

SCC Court File No.:

**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

**APPLICANT
(Respondent)**

-and-

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

**RESPONDENTS
(Appellants)**

**APPLICATION FOR LEAVE TO APPEAL
AND MOTION FOR EXTENSION OF TIME
(1704604 ONTARIO LIMITED – APPLICANT)**

(Pursuant to Sections 40 and 59 of the *Supreme Court Act*, RSC 1985 and
Rules, 6 and 47 of the Rules of the Supreme Court of Canada, SOR/2002-156)

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E.	Transcript of Cross-Examination of Peter Gagnon
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H.	Answers to Undertakings Given by Patricia Avery

- I. Transcript of Cross-Examination of Michael Davies
- J. Answers to Undertakings Given by Michael Davies

**PART I: POSITION WITH RESPECT TO ISSUES OF PUBLIC IMPORTANCE AND
STATEMENT OF FACTS**

1. The case at bar is of public importance because it involves the application of Ontario's anti-SLAPP legislation, Sections 137.1 to 137.5 of the *Courts of Justice Act*, and the test to be applied on motions brought under it. The decision appealed from is the first time this legislation has been considered by the Ontario Court of Appeal.
2. In its decision, the Court of Appeal sets out the test to be applied on motions brought under the legislation. Historically, the lack of clear guidance in the legislation on how the test should be applied resulted in numerous and varied interpretations of the test in the lower courts resulting in inconsistent decisions.
3. Although this appeal is limited to the within matter, it is must be noted that the Court heard together appeals from six (6) different lower court decisions involving the interpretation of the legislation. The subject matter of the appeals varied, with this appeal being the only decision to consider the legislation in the context of a breach of contract claim.
4. Ultimately, the Court of Appeal enunciated the test and applied it in a consistent manner to all the appeals before it.
5. The case at bar is of public importance because it has a profound impact on not only the applicant, 1704604 Ontario Limited, but in fact, on the entire City of Sault Ste. Marie and surrounding area. The case centres around a proposed ninety-one (91) lot residential development that would have been novel for the City of Sault Ste. Marie. If approved, the development would have brought numerous benefits to the community including injecting more than \$100,000,000.00 into the local economy, increasing tourism and recreation and advancing desperately needed professional recruitments and retention.
6. Importantly, the case sets precedent for the appropriate application of anti-SLAPP legislation where a binding contract requires a promise of confidentiality. The impact of anti-SLAPP legislation in all other Canadian provinces including British Columbia who has recently introduced anti-SLAPP legislation, modeled after the Ontario statute.

Statement of Facts

Background

7. Sault Ste. Marie is a mid-sized northern Ontario community located at the heart of the Great Lakes. The steel industry is its economic backbone. As such, the City has experienced great fluctuations in the economy. In the recent past, the steel plant's struggles have had financial consequences on almost every resident therein.

8. 1704604 Ontario Limited is a company comprised of spouses, Jeff and Patricia Avery. The Avery's live at 64 Alagash Drive, in an area of Sault Ste. Marie known as the Pointe Aux Pins area. Their children, grandchildren and siblings also live in the Pointe Aux Pins area.¹ Mr. Avery is the President and Manager of Avery Construction Ltd. Dr. Patricia Avery is a retired physician who devoted countless volunteer hours in pursuit of attracting doctors to the under-serviced city via the Physician Recruitment Committee. As a child, Dr. Avery summered with her family in the area.

9. From their many years of family vacations in Florida, the Avery's became familiar with a type of residential development previously unseen in Sault Ste. Marie. Essentially, it is a waterfront community where residents have access to a water course via a series of canals. This allows residents to access water crafts on their residential property without having to travel elsewhere to launch the craft. 1704604 Ontario Limited, proposed such a development at Pointe Aux Pins, the exact location where the Avery family resides.

10. The Pointes Protection Association (the "PPA") was incorporated on March 28th, 2008 as a not-for-profit corporation to provide a co-ordinated voice for some of the residents in the area opposing the proposed development.

11. In order for the proposed development to proceed, 1704604 Ontario Limited applied to the City of Sault Ste. Marie to rezone the subject property, to amend the Official Plan, to approve the draft plan of subdivision, to approve the draft plan of condominium and to close Alagash Drive.

¹ Affidavit of Dr. P. Avery, paras 8-13 [Documents Relied Upon, Vol II, Tab B].

12. The City of Sault Ste. Marie heard the matters at the open Council meeting of July 15th, 2013 and denied 1704604 Ontario Limited all applications.

The SSMRCA Approval

13. 1704604 Ontario Limited engaged Great Lakes Environmental Services to conduct three (3) separate evaluations of the on-site wetland between 2004 and 2009. All three (3) evaluations concluded that the wetland was not Provincially Significant as it scored well below the threshold required for it to be designated as such by the Ministry of Natural Resources.²

14. Having satisfied itself that the wetland was not Provincially Significant, 1704604 Ontario Limited applied to the SSMRCA for development approval.³

15. Initially, the SSMRCA declined approval citing a concern that the Proposed Development would interfere with the wetland's hydrologic function.⁴

16. 1704604 Ontario Limited appealed the SSMRCA's initial decision to the Mining and Lands Commissioner. The appeal settled following 1704604 Ontario Limited's agreement to complete a site-specific hydrogeological study.⁵

17. After reviewing the site-specific hydrogeological study provided by 1704604 Ontario Limited, the SSMRCA granted its approval and SSMRCA was satisfied that the Proposed Development would not interfere with the wetland.⁶

18. Specifically, in granting its approval, the SSMRCA concluded that "the control of flooding, erosion, dynamic beaches, pollution or the conservation of the land [would] not be affected by the [Proposed] [D]evelopment."⁷

² *Affidavit of Dr. P. Avery*, paras 30–31 [[Documents Relied Upon, Vol II, Tab B].

³ *Affidavit of Dr. P. Avery*, para 33 [Documents Relied Upon, Vol II, Tab B].

⁴ *Affidavit of Dr. P. Avery*, para 34 [Documents Relied Upon, Vol II, Tab B].

⁵ *Affidavit of Dr. P. Avery*, para 35 [Documents Relied Upon, Vol II, Tab B].

⁶ *Affidavit of Dr. P. Avery*, para 36–37 [Documents Relied Upon, Vol II, Tab B].

⁷ *Sault Ste. Marie Region Conservation Authority: Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses*, O Reg 176/06 s 3(1).

Judicial Review of the SSMRCA Approval

19. PPA brought an application to the Ontario Superior Court to judicially review the decision of SSMRCA.⁸

20. The PPA took the position that the Proposed Development posed considerable risk to the wetland. Through its judicial review application, the PPA sought a declaration that the SSMRCA's approval of the development was illegal and invalid because the PPA alleged it was contrary to the *Conservation Authorities Act* and O Reg 176/06, both of which are aimed at protecting Ontario's wetlands.⁹

21. The judicial review application was resolved through Minutes of Settlement and was dismissed by an order of the Divisional Court, on a "with prejudice" basis.¹⁰

22. Under the Minutes of Settlement, the PPA agreed "not to take any further court proceeding seeking the same or similar relief," not to "knowingly make any false or untrue comments or statements to the media, electronic or print, in regards to the Pointe Estates development," and 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 the Resolutions passed by the SSMRCA on December 13th 2012 in regards to the Pointe Estates Development Under subsection 3(1) of Ontario Reg. 176/06 are illegal or invalid or contrary to the provisions of the *Conservation Authorities Act* R.S.O. 1990 c. C.27 and Ontario Reg. 176/06 being the *Regulation of Development, interference with Wetlands and Alterations to Shorelines and Watercourses* or that the SSMRCA exceeded its jurisdiction by passing the above noted Resolutions with no reasonable evidence to support its decision and considered factors extraneous to those set out in subsection 3(1) of Ont. Reg. 176/06.

23. The PPA's former counsel was extensively involved in the drafting process and materially contributed to the crafting of the provisions of the Minutes of Settlement.¹¹

⁸ *Affidavit of Dr. P. Avery*, para 41 [Documents Relied Upon, Vol II, Tab B]

⁹ *Application for Judicial Review*, Affidavit of Dr. P. Avery [Documents Relied Upon, Vol II, Tab B, Exhibit "9"].

¹⁰ *Order of Justice Gordon of the Ontario Divisional Court*, Affidavit of Dr. P. Avery [Documents Relied Upon, Vol II, Tab B, Exhibit "12"].

24. Importantly, the Minutes of Settlement did not purport to prevent the PPA from participating as a party in any subsequent Ontario Municipal Board (“OMB”) hearing or other legal proceeding.¹²

Development Applications are Heard by City Council

25. Several months before execution of the Minutes of Settlement, the hearings for the local approvals took place at the open session of City Council in Sault Ste. Marie on July 15th, 2013. At that meeting the PPA’s president, Peter Gagnon publicly voiced his opposition to the Proposed Development.

26. Notwithstanding that the rezoning and Official Plan Amendment had been supported by City Staff, Council denied its approval on July 15, 2013.¹³

Ontario Municipal Board Hearing

27. On July 26, 2013, 1704604 Ontario Limited appealed Council’s decision to the Ontario Municipal Board (OMB).

28. The PPA and Klaas Oswald were both granted party status. Neither the City nor 1704604 Ontario Limited opposed the PPA’s request for party status.¹⁴

29. On August 19, 2014, a prehearing conference was held before Member Makuch to narrow the issues. At that conference, Member Makuch reviewed the Minutes of Settlement as well as the various issues the PPA sought to have heard by the OMB. One such issue was whether the on-site wetland should be re-designated as being “provincially significant”.

30. Member Makuch cautioned the PPA that the re-designation issue it proposed to include was “one which they agreed would not be placed before this Board or any subsequent legal proceeding according to the Minutes of Settlement...”¹⁵

¹¹ *Affidavit of Dr. P. Avery*, para 46 [Documents Relied Upon, Vol II, Tab B].

¹² *Affidavit of Dr. P. Avery*, para 48 [Documents Relied Upon, Vol II, Tab B].

¹³ *Affidavit of Dr. P. Avery*, para 37 [Documents Relied Upon, Vol II, Tab B].

¹⁴ *Affidavit of Dr. P. Avery*, para 43 [Documents Relied Upon, Vol II, Tab B].

31. Member Makuch concluded his decision to reject the PPA's impugned issue by stating:

The Board deals with planning matters. While the wetland designation will be of relevance before the Board, ultimately, the Board will not necessarily be called upon to question the legitimacy of the designation made by the MNR. Rather, the Board will consider the designation of the property, for planning purposes.¹⁶

32. At the three-week long OMB hearing, the PPA called Peter Gagnon as a witness. Mr. Gagnon testified, inter alia, in his opinion, the Proposed Development would cause the loss of approximately 70% of the on-site wetland area and would cause significant environmental damage if approved.

33. In his testimony, Mr. Gagnon explained his concept of environmental damage as follows:

Loss of wetland function, which as again, cleaning water, yeah, that's right, so that would be pollution. Conservation of land, which was the fifth point, would be – land would be removed. That's environmental damage.¹⁷

34. Mr. Gagnon acknowledged that the constituent components of his concept of environmental damage were all matters the SSMRCA had a statutory mandate to consider in granting its approval.¹⁸

35. Further, Mr. Gagnon conceded that the Minutes of Settlement included all the constituent components of his concept of environmental damage and also the entire position advanced by PPA in its opposition to the Proposed Development at the OMB appeal hearing.¹⁹

Breach of Contract Action Against the PPA

36. On September 4, 2015, 1704604 Ontario Limited, commenced the breach of contract claim that is at issue currently. The claim alleges PPA breached the Minutes of Settlement at the Ontario Municipal Board hearing.

¹⁵ *Decision of Member Makuch dated September 12, 2014* at para 16, *Affidavit of Dr. P. Avery* [Documents Relied Upon, Vol II, Tab B, Exhibit "16"].

¹⁶ *Ibid.*.

¹⁷ *OMB Transcript, p. 1836*, Affidavit of B. Wenmann [Documents Relied Upon Vol III, Tab D, p. 494].

¹⁸ *Ibid* at p. 1836–7.

¹⁹ *Ibid* at p. 1842.

37. On November 3, 2015, the *Protection of Public Participation Act, 2015*, Ontario's anti-SLAPP legislation, came into force. The legislation amended the *Courts of Justice Act* by creating a new section 137.1. This section sets out an expedited procedure for dismissing SLAPPs.

38. On November 17, 2015, without serving and filing a Statement of Defence, the respondents brought a motion under section 137.1 of the *Courts of Justice Act*, which sets out a procedure whereby a defendant may move at any time after a proceeding is commenced, to have the proceeding dismissed where the defendant can show that the proceeding arises from an expression made by the defendant that relates to a matter of public interest. If this threshold is met, the burden switches to the plaintiff who must show that the proceeding has substantial merit and that the harm or potential harm caused to the plaintiff by the defendant's expression is sufficiently serious that the public interest in allowing the claim to proceed, outweighs the public interest in protecting the defendant's freedom of expression.

39. The motion judge found that the actions of the defendant, and, in particular, the testimony given by the PPA's President, Peter Gagnon, before the OMB was an expression on a matter of public interest. The motion judge, however, refused to grant the defendants' motion to dismiss under s 137.1 because he found the plaintiff had met its burden of establishing that:

- (a) its claim has substantial merit;
- (b) the defendants have no valid defence; and
- (c) "the public interest in allowing the litigation to continue and permitting the issues related to the minutes of settlement and finality of agreements made between parties outweighs the public interest in protecting the right of Peter Gagnon to freely express himself by giving evidence before the [OMB]."

40. The defendants appealed the motion judge's decision to the Ontario Court of Appeal. The Appeal Court found:

- i. That failing to file a Statement of Defence was not determinative of absence of a reasonable defence;
- ii. The litigation did not have substantial merit;

- iii. That the harm experienced or to be experienced by 1704604 Ontario Limited had not been identified or quantified sufficiently to warrant the litigation to proceed. Hence, the anti-SLAPP applied and the action for breach of contract was dismissed.

41. The Court of Appeal allowed the appeal and dismissed 1704604 Ontario Limited's action for breach of contract.

PART II: STATEMENT OF THE QUESTIONS AT ISSUE

42. Does the anti-SLAPP legislation apply in cases of breach of contract and, in particular, the case at bar?

43. If so, is it restricted in its application because the case at bar meets both the merits-based threshold and the public interest threshold as set out by the Court of Appeal?

44. If the anti-SLAPP legislation applies to the case at bar, what consequences will ensue for other breach of contract cases and particularly ones with confidentiality clauses?

PART III: STATEMENT OF ARGUMENT

45. Before anti-SLAPP legislation can be applied, there must be a SLAPP lawsuit contemplated, if not initiated. SLAPP litigation by definition is strategic. It is brought with an aim to intimidate and coerce legitimate critics into silence. Its purpose is to limit public participation and chill would be critics into frightened silence and cowed inactivity. Moreover, SLAPP lawsuits are "trumped up" in that they generally have no real chance of success. Their power is in threat.

46. In the case at bar, the litigation commenced is not strategic. Rather, it is a legitimate quest for justice following a breach of a legally binding contract. It seeks a legal remedy contemplated by the Minutes of Settlement. The goal is not intimidation. Rather, it is fairness. It seeks enforcement of a legal contract crafted by all parties with the benefit and advice of legal counsel for each party.

47. 1704604 Ontario Limited met its promises. Specifically, it did not pursue any costs for the security for costs application heard by the Divisional Court on August 9th, 2013.

48. The PPA did not meet its promises.

49. 1704604 Ontario Limited does not seek to render PPA mute. Nor does it hope to quell public participation. The bell has already been rung. PPA expressed its concerns in violation of the voluntary Minutes of Settlement at the open City Council meeting, the SSMRCA, the OMB, the Ontario Mining and Lands Tribunal, and Ontario Divisional Court. There is no concern raised by 1704604 Ontario Limited about other parties mentioning wetlands. In fact, such submissions were made by Mr. Oswald. Mr. Oswald was not bound by the Minutes of Settlement. This is not a case of ongoing expression where, for example, the moving party has a social media forum that continues to put forward criticism. The opportunity for PPA to express its opinion has been fully utilized and is no longer open. Every avenue in which PPA may have participated have all been exhausted with full participation from PPA.

50. Notably, the Court of Appeal comments in its decision that this case is better suited to Summary Judgment. Nonetheless, the Court not only applies the anti-SLAPP legislation, it uses the 1704604 Ontario Limited case as the model to develop and apply the anti-SLAPP test even though the shoe does not fit. The Court squeezes the facts into the two-step test resulting in a decidedly ill-fitting result. The anti-SLAPP legislation provides a shield to would be litigants encouraging and allowing full public participation and expression in matters of public interest. The anti-SLAPP provisions of the *Courts of Justice Act* are not to be employed as a sword to allow such courts as slander or in this case, breach of contract. In short, the anti-SLAPP provisions of the *Courts of Justice Act* do not translate to the facts of this case and should not be applied.

51. In the alternative, should this Honourable Court find that the fact scenario is appropriate for anti-SLAPP application, it is submitted that the Court of Appeal test for anti-SLAPP application has not been met. The Court of Appeal plainly identifies a two-prong test that must be cleared by a respondent in order for the anti-SLAPP argument to succeed. A respondent must meet both a merits-based threshold and a public interest-based threshold. It is submitted that 1704064 Ontario Limited clears both thresholds.

52. The merit-based threshold has two (2) components. A respondent must show that the litigation has substantial merit and the Defendant has no valid defence. It is submitted that the facts of this case show that 1704604 Ontario Limited has met both prongs.

53. In the case at hand, the litigation has substantial merit. 1704604 Ontario Limited alleges that PPA breached the Minutes of Settlement by permitting Peter Gagnon to give evidence about wetlands at the Ontario Municipal Board. These are not bold allegations. They are supported and evidenced by the Minutes of Settlement, the Ontario Municipal Board pre-hearing Conference decision of Member Makuch and the transcript and decision of the Ontario Municipal Board. Accordingly, a reasonable trier of fact on examination of the record could reasonably find that the claim has substantial merit.

54. While a respondent to a motion brought under the anti-SLAPP legislation does not have to address all potential defences and demonstrate none have validity, a respondent must satisfy the motion judge that there are reasonable grounds to believe there is no valid defence. It is not a respondent's burden to "put a defence in play". However, in the facts of this case, no Statement of Defence has been filed. This leaves 1704604 Ontario Limited in the unenviable and frankly, unfair position, of not only having to weigh the merits of possible defences, but actually having to cavass what defences would be available (whether or not the Defendant contemplated any of them). This imbalance does not place litigants on equal footing. Rather, it gives a distinct advantage to the moving party.

55. In like manner, 1704604 Ontario Limited meets the public interest hurdle. The Court of Appeal describes this threshold as "the heart of Ontario's anti-SLAPP legislation". The public interest in seeing 1704604 Ontario Limited claims continue outweighs the public interest in protecting expression in this case. 1704604 Ontario Limited has incurred serious harm as a result of the expression made by PPA in violation of a duly executed contract. By putting forward a position on the wetlands, PPA influenced the decision of Member Taylor, thereby effectively ending the development. This assertion is not mere conjecture. Member Taylor states that he prefers the evidence of Mr. Gagnon to that of 1704604 Ontario Limited's expert. Mr. Gagnon's evidence was influential and led to the ultimate denial of the appeal of the Ontario Municipal Board. As a result, the envisioned development has not proceeded.

56. Damage was suffered by the entire community and not merely 1704604 Ontario Limited. Sault Ste. Marie is profoundly impacted by the sways in the steel market. A development of this

magnitude would have created a badly needed injection into the job market, represented a change in an otherwise stagnant residential developmental market and increased the municipal tax base.

57. Ultimately, if the application of the Court of Appeal test for anti-SLAPP protection is upheld, there are consequences for any and all future contracts. Any contract that has a confidentiality provision is at risk of essentially being overturned by anti-SLAPP legislation. A private agreement between two (2) legal entities both of whom are represented by legal counsel, is subject to court interference if one can say part of the contract involved a commitment to silence. This means virtually every severance agreement, insurance settlement, and medical malpractice waiver are in jeopardy of being opened and negated by this misapplication of the anti-SLAPP legislation. The intent of anti-SLAPP legislation was to provide protection to David when fighting Goliath. It was not intended to arm David with lethal weaponry.

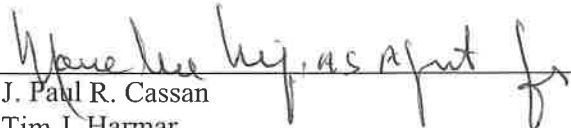
PART IV: COST SUBMISSIONS

58. 1704604 Ontario Limited seeks cost of this application.

PART V: ORDER SOUGHT

59. 1704604 Ontario Limited applies for an Order setting aside the decision of the Court of Appeal as it relates to breach of contract cases, specifically, the subject case including setting aside the Court of Appeal's decision on costs in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of October, 2018



J. Paul R. Cassan
Tim J. Harmar

Lawyers for the Applicant/Respondent

PART VI: TABLE OF AUTHORITY

N/A

PART VII: STATUTORY PROVISIONS

*Courts of Justice Act, RSO 1990, c C.43***Dismissal of proceeding that limits debate
Purposes**

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
- (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. 2015, c. 23, s. 3.

Definition, “expression”

(2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that

**Rejet d’une instance limitant les débats
Objets**

137.1 (1) Les objets du présent article et des [articles 137.2](#) à [137.5](#) sont les suivants :

- a) encourager les particuliers à s’exprimer sur des affaires d’intérêt public;
- b) favoriser une forte participation aux débats sur des affaires d’intérêt public;
- c) décourager le recours aux tribunaux comme moyen de limiter indûment l’expression sur des affaires d’intérêt public;
- d) réduire le risque que la participation du public aux débats sur des affaires d’intérêt public ne soit entravée par crainte d’une action en justice. 2015, chap. 23, art. 3.

Définition du terme «expression»

(2) La définition qui suit s’applique au présent article.

«expression» Toute communication, que celle-ci soit faite verbalement ou non, qu’elle soit faite en public ou en privé et qu’elle s’adresse ou non à une personne ou à une entité. 2015, chap. 23, art. 3.

Ordonnance de rejet

(3) Sur motion d’une personne contre qui une instance est introduite, un juge, sous réserve du paragraphe (4), rejette l’instance si la personne le convainc que l’instance découle du fait de l’expression de la personne relativement à une affaire d’intérêt

the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

- (a) there are grounds to believe that,
 - (i) the proceeding has substantial merit, and
 - (ii) the moving party has no valid defence in the proceeding; 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. 2015, c. 23, s. 3.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

- (a) in order to prevent or avoid an order under this section dismissing the proceeding; or
- (b) if the proceeding is dismissed under this section, in order to continue the

public. 2015, chap. 23, art. 3.

Absence de rejet

(4) Un juge ne doit pas rejeter une instance en application du paragraphe (3) si la partie intimée le convainc de ce qui suit :

- a) il existe des motifs de croire :
 - (i) d'une part, que le bien-fondé de l'instance est substantiel,
 - (ii) d'autre part, que l'auteur de la motion n'a pas de défense valable dans l'instance;
- b) le préjudice que la partie intimée subit ou a subi vraisemblablement du fait de l'expression de l'auteur de la motion est suffisamment grave pour que l'intérêt public à permettre la poursuite de l'instance l'emporte sur l'intérêt public à protéger cette expression. 2015, chap. 23, art. 3.

Suspension des autres étapes de l'instance

(5) Une fois qu'une motion est présentée en vertu du présent article, aucune autre étape ne peut être commencée dans l'instance par l'une ou l'autre partie tant qu'il n'a pas été statué de façon définitive sur la motion, y compris tout appel de celle-ci. 2015, chap. 23, art. 3.

Aucune modification des actes de procédure

(6) Sauf ordonnance contraire d'un juge, la partie intimée ne doit pas être autorisée à modifier ses actes de procédure dans l'instance :

- a) soit afin d'empêcher ou d'éviter qu'une ordonnance rejetant l'instance ne soit rendue en application du présent article;
- b) soit, si l'instance est rejetée en application du

proceeding. 2015, c. 23, s. 3.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

Procedural matters

Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

Hearing date to be obtained in advance

présent article, afin de poursuivre l'instance. 2015, chap. 23, art. 3.

Dépens en cas de rejet

(7) Si un juge rejette une instance en vertu du présent article, l'auteur de la motion a droit aux dépens afférents à la motion et à l'instance sur une base d'indemnisation intégrale, sauf si le juge décide que l'adjudication de ces dépens n'est pas appropriée dans les circonstances. 2015, chap. 23, art. 3.

Dépens en cas de refus de la motion en rejet

(8) Si un juge ne rejette pas une instance en application du présent article, la partie intimée n'a pas droit aux dépens afférents à la motion, sauf si le juge décide que l'adjudication de ces dépens est appropriée dans les circonstances. 2015, chap. 23, art. 3.

Dommages-intérêts

(9) Lorsqu'il rejette une instance en application du présent article, le juge qui conclut que la partie intimée a introduit l'instance de mauvaise foi ou à une fin illégitime peut accorder à l'auteur de la motion les dommages-intérêts qu'il estime appropriés. 2015, chap. 23, art. 3.

Questions procédurales

Introduction

137.2 (1) Une motion en rejet d'une instance visée à l'article 137.1 est présentée conformément aux règles de pratique, sous réserve des règles énoncées au présent article. Sa présentation peut se faire à n'importe quel moment après l'introduction de l'instance. 2015, chap. 23, art. 3.

Motion entendue dans les 60 jours

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

Section Amendments with date in force (d/m/y)

Appeal to be heard as soon as practicable

137.3 An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal. 2015, c. 23, s. 3.

Section Amendments with date in force (d/m/y)

Stay of related tribunal proceeding

137.4 (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the

(2) Une motion visée à l'article 137.1 est entendue au plus tard 60 jours après le dépôt de l'avis de motion auprès du tribunal. 2015, chap. 23, art. 3.

Obtention préalable de la date d'audience

(3) L'auteur de la motion obtient du tribunal la date d'audience sur la motion avant la signification de l'avis de motion. 2015, chap. 23, art. 3.

Limitation des contre-interrogatoires

(4) Sous réserve du paragraphe (5), le contre-interrogatoire sur tout élément de preuve documentaire déposé par les parties ne doit pas dépasser un total de sept heures pour l'ensemble des demandeurs dans l'instance et de sept heures pour l'ensemble des défendeurs. 2015, chap. 23, art. 3.

Idem : prolongation

(5) Un juge peut prolonger la durée accordée pour le contre-interrogatoire sur tout élément de preuve documentaire si cette prolongation est nécessaire dans l'intérêt de la justice. 2015, chap. 23, art. 3.

Appel entendu dès que matériellement possible

137.3 L'appel d'une ordonnance visée à l'article 137.1 est entendu dès que matériellement possible après que l'appelant a mis l'appel en état. 2015, chap. 23, art. 3.

Suspension d'une instance connexe devant un tribunal administratif

137.4 (1) Si la partie intimée a introduit une instance devant un tribunal administratif au sens que la *Loi sur l'exercice des compétences légales* donne à «tribunal» et

court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal. 2015, c. 23, s. 3.

Notice

(2) The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),

- (a) notice of the stay; and
- (b) a copy of the notice of motion that was filed with the tribunal. 2015, c. 23, s. 3.

Duration

(3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4). 2015, c. 23, s. 3.

Stay may be lifted

(4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

- (a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or
- (b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay. 2015, c. 23, s. 3.

Same

(5) A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of

que l'auteur de la motion croit que l'instance se rapporte à la même affaire d'intérêt public qui, selon lui, serait le fondement de l'instance faisant l'objet de sa motion visée à l'article 137.1, ce dernier peut déposer auprès du tribunal administratif une copie de l'avis de motion qui a été déposé auprès du tribunal judiciaire et, une fois celle-ci déposée, l'instance devant le tribunal administratif est réputée avoir été suspendue par celui-ci. 2015, chap. 23, art. 3.

Avis

(2) Le tribunal administratif remet les documents suivants à chaque partie à l'instance dont il est saisi et qui est suspendue en vertu du paragraphe (1) :

- a) un avis de la suspension;
- b) une copie de l'avis de motion qui a été déposée auprès du tribunal administratif. 2015, chap. 23, art. 3.

Durée

(3) La suspension d'une instance devant le tribunal administratif visé au paragraphe (1) demeure en vigueur tant qu'il n'a pas été statué de façon définitive sur la motion, y compris tout appel de celle-ci, sous réserve du paragraphe (4). 2015, chap. 23, art. 3.

Levée de la suspension

(4) Un juge peut, sur motion, ordonner que la suspension soit levée à une date antérieure s'il est d'avis :

- a) soit que la suspension cause ou causerait vraisemblablement un préjudice injustifié à une partie à l'instance devant le tribunal administratif;
- b) soit que l'instance qui fait l'objet de la motion visée à l'article 137.1 et l'instance devant le tribunal administratif qui a été

the Court of Appeal. 2015, c. 23, s. 3.

Statutory Powers Procedure Act

(6) This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*. 2015, c. 23, s. 3.

Application

137.5 Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading. 2015, c. 23, s. 3

suspendue aux termes du paragraphe (1) ne sont pas suffisamment connexes pour justifier la suspension. 2015, chap. 23, art. 3.

Idem

(5) Une motion visée au paragraphe (4) est présentée devant un juge de la Cour supérieure de justice ou, si la décision rendue sur la motion en vertu de l'[article 137.1](#) est portée en appel, devant un juge de la Cour d'appel. 2015, chap. 23, art. 3.

Loi sur l'exercice des compétences légales

(6) Le présent article s'applique malgré toute disposition contraire de la [Loi sur l'exercice des compétences légales](#). 2015, chap. 23, art. 3.

Application

137.5 Les [articles 137.1 à 137.4](#) s'appliquent à l'égard des instances introduites le jour où la *Loi de 2015 sur la protection du droit à la participation aux affaires publiques* reçoit la première lecture ou après ce jour. 2015, chap. 23, art. 3.