SCC Court File No.: 38376

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

1704604 ONTARIO LIMITED

APPELLANT

-and-

POINTES PROTECTION ASSOCIATION, PETER GAGNON, LOU SIMONETTI, 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

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REPLY FACTUM
(1704604 ONTARIO LIMITED, APPELLANT)

(Pursuant to the Order of the Honourable Justice Rowe dated September 20, 2019)

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PART I & II: OVERVIEW AND POSITIONS ON SUBMISSIONS

1. 1704604 Ontario Limited ("1704604") submits this factum to address the arguments put forward by the interveners.

2. The interveners' arguments fall into three categories relevant to the issues raised in 1704604's appeal:

i. The legislation should apply to all SLAPPs;
ii. Plaintiff's should be subjected to a high burden to cross the "merits-based hurdle"; and
iii. The balancing required under the "public interest hurdle" should be primarily driven by monetary damages.

3. The application of the legislation should be guided by its purpose as should the interpretation of each of the plaintiff's burdens.

4. Ontario enacted *The Protection of Public Participation Act, 2015* – also known as the "anti-SLAPP" legislation – to provide an expedited and cost-effective procedure to identify and weed out meritless claims that seek to "gag" or silence those expressing themselves on matters of public interest.

5. Although the legislation does not expressly use the term SLAPP the legislature signalled it is intended to apply to that subset of proceedings by the heading preceding s. 137.1 of the Courts of Justice Act, which uses the term "gag proceedings" [1]; a term commonly used to describe SLAPPs.

[1] See Bill 52, *An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest*, 1st Sess, 41st Parl, Ontario, 2014 (assented to 3 November 2015) SO 2015, c 23 s 3.

6. The legislation applies to all SLAPPs, whatever the cause of action. The legislature employed careful wording to allow the courts to identify and deal with SLAPPs by providing that the proceeding must "arise from" an expression related to a matter of public interest.[2]

7. Where the "essential character" of a proceeding discloses that it is a SLAPP, some of the interveners argue that there should be a high burden placed on the plaintiff at the "merits-based hurdle" to convince the motion judge they are likely or more than likely to succeed at trial.

8. A high burden is antithetical to the legislation's purpose and risks having the motion judge usurping the role of the trier of fact by having to take a deep dive into the merits of the proceeding at preliminary instance.

9. 1704604 also agrees with those interveners that argue a high burden could deprive victims of hate speech of access to justice, as such, create a form of reverse litigation chill.

10. Likewise, a focus on monetary damages, as argued by several of the interveners belies the breadth of harm intended to be considered in the balancing test under the "public interest hurdle".

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[2] Ontario, Legislative Assembly, Official Report of the Debates (Hansard), 41st Parl, 1st Sess, No 41A (10 December 2014) at 1971 (The Honourable Madeleine Meilleur) "…this proposal could go a long way toward easing the financial and emotional strain of defending oneself against a strategic lawsuit. It would do so by giving our courts a way to quickly identify and deal with such a suit, with minimal time or expense to any party. Catching strategic lawsuits early also has benefits to the courts, by minimizing the amount of valuable public resources wasted on those matters. This, of course, benefits all court users. Since the bill with give the court a speedy way to identify a case as strategic, the plaintiff who has been accused of launching a strategic suit would not be greatly delayed by the motion. Those with legitimate claims would be heard in the normal course."

11. 1704604 agrees with those interveners that argue that there are many claims involving non-monetary harms such reputational damage or loss of legal rights that may not readily lend themselves to quantification. Such harms may carry significant public interest considerations favouring the proceeding continuing to trial.

PART III: ARGUMENT

A. The legislation covers all SLAPPs, whatever the cause of action.

12. In its factum, Ecojustice argues that s. 137.1 should be interpreted broadly to cover all SLAPPs, whatever the cause of action. Ecojustice states that its position is supported by the legislation's purpose and its express language.

13. The purpose of the legislation is to protect defendants from SLAPPs. To that end, the legislation provides an expedited procedure to weed out unfounded claims brought solely to "gag" or silence those expressing themselves on matters of public interest. The procedure carries significant consequences. Not only is a plaintiff deprived of access to justice, but they are subject, *prima facie*, to a full indemnity cost award and, in some cases, damages.

14. The drafters were attuned to the risk that non-SLAPPs could be caught by the breadth of the legislation. To guard against this, the drafters included the express limitation that the proceeding must "arise from" expression that relates to a matter of public interest.

i. A proceeding must "arise from" an expression

15. As discussed in 1704604's factum, to determine whether a proceeding "arises from" protected expression requires a court to define its essential character. This Honourable Court provided the model for how to make such a determination in its landmark decision in *Weber v Ontario Hydro*.[3]

16. In that case, this Court explained that in considering whether a dispute arises from a collective agreement, a decision maker must attempt to define the dispute's essential character. This Court observed that although it will be clear in some cases that the dispute is grounded in a

[3] [1995] 2 SCR 929.

collective agreement, others will require consideration of factors such as the relationship between the parties and where the claim originated to make this determination.[4]

17. Notwithstanding, this Court stated, "the question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement."[5]

18. This court gave additional guidance to how to determine "essential character" in *Ward v Canada (Attorney General).*[6] In that case, this Court's comments came in the context of determining the pith and substance of legislation; the first step of which is to define its essential character.[7] To do so, this Court explained it is necessary to consider the background and circumstances of the legislation's enactment, its purpose and effect.[8]

19. Applying this Court's guidance on how to define the essential character of a proceeding and, therefore, whether it arises from an expression, a judge hearing a motion under s 137.1 must consider the circumstances surrounding the proceeding and the purpose and effect of the plaintiff's claim.

20. In some cases it will be clear that a claim is a SLAPP. Either an expression is the basis for the dispute or it is not. Either the purpose and effect of a claim is to "gag" or silence someone or it is not. In those cases where it is unclear, the essential character of the proceeding must be defined for a defendant to meet the threshold burden of establishing the proceeding arises out of protected expression.

21. Proceedings brought against defendants that have contractually agreed to forego their right to express themselves are not SLAPPs. Such proceedings do not arise from an expression, but the violation of the parties' agreement. That is their "essential character". The purpose and effect of such proceedings is to enforce the plaintiff's contractual rights, not to "gag" or silence defendants.

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[4] *Ibid* at para 52.
[5] *Ibid* at para 52.
[6] 2002 SCC 17, [2002]1 SCR 569.
[7] *Ibid* at para 17.
[8] *Ibid* at para 18.

22. It is precisely these types of proceedings that the legislature sought to avoid being subject to expedited dismissal under s. 137.1 by narrowing the scope of the legislation by using the words "arising from" in ss. 137.1(3).

ii. Presumption against interference with private rights

23. Narrowing the scope of the legislation in this way also accords with the presumption against interference with private rights. When to interpreting legislation that removes or curtails a right of civil action, this presumption requires any ambiguity be resolved in favour of the person whose right of action is being curtailed.[9]

24. The presumption against interference with private rights should inform not only to the interpretation of the defendant's burden under in s. 137.1(3), but also the plaintiff's burden under s. 137.1(4).

B. The plaintiff's burden under the "merits-based hurdle" should not require the claim to be adjudicated at this stage

25. Several of the interveners argue in favour of a high standard being set for plaintiffs to cross the "merits-based hurdle". Such a standard would require the plaintiff to convince the motion judge that their claim is likely or more than likely to succeed. This is, however, antithetical to the legislation's purpose and requires the motion judge to take a deep dive into the merits; risking judgment being rendered at this early stage and duplicating the approach taken in summary judgment; something the legislature did not intend.

i. A claim has "substantial merit" if it discloses "a serious question to be tried"

26. As observed by the lower courts, the use of the phrase "substantial merit" is a first instance in Canadian legislation and one that has not been subject to judicial definition. As well, few foreign courts have had occasion to interpret "substantial merit". None have done so in the context of an anti-SLAPP motion.

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[9] *Beradinalli v Ontario Housing Corporation*, [1979] 1 SCR 257 at 280.

27. The North Carolina Court of Appeals has, however, judicially interpreted "substantial merit" in the context of a caveat proceeding. In such a proceeding, North Carolina Gen. Stat 6(2) permits the courts to apportion costs, but such costs will only include attorney's fees if the court finds the proceeding has substantial merit.

28. In *Dyer v State*,[10] the North Carolina Court of Appeals explained that "a proceeding has substantial merit if there is substantial evidence to support the claim." The Court further explained that "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." In *Dyer*, the Caveators claimed the testatrix did not have the necessary testamentary capacity to execute her will. To support an award of attorney's fees the Court thus required the Caveators to present "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion that the Testatrix lacked testamentary capacity at the time she executed her will."[11]

29. The Court's explanation of substantial merit is elucidatory and fits neatly with anti-SLAPP motions. The "merits-based hurdle" in several states' anti-SLAPP legislation has been interpreted as requiring the respondent to establish "that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a *prima facie* case."

30. For instance, to determine whether a plaintiff has met their burden at this stage, the United States Court of Appeal for the Ninth Circuit held, in *Schwern v Plunkett*,[12] that the evidence should be viewed in the light most favourable to [the plaintiff]" and inferences should be drawn in the plaintiff's favour. Where there is a conflict between the parties proffered factual narratives, the courts will only adopt the version that most favours to the plaintiff if it is supported by substantial evidence." In this context, the courts have held that "substantial evidence" means "sufficient evidence from which a reasonable trier of fact could find that the plaintiff met its burden of production to support a *prima facie* case."[13]

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[10] 102 NC 480 (1991) [Book of Authorities ("*BOA*"), Tab 1]
[11] *Ibid* at 1.
[12] 845 F 3d 1241 (2017) [BOA, Tab 2]
[13] *Ibid* at 3.

31. It is submitted that there is no practical difference in the above formulations of "substantial evidence" and what it requires a plaintiff to produce.

32. "Substantial merit" in s. 137.1(4)(i) should be interpreted similarly. This was the view of the motion judge, the Honourable Justice Gareau. That is, a plaintiff's claim will have "substantial merit" if it discloses a "serious question to be tried". That is, viewed in the light most favourable to the plaintiff, the evidence permits a reasonable trier of fact to determine there are probable facts to support the pleaded cause of action.

33. Interpreting "substantial merit" in this way accords with the legislation's purpose in weeding out unfounded claims brought solely to silence those expressing themselves on matters of public interest. It recognizes the early stage that such motions are brought in proceedings, the requirement that motion judges not adjudicate the matter by taking a "deep dive" into the merits and the importance of not depriving plaintiffs with valid cases of access to justice.

34. Further, it respects the necessary separation with the plaintiff's burden to demonstrate the defendant has "no valid defence".

ii. A defendant has "no valid" defence if the evidence does not support any of affirmative defences proffered

35. Some of the interveners argue that "substantial merit" requires the motion judge to assess the likelihood of the plaintiff's claim succeeding at trial. This cannot be correct because such an assessment necessarily involves consideration of the likelihood that the defendant will prevail on one or more of its proffered defences. In other words, it would see the combination of two separate analyses under s. 137.1(4)(a)(i) and (ii).

36. The difference between "substantial merit' and "no valid defence" is that while the former focuses on the evidence to support the plaintiff's cause of action, the latter focus on the tenability of the defences proffered.

37. Assessing tenability requires the motion judge to consider whether the defences set out in the defendant's materials are made out based on the evidence provided,[14] which again is viewed in the light most favourable to the plaintiff. The plaintiff must demonstrate that the evidence permits a reasonable trier to find that none of the defences are adequately supported.

38. This approach does not require the motion judge to take a "deep dive" into the merits. For example, in a defamation case, if the motion judge finds that the plaintiff's cause of action is supported by the evidence (i.e. whether the elements of slander or libel are made out), they would then consider whether that same evidence supports the proffered defences (for ex. qualified privilege).

39. It also accords with the approach argued by Greenpeace Canada ("Greenpeace"). In its factum, Greenpeace rejects the argument advance by some of the other interveners, that the plaintiff should be put to the onerous burden of proving the defendants have no valid defences available to them. This approach, argues Greenpeace, would be "unworkable" as it would require a plaintiff to anticipate all potential defences and demonstrate that none have validity.

40. 1704604 agrees with Greenpeace that placing a high onus on the plaintiff does not serve the anti-SLAPP legislation's purpose. As argued by Greenpeace, a high onus could have the effect of preventing those who are the victims of hate speech from "protecting their reputations from malicious or hateful smear campaigns." Further, this may chill public servant plaintiffs from advancing legitimate claims based on unjustified attacks on their reputations.[15]

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[14] This would include consideration of whether a defence has been explicitly or implicitly waived. For instance. in *Navellier v Sletten*, 124 Cal. Rptr2d 530 (2002), 29 Cal. 4th 82. 52 (a California Supreme Court Decision cited at paragraph 75 of the Respondent's factum) the Court explained "[i]indeed, as the statute is designed and as we have construed it, a defendant who in fact has validly contracted not to speak or petition has in effect "waived" the right to the anti-SLAPP statute's protection in the event he or she later breaches the contract".

[15] See, the Honourable Madeleine Meilleur, s*upra* note 2 at 1971 in which she states:

> "[w]e recognize that reputation is one of the most valuable assets a person or business can possess".

41. Moreover, while the technical approach recommended by most interveners may be workable in defamation cases, where the defences are affirmative defences easily assessed by the courts, such an approach would be overly burdensome or impossible in other causes of actions, such as breach of contract cases, fraud and assault and others in which the defence is a different version of facts. In such cases, proving the defendant has no valid defence would require a deep dive into the evidence and credibility of the parties and witnesses, an act which would be contrary to the purpose of the legislation to serve as an expedited screening tool.

42. An overly technical or mechanical approach will require motion judges to adjudicate the merits of the case, instead of using the procedure to weed out strategic lawsuits. As stated by Greenpeace "the Statute's noble objective gets lost when the focus is on technical thresholds instead of the overall purpose of the legislation."[16]

C. The "public interest" hurdle should focus on a broad range of harms

43. The plaintiff bears a unique burden under the "public interest hurdle". Notwithstanding that there are grounds to believe the proceeding has substantial merit and the defendant has no valid defence, a plaintiff's claim will be dismissed in its early stages if the plaintiff cannot establish that "the harm caused by the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression."[17]

i. A plaintiff does not have to balance the public interest to succeed at trial

44. What is unique about the plaintiff's burden under s. 137.1(4)(b) is that, unlike the merits of the plaintiff's claim, the public interest in it is not a valid consideration for the trial judge. In other words, a plaintiff's claim may be summarily dismissed on a motion under the anti-SLAPP legislation based on a consideration that is irrelevant to the claim's ultimate success or failure at trial.

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[16] Greenpeace Factum at para 22.
[17] *Courts of Justice Act*, RSO 1990 c C.43 s 137.1(4)(b).

45. This underscores the risk that the legislation may be used strategically by defendants who know they cannot succeed on the merits at trial, but seek to do so at an early stage based on a burden borne by the plaintiff that is irrelevant to the trier of fact.

46. Coupled with the legislation's presumption that a defendant will not be subject to costs if unsuccessful on the motion there a substantial risk of a reverse form of litigation chill if this Court does not strike the appropriate balance.

ii. Harm includes non-monetary damages

47. As argued by the British Columbia Civil Liberties Association (the "BCCLA") and the Canadian Civil Liberties Association, in striking the appropriate balance the courts should assess harm broadly such that the assessment is not primarily driven by monetary damages.

48. As stated by the BCCLA, "nothing in the language of the legislation indicates that it is limited to pecuniary damages".[18] The BCCLA's comments regarding the protection of reputation and privacy may be primarily important in certain proceedings arising from an expression. There may be other rights at issue in such proceedings worthy of protection.

iii. The harm suffered is linked to the public interest in the proceeding continuing

49. In some cases, such as 1704604's appeal, there will be additional considerations furthering public interest in a proceeding continuing. In 1704604's appeal, not only is there public interest in protecting the finality of settlement, but also in upholding a court order.

50. It will be recalled that the Pointes Protection Association's Application for Judicial Review was dismissed by the Divisional Court "with prejudice". The parties agreed to the "with prejudice" dismissal because they sought to fully resolve the issues raised in the Application of Judicial review such that they would be *res judicata* in any future proceeding.[19]

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[18] BCCLA Factum at para 16.

[19] See *Segal v Plazavest*, 2004 CanLII 35087 (ON SC) at para 26 in which Master Kelly stated If the Plaintiffs had wanted an opportunity to revisit the settlement, in the event that documents obtained thereafter raised issues not previously seen or capable of being seen, and not exempted,

51. This is not to suggest that monetary damages are not an important consideration, only that they are not the only "harm" that must be considered at this stage.

52. There will be many cases, such 1704604's appeal, in which harm is evinced through both monetary and non-monetary damages.

PART IV: SUBMISSIONS CONCERNING COSTS

53. 1704604 does not seek costs against the interveners and asks that no costs be awarded to the interveners.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

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Dated at Sault Ste. Marie, in the Province of Ontario, this 8th day of October, 2019.

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they should have made full documentary disclosure a condition in the Minutes and the Release, and in the consent to dismissal with prejudice. A settlement, followed by dismissal with prejudice based on the settlement, is analogous to a court finding and triggers the principle of res judicata

PART VI: TABLE OF AUTHORITIES

AUTHORITY	**at Paragraph(s)**
Cases	--
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