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

APPLICANT
(Respondent)

-and-

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

RESPONDENTS
(Appellants)

APPLICANT'S REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO APPEAL (1704604 ONTARIO LIMITED – APPLICANT)

(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada)*

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Implied Contractual Obligation

1. The Respondent's depiction of the Applicant's position on breach of contract is incorrect. The Applicant does not assert that the PPA breached an implied contractual obligation. Rather, it is the Applicant's position that the PPA breached its promises as set out in the Minutes of Settlement. The Minutes of Settlement obligated the PPA to "not advance the position that the resolutions passed by the SSMRCA on December 13, 2012 in regards to the Pointes Estates Development under subsection 3(1) of Ontario of Ontario Reg. 176/06 are illegal or invalid or contrary to the provisions of the *Conservation Authorities Act*, R.S.0 1990 c, C.27 and Ontario Reg. 176/06 being the Regulation of Development, interference with Wetlands and Alterations to Shorelines and Watercourses."

2. This obligation is not implied but express. The Applicant did not and does not seek to gag the PPA from any and all proceedings. The PPA was free to bring forward evidence at the OMB or other tribunal relating to any host of land development issues such as issues concerning traffic, lighting, access and egress or population density. The prohibition was merely on matters relating to the permit application for wetland development as approved by the SSMRCA.

3. Not only was the PPA bound to keep silent on the SSMRCA permit application by virtue of the Minutes of Settlement, it was also not the proper venue in which to being forward such argument. Rather, arguments concerning permits issued by any Conservation Authority lie to the Ontario Mining and Lands Tribunal.

4. For this reason, the Court of Appeal's interpretation of the Minutes of Settlement cannot stand. If the parties contacted simply to prevent the PPA from discussing the legality or validity of the Conservation Authority permits at the OMB, the parties contracted for something the PPA could not do in any event. Notwithstanding the foregoing, the PPA did "advance the position" that the Conservation Authority permits were illegal or invalid by tendering evidence that the proposed development would destroy almost all the on-site wetland. Ensuring wetlands will not be destroyed is the paramount consideration of Conservation Authorities in approving wetland developments and any approval that would see wetlands destroyed would most certainly be illegal or invalid. Although the PPA did not expressly state this, it was implicit in all their evidence at the OMB.

Error Correcting

5. The Respondents assert that the appeal to this Honourable Court is merely one of error correcting [1] and as such it lacks the criterion of public importance on the issue.

6. While contractual interpretation and breach of contract is a critical component to the Applicant's case, it is not the contractual breach that renders the issue meritorious and worthy of appeal to the highest court. Rather, it is the widespread impact of the anti-SLAPP test as explained by the Ontario Court of Appeal that marks this case worthy of a Supreme Court of Canada appeal.

7. Although the base dispute of breach of contract impacts two (2) parties most directly, the consequence of the breach has wide reaching impact. Because the obligations set out in the Minutes of Settlement were breached by the PPA, evidence was put forward before the Ontario Municipal Board that ultimately determined that tribunal's decision. The decision to deny the development has had profound impact on not only the Applicant but also the community at large.

Anti-SLAPP Application to Breach of Contract

8. While the legislation does not specifically exclude breach of contract cases for anti-SLAPP applications, the Court of Appeal noted in its decision that such cases are better suited to summary judgment.

9. Anti-SLAPP legislation is a powerful tool where litigants bring forward threatening, intimidating and implausible lawsuits with limited chance at success to the distress and peril of vulnerable parties.

10. Conversely, contracts presume a level of equality between contracting parties. Historically, case law has been clear that where parties are not on equal footing contracts are rendered void. People under duress or incompetence are not able to legally enter into contracts. Such defences are strong arguments in favour of untying agreements.

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[1] Response to Application for Leave to Appeal (Pointes Protection Association, Peter Gagnon, Lou Simionetti, Patricia Grattan, Gay Gartshore, Rick Gartshore and Glen Stortini, Respondents), page 38, paragraph 27.

11. In short, there are defences available for breach of contract. However, where two (2) consenting parties enter into Minutes of Settlement with the full benefit of legal representation it is an improper and strategic move to allege the original contract constitutes SLAPP litigation.

12. Further, although in no way binding on this Honourable Court, U.S. courts have interpreted similarly worded anti-SLAPP legislation to mean that "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 that contract."[2] Accordingly, "[t]he anti-SLAPP statute affords no protection to the defendant who breaches a contract limiting his right to speak publicly on matters of public interest."[3]

Slippery Slope

13. The Applicant holds the Court of Appeal decision and the test to be applied in anti-SLAPP cases is both precedent setting and important for many types of future litigation. Most notably, the test as set out by the Court of Appeal is problematic when applied to breach of contract cases in particular those involving confidentiality clauses.

14. The suggestion that the Court of Appeal decision concerning new legislation and its proper application as wide spread is not hyperbolic. Rather, it is the essence of Canadian jurisprudence.

Order Sought

15. The Applicant reiterates its respectful request 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 10th day of December, 2018

J. Paul R. Cassan/ Tim J. Harman
Lawyers for Applicant/Respondent

[2] *Limandri v Wildman*, 2013 Cal App Unpublished 4023 at 10.
[3] *Ibid.*

TABLE OF AUTHORITIES

At Paragraph(s)

STATUTORY PROVISIONS

Conservation Authorities Act, R.S.0 1990 c, C.27

Ontario Reg. 176/06, s. 3(1)

3. (1) The Authority may grant permission for development in or on the areas described in subsection 2 (1) if, in its opinion, the control of flooding, erosion, dynamic beaches, pollution or the conservation of land will not be affected by the development.