

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

B E T W E E N :

MAIA BENT and LERNERS LLP

Appellants

- and -

HOWARD PLATNICK

Respondent

- and -

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, GREENPEACE CANADA,
CANADIAN CONSTITUTION FOUNDATION, ECOJUSTICE CANADA SOCIETY,
WEST COAST LEGAL EDUCATION AND ACTION FUND, ATIRA WOMEN'S
RESOURCE SOCIETY, B.W.S.S. BATTERED WOMEN'S SUPPORT SERVICES
ASSOCIATION and WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE
CRISIS CENTER, CANADIAN CIVIL LIBERTIES ASSOCIATION and AD
IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN JOURNALISTS
FOR FREE EXPRESSION, CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS,
A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, ABORIGINAL
PEOPLES TELEVISION NETWORK and POSTMEDIA NETWORK INC., CANADIAN
BROADCASTING CORPORATION AND
BARBRA SCHLIFER COMMEMORATIVE CLINIC**

Interveners

[Style of cause continued on next page.]

FACTUM OF THE INTERVENER, GREENPEACE CANADA
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

STOCKWOODS LLP

TD North Tower
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Nader R. Hasan

Carlo Di Carlo

Tel: 416-593-1668

Fax: 416-593-9345

Email: NaderH@stockwoods.ca
CarloDC@stockwoods.ca

GREENPEACE CANADA

33 Cecil Street
Toronto, ON, M5T 1N1

Priyanka Vittal

Tel: 416-597-8408

Email: pvittal@greenpeace.org

**Counsel for the Intervener,
Greenpeace Canada**

JURISTES POWER LAW

130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: 613-702-5573

Fax: 613-702-5573

Email: mvincelette@juristespower.ca

**Ottawa Agent for the Intervener,
Greenpeace Canada**

**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

- and -

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

Respondents

- and -

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, GREENPEACE CANADA,
CANADIAN CONSTITUTION FOUNDATION, ECOJUSTICE CANADA SOCIETY,
WEST COAST LEGAL EDUCATION AND ACTION FUND, ATIRA WOMEN'S
RESOURCE SOCIETY, B.W.S.S. BATTERED WOMEN'S SUPPORT SERVICES
ASSOCIATION and WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE
CRISIS CENTER, CANADIAN CIVIL LIBERTIES ASSOCIATION and AD
IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN JOURNALISTS
FOR FREE EXPRESSION, CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS,
A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, ABORIGINAL
PEOPLES TELEVISION NETWORK and POSTMEDIA NETWORK INC., CENTRE
FOR FREE EXPRESSION and CANADIAN ASSOCIATION OF JOURNALISTS AND
COMMUNICATIONS WORKERS OF AMERICA/CANADA**

Interveners

ORIGINAL TO: **SUPREME COURT OF CANADA**
The Registrar
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO THE PARTIES FOR FILE NO. 38376:

WISHART LAW FIRM LLP
Barristers and Solicitors
390 Bay Street, 5th Floor
Sault Ste. Marie, ON P6A 1X2

Orlando M. Rosa
Tim J. Harmar
Tel: 705-949-6700
Fax: 705-949-2465
Email: orosa@wishartlaw.com
harmar@wishartlaw.com

**Counsel for the Appellant, 1704604
Ontario Limited**

WIFFEN LITIGATION
Professional Corporation
181 University Avenue, Suite 2200
Toronto, ON M5H 3M7

Mark Wiffen
Tel: 416-792-3494
Fax: 647-317-1515
Email: mark.wiffen@wiffenlaw.ca

**Counsel for the Respondents, Pointes
Protection Association, Peter Gagnon,
Lou Simonetti, Patricia Grattan, Gay
Gartshore, Rick Gartshore and Glen
Stortini**

STOCKWOODS LLP
TD North Tower
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Justin Safayeni
Pam Hrick
Tel: 416-593-7200
Fax: 416-593-9345
Email: justins@stockwoods.ca
pamh@stockwoods.ca

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Marie-France Major
Tel: 613-695-8855
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca
fmajor@supremeadvocacy.ca

**Ottawa Agent for Counsel for the
Appellant, 1704604 Ontario Limited**

CHAMP & ASSOCIATES
Barristers & Solicitors
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Tel: 613-237-4740
Fax: 613-232-2680
Email: broy@champlaw.ca

**Ottawa Agent for Counsel for the
Respondents, Pointes Protection
Association, Peter Gagnon, Lou Simonetti,
Patricia Grattan, Gay Gartshore, Rick
Gartshore and Glen Stortini**

POWER LAW
1103-130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

**Counsel for the Interveners,
the Centre for Free Expression,
Canadian Association of Journalists and
Communications Workers of America /
Canada**

**Ottawa Agent for the Interveners, the
Centre for Free Expression, Canadian
Association of Journalists and
Communications Workers of America /
Canada**

COPIES TO THE PARTIES FOR FILE NO. 38374:

WINKLER DISPUTE RESOLUTION

39 Glenayr Road
Toronto, ON M5P 3B9

Howard Winkler

Eryn Pond

Tel: 416-519-2344

Fax: 416-915-6325

Email: hwinkler@winklerlawllp.com

epond@winklerlawllp.com

Counsel for the Appellant, Maia Bent

LAX O’SULLIVAN LISUS GOTTLIEB

2750 – 145 King Street West
Toronto, ON M5H 1J8

Terrence J. O’Sullivan

Andrew Winton

Tel: 416-598-3556

Fax: 416-598-3730

Email: tosullivan@lolg.ca

awinton@lolg.ca

Counsel for the Appellant, Lerner LLP

DANSON RECHT LLP

2000 – 700 Bay Street
Toronto, ON M5G 1Z6

Timothy S.B. Danson

Marjan Delavar

Tel: 416-929-2200

Fax: 416-929-2192

Email: danson@drilitigators.com

marjan@drilitigators.com

BORDEN LADNER GERVAIS LLP

1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: 613-369-4795

Fax: 613-230-8842

Email: kperron@blg.com

**Ottawa Agent for Counsel for the
Appellant, Maia Bent**

BORDEN LADNER GERVAIS LLP

1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: 613-369-4795

Fax: 613-230-8842

Email: kperron@blg.com

**Ottawa Agent for Counsel for the
Appellant, Lerner LLP**

SUPREME ADVOCACY LLP

340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.

Marie-France Major

Tel: 613-695-8855

Fax: 613-695-8580

Email: emeehan@supremeadvocacy.ca

fmajor@supremeadvocacy.ca

**Counsel for the Respondent, Howard
Platnick**
BIRENBAUM LAW
1200–555 Richmond Street West
Toronto, ON M5V 3B1

Joanna Birenbaum
Tel: 647-500-3005
Fax: 416-968-0325
E-mail: joanna@birenbaumlaw.ca

**Counsel for the Intervener, Barbra
Schlifer Commemorative Clinic**

**CANADIAN BROADCASTING
CORPORATION**
Legal Services
250 Front Street West
Toronto, ON M5V 3G7

Sean A. Moreman
Tel: 416-205-6494
Fax: 416-205-2723
E-mail: sean.moreman@cbc.ca

**Counsel for the Intervener, Canadian
Broadcasting Corporation**

**Ottawa Agent for Counsel for the
Respondent, Howard Platnick**

GOWLING WLG (CANADA) LLP
2600–160 Elgin Street
Ottawa, ON K1P 1C3

Guy Régimbald
Tel: 613-786-0197
Fax: 613-563-9869
E-mail:
guy.regimbald@gowlingwlg.com

**Ottawa Agent for the Intervener,
Canadian Broadcasting Corporation**

COPIES TO MUTUAL PARTIES FOR FILE NOS. 38376 AND 38374:

MAIA TSURUMI
154 West 18th Avenue
Vancouver, BC V5Y 2A5
Tel: 604-736-8703
Email: mtsurumi@legalanalysis.ca

**Counsel for the Intervener, British
Columbia Civil Liberties Association**

ST. LAWRENCE BARRISTERS LLP
144 King Street East
Toronto, ON M5C 1G8

Alexi N. Wood
Jennifer P. Saville

GOLDBLATT PARTNERS LLP
500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

**Ottawa Agent for the Intervener, British
Columbia Civil Liberties Association**

GOWLING WLG (CANADA) LLP
2600–160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695

Tel: 647-245-8283
Fax: 647-245-8285
Email: alexi.wood@stlbarristers.ca

**Counsel for the Intervener, Canadian
Civil Liberties Association**

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg
Simon Cameron
Tel: 416-601-8200
Fax: 416-868-0673
Email: agoldenberg@mccarthy.ca

**Counsel for the Intervener, Canadian
Constitution Foundation**

LINDEN & ASSOCIATES
RBC Plaza, North Tower
200 Bay Street, Suite 2010
Toronto, ON M4J 2J1

Iain A.C. MacKinnon
Tel: 416-861-9338
Fax: 416-861-9973
Email: imackinnon@lindenlex.com

**Counsel for the Interveners, Ad IDEM /
Canadian Media Lawyers Association,
Canadian Journalists for Free Expression,
CTV, a Division of Bell Media Inc.,
Global News, a division of Corus
Television Limited Partnership,
Aboriginal Peoples Television Network,
Postmedia Network Inc.**

**ECOJUSTICE
ENVIRONMENTAL LAW CLINIC
AT THE UNIVERSITY OF OTTAWA**
Faculty of Law - Common Law
216-1 Stewart Street
Ottawa, ON K1N 7M9

**Joshua Ginsberg
Julia Croome
Sue Tan**

Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

**Ottawa Agent for the Intervener,
Canadian Civil Liberties Association**

POWER LAW
1103-130 Albert Street
Ottawa, ON K1P 5G4

Darius Bossé
Tel: 613-702-5566
Fax: 613-702-5566
Email: DBosse@juristespower.ca

**Ottawa Agent for Counsel Intervener,
Canadian Constitution Foundation**

CONWAY BAXTER WILSON LLP
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor
Tel: 613-691-0368
Fax: 613-688-0271
Email: dtaylor@conway.pro

**Ottawa Agent for the Interveners, Ad
IDEM / Canadian Media Lawyers
Association, Canadian Journalists for
Free Expression, CTV, a Division of Bell
Media Inc., Global News, a division of
Corus Television Limited Partnership,
Aboriginal Peoples Television Network,
Postmedia Network Inc.**

Tel: 613-562-5800
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca

**Counsel for the Intervener, Ecojustice
Canada Society**

DENTONS CANADA LLP
250 Howe Street, 20th Floor
Vancouver, BC V6C 3R8

David Wotherspoon
Rajit Mittal
Tel: 604-691-6429
Fax: 604-683-5214
Email: david.wotherspoon@dentons.com

**Counsel for the Interveners, West Coast
Legal Education and Action Fund, Atira
Women's Resource Society, B.W.S.S.
Battered Women Support Services
Association, Women Against Violence
Against Women Rape Crisis Center**

DENTONS CANADA LLP
1420-99 Bank Street
Ottawa, ON K1P 1H4

David R. Elliott
Tel: 613-783-9699
Fax: 613-783-9690
Email: david.elliott@dentons.com

**Ottawa Agent for the Interveners, West
Coast Legal Education and Action Fund,
Atira Women's Resource Society,
B.W.S.S. Battered Women Support
Services Association, Women Against
Violence Against Women Rape Crisis
Center**

TABLE OF CONTENTS

PART I - STATEMENT OF FACTS 1

PART II - OVERVIEW AND POSITIONS ON QUESTIONS IN ISSUE..... 1

PART III - LAW AND ARGUMENT 2

 A. A PURPOSIVE APPROACH TO THE ANTI-SLAPP STATUTE 2

 B. A NARROW APPROACH TO THE ANTI-SLAPP STATUTE SHOULD BE REJECTED 4

 i. “No Valid Defence” (s. 137.1(4)(a)(ii))..... 4

 ii. Balancing Harm Suffered Versus Free Expression (s. 137.1(4)(b)) 6

 C. THE PROPOSED TEST..... 7

PART IV - COSTS..... 9

PART V - ORDER REQUESTED 9

PART I - STATEMENT OF FACTS

1. Greenpeace Canada (“**Greenpeace**”) accepts the facts as set out in the parties’ facts and takes no position on disputed facts.

PART II - OVERVIEW AND POSITIONS ON QUESTIONS IN ISSUE

2. Freedom of expression is essential to any free and democratic society. That freedom, however, is threatened when well-resourced entities launch strategic lawsuits aimed at stifling speech to protect their economic interests. These lawsuits, otherwise known as “strategic lawsuits against public participation”, or “**SLAPPs**”, undermine free speech and the public interest. They abuse an already overburdened court system.

3. In 2015, the Ontario legislature sought to address the various harms that SLAPPs cause by adding s. 137.1 to Ontario’s *Courts of Justice Act* (the “**Anti-SLAPP Statute**”). The express purpose of this provision is to discourage “the use of litigation as a means of unduly limiting matters of public interest.”

4. As the victim of a notorious ongoing SLAPP,¹ Greenpeace knows firsthand the importance of a strong Anti-SLAPP regime. But it also recognizes that the tort of defamation plays an important role in ensuring that victims of hate speech and other vitriol can defend their reputations.²

5. Accordingly, whereas some of the other parties and interveners propose tests that are pro-defendant or pro-plaintiff, Greenpeace proposes a test that is pro-*purpose*. For the Anti-SLAPP Statute to accomplish its ambitious purpose, courts must interpret it purposively. Applying the factors in s. 137.1 in a technical, formalistic manner will undermine the Anti-SLAPP Statute’s purposes. An overly narrow or technical approach may have the perverse effect of preventing underdogs from bringing defamation suits to protect their reputations from defamation campaigns launched by those seeking to chill *their* speech.

¹ Raveena Aulakh, “Quebec forestry company suing Greenpeace for \$7 million”, *Toronto Star* (June 24, 2013), online: <https://www.thestar.com/news/canada/2013/06/24/quebec_forestry_company_suing_greenpeace_for_7_million.html>

² *Paramount v. Johnston*, 2019 ONSC 2910.

6. Greenpeace proposes a test that is focused on the underlying purposes and policies animating the Anti-SLAPP Statute. This reformulated test will enable a court to properly identify and expeditiously dismiss a true SLAPP, but will also preserve sufficient room for meritorious lawsuits to proceed to adjudication on their merits.

PART III - LAW AND ARGUMENT

A. A Purposive Approach to the Anti-SLAPP Statute

7. The organizing principle of this Court's approach to statutory interpretation has always been a purposive one.³ And where this Court concludes that a common law test has become unmoored from its statutory purpose, it has seen fit to rewrite the test to better accord with its purposes.⁴

8. To give effect to the overarching objective of the Anti-SLAPP Statute, the express purposes of the statute must infuse the test. The Anti-SLAPP Statute was enacted to "prevent the misuse of the judicial system or other agencies of justice at the hands of litigants who resorted to lawsuits for strategic purposes."⁵

9. This overarching purpose is reflected not merely in the *travaux préparatoires* and the legislative debates. Section 137.1(1) explicitly provides that the purposes of the Anti-SLAPP Statute are to:

- (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

³ *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, [2018] 1 S.C.R. 635, ¶12; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, [2013] 3 S.C.R. 810, ¶ 24, 25 and 28.

⁴ See, e.g., *R. v. Grant*, [2009] 2 S.C.R. 353, ¶59-66 (where this Court rewrote the *Collins/Stillman* test for excluding evidence under s. 24(2) of the *Charter* to better accord with the purposes of s. 24(2)).

⁵ *Paramount v. Johnston*, 2018 ONSC 3711, ¶20 (citing Ministry of the Attorney General, Anti-Slapp Advisory Panel Report to the Attorney General (Ontario: Ministry of the Attorney General, 2010)).

(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.⁶

10. In *United Soils Management Ltd. v. Mohammed*,⁷ Lederer J. described the paradigmatic SLAPP scenario:

Parties, often corporations and other well-resourced members of our society, when confronted with negative comment or publication implicating matters of public interest of concern to them, commenced a law suit for libel. The purpose of the litigation was not to realize on a claim for damages. It was to suggest a potential vulnerability to the individual making the impugned observation or causing its publication. The goal was to elicit a quick retraction and apology and have the party remove herself, himself or itself from taking part in any further public debate of the issue at hand.

11. The substantive provisions of the Anti-SLAPP Statute reflect these purposes.

12. First, as set forth in greater detail below, the shift in onus in s. 137.1(4) very clearly reflects the legislative intent that plaintiffs ought bear the burden of showing why an alleged SLAPP ought to be permitted to proceed.

13. Second, the costs regime embedded in s. 137.1(7) also reflects this purpose. Because a SLAPP brought by a well-resourced plaintiff could starve out a defendant long before trial, the regime creates a *presumption* that a successful defendant on an Anti-SLAPP motion will be entitled to costs on a full indemnity basis. Even if the plaintiff successfully resists the Anti-SLAPP motion, the provision creates a presumption that no costs will be awarded. This again reflects the Legislature's intent that the Anti-SLAPP Statute serve as a counter-weight against the power imbalance that typically defines SLAPPs.

14. Third, the procedure envisioned under the Anti-SLAPP Statute allows the motion for dismissal to be brought at any stage of the proceedings, and requires that the Court decide the motion before any other step in the proceeding can be taken.⁸ This ensures that the SLAPP plaintiff

⁶ *Court of Justice Act*, 2015, c. 23, s. 3, s. 137.1(1).

⁷ *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450, ¶2, aff'd 2019 ONCA 128.

⁸ *Court of Justice Act*, 2015, c. 23, s. 3, s. 137.1(5).

cannot overwhelm the defendant with motions before a judge decides whether the matter should be dismissed as a SLAPP.

15. The Anti-SLAPP Statute was intended to address a distinct problem. The test employed must be responsive to these policy goals. Although the mechanical approach may be easier to apply, it will not accomplish what the Legislature intended it to do: to keep SLAPPs out but to allow valid claims to go forward.

B. A Narrow Approach to the Anti-SLAPP Statute Should Be Rejected

16. Currently, the majority of judicial attention in the case law has focused on two of the factors set out in the Anti-SLAPP Statute. Specifically, courts have focussed on whether the plaintiff can meet its burden of showing: (a) that “no valid defence” exists; and (b) that the harm it faces outweighs the public interest in protecting the expression in question.⁹

17. Greenpeace’s position is that some courts have been approaching these two factors in an overly narrow manner. This causes the larger objectives of the Anti-SLAPP Statute to become lost in the analysis. It also could lead to unintended consequences that would be contrary to the purpose of the Act.

i. “No Valid Defence” (s. 137.1(4)(a)(ii))

18. Ontario courts have been inconsistent in how they have treated the “no valid defence” factor. The earliest cases interpreted this factor as creating a significant evidentiary and persuasive onus on the plaintiff. Courts held that the provision required that that plaintiff show that the defendant had “no valid defence whatsoever” and that there could not even “be an arguable point on the defence side”. A defence that could go “either way” would not satisfy this threshold.¹⁰

19. The tide turned in the *Pointes* decision below. There, the Ontario Court of Appeal found that it was enough for the plaintiff to show that a trial judge *could* conclude that none of the

⁹ See, for example, [Platnick v. Bent](#), 2016 ONSC 7340, [Rizvee v. Newman](#), 2017 ONSC 4024, [1704604 Ontario Ltd. v. Pointes Protection Association](#), 2018 ONCA 685 and [Bondfield Construction Company Limited v. The Globe and Mail Inc.](#), 2019 ONCA 166.

¹⁰ See [Bondfield Construction Co. v. The Globe and Mail](#), 2018 ONSC 1880, ¶46 for a discussion of this case law.

defences would succeed at trial.¹¹ More recent decisions from the Ontario Court of Appeal have arguably further weakened this threshold. In *Bondfield*, the Court of Appeal held that the plaintiff must only show that a defence “could go either way” in order to satisfy the threshold.¹²

20. Some of the interveners in this appeal ask that this Court endorse the early approach. That is, they suggest that the factor be strengthened such that the plaintiff is required to prove that the defendants have no valid defences available to them. In *Pointes*, the Court of Appeal held that such an interpretation would make the section “unworkable”.¹³ It would require the plaintiff to anticipate all potential defences and demonstrate that none have validity.¹⁴

21. More fundamentally, however, it is not clear that the test must place such an onerous threshold on the plaintiff in order to serve the Anti-SLAPP Statute’s purpose. Indeed, such a threshold may have the effect of preventing underdogs from bringing defamation suits to protect their reputations from malicious or hateful smear campaigns.¹⁵ The *Paramount* decision is instructive in this regard. In that case, the defendants filmed videos outside of a Middle Eastern restaurant where a fundraiser was being held for the Prime Minister. A large crowd gathered outside of the restaurant, and one of the individuals on the video stated (among other things) that only “jihadists” were allowed to enter the restaurant.¹⁶ The defendant’s speech bordered on hate speech and played on the worst stereotypes about Canadians of Middle Eastern origin. After the restauranteur brought a defamation claim, one of the individuals alleged to have made such statements brought an Anti-SLAPP motion.¹⁷ The motion failed (and the defamation action subsequently succeeded), but the Anti-SLAPP motion could have gone the other way if this Court were to adopt the restrictive, mechanical approach suggested by some of the interveners.

¹¹ [1704604 Ontario Ltd. v. Pointes Protection Association](#), 2018 ONCA 685, ¶84.

¹² [Bondfield Construction Company Limited v. The Globe and Mail Inc.](#), 2019 ONCA 166, ¶15.

¹³ [1704604 Ontario Ltd. v. Pointes Protection Association](#), 2018 ONCA 685, ¶83.

¹⁴ [1704604 Ontario Ltd. v. Pointes Protection Association](#), 2018 ONCA 685, ¶83, 84.

¹⁵ See, for example, [Paramount v. Johnston](#), 2018 ONSC 3711.

¹⁶ [Paramount v. Johnston](#), 2018 ONSC 3711, ¶12.

¹⁷ Although the motion was ultimately dismissed, this was only on the basis that the court found that the impugned expression did not relate to a matter of public interest. The Court explicitly did not consider the factors set out in s. 137.1(4). See [Paramount v. Johnston](#), 2018 ONSC 3711, ¶53.

22. The Anti-SLAPP regime should not prevent victims of hate speech from suing for defamation, but it should prevent the powerful from leveraging their superior resources to stymie free speech. The Statute's noble objective gets lost when the focus is on technical thresholds instead of the overall purpose of the provision.

ii. Balancing Harm Suffered Versus Free Expression (s. 137.1(4)(b))

23. A similar point can be made with respect to case law's treatment of the balancing factor. Initial decisions suggested that courts were simply to weigh the harm suffered by the plaintiff and compare that to the harm to the public interest. This was the approach in the decision below, where the Court stressed that the plaintiff must adduce evidence of harm:

On the s. 137.1 motion, the plaintiff must provide a basis upon which the motion judge can make some assessment of the harm done or likely to be done to it by the impugned expression. This will almost inevitably include material providing some quantification of the monetary damages.¹⁸

24. This mechanical approach to the balancing factor again loses sight of the purpose of the Anti-SLAPP Statute. Harm is assumed in defamation for a reason: it is often difficult to substantiate harm to reputation.¹⁹ A charitable group promoting the public interest that brings a defamation suit in order to protect its reputation from a social media defamation campaign may not be able adduce evidence that would allow it to quantify its monetary damages. Harm to reputation is notoriously difficult to prove. A court should consider whether dismissing a claim for lack of proof of harm at this stage actually furthers the public interest.

25. By contrast, there may be instances where the plaintiff has proven harm (even significant harm) but where the public interest value of the defendant's speech nonetheless outweighs that harm. A public interest campaign to divest from fossil fuel industries may well cause actual

¹⁸ [1704604 Ontario Ltd. v. Pointes Protection Association](#), 2018 ONCA 685, ¶90.

¹⁹ As the British Columbia Supreme Court noted in [Lapointe v. Summach](#), 2001 BCSC 805, ¶132, in a defamation action "some damage must be presumed because it is of the essence of defamation that it spreads its poison in insidious ways, so that one never can know what harm has been done".

economic harm to fossil fuel companies. But if public interest groups are not free to advocate against companies contributing to climate change, then the Anti-SLAPP Statute is a paper tiger.

C. Greenpeace’s Proposed Test

26. The recent Ontario decisions suggest that courts are increasingly aware of the need to ensure that the Anti-SLAPP Statute is being applied in a more purposive manner. In *Bondfield*, the Court of Appeal began its analysis by asking, “Does this claim have the hallmarks of a classic SLAPP?”²⁰

27. This is a step in the right direction. Such a balanced approach ensures that a legitimate plaintiff’s ability to redeem harm to its reputation is not unduly burdened, while still ensuring that true SLAPPs are identified and dismissed.

28. Greenpeace respectfully submits that this Court ought to endorse this approach, and offer additional guidance to ensure that the purpose of the Act permeates the test. Greenpeace thus proposes the following framework:

- (a) The defendant’s onus — that the expression “relates to a matter of public interest” — should be interpreted in a broad manner.²¹ Public interest should be interpreted in a manner consistent with this Court’s decision in *Grant v Torstar*²².
- (b) The first prong of the plaintiff’s onus — demonstrating a reasonable basis to believe that the plaintiff’s claim has substantial merit — should be interpreted in a manner consistent with the Ontario Court of Appeal’s decision in *Pointes*.²³ The plaintiff must show that its claim is legally tenable and supported by the evidence, and that a reasonable trier of fact could find in its favour.

²⁰ *Bondfield Construction Company Limited v. The Globe and Mail Inc.*, 2019 ONCA 166, ¶22.

²¹ While the *Grant v. Torstar* approach is broad, it does not include hate speech. See *Paramount v. Johnston*, 2018 ONSC 3711, ¶37-39.

²² *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640.

²³ *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, ¶80.

- (c) The second prong of the plaintiff's onus — “no valid defence” — should be interpreted in a manner similar to what was articulated in *Bondfield*, but should be informed by the outcome of the balancing analysis as set out below.
- (d) The bulk of the analysis should fall on the balancing test. This prong most directly reflects the purpose of the Anti-SLAPP Statute. Courts should look to the reality of the matter and determine whether a case bears the hallmarks of a SLAPP. In so doing, courts should consider the following factors:
- the public interest value of the defendant's speech;
 - whether a power imbalance exists as between the plaintiff and the defendant;
 - whether the plaintiff has a history of using lawsuits to silence its critics;
 - whether there is a history of litigation between the plaintiff and the defendant;
 - whether the plaintiff's actions could affect people's ability or willingness to express views or take action on matters of public interest (i.e., create a chilling effect);
 - whether the defendant has a history of activism or advocacy in the public interest;
 - whether the defendant's speech had invoked stereotyping, discriminatory or prejudicial ideas;
 - whether the defendant's speech is aimed at stoking fear or hostility towards a member of a group protected under s. 15 of the *Canadian Charter of Rights and Freedoms* or under human rights legislation;
 - whether there is a punitive or retributory purpose motivating the plaintiff's lawsuit; and
 - whether the resources being used to mount the lawsuit are disproportionate to the harm caused or expected damages award.

29. Focusing on this context (*i.e.*, the reality of the plaintiff's action and conduct *and* the defendant's action and conduct) will help ensure that the Anti-SLAPP Statute works in a purposive manner. The above-noted factors should therefore guide how the other aspects of the test are

applied. Where these factors suggest that the plaintiff's action bears the hallmarks of a "classic SLAPP" suit, a more rigorous analysis should be applied at the first two stages of the plaintiff's burden, such that the plaintiff must prove that the defendant has no defences available to it (i.e., showing that the defence that could go "either way" will not suffice to defeat an Anti-SLAPP motion). By contrast, where the above factors suggest that the suit is not a SLAPP, then cases where the defences could go either way should be allowed to proceed to the merits. It is not enough that the Anti-SLAPP Statute be incidental to the public interest; it must actively promote the public interest.

PART IV - COSTS

30. Greenpeace does not seek costs and asks that none be awarded against it.

PART V - ORDER REQUESTED

31. Greenpeace does not request any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of October, 2019.



STOCKWOODS LLP

Nader R. Hasan

Carlo Di Carlo

*Counsel for the Intervener,
Greenpeace Canada*

PART VI - TABLE OF AUTHORITIES

	Para(s) in Factum
CASE LAW	
<i>1704604 Ontario Ltd. v. Pointes Protection Association</i> , 2018 ONCA 685	16, 20, 21, 24, 28
<i>Bondfield Construction Co. v. The Globe and Mail</i> , 2018 ONSC 1880	19
<i>Bondfield Construction Company Limited v. The Globe and Mail Inc.</i> , 2019 ONCA 166	16, 20, 26
<i>Grant v. Torstar Corp.</i> , [2009] 3 S.C.R. 640	28
<i>Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)</i> , [2013] 3 S.C.R. 810	7
<i>Lapointe v. Summach</i> , 2001 BCSC 805	25
<i>Paramount v. Johnston</i> , 2018 ONSC 3711	8, 22, 28
<i>Paramount v. Johnston</i> , 2019 ONSC 2910	4
<i>Platnick v. Bent</i> , 2016 ONSC 7340	16
<i>R. v. Grant</i> , [2009] 2 S.C.R. 353	7
<i>Rizvee v. Newman</i> , 2017 ONSC 4024	16
<i>United Soils Management Ltd. v. Mohammed</i> , 2017 ONSC 4450	10
<i>West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)</i> , [2018] 1 S.C.R. 635	7
LEGISLATION	
<i>Court of Justice Act</i> , 2015, c. 23, s. 3, s. 137.1(1)	9, 14