S.C.C. File No. 38374

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, CANADIAN CONSTITUTION FOUNDATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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[Style of cause continued from previous page.]

S.C.C. 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 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

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TABLE OF CONTENTS

PART I—OVERVIEW

1. These appeals concern the interpretation of "anti-SLAPP" provisions enacted by Ontario's legislature for the purpose of protecting and promoting expression on matters of public interest.[1] The parties and certain interveners invoke "*Charter* values" — particularly those said to underlie the s. 2(*b*) guarantee — in support of a preferred interpretation of the legislation.[2] In so doing, they demonstrate the extent to which this Court's warnings about the use and misuse of "*Charter* values" in statutory interpretation have gone unheeded.[3]

2. Litigants too often raise "*Charter* values" where they have no plausible application.[4] This makes statutory interpretation more complicated, more uncertain, and more subjective than it should be.[5] The Canadian Constitution Foundation (the "**CCF**") intervenes on the question of whether "*Charter* values", as that term has come to be understood, should have any application in these appeals. The CCF submits that they should not — and that the Court should explain why this is so.

3. This Court has previously restricted the role that *"Charter* values" may play in statutory interpretation. It has cautioned that they may "only play a role if there is a genuine ambiguity as to the meaning of a provision" and must not be used "to create ambiguity

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[1] *Courts of Justice Act*, s. 137.1(1), R.S.O. 1990, c C. 43 [*CJA*].

[2] Factum of the Appellant, Maia Bent (July 22, 2019), S.C.C. File No. 38374, ¶119; Factum of the Appellant, 1704604 Ontario Ltd. (July 22, 2019), S.C.C. File No. 38376, ¶¶60, 82, 160; Factum of the Respondent, Dr. Howard Platnick, Lerners LLP Appeal (September 12, 2019) S.C.C. File No. 38374, ¶¶60-61, 64; Factum of the Respondent, Dr. Howard Platnick, Bent Appeal (September 12, 2019) S.C.C. File No. 38374, ¶¶48-54, 64; Memorandum of Argument of the Proposed Intervener, B.C. Civil Liberties Association (Aug. 19, 2019), S.C.C. File No. 38376 and 38374, ¶¶3, 25, 32; Memorandum of Argument of the Proposed Intervener, EcoJustice Canada Society (Aug. 19, 2019), S.C.C. File No. 38376 and 38374, ¶¶28,29; Memorandum of Argument of the Proposed Intervener, Canadian Civil Liberties Association (Aug. 19, 2019), S.C.C. File No. 38376 and 38374, ¶19(b); Memorandum of Argument of the Proposed Intervener, Media Coalition (Aug. 19, 2019), S.C.C. File No. 38376 and 38374, ¶20(g); Memorandum of Argument of the Proposed Intervener, B.C. Coalition (Aug. 19, 2019), S.C.C. File No. 38376 and 38374, ¶23.

[3] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶28; *R. v. Rodgers*, 2006 SCC 15, ¶¶18-19.

[4] See *Gyorffy v. Drury*, 2013 ONSC 1929 (Div. Ct.), aff'd, 2015 ONCA 31.

[5] M. Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2015), 67 S.C.L.R. 361, at 367, 382.

where none exists".[6] Despite this direction, arguments from "*Charter* values" continue to confuse and complicate statutory interpretation. This Court should resolve that confusion in deciding these appeals. It can and should do so by clarifying that: (i) genuine ambiguities that entitle courts to look to the *Charter* in statutory interpretation are exceedingly rare; and (ii) where genuine ambiguity exists, a court may have recourse to *Charter* rights in the interpretive exercise, not to nebulous "*Charter* values".

PART II—STATEMENT OF ARGUMENT

1. The *Charter* does not apply in statutory interpretation absent genuine ambiguity

4. This Court has generally endorsed a requirement of statutory ambiguity for the *Charter* to have application in statutory interpretation.[7] In certain cases, however, this Court has articulated a broader set of circumstances in which "*Charter* values" may play a part. For example, in *Clarke,* Abella J. noted that "*Charter values"* form part of the "broader interpretive context contemplated by our 'modern rule of interpretation'".[8] In *Mabior,* McLachlin C.J. went still further, writing that "*Charter* values are always relevant to the interpretation of a disputed provision of the *Criminal Code*".[9] The Court has also been inconsistent about what constitutes genuine ambiguity — two or more plausible interpretations of a disputed provision, or two or more equally convincing interpretations.[10]

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[6] *Bell ExpressVu, supra* note 3, ¶28; see *Rodgers, supra* note 3, ¶¶18-20.

[7] *Bell ExpressVu*, 2002 SCC 42, ¶¶28-30, 62.

[8] *R. v. Clarke*, 2014 SCC 28, ¶¶1, 12; see also *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, ¶¶34-35.

[9] *R. v. Mabior*, 2012 SCC 47, ¶44 (emphasis added); see also T. Cromwell et al., "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017), 95 C.B.R. 297, at 322 n. 108 [*Presumptions of Intent*]; M. Power & D. Bossé, "Une tentative de clarification de la présomption de respect des valeurs de la *Charte canadienne des droits et libertés*" (2014), 55 C.D.D. 775, at 790-791.

[10] *Bell ExpressVu, supra* note 3, ¶62; see T. Cromwell, "Role of Presumptions", *supra* note 9, at 322, n. 108.

5. This has caused confusion for lower courts and litigants.[11] Far too frequently, litigants advance "*Charter* values" arguments, even where there is not even plausible ambiguity in the legislative text, and where the *Charter* can have no direct application.[12] The consequence is that the statutory interpretation exercise has become encumbered by references to vague theoretical ideals, to the detriment of the concrete interpretive methodologies that the "modern principle" prescribes. The cost is undue complexity for litigants, and needless uncertainty for everyone who might rely on legislation.[13]

6. Under the "modern principle", the purpose of statutory interpretation remains "discerning legislative intent".[14] There is a constitutional dimension to this focus; unlike in the development of the common law, the judicial function "vis-à-vis statute law" does not extend to "ensuring that it … reflect[s] the basic values of society".[15] Courts exceed their role when they privilege "values" purportedly derived from the *Charter* over choices that legislators have made; there is generally no principled reason to presume that the legislature wished to advance — or even contemplated — any particular set of values in enacting particular legislation. The only evidence of what legislators intended lies in the legislation's text, context, and purpose. As this Court recognized in *Bell ExpressVu,* presuming *Charter* consistency — that is, non-infringement of the rights enumerated in the *Charter* — "could sometimes frustrate true legislative intent".[16] It is even more hazardous to presume that the legislature intended to prefer nebulous and unenumerated "*Charter* values".

7. By contrast, where there is a clear indication that the legislature did wish to advance a particular value, nothing is gained by labelling that value as a "*Charter* value". It is simply the value that the legislature has chosen to further — and it can (and should) be discerned using the

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[11] *See R. v. Stipo,* 2019 ONCA 3, ¶¶178-180; *R. v. Sohal,* 2018 ABQB 845, ¶30; *R. v. Serdyuk,* 2012 ABCA 205, ¶48; *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia*, 2012 BCCA 282, ¶39, rev'd on other grounds, 2013 SCC 42.

[12] See, e.g., *Gyorffy, supra* note 4, in which Ontario's Divisional Court used the "*Charter* value" of equality to interpret an evidentiary requirement under a regulation to the *Insurance Act,* R.S.O 1990, c l.8.

[13] *Horner, supra* note 5, at 363, 382.

[14] *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36, ¶17.

[15] *Bell ExpressVu, supra* note 3, ¶61.

[16] *Bell ExpressVu, supra* note 3, ¶64.

ordinary tools of statutory interpretation, without recourse to the judicial imagination.[17] The provisions at issue in these appeals make clear that legislatures are capable of identifying which values they wish to promote when they desire to do so.

8. The only possible consequence of identifying particular values as "*Charter* values" is that those values will enjoy undue prominence in the analysis, whether or not the tools of statutory interpretation reveal that the legislature specifically intended to advance them. Just as courts must leave room for the legislature to limit *Charter* rights through legislation,[18] so must courts allow legislatures to choose which values to advance, and how. Identifying such legislative choices requires greater objectivity than "*Charter* values" can provide.

2. "*Charter* values", properly defined, are not unenumerated; they are a means of using *Charter* rights in cases in which the *Charter* does not apply directly

9. The first difficulty with "*Charter* values" is their identification. The term "*Charter* values" has been used in two opposing ways.

10. First, "*Charter* values" has referred to the application of the enumerated "*Charter* rights" where the *Charter* does not directly apply.[19] These "*Charter* values" may be "more flexible", but there remains a close connection with the actual "constitutional settlement" embodied in the text of the *Charter*.[20] *Bell ExpressVu* uses the term "*Charter* values" in this sense, equating their role in statutory interpretation with a "blanket presumption of *Charter* consistency", whereby statutes are interpreted "such that they conformed to the *Charter*".[21]

11. Rather than apply such a "blanket presumption", courts deploy "*Charter* values" (in the *Bell ExpressVu* sense of the term) as this Court described in *Sharpe*: "If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted".[22] Similarly, in *Slaight,* this Court stated that:

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it

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[17] Horner, "Uncanny Valley", *supra* note 5, at 367, 382.

[18] *Bell ExpressVu, supra* note 3, ¶64.

[19] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, ¶39.

[20] *See Gehl v. Canada (Attorney General)*, 2017 ONCA 319, ¶¶80-81 (citation omitted).

[21] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, ¶¶64 and 66.

[22] *R. v. Sharpe*, 2001 SCC 2, ¶33.

> should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.[23]

12. Second, the term "*Charter* values" has come to mean a long, non-exhaustive, and non-authoritative list of judicially endorsed principles that purportedly underlie the *Charter*, including "liberty, human dignity, equality, autonomy, and the enhancement of democracy".[24] Where these values are applied in statutory interpretation, the result is subjectivity, "lack of clarity",[25] and thus unpredictability as well as an unwarranted expansion of the judicial role. The Court of Appeal for Ontario recently described this use of "*Charter* values" in *Gehl*:

> *Charter* values … are not a discrete set, like *Charter* rights, which were the product of a constitutional settlement and are easily ascertained by consulting a constitutional text. The identification of *Charter* values has been *ad hoc*. Sometimes (as in our colleague's reason[s]) they track the language of an enumerated right, in this case, equality.
>
> Other times *Charter* values have been formulated at a much higher level of abstraction—as concepts such as justice, liberty, autonomy or dignity…. The meaning of these concepts—and their juridical application—is both contestable and contested. Philosophers have debated the requirements of justice, for example, for thousands of years. The same could be said of many other *Charter* values.[26]

13. This Court should confirm that "*Charter* values" in this second sense play no role in statutory interpretation. Disputes about statutory interpretation, like these appeals, can only be sidetracked when litigants (and judges) engage in the debates that the Court of Appeal for Ontario described in *Gehl*. Where the *Charter* is not engaged directly, the task of determining legislative intent should turn on the text, context, and purpose of the statutory provision at issue, not on the purported purposes of *Charter* provisions. Only in the rare case of genuine ambiguity should courts consider the implication of enumerated *Charter* rights — *i.e.*, "*Charter* values" in the first sense, and as this Court used the term in *Bell ExpressVu.*

14. In *BellExpress Vu,* the "*Charter* value" that Iacobucci J. considered was one that could have been advanced through a constitutional challenge; indeed, in that case, a constitutional challenge had been abandoned for procedural reasons.[27] Similarly, this Court's other "*Charter* value" statutory interpretation cases concern provisions the validity of which might otherwise

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[23] *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 at 1078.

[24] *Alberta v. Hutterian Brethren of Wilson Colony,* 2009 SCC 37, ¶88.

[25] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, ¶172, per Rowe J (dissenting).

[26] *Gehl, supra* note 20, ¶¶80-81 (citation omitted).

[27] *Bell ExpressVu*, *supra* note 3, ¶60 (and 67).

have been challenged.[28] In each case, the "*Charter* values" to which the Court had recourse were not abstracted from the *Charter*'s text; they were part and parcel of the *Charter* rights that might, in a different case, have applied directly. "*Charter* values" were thus considered only in circumstances in which the *Charter* itself —and the particular rights it protects — could possibly have been engaged directly.[29]

15. This explains the Court's repeated concern that "*Charter* values" be used only in cases of genuine ambiguity. So constrained, "*Charter* values" are unlikely to restrict legislation that the legislature intended to limit a *Charter* right. As Iacobucci J. stated in *Symes*:

> [T]o consult the *Charter* in the absence of such ambiguity is to deprive the *Charter* of a more powerful purpose, namely, the determination of a statute's constitutional validity. If statutory meanings must be made congruent with the *Charter* even in the absence of ambiguity, then it would never be possible to apply, rather than simply consult, the values of the *Charter*. Furthermore, it would never be possible for the government to justify infringements as reasonable limits under s. 1 of the *Charter*, since the interpretive process would preclude one from finding infringements in the first place.[30]

16. The Court has echoed the same concern in considering the application of "*Charter* values" in statutory interpretation.[31] If the term "*Charter* value" had been intended to include unstated principles that cannot ground *Charter* validity challenges, then this justification for restricting the application of "*Charter* values" to cases of genuine ambiguity would lose its normative justification. "*Charter* values" can only be used to interpret genuinely ambiguous statutory provisions because, otherwise, legislatures would be denied the opportunity to justify limits on the *Charter* rights to which "*Charter* values" correspond.

17. This interpretation of "*Charter* value" finds support in Abella J.'s reasons in *Clarke*:

> The requirement of statutory ambiguity as a prerequisite to the application of Charter values was most recently acknowledged in *R. v. Mabior* … , where the Chief Justice stated that Charter

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[28] *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038; *Symes v. R.,* [1993] 4 S.C.R. 695; *Charlebois c. Saint John (Ville),* 2005 SCC 74; *R v. Rodgers,* 2006 SCC 15; *Canada v. Pharmaceutical Society (N.S.),* [1992] 2 S.C.R. 606.

[29] A. Macklin, "Charter Right or Charter-Lite?:Administrative Discretion and the Charter", (2014) SCLR 67 at 562; S. Gardbaum, "The 'Horizontal Effect' of Constitutional Rights", (2003) 102 Mich, L. Rev. 387

[30] *Symes v. Canada,* [1993] 4 S.C.R. 695 at 752; *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42, ¶64.

[31] *Slaight Communications Inc. v. Davidson,* [1989] 1 S.C.R. 1038 at 1072; *Symes v. R.,* [1993] 4 S.C.R. 695 at 752, ¶¶108-113; *Charlebois c. Saint John (Ville),* 2005 SCC 74. ¶19; *R v. Rodgers,* 2006 SCC 15, ¶18; *Willick v. Willick,* [1994] 3 S.C.R. 670 at 679-680.

> values are "always relevant" to the interpretation of a "disputed" provision of the *Criminal Code*… The two cases relied on by the Chief Justice for this proposition — *R. v. Sharpe* … , and *Application under s. 83.28 of the Criminal Code, Re* … , — both assert that where more than one interpretation of a provision is equally plausible, *Charter* values should be used to determine which interpretation is **constitutionally compliant**.[32]

18. Admittedly, in other cases, this Court has given the term "*Charter* values" a wider interpretation. In *Mabior*, for example, the Court identified "equality, autonomy, liberty, privacy, and human dignity" as "*Charter* values" even though none of them would be independently sufficient to ground a *Charter* challenge.[33] Under this approach, however, "*Charter* values" are attenuated from constitutional text and become too indeterminate to assist in the exercise that underlies statutory interpretation: the search for legislative intent. Courts can only frustrate that inquiry by relying on interpretive aids such as "*Charter* values" that exist only in the ether. This was the concern that the Court of Appeal for Ontario articulated in *Gehl*, and that Professor Stuart explained in his commentary on *Clarke*:

> In my view, the current rhetoric of *Charter* values ("*Charter*-lite" would be a better term) is growing increasingly unruly and is particularly disquieting if one believes in the rule of law. In my view, this has also weakened existing rights such as those under section 7 and section 2(d) and equality rights (section 15).[34]

19. An important corollary of the principle that only *Charter* rights may play a role in statutory interpretation is that, where each of the disputed interpretations is constitutionally valid, the *Charter* can provide no further interpretive assistance. This principle is sufficient to dispose of the "*Charter* values" arguments advanced by the various interveners in these appeals who do not dispute that the "anti-SLAPP" provisions are constitutionally valid but who claim that the statute could be interpreted better to advance "*Charter* values."[35]

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[32] *Clarke*, *supra* note 3, ¶15 (emphasis added; citations omitted).

[33] *Mabior*, *supra* note , ¶45.

[34] D. Stuart, "Comment on *R. v. Clarke*, 2014 SCC 28", 2014 CarswellOnt 4477, Book of Authorities of Canadian Constitution Foundation, Tab 1; *Gehl*, *supra* note 20, ¶¶80-81.

[35] Memorandum of Argument of the Proposed Intervener, B.C. Civil Liberties Association (Aug. 19, 2019), S.C.C. File No. 38376 and 38374, ¶¶3, 25, 32; Memorandum of Argument of the Proposed Intervener, EcoJustice Canada Society (Aug. 19, 2019), S.C.C. File No. 38376 and 38374, ¶¶28,29

3. "*Charter* values" can only apply in these appeals to the extent that "*Charter* rights" shape the common law

20. Absent genuine ambiguity about the legislature's intent, "*Charter* values" have no proper role in statutory interpretation as a matter of principle. And, where a genuine ambiguity does not potentially go to a disputed provision's constitutionality, "*Charter* values" can have no effect on statutory interpretation as a matter of practice. So it is here.

21. In enacting the "anti-SLAPP" provisions in s. 137.1 of Ontario's *Courts of Justice Act*[36] the provincial legislature intended to buttress, not to limit, the *Charter*-protected freedom of expression. The legislature enacted these provisions to safeguard the freedom of expression against potential incursions by the common law, particularly the common law of defamation, and by the litigation process through which the common law is enforced. The contours of the common law are, in turn, delineated by the *Charter*'s guarantees.

22. As this Court has indicated with respect to defamation, for example, s. 2(*b*) requires the availability of certain defences; without them, the limits on the freedom of expression that the common law of defamation imposes would not be justifiable under s. 1 of the *Charter*.[37] These *Charter*-mandated defences seem clearly to be among the "valid defence[s]" to which s. 137.1(4)(a)(ii) of Ontario's *Courts of Justice Act* refers.[38]

23. In discerning the legislative intent of the "anti-SLAPP" provisions, a court may properly consider how one or more specific *Charter* rights — here, s. 2(*b*) — forms part of the legislation's common law backdrop. This is different than reasoning from "*Charter* values", because it reflects an actual, objectively definable constitutional guarantee, the impact of which on the common law may have informed the legislature's intent in enacting the provisions. While "*Charter* values" in the abstract sense of that term do not belong in the analysis, the Court can properly consider the *Charter* itself to the extent that the "anti-SLAPP" provisions' text, context, and purpose indicate a legislative intent to reflect a *Charter* right.

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[36] *CJA*, *supra* note 1, s. 137.1(1).

[37] See *Grant v. Torstar Corp.*, 2009 SCC 61, ¶¶1-2, 65.

[38] *CJA*, *supra* note 1, s. 137.1(4)(a)(ii).

24. This Court recently concluded as much, with respect to a different statutory scheme, in *Jarvis*.[39] There, the Court was asked to interpret the expression "reasonable expectation of privacy" in s. 162(1) of the *Criminal Code*. For the majority, Wagner C.J. observed that:

> The interpretation of a statutory provision may be informed by the broader legal context. Because Parliament chose to describe the element of the offence with which we are concerned using the expression "reasonable expectation of privacy", one aspect of the broader legal context is of particular importance in the case at bar: the jurisprudence interpreting the right to be secure against unreasonable search and seizure guaranteed in s. 8 of the Charter, along with closely related jurisprudence…
>
> Parliament must be understood as having chosen the words "reasonable expectation of privacy" in s. 162(1) purposefully and with the intention that the existing jurisprudence on this concept would inform the content and meaning of these words in this section.[40]

25. Concurring in *Jarvis*, Rowe J. criticized the majority for what he described as reasoning on the basis of "*Charter* values".[41] Still, the majority's use of "s. 8 of the *Charter*, along with closely related jurisprudence" may be understood as considering a *Charter* right as an element of the legislature's intent. Because Parliament lifted language out of the s. 8 jurisprudence, the tools of statutory interpretation led not to "*Charter* values", but to the *Charter* itself.

26. So it may be here. In enacting the "anti-SLAPP" provisions, the Legislative Assembly intended to make it more difficult to use litigation to shut down speech on matters of public interest. This is plainly stated in section 137.1(1) of the *CJA*, which sets out the provision's purposes.[42] The legislature enacted the "anti-SLAPP" provisions against a backdrop of common law causes of action, most obviously (though, as these appeals illustrate, not exclusively) defamation. Those causes of action are, in turn, shaped by the *Charter* — not by "*Charter* values", but by *Charter* rights. Since the legislature is presumed to have intended to legislate in a manner consistent with this common law backdrop,[43] the *Charter* may properly inform the Court's understanding of the legislature's intent through the effect that *Charter* rights have had on the contours of the common law.

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[39] *R. v. Jarvis*, 2019 SCC 10.

[40] *Jarvis, supra* note 39, ¶54, 56 (emphasis added).

[41] *Jarvis, supra* note 39, ¶104-106, per Rowe J. (concurring).

[42] *CJA, supra* note 1, at s. 137.1(1).

[43] *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, ¶56; *Canada (Attorney General) v. Thouin*, 2017 SCC 46, ¶19; *Rawluk v. Rawluk*, [1990] 1 SCR 70 at 90.

27. Although the *Charter* does not apply directly to the common law,[44] certain defenses to defamation may be constitutionally required. For example, s. 2(*b*) of the *Charter* would surely be implicated if the legislature were to abolish defences such as justification and fair comment, as these defenses go to the core of the s. 2(*b*) guarantee.[45] If these defenses are indeed constitutionally required, then the s. 2(*b*) right requires their constitutional dimension properly to be considered in discerning the "anti-SLAPP" provisions' legislative intent.

28. For example, the "anti-SLAPP" provisions provide that, when a plaintiff has commenced an action, including an action in defamation, a judge shall "dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest", unless, among other factors, "the moving party has no valid defence in the proceeding".[46] If certain defamation defenses are constitutionally required, then the legislature may be understood to have intended for courts to require plaintiffs to demonstrate that there are grounds to believe that these defenses can never be viable, and not just that they may not be accepted at trial. Such a high threshold would reflect the constitutional import of the "defence(s)" to which the legislation refers; that the *Charter* requires certain "valid defence[s]" to be available may inform the interpretation of the words "no valid defence" in the legislation.

29. The purpose of these examples is not to ask the Court to accept the CCF's understanding of how *Charter* rights shape the common law of defamation, or to advance a particular interpretation of the "anti-SLAPP" provisions. Instead, they are meant to illustrate how *Charter* rights, rather than "*Charter* values", may properly be considered in using the tools of statutory interpretation to determine legislative intent. This is the approach the Court should follow in interpreting the "anti-SLAPP" provisions at issue in these appeals.

PART III—SUBMISSIONS CONCERNING COSTS

30. The CCF requests that no costs be awarded either for or against it.

PART IV—ORDER SOUGHT

31. The CCF takes no position with respect to the disposition of these appeals.

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[44] *Dolphin Delivery Ltd.*, *supra* note 19, ¶33.

[45] See *Grant*, *supra* note 37, ¶¶1-2.

[46] *CJA*, *supra* note 1, at ss. 137.1(1)(3) and 137.1(1)(4)(a)(ii).

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

Adam Goldenberg / Simon G. Cameron

PART V—TABLE OF AUTHORITIES

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Courts of Justice Act, R.S.O. 1990, c C. 43, Section 137.1(1)	21, 22, 26, 28