dates on which a party did obtain the evidence.<sup>103</sup>

The KMI Letters supported Dr. Platnick's position that Ms. Bent had given an interview to the publisher, and therefore she had a role in publishing the defamatory contents in the magazine.<sup>104</sup> Dr. Platnick began his defamation action against Ms. Bent on January 27, 2015, 17 months before the s. 137.1 motion was heard. In his statement of claim, he alleged that Ms. Bent had given an interview to the industry magazine.<sup>105</sup> The parties received a hearing date for the s. 137.1 motion on April 28, 2016. Ms. Bent was then cross-examined on her affidavit on June 6, 2016, and the alleged interview was not discussed. Dr. Platnick's counsel corresponded with the magazine editors in July 2016, well after the s. 137.1 hearing took place on June 27, 2016. Counsel then sought to introduce the evidence on November 8, 2016 – while the decision was under reserve with the motion judge.<sup>106</sup>

The minority faulted Dr. Platnick for missing opportunities to obtain the evidence from the magazine publishers earlier. Dr. Platnick raised the issue of this alleged interview, but his counsel failed to ask about it at cross examination. The minority found no good explanation for why counsel only emailed the magazine publishers after the hearing. As a result, the minority found that the KMI letters did not satisfy the due diligence requirement.<sup>107</sup>

By comparison, the majority excused the delay in obtaining the letters from KMI. Instead of focusing on the date the claim was issued, the majority focused on the 25 days that Dr. Platnick had to prepare his evidentiary record for the motion.<sup>108</sup> The majority was willing to relax the due diligence requirement because the type of evidence represented by the KMI Letters is often only attainable on discovery, or through motions for production of documents from a

103. *Platnick, supra*, footnote 2, at para. 55.

104. *Platnick, supra*, footnote 2, at para. 46.

105. *Platnick, supra*, footnote 2, at paras. 273-274.

106. *Platnick, supra*, footnote 2, at paras. 273-281.

107. *Platnick, supra*, footnote 2, at paras. 277, 284 and 286-287.

108. *Platnick, supra*, footnote 2, at paras. 58-59.

non-party. That type of evidence would typically be unavailable on the expedited time frame of a s. 137.1 motion, and therefore, Dr. Platnick should not be faulted for only obtaining it after the hearing.<sup>109</sup>

Tacitly, the majority conceded that Dr. Platnick and his counsel did not satisfy the due diligence requirement. Instead, the majority decision in *Platnick* reflects a policy choice to show some leniency while the s. 137.1 case law is still developing. Given the 5:4 split in that decision, counsel in any future case would be unwise to count on a court reaching a similar result in their case. Dr. Platnick did not have the benefit of two Supreme Court decisions laying out the s. 137.1 framework. With the decisions of *Pointes* and *Platnick* in hand, counsel should be particularly aware of their due diligence obligations before a hearing.

## **2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial**

Neither the majority nor the minority provided an in-depth analysis of the letters' relevance. The majority determined that the KMI Letters were relevant to the finding that Ms. Bent in some way authorized re-publication of her allegations, and as such, should have reasonably foreseen the harm that could flow from re-publication.<sup>110</sup> The minority would have held that the KMI Letters did not bear directly upon the defence of qualified privilege, as they had only speculative value with respect to re-publication and reasonable foreseeability.<sup>111</sup> Therefore, for the minority, the letters were of no assistance to the determination of whether Ms. Bent's email was reasonably appropriate in the circumstances.<sup>112</sup>

Similarly, the majority relied on the Dua letter to defeat the potential defence of justification.<sup>113</sup> That letter confirmed that Dr. Platnick had not changed Dr. Dua's conclusion, but rather, had relied on an updated version of her report, which was prepared after the two had spoken about the initial draft.<sup>114</sup> By comparison, the minority relied on the fact that Ms. Bent had no knowledge of the second revised report from Dr. Dua.<sup>115</sup>

109. *Platnick*, *supra*, footnote 2, at paras. 55-60.

110. *Platnick*, *supra*, footnote 2, at paras. 154-158.

111. *Platnick*, *supra*, footnote 2, at para. 297.

112. *Platnick*, *supra*, footnote 2, at para. 296.

113. *Platnick*, *supra*, footnote 2, at paras. 63 and 117-118.

114. *Platnick*, *supra*, footnote 2, at para. 70.

115. *Platnick*, *supra*, footnote 2, at paras. 191-195.

The determinations of relevance were key features of both decisions in *Platnick*, and they supported the ultimate disposition of the appeal. The takeaway for counsel is that relevance is subject to interpretation. A party that is seeking leave to introduce fresh evidence must present a clear theory of how the evidence goes to an issue on appeal. Even if a party does so, it is still possible that a well-informed court could reach opposite conclusions about the relevance of the evidence.

### **3. The evidence must be credible in the sense that it is reasonably capable of belief**

To be “credible” for the purpose of a *Palmer* analysis, the evidence must be “reasonably capable of belief when viewed in the context of other evidence relevant to that issue.”<sup>116</sup> The majority found that the Dua Letter and KMI letters “bolster[ed] a pre-existing predicate of facts.”<sup>117</sup> The minority pointed out that the letters were untested,<sup>118</sup> but the majority found that the purpose of admitting the evidence here was to perform a screening exercise of Dr. Platnick’s claim.

The unanimous court in *Pointes* stated that full testing of evidence, and ultimate determinations of credibility should not be conducted on a s. 137.1 motion. Section 137.1 motions are made at an early stage in the proceeding. At most, a motion judge should conduct limited weighing of evidence, and a judge should at most make preliminary assessments of credibility, keeping in mind that a s. 137.1 motion is not an adjudication on the merits.<sup>119</sup> The minority raised concerns about credibility that go to weight of the evidence, rather than the quality of the evidence, if believed. These concerns included the fact that the evidence constituted hearsay, and that the evidence was unsworn and untested.<sup>120</sup>

The problem with admitting any evidence on appeal is that a party is asking an appellate court to assess the evidence and its credibility<sup>121</sup> without the benefit that a motion judge enjoys, of being closer to the full evidentiary record on the motion. The *Palmer* test necessarily has deficiencies. An appellate court does not have full access to the evidentiary record, but the court still has to consider how the proposed new evidence would mesh or clash with the

116. *Platnick, supra*, footnote 2, at para. 66.

117. *Platnick, supra*, footnote 2, at para. 67.

118. *Platnick, supra*, footnote 2, at para. 293.

119. *Pointes, supra*, footnote 1, at para. 52.

120. *Platnick, supra*, footnote 2, at paras. 266, 271, 293-294.

121. *R. c. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, 148 C.C.C. (3d) 193 (S.C.C.), at para. 27.

existing evidentiary record. This introduces another element of risk for litigants, because a party on appeal has few means of addressing a court's concerns about the credibility of the proposed evidence.

**4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result**

This final point considers the potential probative value of the evidence. To succeed on this point, a party must show that the proposed new evidence, when considered against the existing evidentiary backdrop, could affect the result. The minority, in deciding not to admit the evidence, noted that the evidence in the KMI Letters would directly contradict evidence that was properly in the record.<sup>122</sup> That complaint seems to go against the purpose of the fourth *Palmer* criterion. New evidence that is capable of affecting the result is very likely to be evidence that directly contradicts existing evidence in the record. In fact, the majority relied on the fact that the KMI Letters directly contradicted Ms. Bent's Statement of Defence to grant their admissibility.<sup>123</sup>

A key distinction between the majority and minority decisions was their willingness to accept the evidence for the truth of its contents. The majority relied on the contents of the KMI Letters to undermine the defence of qualified privilege, and to find a basis where the harm Dr. Platnick suffered could have "as a result" of Ms. Bent's expression.<sup>124</sup> The minority would not have considered the KMI Letters for the truth of their contents, because they contained untested hearsay, and because relying on the letters would at most produce a speculative theory of how the motion judge could have reached a different conclusion.<sup>125</sup>

The majority's generous reading of the letters and willingness to relax the *Palmer* factors likely would not be followed in future cases. For an advocate seeking to rely on *Platnick* in a future case, it will be important to remember that the majority's assessment was at least partially based on the novelty of s. 137.1 motions. Therefore, even though the majority forgave various deficiencies in the new evidence in this case, it is not likely that they would do so in the future. The minority decision is likely to be influential going forward, as an

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122. *Platnick*, *supra*, footnote 2, at para. 295.

123. *Platnick*, *supra*, footnote 2, at para. 71.

124. *Platnick*, *supra*, footnote 2, at para. 71.

125. *Platnick*, *supra*, footnote 2, at paras. 296-297.

example of how the court would view similar evidence without any granting of leniency.

### **5. The Federal Courts and Ontario Courts follow similar principles in considering fresh evidence**

Section 134(4)(b) of the Ontario *CJA*<sup>126</sup> governs the admission of fresh evidence on appeal. Rule 61.16(2) of the *Rules of Civil Procedure*<sup>127</sup> provides the procedure for doing so, which is to bring a motion before the appellate court panel. *Sengmueller v. Sengmueller*<sup>128</sup> is a leading case that applies these rules. In *Sengmueller*, the Court of Appeal for Ontario considered whether a court should admit fresh evidence that did not exist at the time of trial.<sup>129</sup> The court admitted the evidence to avoid “a substantial injustice in result”, but the court noted two policy concerns that will usually count against doing so.<sup>130</sup> First, admitting new evidence can raise new issues on appeal, turning an appellate court into a trial court. The minority raised this concern in *Platnick*, suggesting that appeals are meant to narrow the scope of issues, rather than broaden them.<sup>131</sup> Second, trials must end. In *Sengmueller*, the court emphasized that there must be finality in the trial process.<sup>132</sup> Similarly, in *Platnick*, the minority identified the legislative intent to have “expedited proceedings under s. 137.1”. These policy considerations highlight the limited circumstances in which a party will succeed on a motion to admit fresh evidence.

The case law on Rule 351 of the *Federal Courts Rules* sets a similar standard for the admission of fresh evidence on appeal. In *BC Tel v. Seabird Island Indian Band (Assessor of)*,<sup>133</sup> the Federal Court of Appeal allowed fresh evidence as a matter of discretion. The court in *BC Tel* emphasized that it had discretion to admit evidence – even if the *Palmer* factors are not met – to ensure the court has a complete record on appeal.<sup>134</sup> Similarly, the majority in *Platnick* exercised their overriding discretion to relax the “due diligence” factor of the *Palmer* test. Section 137.1 motions are relatively new, and the court

126. R.S.O. 1990, c. C.43.

127. R.R.O. 1990, Reg. 194.

128. (1994), 111 D.L.R. (4th) 19, 25 C.P.C. (3d) 61, 1994 CarswellOnt 375 (Ont. C.A.) (*Sengmueller*).

129. *Sengmueller*, *supra*, footnote 128 at para. 10.

130. *Sengmueller*, *supra*, footnote 128 at para. 10.

131. *Platnick*, *supra*, footnote 2, at paras. 288-292.

132. *Sengmueller*, *supra*, footnote 128 at para. 10.

133. 2002 FCA 288, 216 D.L.R. (4th) 70, [2003] 1 F.C. 475 (Fed. C.A.) (*BC Tel*).

134. *BC Tel*, *supra*, at para. 30.

allowed the evidence because there was ambiguity surrounding the nature and comprehensiveness of the evidentiary record required on such a motion.<sup>135</sup>

The takeaway from these decisions is the general rule that fresh evidence will not be admitted as a matter of course. Parties must lead with their best evidence and put their best foot forward at trial.<sup>136</sup> It would be unfair to admit fresh evidence on appeal if a party willingly ignores these obligations. Regrets about arguments not made and evidence not led are part of the life of an advocate. The closely decided case of *Platnick* underscores the importance of due diligence in bringing forward all relevant evidence at the initial hearing, and the risks of failing to do so. As one of the most recent applications of that test, *Platnick* is an important case for any practitioner to consider when seeking leave to admit new evidence.

## VII. Why Good Legal Drafting Matters

*Platnick* and *Pointes* are both good examples of why parties should thoroughly consider the words in an agreement before establishing a contractual relationship. As these decisions illustrate, while contractual wording may seem crystal clear when the parties form a contract, language can suddenly become controversial by the time it is reviewed again, often at a point where much more is at stake. “Clarity” when drafting a contract is contextual. While the language of a contract may be clear for a particular purpose, it may be ambiguous or not fit for purpose, if the parties apply the agreement in a different context than the parties originally contemplated when they negotiated their agreement.

Often, the pressure associated with closing a transaction, reaching a settlement, or rushing to join an online forum causes lawyers to ignore the possible risks and the severity of those consequences. However, good lawyering requires looking beyond the four corners of the document and considering the possible interpretations of contractual terms, and the contingencies arising from them.

Courts and commentators often say that the purpose of contract law is to protect the reasonable expectations of contracting parties; that is, to provide an effective and fair framework for contractual dealings based on the intention of the parties at the time of contract formation.<sup>137</sup> In *Platnick*, by subscribing to the OTLA Listserv, Ms.

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135. *Platnick*, *supra*, footnote 2, at paras. 50-53 and 59-61.

136. *Platnick*, *supra*, footnote 2, at para. 288.

137. S. Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters Canada), at p. 25.

Bent consented to a user agreement that required her not to “send, resend, or disseminate any material that is or may be *defamatory* or *otherwise actionable*” (emphasis added).<sup>138</sup> On its face, the provision shows little ambiguity. Ostensibly, the clause shows OTLA’s intention to limit the type of content that subscribers could post on the Listserv, and its expectation that subscribers not post controversial information that could attract liability. This is a plain reading of the provision.

Although OTLA was not a party to Ms. Bent’s s. 137 motion, the court considered this clause when assessing her defence of qualified privilege. On a plain reading of the provision, the majority found that Ms. Bent breached the user agreement by sending her defamatory email. As the user agreement explicitly precluded members from exchanging defamatory communications, Ms. Bent could not rely on the confidentiality clause. Therefore, Ms. Bent was unable to rely on the user agreement to advance her qualified privilege defence.<sup>139</sup> In hindsight, OTLA could have clearly outlined what it meant by a defamatory or otherwise actionable post, as it recently did by amending its user agreement. The revised language now prohibits subscribers from posting material that is “obscene, offensive, inflammatory, libelous, derogatory, or any language directed to harm someone personally”.<sup>140</sup> With this type of language, it would have been clear to Ms. Bent that while she could use the Listserv to alert her OTLA colleagues to always get full discovery, singling out Dr. Platnick by name would be inappropriate and could attract liability.

A well-written agreement clearly articulates the parties’ original intentions and leaves no room for ambiguity or inconsistency. *Pointes* is an example where good drafting prevented the other party from arguing that something else was intended. The agreement at issue in that case was one that most lawyers are very familiar with – a settlement agreement. According to Ontario’s Ministry of Attorney General, between 95% and 97% of all civil cases are settled prior to reaching a final disposition in court.<sup>141</sup> The purpose of settling cases

138. Ontario Trial Lawyers Association, “Undertaking and Indemnity” (Toronto: OTLA), unpublished (*OTLA Listserv User Agreement*); *Platnick, supra*, footnote 2 at para. 131. This type of clause is not unpopular. For example, the Criminal Lawyers Association has an almost identical clause (“Listserv – The Criminal Lawyers Association”) at <https://criminallawyers.ca/members-only/listserv>.

139. *Platnick, supra*, footnote 2, at para. 131.

140. OTLA revised undertaking. *Platnick, supra*, footnote 2 (Factum of the Appellant at para. 2, available in Supreme Court of Canada docket 38374 Supreme Court of Canada docket 38374).

is to avoid the costs and uncertainty of pursuing litigation through the judicial procedure. However, a settlement can lead to future problems if the parties do not clearly set out the specific obligations of the parties, the scope of the agreement and the claims that are being settled. These problems are often what the parties intended to avoid in the first place. Again, language always matters: the clearer those intentions appear in the text of the contract, the less risk a court will come to an interpretation that one of the parties may not have contemplated.

In *Pointes*, there were two outstanding proceedings regarding a proposed residential development: an application for judicial review, and a hearing before the OMB. The application for judicial review was brought by the Association, to challenge the Conservation Authority's decision to approve the development. At the same time, the Developer had appealed Council's decision to the OMB, because Council did not approve the development. While the OMB appeal was pending, the Developer and the Association entered into settlement discussions, and ultimately reached an agreement to settle the Association's judicial review application.<sup>142</sup>

The Minutes of Settlement clearly contemplated that the Association was seeking to participate in the OMB appeal, and simply provided that the Association and its members were not to take either of the following positions:

- 1) that the Conservation Authorities' resolutions are "illegal or invalid or contrary to the provisions" of the [Act], or
- 2) that the Conservation Authority "exceeded its jurisdiction in passing the resolutions".<sup>143</sup>

At the OMB hearing, the Association gave evidence about wetland destruction and the adverse effects of the proposed development, claiming that the proposed development did not comply with provincial laws regarding wetland development. After the OMB dismissed the appeal, the Developer brought a claim against the Association for breach of contract. On the s. 137.1 motion brought by the Association, the court found that the Developer had tried to advance an interpretation that clashed with the plain language of the contract. The Settlement Agreement had been clearly drafted, but not in a way that helped the Developer.<sup>144</sup>

141. Ontario, Ontario Court of Justice and Ministry of the Attorney General, *Civil Justice: First Report* (Toronto, Publications Ontario (7 March 1995) (Co-chairs: R Blair J. and S. Lang).

142. *Pointes*, *supra*, footnote 1, at para. 87.

143. *Pointes*, *supra*, footnote 1, at para. 88.

When drafting a contract, the lawyer should always determine the reasons their clients want to enter into the contact, and consider whether entering into this contractual relationship will enable the client to meet his or her objectives. Foresight in this case should have been possible. The Developer knew about the OMB hearing, and should reasonably have known that the Association could raise the type of arguments it did at the hearing. Yet, nothing in the Minutes of Settlement stated that the Association would not raise any factual issues regarding the wetlands at the OMB hearing. To minimize litigation, lawyers must also consider as many possibilities as they can conceive prior to finalizing the agreement. It seems clear that the Developer knew that the Association would not give up its right to oppose the Developer's OMB appeal.<sup>145</sup> Unable to secure a settlement of the OMB appeal on terms that would permit it to proceed with its development, the Developer sought to use the settlement of the judicial review application to "imply" a term to which it knew the Association would never agree.

Applying the customary principles of contractual interpretation, which requires courts to ascertain the objective intent of the parties and consider of the surrounding circumstances at the time of the execution of the contract, the court found that the Developer's breach of contract claim was not legally tenable. The decision confirms that being a good lawyer requires much more than simply writing clear and unambiguous contracts. A sound understanding of the purpose of entering into the agreement is therefore essential for parties to avoid unintended consequences. In a case such as *Pointes*, counsel must avoid ambiguous language that can later allow the opposite party to argue for an implied concession that the parties never agreed to.

### **VIII. Can a Contract Limit a Party from Giving Evidence in a Subsequent Proceeding?**

This is an issue hinted at, but not answered in *Pointes*.<sup>146</sup> In the course of weighing the public interest element, the court noted that testimony before an adjudicative tribunal militates in favour of protecting it, and also noted the absolute privilege from defamation proceedings accorded to a witness who gives evidence.

In intellectual property cases it is common to include a term that the settling party will not contest, or assist any other party in

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144. *Platnick, supra*, footnote 2, at para. 107.

145. *Pointes, supra*, footnote 1, at paras. 109-110.

146. *Pointes, supra*, footnote 1, at paras. 120-124.

contesting the validity of the intellectual property right that was the subject of the litigation. This type of term is often referred to as a “no-challenge clause”. Such terms are rarely litigated, but the Ontario Divisional Court recently dealt with an agreement with a no-challenge clause in *Loops, L.L.C. and Loops Flexbrush, L.L.C v. Maxill Inc.*<sup>147</sup>

Loops was the owner of a Canadian patent, and sued Maxill for infringement in the Federal Court. The Federal Court conducted a mediation, which resulted in a settlement. The settlement provided for a consent judgment providing, among other things, that Maxill had infringed the patent. It also included a term that Maxill would not make, have made, sell or offer to sell the infringing device (a toothbrush) anywhere in the world and it would not directly or indirectly assist any person in attacking the validity of certain listed intellectual property. The schedule listing the intellectual property covered by the agreement included a United States counterpart to the Canadian patent that had been in issue.

Loops learned that Maxill was selling a toothbrush in the United States that it believed was contrary to the settlement agreement. It commenced proceedings in Ontario for breach of contract. It also started a patent infringement action in the United States District Court for the District of Utah naming Maxill as a defendant. Later, a subsidiary of Maxill incorporated in Ohio started an action in the United States District Court for the Western District of Washington seeking a declaration that it did not infringe the United States patent and that the United States patent was invalid. In due course the two cases were consolidated and continued in the Western District of Washington. Loops brought a motion to stay the consolidated proceeding in Washington, but the stay was denied.

Consequently, Loops brought a motion in its Ontario action to obtain an interlocutory injunction enforcing the no-challenge clause against Maxill. In dismissing the motion, the court determined that that the no-challenge clause was unenforceable as contrary to the public interest. On appeal, the Divisional Court recognized that there might be limits to the power to contract where the public interest is harmed.<sup>148</sup> That said, it held that in order to void a clause in a settlement agreement in which a party gave up a defence in any

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147. *Loops L.L.C. v. Maxill Inc.*, 2020 ONSC 5438, 326 A.C.W.S. (3d) 477, 2020 CarswellOnt 17205 (Ont. Div. Ct.) (*Loops*). In this article, the plaintiffs are referred to collectively as Loops. The reasons contain material subject to a protective order, and the public version of the reasons contains several redactions of some of the terms of the settlement agreement.

148. *Loops, supra*, at para. 50.

future proceeding would require evidence that would enable “the court to weigh the implications (both negative and positive) of enforcing the no-challenge clause against the implications of refusing to do so”. Ultimately, the Divisional Court concluded that *Loops* had made out a *strong prima facie* case that the no-challenge clause should be enforced, and allowed the appeal and granted the injunction.

While *Loops* establishes that no-challenge clauses are not contrary to public policy as such, there remains an area to be explored between the finding in *Loops* and the extent to which a clause might limit the giving of testimony in some subsequent case as hinted at in *Pointes*. Consider a case involving a trademark that is settled part way through a trial and before judgment with a standard no-challenge clause. Assume the defendant adduced evidence at trial through an employee to prove that the trademark was not distinctive and consequently invalid. The situation that will challenge the limits of a no-challenge clause will be one in which a completely independent party in subsequent litigation summons the settling defendant’s employee to repeat the evidence given in the settled proceeding.

### **IX. Think Before You Post on Your Listserv Next Time**

When a lawyer is seeking to share information or learn about specialized practice areas, they may turn to fellow practitioners in that field, through a Listserv managed by a professional association. This could be to discuss legal issues, to address practice-related questions, or to socialize with other practitioners. A Listserv managed by a professional association is typically restricted to members of that association, all of whom must consent to a user agreement, which typically clarifies the Listserv’s confidentiality and eligibility requirements.

Although Listservs are a valuable tool for exchanging information and fostering communication among practitioners with similar interests, *Platnick* reminds lawyers to be mindful when sending or responding to emails in such a context. Given the inherently public nature of mass email communication (or frankly any electronic communication), there is always the risk that the contents of Listserv-distributed messages will not be kept confidential, even if so intended by the association, or so required of the practitioners.

Communication via email distribution lists presents the possibility of confidential information being forwarded within seconds to a large number of people. It is therefore wise to exercise

extreme caution when posting information online. After all, new technology does not relieve lawyers of their duty of confidentiality. Once one sends an email, all control is lost. If the recipient forwards it, the original sender cannot know who the end reader may be, nor can one predict how any of recipients may react to a note. Therefore, lawyers should avoid including controversial and client-specific information.

Ms. Bent sent the email that was the subject of *Platnick* through a Listserv with approximately 670 subscribers, all of whom had undertaken to maintain in strict confidence the information, opinions and comments shared by fellow Listserv members. Notwithstanding the confidentiality undertaking, one of the subscribers leaked the alleged defamatory email, which ended up being re-published in an insurance trade magazine. As previously noted, the majority in *Platnick* found that Ms. Bent could not rely on the confidentiality provision of the Listserv agreement because her post violated the terms of that agreement.

To the authors' knowledge, there is no case law addressing the confidentiality of communications exchanged via a Listserv. The majority decision in *Platnick* is a warning to lawyers who communicate via Listservs; that qualified privilege will not attach to Listserv communications just by virtue of the email distribution list being closed, or by it being treated as a private forum for subscribers to exchange ideas. There are always other considerations, including whether the communication, or all the contents of the communication, is necessary or appropriate.

Justice Abella, writing for the minority in *Platnick*, connected a lawyer's duty to "strictly and scrupulously fulfill" their undertakings with Ms. Bent's reasonable expectation that the Listserv members would uphold their confidentiality obligations.<sup>149</sup> This supports a finding of qualified privilege attaching to the Listserv communications, because there were inherent protections created by lawyers' duties under the Rules of Professional Conduct.<sup>150</sup> The core portion of qualified privilege – that there was some duty to be fulfilled (broadly construed) – came from Ms. Bent's obligations to inform her colleagues of "questionable conduct" by an insurer's expert.<sup>151</sup> Therefore, Ms. Bent would have an argument that she communicated appropriate information to appropriate people, using an appropriate means of communication.<sup>152</sup>

149. *Platnick*, *supra*, footnote 2, at para. 242.

150. *Platnick*, *supra*, footnote 2, at para. 243.

151. *Platnick*, *supra*, footnote 2, at para. 227.

152. *Platnick*, *supra*, footnote 2, at para. 243.

Rather than attacking the supposed duty identified by Justice Abella, the majority relied on other terms of the Listserv agreement to decide this point. Whether Ms. Bent had a viable defence of qualified privilege turned on the scope of communications covered and protected by the Listserv agreement. Because the agreement explicitly prohibited potentially defamatory communications, the defence of qualified privilege failed. There were several ways for the majority to have vitiated the defence of qualified privilege. They chose to rely on contractual interpretation. Lawyers should always be careful to understand what terms govern their means of communication.

As social networking sites and tools become more popular, lawyers are more likely to continue use of those methods when seeking guidance from their colleagues. The ease of email communication and the rapid responses of multiple people via Listservs may entice lawyers to exchange communications without carefully considering whether they are disclosing more information than necessary. As Listservs have the potential to disclose sensitive information that the sender intends to treat as confidential to a large audience, lawyers who choose to use such forums should presume that everything they say or do will eventually become public. A practical process that would avoid many difficulties involves a question to oneself before the communication is sent or posted: "If my communication came up in subsequent litigation, and the opposite lawyer asked for it to be marked as an exhibit, how would I feel about that?" If there is any possibility that having the communication made an exhibit would be a bad outcome, the communication should be rewritten until you would be happy to have it made an exhibit.

## **X. Conclusion**

While the decisions of the Supreme Court of Canada in *Pointes* and *Platnick* are important for their exposition of the proper application of s. 137.1 of the *CJA*, this is not their only importance. That one of the two cases arose from an alleged breach of an agreement settling litigation makes it clear that the reach of s. 137.1 of the *CJA* goes beyond defamation cases. Lawyers who draft agreements that seek to limit disclosure of information, including confidentiality agreements and non-disclosure agreements, will want to reconsider both the way they draft such agreements and the advice they give their clients on the ability to enforce such agreements. The cases also highlight the importance of careful contract drafting

generally. A provision that directs users of a Listserv or website not to “send, resend, or disseminate any material that is or may be defamatory or otherwise actionable” provides very broad protection to the party responsible for operating the Listserv or website. However, it effectively means that users must be confident they would succeed on a motion under Rule 21.01(1)(b)<sup>153</sup> to “to strike out a pleading on the ground that it discloses no reasonable cause of action or defence” before using the service. This is hardly likely to encourage use of the service.

Even though a failed motion under s. 137.1 of the *CJA* “is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence”,<sup>154</sup> before advising such a motion counsel will want to consider whether a finding that there are “grounds to believe” that the defendant has “no valid defence” may impair the defendant’s case as it proceeds. As a practical matter, it seems certain to be a finding that any plaintiff would emphasize during mediation and would likely raise the plaintiff’s expectations for settlement. Based on experience with other “non-determinative” proceedings, such a finding has the potential to have a direct effect on the ultimate outcome of the case. What happens in a s. 137.1 motion may not stay in the s. 137.1 motion.

The cases require us to consider yet again the particular problems posed by expert evidence. Among other things, we need to find a way to ensure that expert testimony is consistently limited to cases where the judge or other trier of fact lacks the special knowledge or skill necessary to draw true inferences from facts stated by fact witnesses. It is also clear that expert evidence on recurring issues poses additional problems. We believe that more consistent use of checklists by both lawyers and judges will improve the consistency in evaluating expert evidence when it is tendered in court.

*Pointes* and *Platnick* are two cases over which thoughtful lawyers will choose to linger. Beyond exploring the limits of freedom of expression, they challenge us to consider other elements of legal practice and how we can improve them.

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153. Rule 21.01(1)(b), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended

154. *Pointes*, *supra*, footnote 1, at paras. 37 and 50; *Platnick*, *supra*, footnote 2, at paras. 4, 48 and 176.