SCC 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 LTD.

Appellant
(Respondent)

- and -

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

Respondents
(Appellants)

FACTUM OF THE RESPONDENTS (POINTES PROTECTION ASSOCIATION, PETER GAGNON, LOU SIMIONETTI, PATRICIA GRATTAN, GAY GARTSHORE, RICK GARTSHORE and GLEN STORTINI, RESPONDENTS)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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CONTENTS

PART I – STATEMENT OF FACTS

A. Overview

1. A SLAPP[1] claim is fundamentally an intimidation tactic. A lawsuit with little or no merit is brought claiming a large amount of money. A defendant is faced with the prospect of years of litigation and expensive legal fees if they wish to vindicate their expression. The potential effect, as described in the Anti-SLAPP Advisory Report to the Attorney General, is that:

> SLAPPs can intimidate opponents, deplete their resources, reduce their ability to participate in public affairs, and deter others from participating in discussion on matters of public interest.[2]

2. Recognizing that the existing remedies under Ontario law did not satisfactorily address these types of claims, the Ontario Legislature passed the "Protection of Public Participation Act, 2015".[3] As part of this Act, sections 137.1 through 137.5 were added to the *Courts of Justice Act*,[4] which provides for an expedited process to dismiss lawsuits which arise from expressions on matters of public interest, and which have insufficient merit or lack sufficient demonstrable harm to justify limiting a person's Charter right of freedom of expression.

3. The present case is a stereotypical SLAPP proceeding. It is reflective of what is described in the Advisory Report as the "standard image" of a SLAPP, involving a "small group of

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[1] A "Strategic Lawsuit Against Public Participation"
[2] Anti-SLAPP Advisory Panel Report to the Attorney General (referred to herein as the "Advisory Report"), para 1
[3] *Protection of Public Participation Act*, 2015, S.O. 2015, c. 23
[4] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1 to 137.5

concerned citizens wishing to express their views on a land development project that would affect their interests, and finding themselves sued by a rich developer".[5]

4. The Appellant, 1704604 Ontario Ltd. (the "Developer"), sought to build a 91-lot development on the outskirts of Sault Ste. Marie, within lands designated by the Provincial government as coastal wetlands. The Pointes Protection Association (the "PPA") and its members, as concerned local citizens, spoke out against the proposed development's negative impact on the wetlands.

5. The Ontario Municipal Board (the "OMB") accepted the PPA's evidence of potential destruction of wetlands. While the Developer was seeking leave to appeal the OMB's decision, the Developer sued the PPA and some of its members for giving evidence at the OMB on the potential loss of wetlands.

6. This action repeats the same allegations of breach of contract rejected by the OMB, and rejected by the Divisional Court in dismissing the Developer's appeal of the OMB decision. These allegations have no more merit now than they did then.

7. The Court of Appeal dismissed the Developer's claim under s. 137.1, holding that the Developer's claim had no reasonable chance of success and no cognizable claim for damages. The Respondents' request that this Court uphold the Court of Appeal's dismissal of the claims against them.

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[5] Advisory Report, para 60

B. The Loss of Coastal Wetlands in the Proposed Development

8. This proceeding is the latest in a series of disputes between the parties as to the ecological impact that would be caused by a development proposed by the Developer.

9. The proposed development was to be located on the outskirts of Sault Ste. Marie, in areas identified by the Province of Ontario as "coastal wetlands". The proposed development was designed to include a two-kilometer canal through the wetlands, leading to the St. Mary's river, along with a new road through the wetlands.

10. The relevant experts (including the Developer's own experts) agreed that the proposed development would result in the loss of wetlands:

a) The Developer submitted a report to the Sault Ste. Marie Region Conservation Authority (the "Conservation Authority") which concluded that "[t]here will however be some long term residual impact due to development. Specifically there will be a direct loss of wetland, vegetation and associated wildlife habitat due to the site development".[6]

b) In an agreed statement submitted jointly by the parties (including the Developer) at the OMB hearing, the relevant experts agreed that "[m]uch of the subject wetland will be lost due to the excavation of the canal, the building of roads and the placement of fill for buildings and other lots…".[7]

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[6] Pointe Estates Subdivision Scoped Environment Impact Study for Development in a Wetland, Great Lakes Environment Services, s. 5.2, pp. 24-26 [Respondents' Record, Tab 1, pp. 102-104]; Decision Delivered by Blair S. Taylor and Order of the Board dated February 27, 2015 (the "OMB Decision"), paras 96-97 [Appellant's Record, Vol. 3, Tab 10.B.26, pp. 37-38]

[7] Statement from Teleconference Meeting of Like Experts: Oct 6, 2014 [Respondents' Record, Tab 2, p. 31]

c) The PPA and the Developer provided evidence at the OMB hearing as to how much of the wetlands would be lost. The PPA, through Peter Gagnon, calculated that 77% of the coastal wetlands within the proposed development would be lost.[8] The City's Director of Planning, relied on by the Developer, said that about 40% of the coastal wetland within the development would be lost.[9]

d) The Developer filed evidence on this motion from one of its experts, Michael Davies. Mr. Davies' evidence was that 48.54 hectares of the "wetland complex" was within the proposed development, and that only 59% of the entire "wetland complex" (including areas located outside the proposed development) would "remain intact post-development".[10]

11. There was no question that a significant amount of the wetlands would be lost if the proposed development proceeded.

C. Development Approval Process

12. The proposed development required numerous approvals and by-law/planning variations prior to proceeding. One required approval was from the Conservation Authority. Separately, the Developer also required that the Sault Ste. Marie City Council provide variances to the relevant by-laws and the Sault Ste. Marie Official Plan, as the proposed development was not in compliance with the City's established zoning and planning requirements.

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[8] OMB Decision, para 129 [Appellant's Record, Vol. 3, Tab 10.B.26, p. 46]
[9] OMB Decision, para 122 [Appellant's Record, Vol. 3, Tab 10.B.26, p. 45]
[10] Affidavit of Dr. Michael Davies, paras 28, 32 [Appellant's Record, Vol. 6, Tab 11.B, p. 2]

13. The Conservation Authority initially rejected the proposed development. It later reconsidered the decision, and on December 11, 2012, the five-member board of the Conservation Authority provided its approval by a split vote of three to two.[11]

14. The PPA brought an application for judicial review of the Conservation Authority's decision on the grounds that (a) the Conservation Authorities' resolutions were "illegal and invalid as they are contrary to the *Conservation Authorities Act*" and the applicable regulations, and (b) that the Conservation Authority exceeded its jurisdiction by passing resolutions "with no reasonable evidence to support its decision and through consideration of factors extraneous" to those set out in the applicable regulation.[12]

D. The City Rejects the Developer's Application

15. While the judicial review application was pending, the proposed development came before Sault Ste. Marie City Council. The Developer had applied to the City to have the City vary its Official Plan and zoning by-laws to permit the proposed development to proceed. City Council rejected the Developer's application by a vote of 7 to 4 on July 15, 2013.[13]

16. The Developer appealed City Council's decision to the OMB on July 26, 2013.

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[11] December 13, 2012 Conservation Authority resolution [Appellant's Record, Vol. 5, Tab 11.A.8, p. 91]
[12] Notice of Application to Divisional Court for Judicial Review [Appellant's Record, Vol. 2, Tab 6, p. 1]
[13] July 15, 2013 Minutes of Regular Meeting of City Council, item 3(d) [Appellant's Record, Vol. 2, Tab 10.B.13, p. 172]

E. The Parties Resolve the Judicial Review Application

17. As of August 2013, there were two outstanding proceedings regarding the proposed development: the PPA's application for judicial review and the Developer's appeal to the OMB. No steps had been taken in the OMB appeal. As of the beginning of August 2013, the only step that had been taken in the judicial review application was that the Developer had brought a motion, which had not yet been heard, seeking $65,000 in security for costs from the PPA.

18. In this context, on August 1, 2013, the parties first discussed the potential settlement of the judicial review application. The PPA's lawyer proposed that the judicial review be held in abeyance pending the OMB appeal. The Developer's lawyer proposed that the parties agree to dismiss the judicial review application, stating:

> If you consent to a dismissal of [the judicial review application] then I will agree that no costs will be sought. Your client can then make its pitch before the OMB. I do not understand why there are two proceedings which effectively address the same issue.[14] [emphasis added]

19. Later that month, the motion for security for costs was decided, and the PPA order to pay $20,000 into court.[15] The settlement discussions continued through this period:

a) The PPA sought assurances as part of any resolution that the Developer would not "agree to a settlement at the OMB which would serve to circumvent [the PPA's] involvement in the process". The Developer refused, stating:

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[14] August 1, 2013 email from O. Rosa to H. Scott [Respondents' Record, Tab 3, p. 32]
[15] *Pointes Protection Association v. Sault Ste. Marie Region Conservation Authority*, 2013 ONSC 5323 [Appellant's Record, Vol. 2, Tab 7, p. 9]

> I will not agree to the insertion of any paragraph in the minutes which address the OMB appeal or its process … The Divisional Court ought not to fetter the rights of either party in the OMB process".[16] [emphasis added]

b) Once the PPA had paid the security for costs into court, it declined to accept a settlement proposal by the Developer without some assurance that the PPA would be able to participate in the OMB appeal.[17]

c) The settlement discussions were ultimately resolved on the basis that the Developer agreed to provide a letter to the PPA confirming that the Developer would not oppose the PPA being added as a party to the OMB appeal.[18] The Developer provided that letter[19], and the parties entered into Minutes of Settlement.[20]

20. The Minutes of Settlement provided that the judicial review application would be dismissed on a with prejudice and without costs basis. In the Minutes of Settlement, the PPA and its members agreed:

> … 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 that the Resolutions passed by the SSMRCA … are illegal or invalid or contrary to the provisions of the *Conservation Authorities Act* [and its regulations] or that the SSMRCA exceeded its jurisdiction by passing [the Resolutions] with no reasonable evidence to support its decision and considered factors extraneous to those set out in [the applicable regulation].[21]

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[16] September 4, 2013 email from O. Rosa to H. Scott [Respondents' Record, Tab 4, p. 37]
[17] September 6, 2013 email from H. Scott to J. Paciocco [Respondents' Record, Tab 5, p. 40]
[18] September 13, 2013 email from H. Scott to O. Rosa [Respondents' Record, Tab 6, p. 42]
[19] September 18, 2013 Letter from O. Rosa to H. Scott [Respondents' Record, Tab 7, 43]
[20] Minutes of Settlement [Appellant's Record, Vol. 2, Tab 10.B.18, p. 196-199]
[21] Minutes of Settlement, para 6 [Appellant's Record, Vol. 2, Tab 10.B.18, p. 197]

21. The language in paragraph 6 of the Minutes of Settlement mirrored the relief sought by the PPA in its Notice of Application in the judicial review proceeding.[22]

F. The OMB Rejects the Developer's Appeal

22. The PPA was granted party status at the OMB on April 2, 2014, along with another party who opposed the development, Klaas Oswald.[23]

23. The OMB appeal hearing was held over three weeks in late 2014. The OMB heard from 17 witnesses on behalf of the Developer, two witnesses from the City, and six witnesses in opposition to the proposed development (two of which were called by the PPA).[24]

24. By the time the OMB hearing took place, the Province of Ontario had passed a new Provincial Policy Statement, which provided guidance on development in sensitive environmental areas. The new 2014 Provincial Policy Statement provided that "[d]evelopment and site alteration shall not be permitted in … coastal wetlands in Ecoregion 5E … unless it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions".[25] Although the Developer disputed that the 2014 PPS applied to the proposed development (instead preferring a prior, less stringent, Provincial Policy Statement), the OMB determined that the 2014 PPS did apply.[26]

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[22] Notice of Application to Divisional Court for Judicial Review [Appellant's Record, Vol. 2, Tab 6, p. 1]
[23] Memorandum of Oral Decision Delivered by Blair S. Taylor on March 11, 2014 and Order of the Board dated April 2, 2014 [Appellant's record, Vol. 5, Tab 11.A.15, p. 134]
[24] OMB Decision, paras 74-75 [Appellant's Record, Vol. 3, Tab 10.B.26, p. 31]
[25] 2014 Provincial Policy Statement Under the Planning Act (the "2014 PPS"), s. 2.1.5 [Respondents' Record, Tab 8, p. 69]
[26] OMB Decision, para 42 [Appellant's Record, Vol. 3, Tab 10.B.26, p. 21]

25. On February 27, 2015, the OMB delivered a decision dismissing the Developer's appeal on multiple grounds. Some of the grounds were not related to the destruction of wetlands. For example, the Official Plan required that the proposed development be a "limited residential development". The OMB held that it did not qualify as a "limited residential development" as "a 91-lot plan of subdivision is a 'big development' in the City".[27]

26. With respect to the destruction of wetlands, the OMB held that the proposed development would result in "destruction of a significant portion of a coastal wetland that is of interest both to the Province of Ontario, the Government of Canada and through the International Joint Commission, the United States of America".[28] In particular, the OMB accepted the evidence of Peter Gagnon that approximately 77% of the coastal wetland within the proposed development would be destroyed.[29] The proposed development therefore did not comply with the Official Plan, the Planning Act or the 2014 PPS, and did not, in the opinion of the OMB, "represent good planning".[30]

27. The Developer raised the Minutes of Settlement, and the related dismissal of the judicial review application, in the OMB hearing. The Developer took the position that:

> … when there is an issue or material fact which has been dealt with in the context of the other proceeding that [it] is not in the mouth of the person which is bound by that previous decision to raise that issue again. And what I'm referring to, obviously, is the Minutes of Settlement and the court order.[31]

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[27] OMB Decision, para 142 [Appellant's Record, Vol. 3, Tab 10.B.26, pp. 49-50]
[28] OMB Decision, para 146 [Appellant's Record, Vol. 3, Tab 10.B.26, pp. 50-51]
[29] OMB Decision, para 134 [Appellant's Record, Vol. 3, Tab 10.B.26, pp. 47-48]
[30] OMB Decision, para 135 [Appellant's Record, Vol. 3, Tab 10.B.26, p. 48]
[31] Transcript of OMB Hearing, p. 2917, lines 9-19 [Appellant's Record, Vol. 3, Tab 10.B.25, p. 3]

28. The OMB did not accede to the Developer's position. On multiple occasions during the course of the OMB hearing, the OMB reiterated that it was not bound by the result of the Conservation Authority proceedings.[32] For example, the OMB member made the following statement during the course of the hearing:

> The Board takes note of the fact that presumably the Conservation Authority wouldn't have been satisfied unless it had issued the permit. So all the Board takes away from this is the Conservation Authority has issued a permit. That's the jurisdiction totally in the Conservation Authority. This Board has jurisdiction as it relates to the Provincial Policy Statement, official plans, wetlands, etc., and I presume at some point in time I'm going to hear evidence with regard to that.[33]

29. Further, in the course of closing submissions, the OMB reiterated its view that it was not bound by the Conservation Authority decision to the extent of the planning issues before it:

> Counsel, we've had this discussion before, and the Board's made it very clear that it is not going to assume any jurisdiction that belongs with Conservation Authority. That being said, the Board retains its inherent jurisdiction with regard to land use planning matters and the Provincial Policy Statement.[34]

G. The Divisional Court Rejects the Developer's Application for Leave to Appeal

30. The Developer sought leave to appeal the OMB decision to the Divisional Court. One of the grounds of appeal that the Developer relied on was (as described by the Divisional Court) that the OMB "breached procedural fairness and natural justice by letting Gagnon give expert evidence about wetland loss in contravention of the settlement agreement with PPA".[35]

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[32] Excerpts from Transcripts of OMB Hearing, [Appellant's Record, Vol. 2, Tab 10.B.24, p. 269-277; Vol. 3, Tab 10.B.25, p. 3-7]
[33] Transcript of OMB Hearing, p. 443, line 23 to p. 444, line 10 [Appellant's Record, Vol. 2, Tab 10.B.24, p. 269]
[34] Transcript of OMB Hearing, p. 2920, lines 13-22 [Appellant's Record, Vol. 3, Tab 10.B.25, p. 6]
[35] *Avery v. Pointes Protection Association*, 2016 ONSC 6463 at para 15

31. The Divisional Court refused the Developer's application for leave to appeal. In doing so, Justice Ellies held that there was no breach of the Minutes of Settlement:

> [112] **I do not accept the developers' argument that Gagnon's evidence constituted a breach of the minutes of settlement.** In my view, because they restricted the PPA's right to challenge the merits of the developers' application, the minutes of settlement must be strictly construed. I agree with the submissions made on behalf of the PPA that the minutes dealt specifically with the SSMRCA's approval under the Conservation Authorities Act and its regulations. **The minutes did not restrict the PPA from advancing issues relating to the Planning Act and the PPS.**
>
> [113] The developers' argument sounds alarmingly like an argument that the SSMRCA had somehow "occupied the field" regarding the loss of wetlands, preventing Gagnon from saying anything about it before the Board. On the contrary, while the Board was obliged to consider the SSMRCA's decision, it was also obliged to arrive at its own conclusion regarding possible negative impacts under the Act. Gagnon's evidence about the extent of the loss of wetlands was relevant to that issue. The fact that the loss of wetlands was also a consideration relevant to the SSMRCA's decision does not mean that Gagnon was adopting a position that the SSMRCA's decision was illegal. **His evidence related to Planning Act matters, not to the Conservation Authorities Act or its regulations.**[36] [emphasis added]

H. The Current Claim Repeats the Arguments Rejected in the OMB Proceeding

32. The Developer has sued the PPA, Peter Gagnon, and 5 other members of the PPA. The Statement of Claim alleges that the Developer suffered $5 million in damages as a result of the defendants' breach of the Minutes of Settlement. In particular, the Statement of Claim alleges that the defendants breached the Minutes of Settlement at the OMB hearing[37] in that:

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[36] *Avery v. Pointes Protection Association*, 2016 ONSC 6463 at paras 112-113
[37] Statement of Claim, para 74 [Appellant's Record, Vol. 2, Tab 9, p. 43]

> The combined result of the Defendants' documentary evidence and Mr. Gagnon's testimony about wetland destruction and the adverse effects of the proposed development was a clear breach of the Minutes of Settlement.[38]

33. Prior to delivering a Statement of Defence, the defendants moved under s. 137.1 of the *Courts of Justice Act* for an order dismissing this action as a proceeding limiting freedom of expression on a matter of public interest.

34. The motion judge declined to dismiss the proceeding under s. 137.1, largely determining the matter on a reading of the pleadings, rather than a substantive review of the evidence.[39] On appeal, the Court of Appeal found that the motion judge erred, and that the proceeding should be dismissed on multiple grounds under s. 137.1:

a) Justice Doherty, writing on behalf of the court, found that the Developer's claim had insufficient merit under s. 137.1(4)(a), as the Developer's proposed interpretation of the Minutes of Settlement "[was] not, in my view, an interpretation that flows reasonably from the language or the factual context of the agreement".[40]

b) Justice Doherty further found that there was insufficient evidence of harm under s. 137.1(4)(b), as not only was there no evidence of harm to the Developer, but "[t]he motion material provides little, if any, insight into the nature of [the Developer's] damage claim, or the quantum of that claim".[41]

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[38] Statement of Claim, para 75 [Appellant's Record, Vol. 2, Tab 9, p. 43]
[39] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 109
[40] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 114
[41] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 122

PART II – OVERVIEW OF POSITION

35. The Respondents' submissions address the following issues:

a) With respect to the interpretation of s. 137.1 as a whole, the Appellant's reliance on the term "SLAPP" as a manner of narrowing the scope of s. 137.1 is misplaced. Section 137.1 deliberately avoids the use of the term "SLAPP".

b) When determining whether a claim is "arising from an expression on a matter of public interest", the Court of Appeal's broad interpretation of this provision is correct. There is nothing in s.137.1 which restricts its application to certain causes of action, and reading this restriction into the statute would permit a plaintiff to avoid the proper application of s. 137.1 through creative drafting.

c) In addressing the application of the merits test under s. 137.1(4)(a), a robust onus on the plaintiff to demonstrate "substantial merit" and "no valid defence" is needed to satisfy the statute's purpose of discouraging litigation on expressions on matters of public interest. While some accommodation may be made for evidence which is not available at the time of the motion but which is reasonably likely to be available at trial, that should not otherwise lower the plaintiff's onus to prove its case.

d) In balancing the harm done against the value of the expression under s. 137.1(4)(b), actual evidence of harm is needed from a plaintiff in order to ensure that public expression on matters of public interest is not hampered by theoretical or nominal harm. Further, the court should not inquire into the motives of a plaintiff on this, or any other step of the analysis, as that approach was deliberately avoided by the drafters of s. 137.1.

e) Finally, regarding the application of s.137.1 to the present case, there is no justification for setting aside the order of the Court of Appeal dismissing the Developer's claim. Its allegation of breach of contract has already been rejected by the OMB and Divisional Court. Even if the contract was to be interpreted as alleged by the Developer, it's claim is barred by the defences of absolute privilege and issue estoppel. In any event, the Developer has filed no evidence in support of any alleged damages, and its theoretical claim for damages lacks merit.

PART III – STATEMENT OF ARGUMENT

A. The Term "SLAPP" is Not Used in the Statute

36. It is not controversial that when interpreting a statute, "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"[42].

37. The purpose of s. 137.1 is readily ascertainable, as it is defined in the statute:

> 137.1 (1) The purposes of this section and sections 137.2 to 137.5 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
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> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.[43]

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[42] *Rizzo v. Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27
[43] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1

38. What is not included in the statement of purpose, and what is not referenced at all in the provision as a whole, is the term "SLAPP". This was a deliberate choice made when the statute was drafted. As the Advisory Report stated in its recommendations:

> The language of the legislation should not include the term "SLAPP" but rather emphasize the importance of (a) protecting expression on matters of public interest from undue interference, and (b) promoting the freedom of the public to participate in matters of public interest through expression.[44]

39. The reasoning put forward in the Advisory Report for avoiding the term "SLAPP" was that it's "pejorative tone may seem to prejudge the merits of cases", which was not beneficial given that "the key evaluation should be the effect, and not the purpose, of the legal action".[45]

40. While referring to s. 137.1 as an "anti-SLAPP" provision may be an easy colloquial shorthand, the Appellant's reliance on the SLAPP term as an interpretive aid is contrary to the intention and language of the provision. The Appellant's submissions in this regard, such as it's submission that "[t]he purpose of subsection 137.1(3) is to identify SLAPP suits", are unhelpful when interpreting what was actually written in the statute.

41. As identified in the Advisory Report, the intended approach in passing s. 137.1 is to protect parties from the *effect* of a claim on expressions on matters of public interest, and not to inquire into the purpose or motive of the plaintiff. The difficulty in ascertaining the actual purpose of an action (particularly at an early stage of the proceeding) was identified as a concern by the Anti-SLAPP Advisory Panel:

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[44] Advisory Report, Summary, para 3
[45] Advisory Report, para 22

> Judging the motive of a plaintiff is likely to be difficult, and often impossible, in an expedited proceeding. In the Panel's view, a finding of bad faith or improper motive should not be necessary to dismiss an action without substantive merit brought against expression on a matter of public interest. In addition, the need for expedited review of such actions has led the Panel to recommend (in the next section of this Report) that the review be conducted on the basis of a paper record and oral argument. In the Panel's view, a focus upon the presence or absence of bad faith or an improper motive, in addition to being unnecessary, is not well suited to expedited adjudication.[46]

B. The Basis for a Broad Interpretation of s. 137.1(3)

42. The first step in any motion under s. 137.1 is to determine whether the defendant has met its onus to show that s. 137.1 is applicable:

> 137.1 (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.[47]

43. This provision requires the defendant to prove two things: (1) that the proceeding "arises from an expression", and (2) that the expression "relates to a matter of public interest".

44. When the scope of protection was addressed in the Advisory Report, "a broad scope of protection" was recommended.[48] The Advisory Report explained that "[i]n the light of the variety of instances in which legitimate public participation may arise, an appropriate protection of public participation should be established on a broad foundation".[49]

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[46] Advisory Report, para 34
[47] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(3)
[48] Advisory Report, para 29
[49] Advisory Report, para 31

45. This approach appears to have been incorporated in the language used in s. 137.1(3). Expression is defined broadly. The definition includes both verbal and non-verbal communications, includes public or private communications, and does not require that the communications be directed at any particular person or entity.[50]

46. Further, phrases similar to "arises from" have traditionally been given a broad meaning by the courts. This includes in the context of automobile insurance legislation,[51] pension benefits legislation,[52] maritime jurisdiction legislation,[53] and contractual arbitration provisions.[54] For example, "arising out of" has been held by this court to have a broader meaning than "caused by", [55] and to require only that there is "some nexus or causal relationship (not necessarily a direct or proximate causal relationship)" that is not "merely incidental or fortuitous".[56]

47. There is no reason to believe, based on either the text of s. 137.1 or the Advisory Report, that the drafters of s. 137.1 intended "arises from" to have a narrower "essential character" meaning, as the Appellant argues. It is overly restrictive to reduce any claim to a single cause or "character". Proceedings which may have the effect of limiting expressions on matters of public interest can arise from complex situations that have multiple causes. Provided that one of those causes is connected with the defendant's expression on a matter of public interest (provided it is

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[50] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(2)
[51] *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at para 21
[52] *Attorney General of Canada v. Frye*, 2005 FCA 264 at paras 21-29
[53] *Paramount Enterprises International, Inc. v. An Xin Jiang (The)* (C.A.), [2001] 2 F.C. 551 at paras 24-25
[54] *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (C.A.) at para 19
[55] *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at para 21
[56] *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 at para 17

not merely incidental or fortuitous), this is sufficient to establish that a claim based on that expression may tend to limit expressions on matters of public interest.

48. The Developer's position that the court should determine whether the "essential character" of a claim is a SLAPP suit, under s. 137.1(3) is another manner of saying that the court should assess the purpose of the claim, rather than the effect. This was not the intent of s.137.1.

49. In essence, the Appellant argues (under the pretext of the "essential character" test) that breach of contract cases should not be covered by s. 137.1. This is inconsistent with the language s. 137.1, which makes no reference to the form of action in determining whether the section applies. The provision could readily have been drafted in a manner that limited it to certain causes of action (i.e. only defamation).

50. Courts have, in the past, addressed a similar question when the scope of absolute privilege, which bars any action based on statements made in any judicial or quasi-judicial proceeding, was addressed. Absolute privilege, which has the similar purpose of promoting "full and free disclosure from witnesses unhampered by fear of retaliatory lawsuits"[57], was determined to apply to all forms of action "however framed".[58] The words of Diplock L.J. regarding absolute privilege in this regard are equally applicable to s.137.1:

[57] *Reynolds v. The City of Kingston Police Services Board* (2007), 84 O.R. (3d) 738 (C.A.) at para 14
[58] *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.* (1999), 124 O.A.C. 125 at para 20; *Amato v. Welsh*, 2013 ONCA 258 at para 35

> Counsel for the plaintiff has sought to persuade this court that that rule of public policy, for reasons which it is impossible to explain, applies only to actions for defamation and that, if one is sufficiently ingenious to discover some other way of bringing an action against a witness for evidence which he has given in a court, then public policy does not apply to that, although all of the evils of the action are precisely the same as if it were a direct action for defamation. It seems quite plain on the authorities – and on the English authorities as well as the Australian authority directly on point – that that argument is without foundation.[59]

51. The practical implication of excluding breach of contract claims from the scope of s. 137.1 is that cases which engage the same public interest as other non-contract based claims will be treated differently, with no principled reason for that differential approach. For example, a whistleblower who speaks out on an important public issue would receive protection from a frivolous defamation claim, but would not receive protection if it was a frivolous claim for breach of an employment agreement, even where the underlying facts are the same. An individual who posted a negative online review of a business would be protected from a frivolous defamation claim, but not from a frivolous claim that they, for example, had breached the terms of use for the company's website that they criticized it.

52. The effect of an ill-founded defamation claim on expressions on matters of public interest is the same as the effect of an ill-founded contractual claim. The lower courts have dismissed other breach of contract claims under s. 137.1 when they arise from expressions on matters of public interest, and have insufficient merit or proven harm to justify permitting the claims to continue.[60]

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[59] *Hung v. Gardiner*, 2003 BCCA 257 at para 36
[60] *Progressive Conservative Party of Ontario v. Karahlios*, 2017 ONSC 7696; *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686

53. The approach proposed by the Developer would open loopholes for plaintiffs who wish to avoid the effect of s. 137.1. By framing a claim as a breach of contract claim, or other forms of action such as inducing breach of contract, intentional interference with contractual relations, conspiracy, or trespass,[61] the application of s. 137.1 would be avoided by creative drafting.

54. Ultimately, the real test of a whether a claim should be dismissed under s. 137.1 is whether it meets the criteria expressly set out in s. 137.1, rather than how the plaintiff chooses to frame its claim.

C. The Statute Calls for a Robust Merits Assessment

55. Once the defendant has satisfied its onus under s. 137.1(3), the onus shifts to the plaintiff to demonstrate the merits of its claim and the harm it has suffered under s. 137.1(4):

> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.[62]

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[61] For example, a plaintiff who seeks to silence picketers could allege that the protestors trespassed on their property when picketing (even if only a fleeting trespass that caused no harm) and argue that the "essential character" of the claim is the intrusion on their property.

[62] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1(4)(b)

56. The first issue under s. 137.1(4) is whether the "responding party satisfies the judge that … there are grounds to believe that … the proceeding has substantial merit". There are three aspects to this test: (1) what is the burden of proof (ie. what is meant by "satisfies"), (2) what is the nature of the evidence to be considered (ie. what are the appropriate "grounds to believe"), and (3) what is the merits threshold to be determined by the motion judge (ie. whether the proceeding has "substantial merit").

57. First, with respect to the burden of proof, Justice Doherty in the decision below held that "satisfies" denotes proof on a balance of probabilities.[63] There is ample support in the case law for this view. As stated by the Alberta Court of Appeal when interpreting the word "satisfied" in other legislation:

> 14. In the first place, it [the word "satisfied"] cannot refer to less than 51% probability: *R v Topp*, [2011] 3 SCR 119 (para 25).
>
> 15. It has been interpreted to mean proof on a balance of probabilities: *R v Driscoll* (1987), 79 AR 298 (CA) (para 17), and cases there cited. "Satisfied" is not a fuzzy word, and does not allow a large free-ranging discretion where any of the three named elements' existence is disputed. For those three, the test is proof on a balance of probabilities.[64]

58. The word "satisfied" is also used in s. 137.1(3), where it requires the defendant satisfy a judge that the proceeding arises from an expression on a matter of public interest. There does not appear to be any dispute that "satisfied" in s. 137.1(3) requires proof on a balance of probabilities. It would be incongruous for the drafters to have intended the word "satisfied" to have different meanings between s. 137.1(3) and s. 137.1(4).

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[63] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 51
[64] *Shannon v. 1610635 Alberta Inc. (c.o.b. Global Energy Services)*, 2014 ABCA 393 at paras 14-15; *R. v. Topp*, [2011] 3 SCR 119 at para 25; *R. v. Driscoll* (1987), 79 A.R. 298 (C.A.) at para 17

59. Second, with respect to the nature of the evidence to be considered, s. 137.1(4)(a) directs that the court is to assess whether it has “grounds to believe” that there is substantial merit. It is submitted that the phrase “grounds to believe” addresses the fact that the merits determination is potentially being made at an early stage of the proceeding. On one hand, it is necessary to ensure that the motion is dealt with quickly and economically, to protect a defendant from a situation where they choose to give up their right to free expression due to the potential costs of an expensive legal process. On the other hand, fairness may, in certain cases, require that the court consider that some evidence may not yet be available due to the expedited nature of the motion.

60. In this regard, an appropriate balancing of the parties rights is to permit the judge to consider not only the evidence properly in the record before them, but also whether there are “grounds to believe” that further identifiable evidence may be available if the matter were to proceed to trial, which may impact the result. There must, however, be appropriate grounds for this belief (i.e. more than simple speculation), in order to balance the defendant’s interests in having a prompt, inexpensive determination of the interest against the potential that a matter is decided without appropriate evidence.

61. For example, to the extent that there are records in the possession of third parties, which are not yet available to the parties for a justifiable reason, the court can consider whether there are grounds to believe that this evidence will be available at trial and will be material to the dispute. Similarly, to the extent that certain witnesses are not available or willing to provide an affidavit on the motion, but could be summonsed for a trial, and there are grounds to believe that they may have material evidence on the merits of the claim, the judge can consider this evidence despite it not being in an admissible form on the motion.

62. Third, once the motion judge has determined what evidence is properly considered on the motion under the "grounds to believe" portion of the test, the judge must then assess whether that evidence would prove that there is "substantial merit" to the claim on a balance of probabilities. The use of the phrase "substantial merit" indicates that the plaintiff cannot rely on technical merit to a potential cause of action (i.e. that it is a theoretically valid claim), but rather must have the necessary evidence to prove the substance of their claim. The plain language indicates a high threshold.

63. Although the process set out in s. 137.1 and s. 137.2 is less extensive than a trial process, that does not mean that difficult questions must be deferred to a trial. As this court stated in *Hryniak*, in the context of summary judgment motions:

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[65]

[65] *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 at paras 27-28

64. The manner in which "substantial merit" (and "no valid defence") is determined should reflect this culture shift. As s. 137.1 seeks to avoid drawing a defendant into an expensive and lengthy dispute, the use of a simplified and expedited fact-finding process appropriately achieves s.137.1's policy goals in a fair and just manner. Judges should be empowered to use their fact-finding ability, to the extent it can be done in a fair and just manner, in determining s. 137.1 motions.

65. Next, to the extent that the plaintiff can satisfy a judge that there are grounds to believe that there is substantial merit to its claim, the plaintiff's must then satisfy the judge that "there are grounds to believe that … the moving party has no valid defence in the proceeding"[66].

66. The "no valid defence" provision engages the same "satisfies" (i.e. proof on a balance on probabilities) and "grounds to believe" issues addressed above. Just as the "substantial merit" test posits a high threshold for the plaintiff to meet, so does s.137.1(4)(a)(ii), which requires that the plaintiff prove that there are no valid defences. As with the "substantial merit" test, the determination as to whether there are "no valid defences" should reflect this court's culture shift in favour of expedited fact finding processes, where it can be done in a fair and just fashion.

67. Subsequent cases decided by the Court of Appeal have held that the plaintiff's onus under s. 137.1(4)(a)(ii) is satisfied if it is shown that a defence "could go either way".[67] The Respondents' submit that this sets the bar too low. To the extent that the necessary evidence is available, it is not in keeping with either the culture shift described in *Hryniak* or the strong language of s. 137.1(4)(a)(ii) to defer difficult questions to a trial judge. If there is no reason to

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[66] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1 (4)(b)(ii)
[67] *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 at paras 15-17

believe that the evidence before a trial judge would be substantially different than the evidence before the motion judge, it is appropriate for the motion judge to determine the merits of the claim on a s.137.1 motion.

68. In summary, the Respondents' submit that the analysis under s. 137.1(4) requires the court to first determine what admissible evidence is available on the motion, or for which there are grounds to believe would be available but for the restricted nature of the motion. The court must then use this evidence to determine, on a balance of probabilities, whether the plaintiff has proven that its claim has "substantial merit" and that here are "no valid defences". To the extent that this assessment requires weighing evidence, the court should do so, subject to the restrictions inherent in assessing what evidence is available under the "reasonable grounds to believe" aspect of the test.

D. The Balancing of Harm vs. Freedom of Expression

69. Under the final step set out in s. 137.1(4), a judge must dismiss a claim unless "the responding party satisfies the judge that … (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". This provision does not contain the "grounds to believe" qualifier contained in s. 137.1(4)(a).

70. For the most part, the Respondents support the approach taken by the Court of Appeal regarding s. 137.1(4)(b):

> a) While the harm to the plaintiff can be both monetary and non-monetary, it will be primarily measured in monetary damages.[68]
>
> b) A plaintiff cannot rest on bald assertions regarding harm. A motion judge must have sufficient evidence to make an informed decision regarding harm.[69]
>
> c) The weight given to the value of the expression at issue will depend on the nature of the expression, where statements containing deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language may be given less weight than statements made without those forms of language.[70]

71. Where the Respondents part with the analysis set out by the Court of Appeal is to the extent the Court of Appeal incorporates consideration of the plaintiff's motives into the s. 137.1(4)(b) analysis (ie. consideration of whether the claim "has the hallmarks of a classic SLAPP").[71] As noted above, the Advisory Report expressly rejected the use of the plaintiff's purpose in bringing an action when it recommended the approach ultimately adopted in s. 137.1. Further, s. 137.1 does not contain language regarding the plaintiff's purpose, in keeping with the recommendations in the Advisory Report. It is submitted that incorporating consideration of the

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[68] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 88
[69] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 91
[70] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 94
[71] *Platnick v. Bent*, 2018 ONCA 687 at para 98; *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166 at para 22

plaintiff's purpose in the analysis under s. 137.1(4)(b) risks undermining the considered approach that went into drafting s. 137.1.

E. US Law Does Not Support the Appellant's Position

72. The Developer relies on a narrow selection of U.S. cases to suggest that the "U.S. decisions collectively reflect the proposition that claims for breach of contract … do not engage anti-SLAPP legislation".[72] This assertion is incorrect.

73. Rather than supporting the Developer's assertions, key US anti-SLAPP cases have expressly rejected the Developer's position that breach of contract cases are excluded from the application of anti-SLAPP laws, including based on the same argument relied on by the Developer here. For example, the California anti-SLAPP law applies to a "cause of action against a person *arising from* any act of that person in further of the person's right of petition or free speech …".[73] In *Navellier v. Sletten*, a decision of the California Supreme Court, the plaintiff raised the same argument that the phrase "arising from" is intended to narrow the reach of the statute such that it does not cover breach of contract cases. [74] The court rejected this argument, holding that both the "formation or performance of contractual obligations" could engage California's anti-SLAPP law, noting:

> Nothing in the statute itself categorically excludes any particular type of action from its operation, and no court has the 'power to rewrite the statute so as to make it confirm to a presumed intention which is not expressed'.[75]

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[72] Appellant's Factum, para 88
[73] *Navellier v. Sletten*, 124 Cal.Rptr2d 530 (2002), 29 Cal.4th 82, 52 P.3d 703 at 535
[74] *Navellier v. Sletten*, 124 Cal.Rptr2d 530 (2002), 29 Cal.4th 82, 52 P.3d 703 at 536
[75] *Navellier v. Sletten*, 124 Cal.Rptr2d 530 (2002), 29 Cal.4th 82, 52 P.3d 703 at 538

74. California courts have, as a result, applied its anti-SLAPP provision to alleged breaches of a settlement agreement.[76] Similarly, Texas courts have applied Texas' anti-SLAPP law to alleged breaches of confidentiality agreements.[77] Not only have US courts held that anti-SLAPP laws can apply to breach of contract cases, but they have applied those laws to dismiss breach of contract cases.

75. Ultimately, there are significant difficulties in using US anti-SLAPP case law as a guide to interpreting s. 137.1. US law related to the first amendment is substantially different than Canadian freedom of expression law. There is no common approach taken by the various US states to anti-SLAPP legislation.[78] None of the US anti-SLAPP laws reflect the same language used in s. 137.1, and many are limited to protecting a party's right of petition to or participation in government, rather than to matters of public interest generally.[79]

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[76] *Vivian v. Labrucherie*, 153 Cal.Rptr. 3d 707 (2013), 214 Cal.App.4th 267
[77] *Toth v. Sears Home Improvement Products Inc.*, 557 S.W.3d 142 (2018)
[78] There is currently no Federal anti-SLAPP law in the US.
[79] The Massachusetts anti-SLAPP law is limited to claims "based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth" (see *Blanchard v. Steward Carney Hospital Inc.*, 477 Mass 141 at fn 12); the Minnesota anti-SLAPP law is limited to protection of speech "genuinely aimed in whole or in part at procuring favorable government action" (see *Middle-Snake-Tamarac Rivers Watershed District v. Stengrim*, 784 N.W.2d 834 (2010) at 841); the Illinois anti-SLAPP law addresses "the moving party's rights of petition, speech, association, or to otherwise participate in government" (see *Sandholm v. Kuecker*, 2012 IL 111443 at para 21)

F. Application to the Present Case

76. Even on the Court of Appeal's relatively narrow approach to s. 137.1,[80] it dismissed the Developer's claim both for lack of merit and lack of harm. It is submitted that regardless of the approach taken by this court, the Court of Appeal's dismissal of this claim should be upheld.

i. Expression on a Matter of Public Interest

77. The motion judge in this case found that this proceeding arose from an expression on a matter of public interest, and that it therefore satisfied s. 137.1(3). The Developer did not challenge that finding at the Court of Appeal.[81] It is submitted that any challenge of the motion judge's determination under s. 137.1(3) is not properly before this court.

78. In any event, the Developer's argument that s. 137.1(3) is not satisfied in the present case because the claim did not "arise from" the defendants' expression is belied by the Developer's own Statement of Claim. In it, the Developer expressly states that the claim is brought as a direct result of the testimony of Peter Gagnon and the documents filed by the PPA at the OMB hearing:

> 75. The combined result of the Defendants' documentary evidence and Mr. Gagnon's testimony about wetland destruction and the adverse effects of the proposed development was a clear breach of the minutes of settlement.[82]

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[80] Shantona Chaudhury and Andrew W. MacDonald, "*Balancing the Public Interest in Expression and the Right to Sue: How Much Protection Should Anti-SLAPP Laws Provide?*" in Todd L. Archibald, ed., Annual Review of Civil Litigation, 2019 (Toronto: Thomson Reuters, 2019) at 64

[81] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at para 105

[82] Statement of Claim, para 75, as well as paras 5, 59, 60, 61, 75 [Appellant's Record, Vol. 2, Tab 9]

79. As noted above, there is no requirement that the PPA prove what the Developer's intention was in bringing the action in order to engage s. 137.1. However, to the extent that the Developer's intention is relevant, that intention can be readily inferred from the circumstances. The Developer is the stereotypical SLAPP plaintiff – a well heeled developer who has brought a frivolous claim alleging damages of millions of dollars, against a group of citizens who expressed their opposition to its development.[83] The claim not only lacks merit, but lacks any rational theory of damages despite having claimed $5 million in damages (plus $1 million in punitive damages).[84] Despite the Developer's breach of contract theory having been already rejected by the Divisional Court in the OMB proceeding, it still persists in this claim through to the Supreme Court of Canada in this action.

80. Further, at the time the Developer brought this meritless claim, it was still seeking leave to appeal from the OMB proceeding, with only the PPA as the only party opposing its motion for leave to appeal. Patricia Avery, the principal of the Developer, confirmed in her cross-examination on this motion that the Developer still intends to proceed with the development.[85] Just as it opposed the PPA giving evidence about any wetlands issues at the OMB, there is good reason to believe that the Developer is seeking to silence the PPA in any future development steps it may take.

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[83] Advisory Report, para 60
[84] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at paras 121-123
[85] Transcript of cross-examination of Patricia Avery, Q. 30-32 [Appellant's Record, Vol. 8, Tab 17, p. 114-115]

i. *There is no Merit to the Developer's Claim*

81. As the Court of Appeal determined, there is no merit to the Developer's claim in this proceeding (let alone "substantial merit").

82. The relevant restrictions on the defendants under the Minutes of Settlement are that the defendants are not to take the position that the Conservation Authorities' resolutions are "illegal or invalid or contrary to the provisions" of the underlying Act, or that the Conservation Authority "exceeded its jurisdiction" in passing the resolutions.[86]

83. The position of the PPA at the OMB hearing was that the proposed development did not comply with the provisions of the *Planning Act*, the Sault Ste. Marie Official Plan, and the Provincial Policy Statement regarding wetland development. These are separate issues from whether the Conservation Authority acted properly in passing its resolutions. This is particularly true given that the Conservation Authority resolutions were passed prior to the implementation of the 2014 PPS, which precluded the proposed development unless the Developer demonstrated "that there will be no negative impacts on the natural features or their ecological functions".[87]

84. The jurisdiction of a municipality is independent of the jurisdiction of a Conservation Authority. While their decision making powers may overlap,[88] decisions by one do not bind decisions by the other within their respective jurisdictions:

> The various municipalities and the [Conservation Authority] act independently regarding their respective areas of control. For example, the conservation authority has jurisdiction over flood and fill permits while the municipalities

[86] Minutes of Settlement, para 6 [Appellant's Record, Vol. 2, Tab 10.B.18, p. 197]
[87] 2014 PPS, s. 2.1.5 [Respondents' Record, Tab 8, p. 69]
[88] *Gilmor v. Nottawasaga Valley Conservation Authority*, 2017 ONCA 414 at para 52

> determine land use by official plans, zoning and the like. Neither controls the other's decision making in these areas.[89] [emphasis added]

85. The Developer's submissions disregard this distinction. Contrary to the Developer's submissions, a decision of the Conservation Authority (or a judicial review decision confirming whether the Conservation Authority acted within its jurisdiction) does not bind the OMB on planning issues. The Conservation Authority's only power with respect to the proposed development is to issue or not issue its own permit.[90] The power to determine compliance with Official Plans or City by-laws is exclusively within the jurisdiction of the relevant municipality, and with the OMB on an appeal of a decision of the municipality.

86. This is the approach correctly taken by both the OMB[91] and the Divisional Court[92]. Although the Conservation Authority decision is a factor that the OMB can consider, it is not binding on the City or the OMB.

87. There was simply no breach of the Minutes of Settlement. If there were any doubt, this determination has already been made by the Divisional Court in the motion for leave to appeal the OMB decision. As Justice Ellies stated in that decision "I do not accept the developers' argument that Gagnon's evidence constituted a breach of the minutes of settlement".[93]

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[89] *Toronto and Region Conservation Authority v. Ontario (Minister of Finance)* (1999), 92 M.P.L.R. (3d) 312 (Sup. Ct.) at para 20
[90] *Conservation Authorities Act*, R.S.O. 1990, c. C.27, s. 21, 28; *Conservation Authorities Act*, O.Reg. 176/06, s. 2, 3
[91] Excerpts from Transcripts of OMB Hearing, [Appellant's Record, Vol. 2, Tab 10.B.24, p. 269-277; Vol. 3, Tab 10.B.25, p. 3-7]
[92] *Avery v. Pointes Protection Association*, 2016 ONSC 6463 at para 96
[93] *Avery v. Pointes Protection Association*, 2016 ONSC 6463 at para 112

88. The entirety of the correspondence leading up to the Minutes of Settlement was in the record. The transcripts of the OMB hearing where the defendants are alleged to have breached the Minutes of Settlement are also in the record. There is no evidence that would be available at trial that was not available to the parties on the motion. The record available on the motion was sufficient to determine this matter fairly.

89. As noted in Justice Doherty's decision, nothing in the Minutes of Settlement explicitly stated that the PPA would not raise any factual issues regarding the wetlands at the OMB hearing. The Developer's own pleading acknowledges that it was only "implicit" that the "wetlands issue was settled".[94] Given that the purpose of the PPA's involvement in the OMB proceeding was to address wetlands related issues (as the Developer was aware through the correspondence leading up to the Minutes of Settlement), it is not reasonable to believe that the PPA had implicitly agreed not to raise those issues. Although the Developer is correct that the PPA was not yet a formal party to the OMB proceeding at the time of the Minutes of Settlement, the Developer had by that time agreed it would not oppose the PPA's involvement and had written a letter to that effect.[95]

90. As a result, the Developer cannot establish, on any reasonable interpretation of s. 137.1(4), that it's claim has "substantial merit". There is no error in Justice Doherty's analysis.

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[94] Statement of Claim, para 46 [Appellant's Record, Vol. 2, Tab 9, p. 33]
[95] September 18, 2013 Letter from O. Rosa to H. Scott [Respondents' Record, Tab 7, p. 43]

ii. *The Defendants Have Multiple Valid Defences*

91. If the Developer cannot meet its onus to show substantial merit in its claim, the claim must be dismissed, and the issue of whether there is "no valid defence" is not reached. However, to the extent that it is necessary to consider the defences available to the defendants, this provides further justification for dismissing this proceeding, as the claim is barred by absolute privilege and issue estoppel.

92. With respect to absolute privilege, the Developer's claim is entirely premised on the Minutes of Settlement having been breached through the giving of evidence at the OMB. Without reliance on the evidence given at the OMB, the Developer has no claim.

93. A claim cannot be based on evidence given in the ordinary course before a court or any judicial tribunal recognised by law. Any such evidence is covered by absolute privilege.[96]

94. Absolute privilege applies in order to encourage parties to give evidence freely and honestly. Permitting a claim against parties for giving evidence in court or a tribunal "would impede inquiry as to the truth and justice of the matter and jeopardise the 'safe administration of justice'".[97]

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[96] *Salasel v. Cutherbertson*, 2015 ONCA 115 at paras 35, 38; *Amato v. Welsh*, 2013 ONCA 258 at paras 34-35; *Samuel Manu-Tech Inc. v. Redipac Recycling Corp*., [1999] O.J. No. 3242 (C.A) at paras 19-20

[97] *Elliot v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 at paras 114, 117, 118

95. Absolute privilege has been held by the Manitoba Court of Appeal to apply to alleged breaches of a settlement agreement, where the breach is based on evidence given in the course of a court proceeding.[98]

96. As a result, as this claim is "directly or indirectly premised on the results" of a prior proceeding, absolute privilege and/or witness immunity preclude this action, based on the principle of finality.[99]

97. Similarly, issue estoppel applies to bar the Developer from relitigating its claim that the defendants breached the Minutes of Settlement, given that the issue has already been determined by the OMB and the Divisional Court. The issue here is the same as in that proceeding, the decision rendered by the Divisional Court was a final decision, and the parties (or their privy, in the case of the individual defendants) were the same.[100] The claim made here is an attempt by the Developer to relitigate the OMB's decision to permit the PPA to give the evidence it gave.

iii. *The Developer Has Not Demonstrated Any Actual Harm*

98. Under s. 137.1(4)(b), the value of the PPA's expression must be weighed against the harm likely to be or have been suffered by the Developer.

99. The public interest in protecting the expressions of the PPA is significant:

a) The expression in question is evidence given under oath in a quasi-judicial setting, which was found by a trier of fact to be reliable and persuasive.

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[98] *Love v. Bell ExpressVu Limited Partnership*, 2006 MBCA 92 at paras 2-5
[99] *Paul v. Sasso*, 2016 ONSC 7488 at paras 18-19
[100] *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.)

b) The nature of the expression is one which directly engages the concepts of "seeking and attaining the truth" and "participation in social and political decision-making", which are central values of freedom of expression.[101]

c) The issue of protection of wetlands is of significant importance. This importance is highlighted by the Province's identification of coastal wetlands in certain areas as requiring protection from development unless it can be demonstrated that "there will be no negative impacts" on the wetlands and their ecological functions.[102]

100. On the other hand, the Developer provided no real evidence of actual or likely harm.

101. The Developer, in its argument, suggests that the "harm" it suffered was the "loss of settlement finality". This is not actual harm suffered (or likely to be suffered) by the Developer. Rather, it is a bald generalized statement of the reason why there exists a theoretical cause of action for breach of contract in the context of settlement agreements. If it were just a matter of making a bald generalization in order to satisfy the plaintiff's onus under s. 137.1(4)(b), it would make the provision largely meaningless. A plaintiff who simply repeats the conceptual reason why a cause of action exists is not proving harm.

102. The only alleged financial harms that the Developer references in its materials are (a) costs related to its judicial review application, and (b) the costs of having to pursue the OMB appeal, such as the "costs of commissioning 23 studies".[103]

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[101] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 976
[102] 2014 PPS, s. 2.1.5 [Respondents' Record, Tab 8, p. 69]
[103] Appellant's Factum, paras 169-170

103. The Developer provided no evidence to support these damages. When it was asked to provide particulars of the expenses it claimed, it took the question under advisement, and ultimately did not provide those particulars.[104]

104. The alleged damages predate the alleged breach of the Minutes of Settlement, and, for the most part, predate even the signing of the Minutes of Settlement. Any costs that the Developer might have claimed in the judicial review application (however minimal, given that the only step taken in the judicial review application was a security for costs motion) were incurred prior to signing the Minutes of Settlement. The studies prepared by the Developer were all prepared prior to the Minutes of Settlement.[105]

105. Damages for breach of contract are to put a party in the position they would be if the contract had been performed.[106] All of the costs incurred by the Developer would have been incurred by it regardless of whether or not the PPA performed the contract in the manner the Developer now alleges. The costs it incurred were the result of City Council's refusal to approve its development application, and the Developer's choice to develop in a coastal wetland contrary to the *Planning Act* and the Sault Ste. Marie Official Plan.

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[104] Transcript of cross-examination of Patricia Avery, Q. 40-41 [Appellant's Record, Vol. 8, Tab 17, p. 117-118]
[105] Transcript of cross-examination of Patricia Avery, Q. 39 [Appellant's Record, Vol. 8, Tab 17, p. 118-119]
[106] *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 at paras 26-27

106. The Developer claimed five million dollars in damages, plus one million dollars in punitive damages. The purported losses it now alleges on this appeal, without supporting evidence, are orders of magnitude less than the five million dollars it claimed. This is indicative of a claim brought as an intimidation tactic, rather than a claim for genuine harm done to the Developer.

G. Conclusion

107. In passing s. 137.1, the Legislature chose to prioritize freedom of expression over the ability of certain plaintiffs to continue with proceedings that do not have substantial merit.

108. There is no merit to the plaintiff's claim in this proceeding. The plaintiff was unsuccessful on its appeal to the OMB, and in its attempt to appeal that decision to the Divisional Court. Its claim in this proceeding is an attempt to relitigate those decisions. This claim was properly dismissed by the Court of Appeal, and that decision should be upheld in this court.

PART IV – SUBMISSIONS ON COSTS

109. The Respondents seek their costs of this appeal.

PART V – ORDER SOUGHT

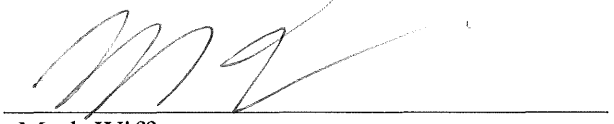
110. The Respondents seek an order dismissing this appeal.

PART VI – CONFIDENTIALITY

111. 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.

Dated at Toronto this 16th of September, 2019

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Mark Wiffen
Counsel for the Respondents

PART VII – TABLE OF AUTHORITIES

No.	*Case*	*Paragraph*
1.	*1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685	34, 57, 70, 77, 79
2.	*Amato v. Welsh*, 2013 ONCA 258	50, 93
3.	*Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405	46
4.	*Attorney General of Canada v. Frye*, 2005 FCA 264	46
5.	*Avery v. Pointes Protection Association*, 2016 ONSC 6463	30, 31, 86, 87
6.	*Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601	105
7.	*Blanchard v. Steward Carney Hospital Inc.*, 477 Mass 141	75
8.	*Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166	67, 71
9.	*Elliot v. Insurance Crime Prevention Bureau*, 2005 NSCA 115	94
10.	*Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686	52
11.	*Gilmor v. Nottawasaga Valley Conservation Authority*, 2017 ONCA 414	84
12.	*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87	63
13.	*Hung v. Gardiner*, 2003 BCCA 257	50
14.	*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927	99
15.	*Love v. Bell ExpressVu Limited Partnership*, 2006 MBCA 92	95
16.	*Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (C.A.)	46
17.	*Middle-Snake-Tamarac Rivers Watershed District v. Stengrim*, 784 N.W.2d 834 (2010)	75
18.	*Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.)	97
19.	*Navellier v. Sletten*, 124 Cal.Rptr2d 530 (2002), 29 Cal.4th 82, 52 P.3d 703	73
20.	*Paramount Enterprises International, Inc. v. An Xin Jiang (The)* (C.A.), [2001] 2 F.C. 551	46
21.	*Paul v. Sasso*, 2016 ONSC 7488	96
22.	*Platnick v. Bent*, 2018 ONCA 687	71
23.	*Pointes Protection Association v. Sault Ste. Marie Region Conservation Authority*, 2013 ONSC 5323	19
24.	*Progressive Conservative Party of Ontario v. Karahlios*, 2017 ONSC 7696	52
25.	*R. v. Driscoll* (1987), 79 A.R. 298 (C.A.)	57
26.	*R. v. Topp*, [2011] 3 SCR 119	57

27.	*Reynolds v. The City of Kingston Police Services Board* (2007), 84 O.R. (3d) 738 (C.A.)	50
28.	*Rizzo v. Rizzo Shoes Ltd., Re,* [1998] 1 S.C.R. 27	36
29.	*Salasel v. Cutherbertson*, 2015 ONCA 115	93
30.	*Samuel Manu-Tech Inc. v. Redipac Recycling Corp.* (1999), 124 O.A.C. 125	50, 93
31.	*Sandholm v. Kuecker*, 2012 IL 111443	75
32.	*Shannon v. 1610635 Alberta Inc. (c.o.b. Global Energy Services)*, 2014 ABCA 393	57
33.	*Toronto and Region Conservation Authority v. Ontario (Minister of Finance)* (1999), 92 M.P.L.R. (3d) 312 (Sup. Ct.)	84
34.	*Toth v. Sears Home Improvement Products Inc.*, 557 S.W.3d 142 (2018)	74
35.	*Vivian v. Labrucherie*, 153 Cal.Rptr. 3d 707 (2013), 214 Cal.App.4th 267	74

No.	***Secondary Authorities***	***Paragraph***
1.	2014 Provincial Policy Statement Under the Planning Act	24, 83, 99
2.	Anti-SLAPP Advisory Panel Report to the Attorney General	1, 3, 38, 39, 41, 44, 79
3.	Shantona Chaudhury and Andrew W. MacDonald, "*Balancing the Public Interest in Expression and the Right to Sue: How Much Protection Should Anti-SLAPP Laws Provide?*" in Todd L. Archibald, ed., Annual Review of Civil Litigation, 2019 (Toronto: Thomson Reuters, 2019)	76

No.	***Statutory Provisions***	***Section***
1.	*Conservation Authorities Act*, R.S.O. 1990, c. C.27	21, 28
	Offices de Protection de la Nature (Loi sur les), L.R.O. 1990, chap. C.27	
2.	*Conservation Authorities Act*, O.Reg. 176/06	2, 3
3.	*Courts of Justice Act*, R.S.O. 1990, c. C.43	137.1 to 137.5
	Tribunaux Judiciaires (Loi sur les), L.R.O. 1990, chap. C.43	
4.	*Protection of Public Participation Act*, 2015, S.O. 2015, c. 23	
	Protection du Droit à la Participation Aux Affaires Publiques (Loi de 2015 sur la), L.O. 2015, chap. 23 - Projet de loi 52	