S.C.C. File Nos. 38374 and 38376

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

SCC File No. 38374

BETWEEN:

MAIA BENT and LERNERS LLP

Appellants
(Respondents)

- and –

HOWARD PLATNICK

Respondent
(Appellant)

- 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 SUPPORT SERVICES ASSOCIATION, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN BROADCASTING CORPORATION, BARBRA SCHLIFER COMMEMORATIVE CLINIC, 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.

Interveners

SCC File No. 38376

AND BETWEEN:

1704604 ONTARIO LIMITED

Appellant
(Respondent)

-and-

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

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(Appellants)

-and-

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PART I - OVERVIEW

1. Section 137.1 of the *Courts of Justice Act* is an important tool to both protect and promote freedom of expression and public participation in debate and discussions on matters of public interest. In these appeals, the Court is asked, for the first time, to provide needed guidance on the proper interpretation of the provisions under s. 137.1 of the *Courts of Justice Act* ("***CJA***") – Ontario's "anti-SLAPP" legislation. The Canadian Civil Liberties Association (the "**CCLA**") intervenes to provide three points on the key principles that ought to inform the interpretation of the words "public interest" in s. 137.1.

2. First, the legislation's stated purpose is clear: to remove from the court system meritless matters that have the intended effect of silencing commentary on matters of public interest. In order to achieve that purpose, "public interest" must be interpreted broadly, but must not be equated with what interests the public. An individual's reasonable expectation of privacy must be respected when interpreting s. 137.1 of the *CJA.*

3. Second, at no time should the court weigh the "quality" of the expression, as suggested by the Court of Appeal for Ontario. Permitting this weighing would encourage courts to engage in a moral "taste test" of the expression at issue.

4. Third, "public interest" must be interpreted consistently throughout all subsections of s. 137.1. The legislative intent requires that, under s. 137.1(3), the motion judge determine if the expression relates to a matter of public interest. The analysis under s. 137.1(4) does not re-analyze the public interest. Rather, s. 137.1(4) is designed to allow certain matters with merit to proceed through to a hearing.

PART II - CCLA'S POSITION ON THE ISSUES

5. The CCLA takes no position on the facts or the outcomes of these appeals. The CCLA's argument in these appeals is limited to the proper interpretation of "public interest" given the legislative purpose of s. 137.1 of the *CJA*.

PART III - ARGUMENT

A. THE "PUBLIC INTEREST" OUGHT TO BE INTERPRETED BROADLY

6. The words "public interest" are not defined in s. 137.1 of the *CJA*. This Honourable Court is tasked with providing necessary guidance for lower courts to properly assess and interpret the "public interest" when applying Ontario's new anti-SLAPP legislation.

(i) The purpose of s. 137.1

7. The legislative purpose of s. 137.1 is clear: to provide defendants with a tool to achieve, at an early stage of the litigation, a dismissal of a meritless matter that is brought against them with the intended effect of silencing commentary on a matter of public interest. A plaintiff's use of the courts to effectively bully a litigant into silence is an abuse of process.[1]

8. The unique provisions of s. 137.1 (e.g. imposing a stay on the entire action while the motion is pending,[2] shielding the defendant / moving party from costs,[3] and allowing the imposition of additional costs against a plaintiff found to have engaged in bad faith or for an improper purpose[4]) are indicators of the Legislature's intention that this section is to be used in unique circumstances. A matter may not be a SLAPP, but it may yet still be unwinnable and subject to a summary

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[1] CJA s. 137.1(1); Comments of the Attorney General, Second Reading, as cited in *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685 at para 33.
[2] CJA s. 137.1(5).
[3] CJA s. 137.1(8).
[4] CJA s. 137.1(9).

judgment. Similarly, a finding that a matter is not a SLAPP is not an indication that the matter ought to be successful.

(ii) The term "public interest" in s. 137.1

9. The prevailing approach to statutory interpretation, which has been widely endorsed by this Court, is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[5] In order to maintain harmony within a legislative scheme, it is a basic principle of statutory interpretation that, within a piece of legislation, the same words are to be given the same meaning.[6]

10. Although not defined, the term "public interest" appears seven times in s. 137.1 of the *CJA*. Considering the legislature's preference for uniform expression, the term "public interest" must be interpreted in a consistent manner.

(iii) The Court of Appeal for Ontario has not provided a meaningful definition of the term "public interest" in anti-SLAPP motions

11. Since the introduction of the new anti-SLAPP legislation, Ontario courts have had to grapple with interpreting the term "public interest" as it is found in s. 137.1(3) and (4) of the *CJA*. To date, few clear lines have emerged, with the Court of Appeal for Ontario stating that an "exhaustive definition is impossible."[7]

12. The lack of definition has led the Court of Appeal for Ontario to find public interest in

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[5] *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28 at para 25.
[6] *R v Zeolkowski*, 1989 CanLII 72 (SCC), [1989] 1 SCR 1378 at 1387.
[7] *Veneruzzo v Storey*, 2018 ONCA 688 at para 24; see also *Able Translations v Express International Translations*, 2018 ONCA 690 at para 24.

expression in several disparate cases, such as:

(a) the integrity of a contract bidding process that involved the expenditure of public money;[8]

(b) the results of laser resurfacing treatments offered by a health provider;[9]

(c) the health and environmental impacts of waste disposal by a site remediation company;[10]

(d) the suitability of individuals to hold elected office;[11]

(e) the legitimacy of a fundraising campaign that relied on donor contributions;[12]

(f) international governmental treatment of an alleged terrorist and his family;[13]

(g) the risks of certain real-estate investments as a result of inadequately-regulated operators;[14] and

(h) the effective administration of the process to determine the claims of people injured in motor vehicle accidents.[15]

13. In an attempt to limit the breadth of "public interest," the Court of Appeal for Ontario noted that a purely private matter cannot gain the protection of s. 137.1(3) "by interspersing references to some other topic that may relate to a matter of public interest".[16] Guidance is needed from this Court to enable lower courts to properly interpret the meaning of "public interest."

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[8] *Bondfield v The Globe and Mail*, 2019 ONCA 166 at paras 7, 26.
[9] *New Dermamed v Sulaiman*, 2019 ONCA 141 at paras 3, 7.
[10] *United Soils v Mohammed*, 2019 ONCA 128 at para 26.
[11] *Able Translations v Express International Translations*, 2018 ONCA 690 at paras 19, 24 *Armstrong v Corus Entertainmen*t, 2018 ONCA 689 at para 15.
[12] *Levant v Day*, 2019 ONCA 244 at para 12.
[13] *Lascaris v B'nai Brith*, 2019 ONCA 163 at paras 10, 22, 33.
[14] *Fortress Real Developments v Rabidoux*, 2018 ONCA 686 at paras 40-41.
[15] *Platnick v Bent*, 2018 ONCA 687 at paras 35-38.
[16] *Veneruzzo v Storey*, 2018 ONCA 688 at para 20.

(iv) The term "public interest" has previously been interpreted by this Court

14. This Court has considered the meaning of the words "public interest" in a variety of cases. As recently as last year, in *LSBC v Trinity Western*, this Court stated that the "public interest is a broad concept and what it requires will depend on the particular context."[17]

15. In reviewing this Court's jurisprudence on public interest, it is evident that in Canada, "public interest" is not limited to purely political issues or to matters involving public figures.

16. In *Grant v Torstar*,[18] when defining the "public interest," this Court wrote:

> Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a "public figure", as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.[19]

17. In *Cusson v Quan*, this Court held that certain published articles were in the public interest because, though they were "not political in the narrow sense, the articles touched on matters close to the core of the public's legitimate concern with the integrity of its public service."[20]

18. This Court's jurisprudence provides guidance on the interpretation of "public interest" as that term appears in s. 137.1. A determination that something is in the "public interest" will vary depending on the context of the expression. The paramount inquiry is to determine whether the

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[17] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 34.
[18] *Grant v Torstar*, 2009 SCC 61.
[19] *Grant v Torstar*, 2009 SCC 61 at para 106.
[20] *Cusson v Quan*, 2009 SCC 62 at para 31.

subject matter of the expression touches on a core issue of public interest. The quality of the expression at issue is not a factor when determining the public interest.

(v) The words "public interest" should be interpreted broadly

19. An overly narrow interpretation will defeat the very purpose of s. 137.1, which aims to achieve broad participation in debates and discourage the use of litigation as a means of unduly limiting expression. A broad interpretation of public interest is consistent with the recognition that the public has a genuine interest in expressing themselves, and in receiving expression, about many matters.

20. The judge hearing the motion has the discretion to decide whether the impugned expression relates to a matter of public interest under s. 137.1(3). Once the judge makes that decision, the legislation requires that the judge dismiss the proceeding, unless the judge is satisfied that all the provisions of s. 137.1(4) are met. Whether expression is in the "public interest" involves factual issues, but is primarily a question of law; the motions judge is asked to determine whether the nature of the statement is such that protection may be warranted in the public interest.[21]

21. When determining whether expression is in the "public interest", the court must consider the subject matter of the impugned expression broadly and as a whole. No one sentence should be scrutinized in isolation. The motions judge must objectively and reasonably determine the pith and substance of the expression's subject-matter. As this Court stated in *Grant*: "[c]are must be taken by the judge making this determination to characterize the subject matter accurately."[22] An overly narrow characterization may inappropriately defeat the purpose of s. 137.1.

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[21] *Grant v Torstar*, 2009 SCC 61 at para 100.
[22] *Grant v Torstar*, 2009 SCC 61 at para 107.

22. In reviewing this Court's jurisprudence, and taking into consideration the general rules of statutory interpretation, the CCLA submits that in order to achieve the Legislature's intent, "public interest" in s. 137.1(3) must be given a broad and liberal definition. In addition, the quality of the expression must not form part of that definition. If courts are invited to weigh in on the quality of expression, that risks a situation where expression that is more eloquent or persuasive is given heightened value. Such a "moral taste test" is contrary to the basic foundations of freedom of expression in our democratic society.

(vi) The term "public interest" does not include purely private interests

23. While the term "public interest" must be interpreted broadly, it must at the same time be balanced against other interests, such as privacy interests. While "public interest" may be a function of the prominence of the person referred to in the expression, mere curiosity is not enough.[23] The pursuit of purely private or prurient interests is not in the "public interest." As this Court has found, what is in the "public interest" is not synonymous with what interests the public.[24] An individual's reasonable expectation of privacy must be respected when interpreting s. 137.1 of the *CJA*.

B. THE BALANCING TEST UNDER S. 137.1(4) SHOULD NOT INCLUDE AN ASSESSMENT OF THE QUALITY OF THE EXPRESSION

24. Under s. 137.1(4), the burden shifts to the responding party (plaintiff) to satisfy the court that the proceeding has merit, that the moving party (defendant) has no valid defence, and that "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

[23] *Grant v Torstar*, 2009 SCC 61 at para 105.
[24] *Grant v Torstar*, 2009 SCC 61 at para 102; *Veneruzzo v Storey*, 2018 ONCA 688 at para 27.

outweighs the public interest in protecting that expression." [25]

25. When analyzing s. 137.1(4) in *Pointes*, the Court of Appeal for Ontario held that "a statement that contains deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language may still be an expression that relates to a matter of public interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, vitriol, and obscenities."[26]

26. The CCLA disagrees. By the time the motions judge engages in the balancing under s. 137.1(4), the expression will already have been deemed to be related to a matter of public interest. The "quality" of the expression should play no role in measuring the extent to which there is a public interest in protecting that expression. Quite often, expression related to a matter of public interest will be spirited, crude, harsh, explicit and intemperate.[27] The protections in s. 137.1 are not limited to expression that is eloquent.

27. Similarly, expression includes much more than oration or speech. As the Court of Appeal for Ontario has recognized, in some cases, "the medium is the message. Tone of voice, volume, facial expressions, and body language all convey meaning that cannot necessarily be conveyed effectively in words."[28] The expression may be communicated orally during a debate, written on Twitter in 280 characters or less, gestured in a picture posted on the internet, scribbled on a protest sign, or shouted on the courtroom steps. There is no reason for the motions judge to draw a distinction between any of these modes of expression when engaging in the balancing exercise

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[25] CJA s. 137.1(4)
[26] *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 68 at para 94.
[27] *Bracken v Niagara Parks Police*, 2018 ONCA 261 at para 57.
[28] *Ibid*.

required by s. 137.1(4) of the CJA.

28. In addition, if a statement is untrue or motivated by malice, the judge can refuse to grant the motion (and let the matter proceed) under s. 137.1(4)(a). Under that section, the responding party (plaintiff) has an opportunity to argue that the defences to the action are unavailable to the moving party (defendant), as will likely be the case if the statement is false or malicious.

29. As a matter of statutory interpretation, the analysis under s. 137.1(4)(b) is limited to weighing the harm suffered by the responding party (plaintiff) as a result of the expression. Under the analysis of that section, the judge has the ability to weigh the harm suffered, and to determine that the harm suffered is so great that the matter ought to still proceed. However, in the CCLA's submission, the judge ought not, at this stage, add in new elements to the meaning of "public interest" as suggested by the Court of Appeal for Ontario.

30. Requiring an assessment of the "quality" of expression is inconsistent with fundamental freedom of expression principles and may subject people to invasive investigations. It risks overlooking valuable expression that may be objectionable to one but central to the identity of another. It risks overlooking expression which is different or not accepted by the majority. As this Court has said, we must "guard carefully against judging expression according to its popularity."[29] While some expression may be discomforting, profane, and even morally abhorrent to some, that is not a factor in determining if expression is deserving of protection. In assessing the "quality" of the expression at the s. 137.1(4) stage, the Court of Appeal for Ontario has invited courts to impose a moral taste test and risks protecting only expression that the majority finds palatable.

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[29] *R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 at p 760.

C. THE APPLICATION OF S. 137.1 IS NOT LIMITED TO DEFAMATION ACTIONS

31. The anti-SLAPP provisions in s. 137.1 of the *Courts of Justice Act* have broad application in civil proceedings. While SLAPPs may often relate to actions for defamation, SLAPPs are also common in other contexts, including actions for trademark and copyright infringement, nuisance, trespass, aboriginal law, contract and family law.

32. There is nothing in the legislation to suggest that the Legislature intended to limit the application of s. 137.1 to certain causes of action only. As a matter of statutory interpretation, if the Legislature had intended to limit the application of s. 137.1, it would have included words to that effect. It did not. All defendants, irrespective of the cause of action, require a swift procedure to dispose of lawsuits that lack merit and that chill freedom of expression.

PART IV - SUBMISSIONS ON COSTS

33. In accordance with the usual practice, the CCLA does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of October, 2019.

Alexi N. Wood

Jennifer P. Saville

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The Canadian Civil Liberties Association

PART VII - TABLE OF AUTHORITIES

	Authority – Case-Law	**Paragraph(s) in Factum**
1.	*1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685	7, 25
2.	*Able Translations v Express International Translations*, 2018 ONCA 690	11, 12
3.	*Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28	9
4.	*Armstrong v Corus Entertainment*, 2018 ONCA 689	12
5.	*Bondfield v The Globe and Mail*, 2019 ONCA 166	12
6.	*Bracken v Niagara Parks Police*, 2018 ONCA 261	26, 27
7.	*Cusson v Quan*, 2009 SCC 62	17
8.	*Fortress Real Developments v Rabidoux*, 2018 ONCA 686	12
9.	*Grant v Torstar*, 2009 SCC 61	16, 20, 21, 23
10.	*Lascaris v B'nai Brith*, 2019 ONCA 163	12
11.	*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32	14
12.	*Levant v Day*, 2019 ONCA 244	12
13.	*New Dermamed v Sulaiman*, 2019 ONCA 141	12
14.	*Platnick v Bent*, 2018 ONCA 687	12
15.	*R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24	30
16.	*R v Zeolkowski*, 1989 CanLII 72 (SCC), [1989] 1 SCR 1378	9
17.	*United Soils v Mohammed*, 2019 ONCA 128	12
18.	*Veneruzzo v Storey*, 2018 ONCA 688	11, 13, 23
	Authority - Legislation	**Paragraph(s) in Factum**
	Courts of Justice Act, RSO 1990 c C 43, s. 137.1	1-2, 4-8, 10-11, 13, 18-32