SCC Court File No.: 38376

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

B E T W E E N:

1704604 ONTARIO LIMITED

APPELLANT
(Respondent)

-and-

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

RESPONDENTS
(Appellants)

FACTUM OF THE APPELLANT, 1704604 ONTARIO LIMITED

(Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I: OVERVIEW AND STATEMENT OF FACTS

Overview

1. This appeal is about the statutory interpretation of legislation in important areas of private ordering and public interest.

2. It concerns the sanctity of contracts and, more specifically, the finality of settlement agreements. It is about whether a party who has breached a contract can tactically use Ontario's anti-SLAPP legislation to avoid liability for the breach.

3. Ontario's anti-SLAPP legislation is found in section 137.1 of the *Courts of Justice Act*.[1] It purports to balance the important public policies favouring free expression and access to justice.

4. The legislation's purpose is to prevent meritless litigation brought primarily to silence those who speak out on matters of public importance. The legislation is not a means for defendants to escape their legal obligations under a contract.

5. 1704604 Ontario Limited (hereinafter "170") submits that if the legislation is interpreted as being overly broad and unfettered in its scope and application, it will have the unintended consequence of limiting plaintiffs' rights to access justice by preventing valid claims from continuing past their early stages.

6. Such a result is antithetical to the legislation's purpose and the mischief it is designed to cure.

7. The motion judge's decision recognized that 170's claim is about the sanctity of agreements made between parties. It is not a claim that is frivolous or fleeting, but rather one of substance.

8. The motion judge's decision also recognized that the hurdles set by the legislation should not be set so high as to chill plaintiffs from bringing forward valid claims.

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[1] *Courts of Justice Act*, RSO 1990, c C.43, s 137.1 ("Ontario's anti-SLAPP legislation" or "the legislation").

9. The motion judge balanced the public interest in the proceeding continuing against the public interest in protecting impugned expression. In doing so, the motion judge found that 170's claim was not only about a breach of contract, but also about how courts should treat settlement agreements. As such, the important public interest in the proceeding merited its continuation.

10. The Ontario Court of Appeal (the "Court of Appeal") disagreed with the motion judge and interpreted the legislation broadly, setting too low a hurdle for defendants seeking to invoke the legislation and too high a hurdle for plaintiffs with valid claims to overcome. The result is that the decision endorses the very mischief the legislation was designed to cure, chilling those with otherwise valid claims and denying them access to justice.

11. The legislation must protect a litigant's fundamental right to access to justice while ferreting out those proceedings brought, not in hopes of success, but in hopes of silencing the opposition. The Court of Appeal erred in ignoring the approach that is called for by the legislation. This Court should allow the appeal and interpret the legislation so that these competing interests are balanced.

Facts relating to the cause of action

12. The Appellant, 170, sought to develop an ecologically friendly 91-lot subdivision in the Pointe Louise area of Sault Ste. Marie, Ontario (the "Development").[2] The Development was expected to inject $100 million into the local economy and provide the City of Sault Ste. Marie an additional $700,000 in annual municipal tax revenue.[3]

13. The Respondent, the Pointes Protection Association, is an association created by a minority of neighbouring residents to oppose the Development. The Pointes Protection Association was led by its president Peter Gagnon (collectively with the other Respondents, the "PPA").[4]

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[2] Reasons on Motion of Justice Edward Gareau, Ontario Superior Court, heard April 25, 2016, dated/filed May 9, 2016 ("Motion Judge's Reasons") at para 4, Appeal Record ("AR"), Vol. 1, Tab 1, p.2.
[3] *Ibid* at para 25, AR, Vol. 1, Tab 1, p. 6.
[4] *Ibid* at para 33, AR, Vol. 1, Tab 1, p. 6.

The Development required Sault Ste. Marie Region Conservation Authority Approval

14. Under the *Conservation Authorities Act*[5] and Ontario Regulation 176/06 Sault Ste. Marie Conservation: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses Authority[6] ("Ontario Regulation 176/06"), 170 required approval from the Sault Ste. Marie Region Conservation Authority (the "SSMRCA") to develop in a wetland.[7]

15. Specifically, subsection 2(1) of Ontario Regulation 176/06 prohibits development in a wetland unless the developer obtains permission to develop.

16. Subsection 3(1) of Ontario Regulation 176/06 provides that the SSMRCA can grant permission for the Development "if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land [would] not be affected by the development".[8]

SSMRCA eventually approved the Development

17. On June 15, 2010, the SSMRCA declined 170's initial application for approval to develop a wetland.[9] The SSMRCA's decision was influenced by Frank Breen, a U.S.-based hydrogeologist who the SSMRCA had hired to peer review the studies 170 submitted as part of its application. Mr. Breen was highly critical of 170 and believed the Development would interfere with the wetland's hydrologic function.[10]

18. 170 appealed the SSMRCA's decision to the Mining and Lands Commissioner. The appeal settled when 170 agreed to complete a site-specific hydrogeological study.[11]

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[5] *Conservation Authorities Act*, RSO 1990, c C.27.
[6] O Reg 176/06: Sault Ste. Marie Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses.
[7] *Ibid*, s 2(1).
[8] *Ibid*, s 3(1).
[9] Motion Judge's Reasons, *supra* note 2 at para 5, AR, Vol. 1, Tab 1, p. 2.
[10] Technical Opinion Evaluation of the Proposed Pointe Estates Development Report by Frank Breen dated December 26, 2011 (without appendices), AR, Vol 7, Tab 15, pp. 314-315.
[11] Motion Judge's Reasons, *supra* note 2 at para 5, AR, Vol. 1, Tab 1, p. 2.

19. 170 completed the hydrogeological study and renewed its application to the SSMRCA. The study's conclusions satisfied the SSMRCA that the Development "would not pose a threat to the on-site wetland" and the SSMRCA approved the Development.[12]

20. The SSMRCA's approval of the Development put to rest the issues that were under its exclusive jurisdiction: that the Development would not affect "the control of flooding, erosion, dynamic beaches, pollution or the conservation of land".[13]

The PPA's Application for Judicial Review

21. After SSMRCA approved the Development, 170 applied to the City of Sault Ste. Marie for rezoning, an official plan amendment and variances which were required for the Development to proceed (the "City Application"). The City Application was scheduled to be heard on July 15, 2013.[14]

22. On March 13, 2013, the PPA filed an Application for Judicial Review of the SSMRCA's decision to approve the Development (the "Judicial Review Application"). Initially only the SSMRCA was a named respondent. 170 was later added as a respondent.[15]

23. Among other relief, the PPA sought a declaration that the SSMRCA's resolutions approving the Development were illegal and invalid because they were contrary to the *Conservation Authorities Act* and Ontario Regulation 176/06.[16] Simply put, the PPA took the position that the Development was contrary to the *Conservation Authorities Act*, and Ontario Regulation 176/06.

24. The most salient grounds cited by the PPA included that the Development would destroy a substantial portion of the wetland, interfere with hydrologic function of the wetland, and degrade surface and ground water

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[12] *Ibid* at para 6, AR, Vol. 1, Tab 1, p. 2.
[13] O Reg 176/06, *supra* note 6 s 3(1)
[14] Motion Judge's Reasons, *supra* note 2 at para 15, AR, Vol. 1, Tab 1, p.58.
[15] Endorsement on Security for Costs, Ontario Superior Court of Justice, dated August 20, 2013 ("Endorsement on Security for Costs") at para 3, AR, Vol. 2, Tab 7, p.10.
[16] Notice of Application to Divisional Court for Judicial Review, Superior Court of Justice (Divisional Court) dated March 19, 2013 (Pointes Protection Association v Sault Ste. Marie Region Conservation Authority and 1704604 Ontario Ltd.), AR, Vol 2, Tb 6, pp. 1-8.

25. In its Judicial Review Application, the PPA relied upon an affidavit sworn by Peter Gagnon, the PPA's President, alleging that the Development would result in a loss or impairment of wetland function and that the Development conflicted with wetland management practices.[17]

Sault Ste. Marie City Council Denied the City Application

26. Before the Judicial Review Application was heard by the Court, the City Application was heard by Sault Ste. Marie City Council. During the hearing of the City Application, Peter Gagnon, the PPA's President, and Frank Breen, the hydrogeologist that had been retained by SSMRCA, appeared before Council to oppose the Development. Although City Staff supported 170's Application, Council defeated the City Application with a 7 to 4 vote.[18]

27. On July 26, 2013, while the Judicial Review Application was ongoing, 170 filed an appeal of the City's decision to the Ontario Municipal Board ("OMB").

The PPA was ordered to pledge $20,000 as security for costs

28. Before the Judicial Review Application was heard, 170 moved for an order requiring the PPA to post security for costs.

29. The court ordered the PPA to post $20,000 in security for costs,[19] holding that PPA was not a public interest litigator as the "[Development] involves a localized area of Sault Ste. Marie and will not have repercussions for the general public. Its opposition appears to reflect a NIMBY "Not in My Backyard" attitude. The members seem to want to protect the neighbourhood even though the great majority of the neighbourhood has shown no interest in opposing the [Development]."[20]

The PPA's Judicial Review Application settled

30. Shortly after Justice Del Frate's order for security for costs, the Judicial Review Application was settled by way of Minutes of Settlement dated September 17, 2013 (the

[17] Frank Breen, previously retained by the SSMRCA, took a position against his former client and swore an affidavit in support of the Application for Judicial Review in which he reiterated his criticism of 170's studies and questioned their conclusions.

[18] Motion Judge's Reasons, *supra* note 2 at para 15, AR, Vol 1, Tab 1, p. 5.
[19] *Ibid* at para 24, AR, Vol. 2, Tab 7, p. 12.
[20] *Ibid* at para 29, AR, Vol. 2, Tab 7, p. 13.

"Minutes")[21] and the Judicial Review Application was dismissed on a "with prejudice" basis without costs. The Minutes were executed by the members of the PPA's executive committee, including Peter Gagnon, and authorized representatives of the SSMRCA and 170.

31. The Minutes were drafted using broad language. The Minutes pre-dated the enactment of the anti-SLAPP legislation. The salient paragraphs of the Minutes provide as follows:

(a) **Paragraph 3: dismissal on a "with prejudice" basis**. Paragraph 3 states that the Judicial Review Application will be dismissed on a "with prejudice" basis, meaning that the dismissal would be conclusive of the parties' rights as though the Judicial Review Application had been prosecuted to a final adjudication adverse to the PPA.

(b) **Paragraph 4: PPA cannot seek the same or similar relief in further proceedings**. Paragraph 4 reflects the nature of the "with prejudice" dismissal of the Judicial Review Application by prohibiting the PPA from seeking the same or similar relief as set out in the PPA's Notice of Application. Paragraph 4 reads:

> *(4) The Pointes Protection Association (hereinafter the "PPA") and its executive committee members comprised of Peter Gagnon, Lou Simonetti, Pat Gratton and Gay Gartshore together with Rick Gartshore, and Glen Stortini (the named individuals hereinafter referred to collectively as the "PPA members") undertake and agree not to take any further court proceeding seeking the same or similar relief as set out in the within Notice of Application;*

(c) **Paragraph 5: no untrue comments or statements by PPA to the media**. Paragraph 5 permits the PPA to voice their opposition to the Development if their comments and statements are true. Paragraph 5 reads:

> *(5) The PPA and the PPA members undertake and agree that they will not knowingly make any false or untrue comments or statements to the media, electronic or print, in regard to the Pointe Estates Development, Jeff Avery, Dr. Patti Avery or the Sault Ste. Marie Region Conservation Authority (hereinafter referred to as the "SSMRCA"). For greater certainty, this would include any comments or statements as to why the PPA or the PPA members have consented to a dismissal of the within Application and any comment to the effect that the PPA and the PPA members were forced into this position by the order for security for costs made on August 20, 2013;*

[21] Minutes of Settlement, Motion Record of the Defendants (Motion to Dismiss Pursuant to s. 137.1), Ontario Superior Court, dated November 26, 2015 Tab A, Tab B (Exhibit 1 – 24), AR, Vol. 2, Tab 10, pp 197-199.

(d) **Paragraph 6: Development is consistent with the SSMRCA governing legislation**. Paragraph 6 prohibits the PPA from "advancing the position" at the OMB or other subsequent legal proceeding that the Development is contrary to the *Conservation Authorities Act* and Ontario Regulation 176/06. In other words, under Paragraph 6, the PPA agreed the Development would not adversely affect the control of flooding, erosion, dynamic breaches, pollution or the conservation of land. Paragraph 6 reads:

> *(6) The PPA and the PPA members undertake and agree that in any hearing or proceeding before the Ontario Municipal Board (OMB) or any other subsequent legal proceeding that they* ***will not advance the position*** *that the Resolutions passed by the SSMRCA on December 13th, 2012 in regards to the Pointe Estates Development under subsection 3(1) of the Ontario Reg. 176/06 are illegal or invalid or* ***contrary to the provisions of the Conservation Authorities Act, R.S.O. 1990 c. C.27 and Ontario Reg. 176/06 being the Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses or*** *that the SSMRCA exceeded its jurisdiction by passing the above-noted Resolutions with no reasonable evidence to support its decision and considered factors extraneous to those set out in subsection 3(1) of the Ont. Reg. 176/06;* [Emphasis added]

(e) **Paragraph 7: consent to an order in accordance with the Minutes' terms**. Paragraph 7 states that the parties consent to an order in accordance with the Minutes' terms, including that the PPA members will execute the Minutes, agree to be bound by them and execute any document needed to give effect to the Minutes. Paragraph 7 reads:

> *(7) The Parties consent to an order in accordance with the terms of these Minutes of Settlement or as otherwise agreed and the Parties hereto, including the PPA Members shall execute these minutes and agree to be bound thereto and shall execute such further and other documentation as necessary to give effect to the terms of these Minutes of Settlement.*

The OMB Appeal

32. At the pre-hearing held March 11, 2014, the PPA and Klaas Oswald (on behalf of the St. Mary's River Binational Public Advisory Council) were granted status in the OMB hearing. 170 did not oppose the PPA's request for party status.[22]

[22] Memorandum of Oral Decision Delivered by Blair S. Taylor on March 11, 2014 and Order of the Board, Issued April 2, 2014, AR, Vol. 5, Tab 11, p. 134.

Contrary to the Minutes, Peter Gagnon testified that the Development would destroy the on-site wetland and cause environmental damage

33. The OMB hearing commenced on November 18, 2014. During the OMB hearing, the PPA called Peter Gagnon as a lay witness.

34. In his testimony, Mr. Gagnon raised the same issues the PPA had raised in its Application for Judicial Review:

> THE WITNESS: Okay. Now key issues, and I – again, I – I know I'm going to – I'm going to give my calculations on this. I guess as a forester, etc., the destruction of 37.2 hectares of a 48.5 hectare rare coastal wetland.[23]
>
> **…**
>
> MEMBER TAYLOR: Your number?[24]
>
> THE WITNESS: Yes, my number, relating to this 37.2 and 48.5, that I'm pretty sure was 77 percent [of the on-site wetland] will be lost.[25]
>
> **…**
>
> THE WITNESS: […] Another issue was increased phosphorous loading which is already above the provincial standard.[26]
>
> MEMBER TAYLOR: You're raising this as an issue, okay.[27]
>
> THE WITNESS: […] The other issue here is the development in a flood plain. As you can see, the flood plain is marked on this map here and the majority of the property is inside the present hundred year flood plain which came to our attention…[28]
>
> **…**
>
> THE WITNESS: […] Key issues continued. Loss of wildlife habitat. Presently a major deer year I've witness this for the pars 20 plus years, sir.[29]
>
> **…**
>
> THE WITNESS: Some other issues water quality and the effects on the upper and lower aquifers are unknown.[30]
>
> **…**

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[23] Excerpts of the Transcript of the Ontario Municipal Board (Peter Gagnon's Testimony) at 1699, lines 1-6, AR, Vol, 7, Tab 14 p. 62.
[24] *Ibid* at 1710, line 15, AR, Vol, 7, Tab 14 p. 73.
[25] *Ibid* at 1710, lines 18-20, AR, Vol, 7, Tab 14 p. 73.
[26] *Ibid* at 1712, lines 2-4. AR, Vol, 7, Tab 14 p. 75.
[27] *Ibid* at 1712, lines 5-6, AR, Vol, 7, Tab 14 p. 75.
[28] *Ibid* at 1712, lines 20-24, AR, Vol, 7, Tab 14 p. 75.
[29] *Ibid* at 1732, lines 5-6, AR, Vol, 7, Tab 14 p. 95.
[30] *Ibid* at 1741, lines 9-11, AR, Vol, 7, Tab 14 p. 104.

> THE WITNESS: Construction of the canal may result in stagnant water, direct loss of vegetation and wildlife habitat due to the removal of site vegetation direct loss of physical wetland loss of hydraulic function of wetland impact on water quality loss of wetland habitat and against this is where my calculations conclude that 70 percent of the physical wetland will be lost.[31]

35. During his cross-examination, 170's counsel questioned Mr. Gagnon about his understanding of the Judicial Review Application's with prejudice dismissal. Specifically, counsel asked whether Mr. Gagnon understood that all the issues raised in the Judicial Review Application regarding the SSMRCA approval were resolved. Mr. Gagnon's unclear responses to this questioning prompted Member Taylor to ask the PPA's Counsel whether she had explained the Minutes to him and whether he understood what a "with prejudice" dismissal meant, to which she answered she had, and he did.[32]

36. Mr. Gagnon admitted during his cross-examination that the issues raised by the PPA at the OMB hearing were matters the SSMRCA was statutorily required to consider when it approved the Development:[33]

> BY MR. ROSA: [...] Do you see that sir? One of the grounds for the application, sub 2(b) was that the people represented by the PPA would suffer special damage should the development be allowed to proceed, and environmental damage would result.
>
> A Umm-hmm.
>
> Q That's what it stated?
>
> A. Yeah
>
> A I presume from that, what you meant to say or what was said, or what was alleged by the PPA is that there would be pollution, right? That the environmental damage that you're talking about.
>
> A. No. no. Loss of wetland function, which as, again, cleaning water, yeah that's right, so that would be pollution. Conservation of land, which was the fifth point, would be – land would be removed. That's environmental damage.
>
> Q. Okay. So again, you do see that the granting of the permission is not just as a consequence of the issue of the wetland it just doesn't consider the issue of the wetlands but there's also other issues that are considered by the Conservation Authority and that included flooding, erosion.

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[31] *Ibid* at 1742-1743, lines 20-25 an1 -3, AR, Vol, 7, Tab 14 p. 105-106.
[32] *Ibid* at 1839-1840, AR, Vol, 7, Tab 14 p. 195-196.
[33] *Ibid* at 1835-1837, AR, Vol, 7, Tab 14 p. 191-193.

A. Yeah.

Q. Dynamic beaches pollution and the conservation of land correct?

A.. Right, right.

Contrary to the Minutes, the PPA Proffered Frank Breen to Testify about the Inadequacy of the Studies on which the SSMRCA Based its Approval

37. In addition to Mr. Gagnon, the PPA proffered Frank Breen as an expert hydrogeologist.

38. Mr. Breen was to give evidence that the conclusions in 170's hydrogeological studies, the studies which the SSMRCA relied on in approving the Development, were unreasonable. Member Taylor found that Mr. Breen was an advocate of the PPA's position and refused to qualify him as an expert.[34] The PPA refused to call Mr. Breen as a lay witness.[35]

39. Despite Mr. Breen not being qualified as an expert, Mr. Breen's "expert" witness statement and highly critical review of the Appellant's hydrogeological studies remained part of the documentary record before the OMB.

The OMB dismissed the appeal based on the PPA's Evidence

40. On February 27, 2015, after a three-week long hearing, the OMB dismissed the appeal based on the PPA's evidence about the impact of the Development on the wetland; the same issue that was concluded and resolved between the parties under the Minutes. Specifically, in dismissing the appeal, Member Taylor stated that he "preferred the evidence of the [PPA], and particularly that of Peter Gagnon".[36] Member Taylor was highly persuaded by Mr. Gagnon's testimony about the amount of wetland that would allegedly be destroyed by the Development and stated "[Mr. Gagnon] alone was able to calculate the loss of the wetlands from the proposed development."[37]

41. Accordingly, Member Taylor concluded that in applying the evidence he heard about the wetland policies in the Provincial Policy Statement and the City's Official Plan, there would be a "substantial loss of approximately 77% of the coastal wetland. Member Taylor acknowledged

[34] Decision Delivered by Blair S. Taylor and Order of the Board dated February 27, 2015 (the "OMB Decision") at para 55 AR, Vol. 3, Tab, 10, p. 47.
[35] *Ibid* at para 56, AR, Vol. 3, Tab, 10, p. 26.
[36] *Ibid* at para 133, AR, Vol. 3, Tab, 10, p. 47.
[37] *Ibid* at para 133, AR, Vol 3, Tab 10, p. 47.

that in so concluding he "preferred the lay evidence of Peter Gagnon over the opinion evidence of [170's] land use planner and that of Mr. McConnell [the City's Planning Director]."[38]

The Claim for Breach of the Minutes

42. On September 4, 2015, 170 commenced this action for breach of contract to hold the PPA liable for breaching the Minutes during the OMB hearing.[39] 170 claimed that the "with prejudice" dismissal of the Judicial Review Application and the content of the Minutes were determinative of the PPA's rights regarding the wetland issue and adequacy of the studies submitted to the SSMRCA.

43. 170 claimed that the PPA contravened the Minutes at the OMB hearing when (1) Mr. Gagnon gave evidence about the destruction of the wetland and related issues raised in the PPA's Application for Judicial Review and (2) the PPA proffered Frank Breen as an expert witness and submitted, as evidence, Mr. Breen's report which questioned the adequacy of 170's reports and was prepared for the SSMRCA during the initial approval application.

44. Specifically, the PPA breached paragraphs 4 and 6 of the Minutes through their above-noted actions by seeking to relitigate the Development's alleged impact on the wetland and by "advancing the position" that the Development contravened the *Conservation Authorities Act* and Ontario Regulation 176/06.

45. In response, the PPA sought to cast 170's claim as an attack on free expression and brought a motion to have the proceeding dismissed under Ontario's then newly enacted anti-SLAPP legislation.

The statutory scheme of Ontario's Anti-SLAPP Legislation

46. Ontario's anti-SLAPP legislation, in force as of November 3, 2015, is set out in section 137.1 of the *Courts of Justice Act*, where "SLAPP" refers to "Strategic Litigation Against Public Participation". The anti-SLAPP provisions subject proceedings brought primarily to limit debate on matters of public interest to a process for expedited dismissal in their early stages.

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[38] *Ibid* at para 133, AR, Vol 3, Tab 10, p. 47.
[39] *Ibid* at para 134, AR, Vol 3, Tab 10, pp. 47-48.

The purposes of the anti-SLAPP Legislation

47. The purposes of the anti-SLAPP legislation are: (a) to encourage individuals to express themselves on matters of public interest; (b) to promote broad participation in debates on matters of public interest; (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.[40]

48. The anti-SLAPP legislation defines "expression" expansively as "any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity."[41]

49. As a threshold issue, the moving party must satisfy the judge that the proceeding "arises from" an expression that relates to a matter of public interest.[42]

50. If the moving party crosses this initial threshold, the onus shifts to the responding party to avoid the proceeding's dismissal by satisfying the judge that:

> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit; and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.[43]

The Decisions Below

The Motion Judge refused to dismiss the proceeding

51. The motion judge was the first judge to interpret Ontario's anti-SLAPP legislation.

52. The motion judge dismissed the motion and made the following key findings:

(a) 170's claim is founded on "an allegation of breach of contract based on the breach of the minutes of settlement related to the testimony of Peter Gagnon at the Ontario Municipal Board hearing", namely "the wetlands issue was decided by the

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[40] Ontario's anti-SLAPP legislation, *supra* note 1 s 137.1(1).
[41] *Ibid*, s 137.1(2).
[42] *Ibid*, s 137.1(3).
[43] *Ibid*, s 137.1(4).

> Conservation Authority, the [PPA] agreed not to revisit that issue by virtue of the Minutes of Settlement dated September 17, 2013 and did so by the testimony of Peter Gagnon at the [OMB]".[44]
>
> (b) because 170's claim concerns important issues about the sanctity of contracts and the finality of settlement, it has substantial merit.[45]
>
> (c) the PPA has no valid defence based on the material filed on their motion,[46] which material asserted, among other things, the defence of absolute privilege; and
>
> (d) "the public interest, in allowing the litigation to continue and permitting the issues related to the Minutes of Settlement and finality of agreements made between parties outweighs the public interest in protecting the right of Peter Gagnon to freely express himself by giving evidence before the [OMB]."[47]

The Ontario Court of Appeal overturned the motion judge's decision

53. The PPA appealed the motion judge's decision to the Ontario Court of Appeal. The Court heard the appeal concurrently with five (5) other appeals concerning the interpretation of Ontario's anti-SLAPP legislation.[48]

54. Writing for the Court, Justice Doherty overturned the motion judge's decision and, in so doing, established a new test to be applied in anti-SLAPP cases.[49]

The Threshold Requirement

55. As discussed above, as a "threshold requirement", the moving party has the onus of satisfying the judge that the proceeding "arises from" an expression on a matter of "public interest".[50]

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[44] Motion Judge's Reasons, *supra* note 2 at para 41, AR, Vol. 1, Tab 1, p. 11.
[45] *Ibid* at para 47, AR, Vol. 1, Tab 1, p. 12.
[46] *Ibid* at para 50, AR, Vol. 1, Tab 1, p. 12.
[47] *Ibid* at para 55, AR, Vol. 1, Tab 1, p. 13.
[48] *Fortress Real Developments Inc v Rabidoux,* 2018 ONCA 686; *Veneruzzo v Storey*, 2018 ONCA 688; *Platnick v Bent*, 2018 ONCA 687; *Able Translations Ltd v Express International Translations Inc*, 2018 ONCA 690; and *Armstrong v Corus Entertainment Inc*, 2018 ONCA 689.
[49] Since the Court of Appeal released its decision in this case, the Court has applied its test in a number of subsequent decisions: *Montour v Beacon Publishing Inc.* 2019 ONCA 246, *Levant v Day,* 2019 ONCA 244, *Bondfield Construction Company Limited v The Globe and Mail Inc, Lascaris v B'nai Brith Canada,* 2019 ONCA 163, *New Dermamed Inc v Sulaiman,* 2019 ONCA 141, *United Soils Management Ltd v Mohammed,* 2019 ONCA 128, *Ontario (Environment and Climate Change) v Geil,* 2018 ONCA 1030.

The merits-based hurdle

56. Once the moving party crosses this "threshold requirement", the Court explained that the onus shifts to the responding party to overcome both a "merits-based hurdle" and a "public interest hurdle".[51]

57. The "merits-based hurdle" requires the responding party to satisfy the judge that there are grounds to believe that: (i) the proceeding has substantial merit; and (ii) the defendant has no valid defence.

58. Justice Doherty held that the responding party must satisfy the judge that, on a balance of probabilities, there are reasonable grounds to believe that the proceeding has "substantial merit". Justice Doherty explained that the responding party is not required to "present a fully developed case", but must show that the claim is legally tenable and supported by evidence.[52] The test, according to Justice Doherty, is whether "it could reasonably be said on an examination of the motion record, that the claim has substantial merit".[53]

59. Regarding the requirement for the responding party to show the moving has "no valid defence", Justice Doherty stated that the responding party is not required to address all the moving party's possible defences and prove that none have any validity.[29] Instead, there is an evidentiary burden on the moving party to advance any proposed "valid defence" (in either its statement of defence or responding motion materials); the responding party would then have the onus of demonstrating that none of these defences would be reasonably likely to succeed.[54]

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[50] Reasons on Appeal of Doherty, Brown and Huscroft JJ.A., Ontario Court of Appeal, heard December 19, 2016 and June 27, 2017, dated/filed August 30, 2018 ("Court of Appeal Decision"), para 51, AR, Vol. 1, Tab 3, p. 37.
[51] *Ibid* at para 80, AR, Vol. 1, Tab 3, p. 48.
[52] *Ibid* at para 80, AR, Vol. 1, Tab 3, p. 48.
[53] *Ibid* at para 79, AR, Vol. 1, Tab 3, p. 47.
[54] *Ibid* at para 83, AR, Vol. 1, Tab 3, p. 49; See also *Bondfield Construction Company Limited v The Globe and Mail Inc*, *supra* note 49 at para 15 in which Justice Doherty stated "Bondfield was required to show that a reasonable trier could conclude that the Globe did not have a valid defence. Bondfield would meet that onus if it showed that a reasonable trier could reject all of the various defences put in play by the Globe. A determination that a defence "could go either

The public interest hurdle

60. In discussing the "public interest hurdle", Justice Doherty explained that the responding party must satisfy the judge that the harm caused to them by the expression is "sufficiently serious" that the public interest, in allowing the claim to proceed, outweighs the public interest in protecting the moving party's freedom of expression.[55]

61. To overcome this hurdle the responding party must provide the basis by which the harm or potential harm caused by the expression can be assessed. This "will almost inevitably include material providing some quantification of the monetary damages" and may require the responding party to present some form of damages brief, but not one that is fully developed.[56]

Application

62. Justice Doherty found that the PPA crossed the initial threshold. The burden then shifted to 170 to overcome the merits-based and public-interest hurdles.

63. Justice Doherty held that 170 did not overcome these hurdles. This finding was based on an incorrect factual matrix. Specifically, Justice Doherty found that 170's claim lacked substantial merit because, "[w]hen the parties entered into the [Minutes] the [PPA] had standing at the OMB and [170] knew that the [PPA] would oppose the development at the OMB." This finding was incorrect. When the parties enacted the Minutes on September 13, 2013, the PPA did not have standing at the OMB. The PPA was granted standing at the OMB on March 11, 2014.

64. Further, Justice Doherty found that "[n]othing in the [Minutes] touched on the [PPA's] participation in the OMB proceedings."[57] This finding was also incorrect. Paragraph 6 of the Minutes explicitly stated that the PPA would not "in any hearing or proceeding before the Ontario Municipal Board (OMB) or any other subsequent legal proceeding…advance the

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way" in the sense that a reasonable trier could accept it or reject it is a finding that a reasonable trier could reject the defence. That is as far as Bondfield had to go to meet its onus under s. 137.1(4)(a)(ii)".

[55] *Ibid* at para 87, AR, Vol. 1, Tab 3, p. 51.
[56] *Ibid* at para 90, AR, Vol. 1, Tab 3, p. 52.
[57] *Ibid* at para 115, AR, Vol. 1, Tab 3, p. 61.

position that the Resolutions passed by the SSMRCA"[58] were contrary to the *Conservation Authorities Act* and Ontario Regulation 176/06.

65. Lastly, Justice Doherty did not consider or mention the "with prejudice" dismissal of the Judicial Review Application in interpreting the Minutes. As such, he failed to consider the complete contract and abide by the accepted principles of contractual interpretation. Justice Doherty also failed to consider the factual matrix in determining what the parties intended.

66. Moreover, Justice Doherty found that the public interest in protecting Mr. Gagnon's expression outweighed the public interest in the proceeding continuing because there was "no evidence of any damages suffered or likely to be suffered by 170 as a result of the alleged breach of the [Minutes]".[59] In making this finding, Justice Doherty agreed with the motion judge that "interference with [170's] reasonable expectation of finality in the litigation could be viewed as causing some harm"[60]. Nevertheless, Justice Doherty required 170 to show that it had suffered quantifiable monetary damages and that 170 failed to do so. [61]Justice Doherty did not consider, however, that 170 gave up its right to costs in the Judicial Review Application. Moreover, Justice Doherty did not consider that 170 had incurred significant costs in commissioning twenty-three (23) studies for the OMB hearing, fees for the OMB hearing, including the attendance of various experts and other costs of that nature, costs which would have been significantly curtailed if the PPA had abided by the Minutes' terms.

67. Justice Doherty observed, in hindsight, that because this case turned on the interpretation of a contract it "could have been more effectively and expeditiously resolved by way of a timely summary judgment motion.[62]

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[58] Minutes of Settlement, Motion Record of the Defendants (Motion to Dismiss Pursuant to s. 137.1), Ontario Superior Court, dated November 26, 2015 Tab A, Tab B (Exhibit 1 – 24), AR, Vol. 2, Tab 10, pp 197-199.
[59] Court of Appeal Decision, *supra* note 50 at para 121, AR, Vol. 1, Tab 3, p. 37.
[60] *Ibid* at para 121.
[61] *Ibid* at paras 122-123, AR, Vol. 1, Tab 3, p 64.
[62] *Ibid* at para 101, AR, Vol. 1, Tab 3, p 57.

PART II: QUESTIONS IN ISSUE

68. This appeal raises the following questions that are important to properly interpret the breadth and ambit of Ontario's anti-SLAPP legislation:

1. Regarding the "threshold requirement", what constituent elements should the judge consider in determining whether a proceeding "arises from" an expression?
2. Regarding the "merits-based hurdle", what must the responding party show to establish that the proceeding has "substantial merit" and the moving party has "no valid defence" under subsection 137.1(4)(a)?
3. Regarding the "public interest hurdle", what must the responding party show to establish the harm suffered or is likely to be suffered is sufficiently serious that public interest in the proceeding continuing outweighs the public interest in the expression under subsection 137.1(4)(b)?
4. Applying the modern principles of statutory interpretation, does 137.1 apply in this case?

PART III: STATEMENT OF ARGUMENT

Standard of Review

69. This appeal raises questions of statutory interpretation. Statutory interpretation is a question of law.[63] This Court applies a correctness standard to lower courts' decisions on questions of law.

Argument overview

70. In interpreting section 137.1, the court should adopt an essential character test to determine if a proceeding is SLAPP suit. If the proceeding passes the essential character test, the court ought to apply the standard of "reasonable issue to be tried" to its analysis under section 137.1(4).

The modern principle of statutory interpretation

71. The Court of Appeal erred when it failed to apply the modern principle of statutory interpretation to its analysis of section 137.1 Left undisturbed, the Court of Appeal's interpretation of section 137.1 severely undermines the principles of freedom of contract, finality of settlements, and access to justice. Any breach of contract case where a

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[63] *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40, [2014] 2 SCR 135 at para 33.

party has consensually agreed to limit its expression is at risk for expedited dismissal under the legislation.

72. The leading case on statutory interpretation is this Court's decision in *Rizzo v Rizzo Shoes Ltd, Re*.[64] In *Rizzo*, Justice Iacobucci, speaking for the court, adopted the modern principle of statutory interpretation. The modern principle of statutory interpretation takes a holistic view that goes beyond the wording of the legislation alone. Under the modern principle, "the words of the Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[65]

Issue 1: Proceedings to enforce contractual agreements do not meet the threshold requirement set out in subsection 137.1(3)

The history of Ontario's anti-SLAPP legislation: Anti-SLAPP Advisory Panel Report to the Attorney General

73. To situate this appeal in its larger context, it is important to understand the history behind Ontario's anti-SLAPP legislation. Bill 52, *Protection of Public Participation Act, 2015*, arose from findings of the 2010 Anti-SLAPP Advisory Panel Report to the Attorney General (the "Report").[66] The Panel was tasked with determining how the Ontario justice system should be designed to prevent the misuse of courts and other agencies of justice without depriving anyone of appropriate remedies for expression that goes too far.

74. In their Report, the Panel found that legislation was needed to deter SLAPP suits and distinguish SLAPP suits from "the traditional range of civil actions which have been subject to relatively limited remedies in their early stages."[67]

The Panel recommended that the expedited dismissal of SLAPP suits must balance a plaintiff's right to access justice

75. The Panel recognized that a test to identify SLAPP suits had to balance the interests of both plaintiffs and defendants. The test had to provide an appropriate remedy for SLAPP suits

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[64] *Rizzo v Rizzo Shoes Ltd, Re*, [1998] 1 SCR 27, 1998 CanLII 837.
[65] *Ibid* at para 21.
[66] Anti-SLAPP Advisory Panel, "Report to the Attorney General of Ontario (2010)" online: <https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.pdf> [*Advisory Panel Report*].
[67] *Ibid* at para 17.

while not impeding access to justice for plaintiffs with non-SLAPP suits. Accordingly, the Panel stated, "[t]he fact that a legal action may have an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff's action from proceeding. The protection and promotion of such expression should not be a cover for expression that wrongfully harms reputational, business or personal interests of others."[68]

76. Although the legislature generally agreed that anti-SLAPP legislation was needed, some members were concerned that reasonable limits needed to be placed on the legislation to prevent the legislation from having "unintended consequences". These unintended consequences included the legislation being misused as a litigation tactic by defendants against plaintiffs who have been genuinely wronged. As stated by MPP Bill Walker at second reading, "[w]e need to ensure we're not opening up a door for people to use [the anti-SLAPP legislation] in the exact reverse way that it was intended and be able to shut down things and shut down people being able to speak".[69]

The purpose of subsection 137.1(3) is to determine whether an action is a SLAPP

77. The purpose of subsection 137.1(3) is to identify SLAPP suits. This is the threshold issue that the judge must determine before embarking on the merits-based and public interest analysis.

78. Subsection 137.1(3) provides:

> **Order to dismiss**
> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

79. Subsection 137.1(3) requires the moving party to satisfy the court that the proceeding "arises from" an expression made by the person that relates to a matter of public interest.

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[68] *Ibid* at para 36.
[69] Ontario, Legislative Assembly, Hansard, 41st Parl, 1st Sess, No 58 (23 March 2015) at 2952 (MPP Bill Walker).

80. The distinguishing feature of a SLAPP suit, however, is that the suit is brought to defeat the ends of justice by *silencing or gagging* the opposing party's expression in public debate.

81. The court's characterization of a proceeding as a SLAPP suit is the threshold issue that needs to be determined carefully. A SLAPP suit can be dismissed even if the suit has a basis in law. The judge can award costs on the motion and in the proceeding on a full indemnity basis as well as award damages. There is also a measure of blame placed on the plaintiff when a proceeding is found to be a SLAPP suit.

82. The aim of a SLAPP is not to succeed on the merits of the suit, but to use the courts to intimidate or impoverish opponents and limit their opponents' freedom of speech. A SLAPP suit may also have the effect of dissuading others from speaking out on matters of public debate.

83. Identifying a proceeding as a SLAPP suit and subjecting it to expedited dismissal under section 137.1 equips judges with a potent weapon to prevent improper use of section 137.1. As such, the court has a responsibility to do more than a superficial review of the proceeding. The court has a responsibility to ensure the proper resort to the use of the anti-SLAPP legislation. The court must also ensure that it does not compromise the right of a plaintiff whose proceeding is brought in good faith, to obtain redress for genuine wrongs committed against them. In other words, the judiciary has a responsibility to ensure that section 137.1 does not chill valid claims from proceeding to a full hearing on their merits.

The essential character test is needed to determine if a proceeding is a SLAPP

84. Interpreting the phrase "arises from" in subsection 137.1(3) as restricting the scope of proceedings that may be dismissed under the expedited process requires the judge to define the essential character of the proceeding. The court then engages in a contextual analysis of the facts and circumstances giving rise to the proceeding.

85. This approach is akin to that which courts undertake to determine jurisdiction in labour relations disputes. In such cases, the courts are guided by this Court's decision

in *Weber v Ontario Hydro*.[70] In *Weber*, the question before this Court was what effect final and binding arbitration clauses in labour relations legislation had on arbitral jurisdiction and whether they served to oust the courts' jurisdiction over claims arising from a collective bargaining relationship. This Court held that where "the difference between the parties arises from the collective agreement, the claimant must proceed by arbitration and the courts of no power to entertain an action in respect of the dispute."[71]

86. To determine whether the dispute arises from the collective agreement requires the decision-maker to determine the dispute's "essential character". In considering the words "arising from" this Court in *Weber* explained that, in determining the dispute's "essential character" the decision-maker should focus on its surrounding facts, and the relationship of the proceeding to the parties' collective agreement. Specifically, whether the proceeding is one that arises either explicitly, or implicitly from the interpretation, application, administration or violation of the parties' collective agreement.[72]

87. Interpreting the phrase "arising from" as requiring the judge to define the "essential character" of the proceeding accords with the language, context and purposes section of 137.1 by mitigating the risk of proceedings having a basis in law being peremptorily dismissed.

88. Contractual proceedings are not SLAPP suits. Parties may freely bargain to limit expression. This principle has been frequently upheld by U.S. courts in determining the application of the states' anti-SLAPP legislation to breach of contract claims. The U.S. decisions collectively reflect the proposition that claims for breach of contract necessarily have a substantial basis other than the defendant's expression and therefore do not engage anti-SLAPP legislation.

89. Likewise, under Ontario's anti-SLAPP legislation, a claim for breach of contract does not "arise from" a defendant's expression. Rather, it arises from the defendant's breach of their contractual obligations. In other words, the essential character of the procedure is not the expression, but the contract limiting the expression. This differentiates such proceedings from,

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[70] *Weber v Ontario Hydro*, [1995] 2 SCR 929, 1995 CanLII 108 [*Weber*].
[71] *Ibid* at para 50.
[72] *Ibid* at para 52.

for example, defamation actions where the expression *is* the basis of the cause of action, not simply an element of the action.

The words "arises from" narrows the scope of subsection 137.1(3)

90. The Court of Appeal devoted only a single sentence in its 125-paragraph decision to the question of whether a proceeding "arises from" protected expression. The Court stated "[a] legal proceeding arises from an expression if that expression grounds the Plaintiff's claim in the litigation."[73]

91. The Court of Appeal's analysis of subsection 137.1(3) was superficial and did not apply the modern principle of statutory interpretation to determine whether the legislation applies to the present proceeding. The interpretation by the Court of Appeal failed to consider that the legislation required the court to embark upon an analysis as to whether the proceeding "arises from" the expression. To give full effect to the balance inherent in the legislation, a court must first consider the essential character of the claim and whether it is primarily directed at an expression.[74]

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[73] Court of Appeal Decision, *supra* note 50 at para 52, AR, Vol. 1, Tab 3, p. 37.

[74] See *Sandholm v Kueker*, 2012 IL 111443 in which the Illinois Supreme Court held that courts should not apply Illinois' anti-SLAPP legislation literally because this would result in the legislation applying to many types of conduct it was not indented to. The Court stated (at para 45), "in light of the clear legislative intent expressed in the statute to subject only meritless SLAPP suites to dismissal, we construe the phrase 'based on, relates to, or is in response' to in section 15 to mean solely based on, relating to, or in response to 'any acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.' Stated another way, where a plaintiff files suit genuinely seeking relief for damages of the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on the defendant's rights of petition, speech, association, or participation in government."

"Arising from" requires the court to discern the "essential character" of the proceeding

92. The purpose of subsection 137.1(1) is to promote free expression on public interest by subjecting lawsuits brought primarily to silence or gag opposition to expedited dismissal and significant cost consequences. Further, the purpose of section 137.1(3) is to provide the courts with a way to identify and deal with such a suit, with minimal time and expense to any party.[75]

93. Subsection 137.1(3) does so by providing judges a speedy way to identify a case as a SLAPP suit while permitting those with legitimate claims to be heard in the normal course.[76] Courts must approach this analysis with care as the implications of an adverse decision under section 137.1 means that a party is denied access to justice in prosecuting a legal claim.

94. The phrase "arises from" in subsection 137.1(3) restricts the type of proceedings that may be dismissed. To be dismissed, the proceeding must be fundamentally based on an expression. It would be incongruous to read the requirement that a proceeding "arises from" an expression as including proceedings in which other circumstances primarily give rise to the cause of action.

95. The words "arises from" limits the type of proceeding which attracts the legislation's expedited dismissal process to claims where the expression itself was the primary basis for the claim. Otherwise, it is difficult to conceive of proceedings that would fall outside of the legislation's ambit.

Parties may consensually agree to limit their expression

96. Many breach of contract actions are based on an "expression", as that term is broadly defined in subsection 137.1(2), and can reasonably be said relate to a matter of public interest. Under the Court of Appeal's broad interpretation of the legislation, these actions are now at risk of being peremptorily dismissed. Breaches of non-disclosure agreements, particularly those in the pharmaceutical industry, non-solicitation and non-competition agreements now risk being subject to dismissal under the anti-SLAPP legislation. The effect of this will be to fundamentally change how parties order their private affairs. An overly broad interpretation of "arises from" and expression has the effect of subjecting contractual breach

[75] Advisory Panel Report, *supra* note 66.
[76] *Ibid*.

claims to scrutiny under section 137.1. It is commercially absurd to cast an interpretation that has the effect of attracting the application of section 137.1 to breach of contract claims. The Court's decision casts uncertainty into the realm of commercial transactions.

97. Parties to settlement agreements regularly consent or bargain to limiting their right to free expression to resolve litigation. Permitting parties to express themselves on matters they have agreed not to by way of settlement, under the guise of free expression, undermines the important public policy favouring settlement finality. The Court's decision creates uncertainty as to whether settlement agreements will be enforced.

98. In short, the Court of Appeal erred in applying a broad interpretation of the phrase "arises from" which rendered it effectively devoid of meaning. This runs contrary to the principle that a legislative provision should not be interpreted to render it, or parts of it, "mere surplusage".[77]

99. Interpreting the phrase "arises from" as narrowing the legislation's scope best accords with the modern approach to statutory interpretation and the legislature's intent that non-SLAPP suits are not subject to expedited dismissal and attendant financial consequences under section 137.1. Such an interpretation contemplates that the legislature turned its mind to creating a test for judges to identify SLAPPs.

The United States experience

100. An interpretation of "arises from" that narrows the legislation's scope is consistent with U.S. decisions that have considered analogous language in various states having anti-SLAPP legislation.

101. For instance, to determine whether a proceeding is "based on" protected activity, the Massachusetts courts require the moving party to make a threshold showing that the claims against it have no other substantial basis.[78] To further limit the "problematic sweep" its anti-SLAPP legislation, the Massachusetts courts have recently held that, when the burden shifts to the non-moving party, it is open to that party to avoid dismissal by showing that each of its

[77] See *R v Proulx*, 2000 SCC 5, [2000] 1 SCR 61 at para 28.
[78] *Duracraft Corporation v Holmes Products Corporation,* 427 Mass. 156 (1998), 13 IER Cases 1479.

challenged claims are not SLAPP suits.[79] The non-moving party "may do so by demonstrating that each such claim was not primarily brought to chill the special movant's legitimate petitioning activities."[80]

Issue 2: The non-moving party must show the proceeding raises a reasonably arguable question and that a reasonable trier could conclude the moving party has no valid defence

The statutory context of subsection 137.1(4)(a) requires a low standard to distinguish anti-SLAPP motions from summary judgment motions

102. The Ontario Court of Appeal erred in setting too high a bar for a plaintiff to meet the "merits-based hurdle" in subsection 137.1(4)(a).

103. Subsection 137.1(4) provides:

> **No dismissal**
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding;

104. The Court of Appeal began its analysis based on the incorrect premise that the word "satisfies" in subsection 137.1(4), signifies that the balance of probabilities is the appropriate standard of proof to be applied. As explained by Ms. Ramani Nadarajah, Counsel for the Canadian Environmental Law Association, while the legislation was before the Standing Committee on Justice Policy, "[t]he grounds-to-believe test is significantly lower than the standard of proof that normally applies in civil proceedings, which is the balance of probability. So we think that the test actually is quite appropriate in this context and that it provides an

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[79] *Blanchard v Steward Carney Hospital Inc*, 477 Mass 141, 2017 IER Cases 171,136.

[80] *Ibid* at 12; See also, *Sandholm*, *supra* note 74 at para 45 in which the Illinois Supreme Court stated (at para 45), "[i]is is clear from the express language of the Act that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute…" The Accordingly, defendants must prove that the plaintiff filed suit solely in retaliation.

effective legal framework to dealing with the problem of SLAPPs."[81]

105. A lower standard than a balance of probabilities accords with the purpose of the legislation, which the Court of Appeal explained is designed to provide "a judicial screening or triage device designed to eliminate certain claims at an early stage of the litigation process".[82] The "merits-based" hurdle established by subsections 137.1(a)(i) and (ii) identify the "criteria to be used in that screening process".[83]

Anti-SLAPP motions are not an alternate vehicle for summary judgment

106. The Court of Appeal emphasized that the legislation "does not provide an alternative means by which a claim can be tried and is not a form of summary judgment intended to allow defendants to obtain a quick and favourable resolution of the merits of allegations involving expressions on matters of public interest."[84] Unlike in a summary judgment motion, a defendant may bring an anti-SLAPP motion before filing a defence. As such, the record in an anti-SLAPP motion is not as robust as it is in a motion for summary judgment and the timing at which the motion is brought in the litigation and the limits it places on examinations are "not conducive to either party putting its 'best foot forward' as is expected in summary judgment proceedings."[85]

107. As such, the Court of Appeal cautioned that motion judges must be careful "that s. 137.1 motions do not slide into *de facto* summary judgment motions."[86] Motion judges must guard against taking a "deep dive" into the merits under the claim under the "much more limited

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[81] Ontario, Legislative Assembly, Hansard, 41st Parl, 1st Sess, No 58 (1 October 2015) at JP 118 (Ramani Nadarajah).
[82] Court of Appeal Decision, *supra* note 50 at para 73, AR, Vol. 1, Tab 3, p. 45.
[83] *Ibid* at para 73, AR, Vol. 1, Tab 3, p. 45.
[84] *Ibid* at para 73, AR, Vol. 1, Tab 3, p. 45.
[85] *Ibid* at para 76, AR, Vol. 1, Tab 3, p. 46; See also *Lascaris v Bnai Brith Canada*, 2019 ONCA 163 at para 30 in which the Court of Appeal explained, "The motion is intended to be brought at the outset of the proceeding before either the plaintiff or the defendant has had the opportunity to marshal the type of evidence that they would for a trial. Indeed, motions under s. 137.1 will often be heard before there has been any form of pre-trial discovery."
[86] Court of Appeal Decision, *supra* note 50 at para 78, AR, Vol. 1, Tab 3, p. 47.

merits analysis required by s 137.1(4)(a)".[87] Accordingly, the Court of Appeal stated that if a proper merits analysis would go beyond what could properly be undertaken under the legislation, the motion judge "should advise the parties that a motion for summary judgment would provide a more suitable vehicle for expeditious and early resolution of the claim."[88]

Principles applied in summary judgment motions

108. For summary judgment motions in Ontario, the motion judge evaluates "whether there is a genuine issue requiring a trial". In *Hyrniak v Mauldin*, this Court held that there will be no genuine issue requiring a trial when the motion judge is able to reach "a fair and just determination on the merits". This will be the case when the process: (1) allows the judge to make the necessary findings of fact; (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. [89]

109. In *Hyrniak*, this Court explained that the new powers granted to a motion judge under Rules 20.04(2.1) and (2.2) of Ontario's *Rules of Civil Procedure* expand the number of cases in which there will be no genuine issue requiring trial, as they permit motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.[90]

The appropriate standard in anti-SLAPP motions is whether there is a "serious question to be tried"

110. Unlike summary judgment motions, judges in anti-SLAPP motions do not benefit from the new fact-finding powers under the *Rules.* In contrast to summary judgment motions, subsection 137.1(4) (a) requires a judge be satisfied that the responding party has met its burden of showing that the proceeding has "substantial merit" and the moving party has "no valid defence". Under the anti-SLAPP legislation, a judge is required to dismiss a proceeding even in the face of genuine issues requiring a trial if the responding party has failed to discharge its burden.

111. As such, it is important that the burden on the responding party not be set too high lest the risk of anti-SLAPP motions becoming *de facto s*ummary judgment motions becomes a

[87] *Ibid* at para 78, AR, Vol. 1, Tab 3, p. 47.
[88] *Ibid* at para 78, AR, Vol. 1, Tab 3, p. 47.
[89] *Hyrniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 at para 49 [*Hyrniak*].
[90] Ibid at para 13.

reality. To mitigate this risk, the appropriate standard in anti-SLAPP motions is whether there is a "serious question to be tried"; the standard formerly used by the courts at the first stage of the test for granting an interlocutory injunction.

112. Although this Court adopted the new standard of a "strong *prima facie* case" in its recent decision in *R v CBC Broadcasting Corp*,[91] the former standard best accords with the purpose of section 137.1, namely that it provide a speedy means to ferret out SLAPP suits, and the early stage at which anti-SLAPP motions are brought.

113. The "serious question to be tried" standard does not require the court to conduct "an extensive review of the merits", rather the "serious question to be tried" test requires a finding that the claim is not frivolous or vexatious.[92] This standard is consistent with the nature of the expedited dismissal process for anti-SLAPP motions, namely the requirement that the judge not engage in a detailed review of the merits of the case, and with ensuring claims requiring a more extensive merits review are dealt with through the summary judgment process.

114. In contrast to summary judgment motions, anti-SLAPP motions are subject to a more limited merits analysis. If the legislature intended the analysis under section 137.1(4) to be akin to the summary judgment procedure, they would have provided more explicit language in the legislation. This proposition is buttressed by the fact that anti-SLAPP motions can be brought before a statement of defence is filed.

115. Such an interpretation is consistent with the British Columbia Court of Appeal's reasoning in *Lucas v British Columbia* (*Superintendent of Motor Vehicles)* wherein in the context of discussing the aspects of a stay, the Court stated:

> The first hurdle which the applicant must meet, in my view, is whether he has raised an arguable question. In the case of *Hughes v. British Columbia (Superintendent of Motor Vehicles)*, [2000] B.C.J. No. 1169 (B.C. C.A. [In Chambers]), in granting a stay Madam Justice Newbury, sitting as a chambers judge, said, "... I am satisfied it is not a frivolous one and that the applicants have raised an arguable question." In my view, given the particular nature of the

[91] *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196 at para 15.

[92] It cannot be said that a claim that does not disclose a reasonably arguable question or no meritorious issue for determination is anything other than frivolous or vexatious.

> proceeding, the applicant must do something more than establish that the grounds are not frivolous. It is hardly ever possible to say that a ground advanced by a competent lawyer is not beyond being frivolous, and certainly I could not say that of the submissions before me today. But, as I take Newbury, J.A. to have done, I define the question as being whether a reasonably arguable question has been raised.[93]

116. Accordingly, "substantial merit" should be interpreted to mean that a claim is not frivolous, but rather discloses a reasonably arguable question. A plaintiff may demonstrate this by establishing there are probable facts to support the pleaded cause of action.

117. This accords with the motion judge's reasoning that claims that require serious consideration by the court meet the test for consideration in subsection 137.1(4)(a)(i).

Summary judgment is the appropriate vehicle for breach of contract claims

118. Summary judgment is the appropriate vehicle for breach of contract cases where the judge must interpret a contract.

119. In the present case, Justice Doherty acknowledged that this matter would have been more efficiently and expeditiously resolved by way of summary judgment motion stating, "cases that turn on the interpretation of a contract are routinely addressed expeditiously and efficiently by way of summary judgment motions under r. 20. With the benefit of hindsight, I would suggest that this is a case that could have been more efficiently and expeditiously resolved by way of a timely summary judgment motion."[94]

120. The proposition that breach of contract cases should be addressed through timely summary judgment motions accords with the purpose of anti-SLAPP motions as a form of judicial triage. By design, in anti-SLAPP motions, judges will not have before them a sufficient evidentiary record to apply the proper approach to contractual interpretation set out by this Court in its decision in *Creston Moly Corp v Sattva Capital Corp*.[95]

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[93] *Lucas v British Columbia* (*Superintendent of Motor Vehicles)*, 2002 BCCA 220 at para 2.
[94] Court of Appeal Decision, *supra* note 50 at para 101.
[95] *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*].

The principles of contractual interpretation

121. In *Sattva*, Justice Rothstein affirmed that the goal of contractual interpretation is determining the parties' intent. Doing so involves reading the contract as a whole, giving the words used their ordinary grammatical meaning, consistent with the surrounding circumstances known to the party when the contract was formed.[96] Accordingly, courts must consider both the words of the contract and the circumstances in which it was made.

122. While contractual interpretation must be rooted in the term of the contract itself, this Court confirmed that an examination of the "factual matrix" must also be conducted. Evidence of surrounding circumstances deepens the judge's understanding of the words used by the parties. This Court observed that contracts do not take place in a vacuum, rather they are made against a background of relevant facts which should therefore be considered by judges when interpreting the terms of a contract.[97]

123. Breach of contract proceedings are, therefore, best addressed by a summary judgment motion where the motion judge has a complete evidentiary record. It is only through summary judgment that the judge will be able to properly determine the parties' intent from a full appreciation of the factual matrix.

124. Where a claim requires a judge to take a "deep-dive" into the merits of the claim, the interests of justice dictate that summary judgment motions are the appropriate vehicle.

Issue 3: The harm suffered or to be suffered by the responding party may be financial or non-financial in nature

125. The purpose of subsection 137.1(4)(b) is to balance "the public interest in permitting the proceeding to continue" against "the public interest in protecting the Defendant's expression." The harm suffered or to be suffered by the responding party from the expression is an essential element for the motion judge to consider in striking the appropriate balance between the two competing interests.

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[96] *Ibid* at para 47.
[97] *Ibid* at para 57.

126. The Court of Appeal erred by interpreting the harm suffered or to be suffered by the responding party as requiring evidence of financial harm.

Harm means financial and non-financial damages

127. In its plain and ordinary meaning the word "harm" includes both financial and non-financial harm.[98] The legislature chose not to include any language qualifying or limiting the type of harm the judge must consider when determining whether the public interest favours the proceeding continuing.

128. In its recent decision in *Levant v Day*, the Court of Appeal recognized that "while the harm suffered or likely to be suffered may often be measured primarily by the monetary damages suffered or likely to be suffered" there are other measures to measure harm that go "beyond the monetary value of the claim".[99]

129. In claims for breach of contract, particularly those for breach of a settlement agreement, there will often be both financial and non-financial harm suffered by the responding party. The financial harm can take the form of foregoing or limiting an entitlement to costs in the proceeding. The non-financial harm can take the form of loss of a binding decision that can result in findings of *res judicata* or other remedies in future proceedings concerning the same issues between the parties.

Irreparable harm may result from a breach of contract

130. Like the non-financial harm from breach of settlement agreements, there are many other types of contracts for which a breach will cause irreparable harm. For example, breaches of agreements governing trade secrets or confidential information cannot be cured by money; no green poultice can again make secret such information once it is disclosed.

131. The "interests of justice" and the "public interest" are necessarily aligned and, therefore, cannot be viewed as functionally separate in the context of the balance to be struck under subsection 137.1(4)(b). From this perspective, the analysis should focus not only on the harm

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[98] For example, in *Montour v Beacon Publishing Inc*, the Ontario Court of Appeal explained that "a serious libel does not always manifest itself in financial loss"

[99] *Levant v Day*, *supra* note 49 at para 18.

suffered or to be suffered by the responding party, but also on the interests of all who may be affected by the functioning of the justice system in relation to the proceeding.

132. Accordingly, the balance that ought to be struck is one that favours preserving the integrity and repute of the justice system.

133. In cases where the essential character of the proceeding engages settlement finality, the interests of justice in preserving the integrity of settlement agreements to resolve litigation and parties' freedom of contract must be considered by the judge in striking the appropriate balance. The appropriate balance in such cases will often elevate the public importance in the proceeding as an essential element together with the harm suffered or to be suffered in determining whether the proceeding should continue.

Issue 4: Section 137.1 does not apply in this case

The proceeding primarily "arises from" the PPA's breach of the Minutes, not an expression on a matter of public interest

134. 170 submits that under the appropriate legal standard, this is not a proceeding to which s. 137.1 applies. The essential character of the claim arises from the PPA's breach of the Minutes, not from an expression relating to public interest. The claim was commenced to enforce 170's legitimate contractual rights under the Minutes. The fact that the breach of the Minutes was an expression on a matter of public interest was not enough to characterize this suit as SLAPP suit. The Court of Appeal erred in not carefully analyzing the essential character of the proceeding to determine if it was a SLAPP suit.

135. Properly construed, subsection 137.1(3) excludes motions brought in claims whose essential character is not primarily based on an expression.

136. Here, the proceeding is not a SLAPP suit. Rather, the proceeding is based on the allegation that the PPA "advanced the position" at the OMB hearing that the Development offended the provisions of the *Conservation Authorities Act* and Ontario Regulation 176/06; the very thing the PPA agreed in the Minutes not to do.

137. Interpreting subsection 137.1(3) as subjecting non-SLAPP suits to expedited dismissal violates the right of a responding party, such as 170, to access justice and runs contrary to the principles of freedom of contract and settlement finality.

138. Simply put, the PPA cannot meet the threshold of showing that 170's claim arises primarily from an expression. The essential character of the claim and its primary purpose is about seeking redress for a breach of the Minutes. It is not a proceeding arising primarily from an expression relating to a matter of public interest.

139. There was no evidence that 170 attempted to silence or gag the PPA. The PPA was a full participant at the OMB hearing. In fact, 170 did not object to them obtaining party standing. The PPA was not restricted at the OMB hearing from making submissions or giving evidence provided it did not breach its contractual obligations under the Minutes.

There were grounds to believe the proceeding had substantial merit and the PPA had no valid defence

The substantial merits of the proceeding

140. The Court of Appeal erred in its approach to the interpretation of the Minutes and did not read the Minutes as a whole nor did it consider the factual matrix giving rise to the Minutes.

141. Contrary to the language of the Minutes and the "with prejudice" dismissal of the PPA's Judicial Review Application, the Court of Appeal found that the PPA was not restricted in their participation at the OMB hearing. In so doing, although the Court of Appeal referred to *Sattva*, it failed to apply the rules of contractual interpretation as set out therein.

142. As discussed above, the parties executed the Minutes knowing that the planning merits of the Development would be determined at the OMB hearing. The parties sought to resolve the issues raised in the Judicial Review Application by way of the Minutes to avoid re-litigating the same issues at the OMB hearing.

143. For this reason, the Minutes specifically stated that the PPA's Judicial Review Application would be dismissed on a "with prejudice" basis. The "with prejudice" dismissal "was conclusive of the rights of the parties, as if the case was concluded adverse to the PPA. It

not only terminated the PPA's judicial review application, but also the "right of action upon which it was based".[100] Accordingly, the PPA was barred by the "with prejudice" dismissal from attempting to re-litigate the same issues raised in its judicial review application. The Court of Appeal erred in not considering this and the underlying Judicial Review Application.

144. The language used in the Minutes reflected the "with prejudice" dismissal of the PPA's Judicial Review Application. The Minutes did not simply prohibit the PPA from expressing that the SSMRCA approval was illegal, invalid, or unsupported by evidence at the OMB hearing. Rather, the PPA agreed they would not "advance" the "position" that the Development was contrary to the provision of the *Conservation Authorities Act* and Ontario Regulation 176/06.

145. The parties chose such language recognizing that the OMB does not have jurisdiction to overturn the SSMRCA approval. Such jurisdiction rests exclusively with the Mining and Lands Commissioner. Therefore, the parties cannot reasonably be said to have solely agreed that the PPA would not challenge the SSMRCA approval at the OMB hearing because that is something the Respondents would not have been able to do in any event.

146. Rather, the parties sought to avoid relitigating the basis of the SSMRCA approval, namely the issues concerning the conservation of land (i.e. wetland destruction) and inadequacy of the Appellant's studies, at the OMB hearing. Importantly, although the OMB did not have jurisdiction to overturn the SSMRCA approval, the OMB could consider the foregoing issues in determining the overall planning merits of the Development.

147. Although the PPA did not request that the OMB overturn the SSMRCA approval, (something the OMB lacked jurisdiction to do) or directly put the validity of that approval in issue, they gave evidence that the development would destroy the wetland and that 170's studies (which had also been submitted to the SSMRCA) were inadequate. In so doing, the PPA indirectly attacked not only the merits and statutory basis of the SSMRCA approval, but it also took the position that the Development was contrary to the provisions of the *Conservation Authorities Act* and Ontario Regulation 176/06, something that the PPA agreed not to do.

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[100] *Purcell Systems Inc v Argus Technologies Ltd*, 2008 FC 1210.

148. It cannot reasonably be said that the PPA could, on the one hand, voluntarily agree not to "advance the position" at the OMB hearing that the Development was contrary to the provisions of the *Conservation Authorities Act* and Ontario Regulation 176/06, but could give evidence to this effect under the guise of the planning merits of the development. Such an interpretation robs the Minutes of any substance and renders them commercially absurd.

The Court applied the wrong factual matrix

149. The need for the court to have a full appreciation of the surrounding circumstances in determining the parties' intent is underscored by the Court of Appeal's error in interpreting the Minutes with the wrong factual matrix; an interpretation that led the Court of Appeal to conclude that the claim lacked substantial merit.

150. The Court held that the PPA *already* had standing at the OMB hearing when they executed the Minutes and that the "nothing in the [Minutes] touched on the [PPA's] participation in the OMB proceedings".[101] Both are incorrect. The PPA did not have standing at the OMB hearing as the OMB hearing had not yet begun.[102] Moreover, the Minutes expressly referred to the OMB hearing (as well as any other subsequent legal proceeding) in its prohibition against the PPA advancing the position that the SSMRCA approval was illegal, invalid, or lacked reasonable supporting evidence.

151. From this incorrect factual matrix, the Court of Appeal concluded "nothing in the [Minutes of Settlement] suggested that [the PPA] could not oppose [170's] development at the OMB. [170] must be taken to have known full well the range of factual issues that could be raised on its appeal before the OMB. Those issues included some that had been considered, albeit in a different regulatory context by the SSMRCA."[103]

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[101] Court of Appeal Decision, *supra* note 50 at para 114.

[102] See note 22, *supra*. The PPA sought and received party status at the first OMB prehearing conference before Member Taylor on March 11, 2014. 170 did not oppose the PPA being granted party status.

[103] Court of Appeal Decision, *supra* note 50 at para 114.

152. The Court of Appeal erred in embarking upon an analysis of the merits, which is typically reserved for summary judgment motions, without the benefit of a complete factual matrix and without considering the Minutes as a whole.

153. As explained by Justice Doherty "[c]ases that turn on the interpretation are routinely addressed expeditiously and efficiently by way of summary judgment motions under r. 20. With the benefit of hindsight, I would suggest that this is a case that could have been more efficiently and expeditiously resolved by way of a timely Summary Judgment motion".[104]

The duty of honest performance

154. The Court of Appeal not only failed to consider the Minutes as a whole but also ignored this Court's finding in *Bhasin v Hyrnew*,[105] that parties owe each other a duty of honest performance; a duty that requires them to be honest with each other in relation to the performance of their contractual obligations. The Court of Appeal did not consider this duty in its decision and thus interpreted the Minutest in a manner that permitted the PPA to knowingly mislead 170 about how they intended to perform their obligations under the Minutes.

No valid defence

155. This Court will recall that the Court of Appeal held that the non-moving party must show that the moving party has "no valid defence" by convincing the judge, through a reasonableness lens, that none of the defences advanced in the materials filed would succeed.

156. This endeavor is generally not possible in a breach of contract claim where the parties will not have access to and cannot provide the judge with the full factual matrix. Without the full factual matrix, the judge cannot properly interpret the contract. Without interpreting the contract, the judge cannot reasonably determine whether the impugned conduct falls within the ambit of the parties' agreement.

157. Based on its incorrect interpretation of the Minutes, the Court of Appeal did not consider whether any of the affirmative defences raised in the PPA's materials had a reasonable likelihood of succeeding.

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[104] *Ibid* at para 101.
[105] *Bhasin v Hyrnew,* 2014 SCC 71, [2014] 3 SCR 494.

158. The motion judge found that the PPA raised defences such as absolute privilege and whether a party can contract out of absolute privilege thereby waiving that right. Consistent with U.S. case law, the motion judge dismissed these defences holding that "parties have the right to waive rights or limit rights by way of separate contractual obligations."

159. Although in no way binding on him, the motion judge found support for his conclusion in the decision of the Supreme Court for the State of Minnesota in *Middle-Snake-Tamarc Rivers Watershed District v Stengrim.*[106] That case closely accorded to the present facts as it concerned the breach of a settlement agreement by landowners wherein the landowners agreed not to challenge a Water Management Project. The Minnesota Court found that the landowners could not shield themselves under Minnesota's anti-SLAPP legislation because they had contractually waived the legislation's protection. The Minnesota Court stated:

> Preexisting legal relationships, such as those based on a settlement agreement where a party waives certain rights, may legitimately limit a party's public participation. **It would be illogical to read Minn. Stat. §§ 554.01-.05 as providing presumptive immunity to actions that a moving party may have contractually agreed to forgo or limit. See Minn. Stat. § 645.17 (2008) (stating that in ascertaining the intention of the Legislature, we may presume that "the legislature does not intend a result that is absurd").** The underlying dispute here is essentially a contractual argument, and the district court had the authority to deny [the Defendant's] anti-SLAPP motion because the court determined it was at best premature.[107] [Emphasis added]

160. Likewise, the California Court of Appeal found parties could contractually waive the protection of that states' anti-SLAPP legislation in its decision in *LiMandri v Wildman*[108]. In that case, the California Court denied a motion brought under the state's anti-SLAPP legislation concerning breach of the confidentiality provisions of a settlement agreement. Specifically, the defendants argued their First Amendment right to freedom of speech permitted them to make the disclosure at issue notwithstanding they had restricted themselves from doing so under the provisions of the settlement agreement. The California Court disagreed, finding that

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[106] Motion Judge's Reasons, *supra* note 2 at para 48, AR, Vol. 1, Tab 1, p. 12.
[107] *Middle-Snake-Tamarac Rivers Watershed Dist v Stengrim* (2010), 784 NW 2d 834, 839 at 4.
[108] *LiMandri v Wildman*, 2013 Cal App Unpublished 4023.

constitutional rights, including the First Amendment right to freedom of speech, can be waived by contract.[109]

161. The California Court explained that allowing the Defendant to do the very thing the Defendant contracted not do to do "would chill the parties' ability in many cases to settle the action before trial. Such a result runs contrary to the strong public policy in this state favoring settlement of actions."[110]

162. In short, the California Court stated, "the anti-SLAPP statute affords no protection to the Defendant who breaches a contract limiting his right to speak publicly on matters of public interest."[111]

The public interest favours the proceeding continuing

163. The motion judge held that the "public interest in allowing the litigation to continue and permitting the issues related to the minutes of settlement and the finality of agreements made between parties to be adjudicated outweighs the public interest in protecting the right of Peter Gagnon to express himself by giving evidence before the [OMB]".[112]

164. In concluding as he did, the motion judge was satisfied that this proceeding raises an "important public interest and policy interest" and that 170 suffered "significant and serious" harm.[113]

The public interest in protecting the sanctity of settlements

165. The Court of Appeal acknowledged that 170 suffered harm by "the loss of its reasonable expectation that its litigation with the defendants over the proposed development was finished."[114] In dismissing *that* harm, however, the Court was guided by its above-noted erroneous interpretation of the Minutes. In this regard, the Court found that 170's expectation of settlement finality was "dependent entirely on the correctness of its interpretation of the

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[109] *Ibid* at 9.
[110] *Ibid* at 11.
[111] *Ibid* at 10.
[112] Motion Judge's Reasons, *supra* note 2 at para 55, AR, Vol. 1, Tab 1, p. 13.
[113] *Ibid* at para 54.
[114] Court of Appeal Decision, *supra* para 50 at para 120, AR, Vol. 1, Tab 3, p. 120.

agreement."[115] Based on the errors in the Court's factual matrix, the Court concluded the Minutes could not reasonably "be read as foreclosing Mr. Gagnon's testimony before the OMB."[116]

166. Had the Court of Appeal applied the proper analysis required in interpreting the Minutes – an analysis that for the reasons discussed above, was not possible through the legislation's expedited process – the Court would have found otherwise and inferred damages from the loss of settlement finality. This would have vitiated the need for the Court to investigate whether there was *other* harm suffered by 170, particularly its focus on 170 establishing quantifiable monetary damages at such an early stage in the litigation.[117]

167. For instance, by agreeing to resolve the PPA's Application for Judicial Review, 170 gave up the opportunity to a hearing and final adjudication on the merits of the PPA's issues by the Divisional Court. Such a decision would have been binding on the OMB and would have estopped all parties in that hearing from re-litigating those same issues. This could have resulted in a much different outcome in the OMB hearing; one that would have seen the Development come to fruition. Accordingly, by giving up this opportunity, 170 suffered harm that is by nature irreparable. It is harm that cannot be quantified in monetary terms or cured.

168. As this Court has observed on numerous occasions, the common law principle of freedom of contract has been given "great weight" and "must not be dismissed lightly".[118] The present proceeding is about ensuring parties are held to their freely bargained for obligations and upholding the important public interest in the early and final settlement of litigation. Permitting the tactical use of the anti-SLAPP legislation to protect expression that parties have freely bargained to contractually limit will bring the justice system into disrepute.

170 suffered monetary damages

169. Notwithstanding the foregoing, 170 did suffer monetary damages. In settling the Judicial Review Application, 170 gave up its right to costs on the security for costs motion. Moreover, if

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[115] *Ibid* at para 120, AR, Vol. 1, Tab 3, p. 120.
[116] *Ibid* at para 120, AR, Vol. 1, Tab 3, p. 120.
[117] *Ibid* at paras 121-123, AR, Vol. 1, Tab 3, pp 63-64.
[118] *Bhasin*, *supra* note 105 at para 70; *Fraser River Pile & Dredge Ltd v Can-Dive Services* Ltd, [1999] 3 SCR 108, [1999] SCR No 48 at para 37.

the Judicial Review Application hadn't been settled, the PPA would have had to pledge $20,000 as security for costs; an amount that 170 would have been entitled to if successful in that proceeding.

170. The damages suffered by 170 also consisted of the cost of commissioning 23 studies, the cost of the OMB hearing, the attendance of various experts and other costs of that nature. These costs would have been significantly curtailed if the PPA had limited their participation as they agreed to do by executing the Minutes.

PART IV: ORDER SOUGHT CONCERNING COSTS

171. 170 requests its costs in on this appeal and in the proceedings below.

PART V: ORDER SOUGHT

172. 170 seeks an Order allowing the Appeal and reversing the decision of the Ontario Court of Appeal and reinstating the Order of the motion court that 170 could proceed with the action.

PART VI: SUBMISSIONS ON CASE SENSITIVITY

173. 170 confirms that there is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation, or restriction on public access to information in the file that could impact the Court's reasons in this appeal.

ALL OF WHICH IS RESPECTFULLY, this 22nd day of July, 2019

Orlando M. Rosa
Counsel for the Appellant

Tim J. Harmar
Counsel for the Appellant

PART VII: TABLE OF AUTHORITIES

Other --

Statutory Provisions