SCC Court File Nos. 38374 and 38376

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

MAIA BENT

Appellant
(Respondent)

- and -

HOWARD PLATNICK

Respondent
(Appellant)

AND BETWEEN

LERNERS LLP

Appellant
(Respondent)

- and -

HOWARD PLATNICK

Respondent
(Appellant)

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, GREENPEACE CANADA, CANADIAN CONSTITUTIONAL 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, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE, CANADIAN CIVIL LIBERITES 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, POST MEDIA NETWORK INC.

Interveners

FACTUM OF THE INTERVENER
ECOJUSTICE CANADA SOCIETY
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada)*

Style of cause continued on second page

BETWEEN:

1704604 ONTARIO LIMITED

Appellant
(Respondent)

- and -

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

Respondents
(Appellants)

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, GREENPEACE CANADA, CANADIAN CONSTITUTIONAL FOUNDATION, ECOJUSTICE CANADA SOCIETY, CENTRE FOR FREE EXPRESSION, CANADIAN ASSOCIATION OF JOURNALISTS, COMMUNICATIONS WORKERS OF AMERICA/CANADA, WEST COAST LEGAL EDUCATION AND ACTION FUND, ATIRA WOMEN'S RESOURCE SOCIETY, B.W.S.S. BATTERED WOMEN'S SUPPORT SERVICES ASSOCIATION, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE, CANADIAN CIVIL LIBERITES 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, POST MEDIA NETWORK INC.

Interveners

ECOJUSTICE CANADA SOCIETY
1910-777 Bay Street, PO Box 106
Toronto, ON M5G 2C8

Joshua Ginsberg
Julia Croome
Sue Tan
Tel: 416-368-7533
Fax: 416-363-2746
Email: jginsberg@ecojustice.ca
jcroome@ecojustice.ca
stan@ecojustice.ca

Counsel for the Intervener, Ecojustice Canada Society

ECOJUSTICE ENVIRONMENTAL LAW CLINIC AT THE UNIVERSITY OF OTTAWA
University of Ottawa
216-1 Stewart Street
Faculty of Law – Common Law
Ottawa, ON K1N 7M9

Joshua Ginsberg
Tel: 613-562-5800 ext. 3399
Fax: 613-562-5319
Email: jginsberg@ecojustice.ca

Ottawa Agent for the Intervener, Ecojustice Canada Society

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0K1

COPIES TO:

WINKLER DISPUTE RESOLUTION
39 Glenayr Road
Toronto, ON M5P 3B9

Howard Winkler
Eryn Pond
Tel: (416) 519-2344
Fax: (416) 915-6325
Email: hwinkler@winklerlawllp.com
epond@winklerlaw.llp.com

Counsel for the Appellant, Maia Bent

BORDEN LADNER GERVAIS LLP
100 Queen Street
Suite 1300
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 369-4795
Fax: (613) 230-8842
Email: kperron@blg.com

Ottawa Agent for the Appellant, Maia Bent

DANSON RECHT LLP
2000 - 700 Bay Street,
Toronto, ON M5G 1Z6

Timothy S.B. Danson
Marjan Delavar
Tel: (416) 929-2200
Fax: (416) 929-2192
Email: danson@drlitigators.com
marjan@drlitigators.com

Counsel for the Respondent, Howard Platnick

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan
Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agent for the Respondent, Howard Platnick

LAX O'SULLIVAN LISUS GOTTLIEB LLP
2750 - 145 King Street West
Toronto, ON M5H 1J8

Terrence J. O'Sullivan
Andrew Winton
Tel: (416) 598-3556
Fax: (416) 598-3730
Email: tosullivan@lolg.ca
awinton@lolg.ca

Counsel for the Appellant, Lerners LLP

BORDEN LADNER GERVAIS LLP
100 Queen Street
Suite 1300
Ottawa, ON K1P 1J9

Karen Perron
Tel: (613) 369-4795
Fax: (613) 230-8842
Email: kperron@blg.com

Ottawa Agent for the Appellant, Lerners LLP

WISHART LAW FIRM LLP
Barristers and Solicitors
390 Bay Street, 5th Floor
Sault Ste. Marie, ON P6A 1X2

Orlando M. Rosa
Tim J. Harmar
Tel: (705) 949-6700
Fax: (705) 949-2465
Email: orosa@wishartlaw.com
tharmar@wishartlaw.com

Counsel for the Appellant, 1704604 Ontario Limited

WIFFEN LITIGATION
Professional Corporation
181 University Avenue, Suite 2200
Toronto, ON M5H 3M7

Mark Wiffen
Tel: (416) 792-3494
Fax: (647) 317-1515
Email: mark.wiffen@wiffenlaw.ca

Counsel for the Respondents, Pointes Protection Association, Peter Gagnon, Lou Simionetti, Patricia Grattan, Gay Gartshore, Rick Gartshore and Glen Stortini

MAIA TSURUMI
Barrister & Solicitor
154 West 18th Avenue
Vancouver, BC V5Y 2A5
Tel: 604.736.8703
Email: mtsurumi@legalanalysis.ca

Counsel for the Intervener, British Columbia Civil Liberties Association

STOCKWOODS LLP
TD North Tower
77 King Street West, Suite 4130
Toronto-Dominion Centre
Toronto, Ontario M5K 1H1
Fax: 416-593-9345

SUPREME ADVOCACY LLP
340 Gilmour Street
Ottawa, ON K2P OR3

Eugene Meehan, Q.C.
Marie-Frnace Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

Ottawa Agent for the Appellant, 1704604 Ontario Limited

CHAMP & ASSOCIATES
Barristers & Solicitors
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Tel: (613) 237-4740
Fax: (613) 232-2680
Email: broy@champlaw.ca

Agent for Counsel for the Respondents, Pointes Protection Association, Peter Gagnon, Lou Simionetti, Patricia Grattan, Gay Gartshore, Rick Gartshore and Glen Stortini

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613.235.5327
Fax: 613.235.3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Intervener, British Columbia Civil Liberties Association

POWER LAW
Suite 1103-130 Alberta Street
Ottawa, ON K1P 5G4

Nader R. Hasan
Tel: 416-593-1668
Email: NaderH@stockwoods.ca

Carlo Di Carlo
Tel: 416-593-2485
Email: CarloDC@stockwoods.ca

GREENPEACE CANADA
33 Cecil Street
Toronto, ON, M5T 1N1

Priyanka Vittal
Tel: 416-597-8408
Email: pvittal@greenpeace.org

**Counsel for the Intervener,
Greenpeace Canada**

Maxine Vincelette
Tel: 613-702-5573
Fax: 1-888-604-2227
Email: mvincelette@powerlaw.ca

**Ottawa Agent for the Intervener,
Greenpeace Canada**

McCARTHY TÉTRAULT LLP
Toronto Dominion Bank Tower, Suite 5300
Toronto, ON M5K 1E6

Adam Goldenberg
Simon Cameron
Tel.: (416) 601-8200
Fax: (416) 868-0673
Email: agoldenberg@mccarthy.ca /
scameron@mccarthy.ca

**Counsel for the Intervener,
Canadian Constitution Foundation**

JURISTES POWER LAW
130 Albert Street
Suite 1103
Ottawa, ON K1P 5G4

Darius Bossé
Tel: (613) 702-5560
Fax: (613) 706-1254
Email: DBosse@juristespower.ca

**Ottawa Agent for the Intervener,
Canadian Constitution Foundation**

DENTONS CANADA LLP
250 Howe Street, 20th Floor
Vancouver, BC V6C 3R8

David Wotherspoon
Rajit Mittal
Tel.: 604-691-6429
Fax: 604-683-5214
Email: david.wotherspoon@dentons.com
raj.mittal@dentons.com

**ATIRA WOMEN'S
RESOURCE SOCIETY**
Legal Advocacy Program
101 East Cordova Street
Vancouver, BC V6A 1K7

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON KlP 1H4

David R. Elliott
Corey Villeneuve, Law Clerk
Tel.: 613-783-9699
Email: corey.villeneuve@dentons.com

**Ottawa Agent for the Interveners, West
Coast Legal Education and Action Fund,
Atira Women's Resource Society, B.W.S.S.
Battered Women's Support Services
Association, Women Against Violence
Against Women Rape Crisis Centre**

Amber Prince
Tel.: 604-331.1407 x108
Fax: 604-688-1799
Email: amber_prince@atira.bc.ca

Counsel for the Interveners, West Coast Legal Education and Action Fund, Atira Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, Women Against Violence Against Women Rape Crisis Centre

ST. LAWRENCE BARRISTERS LLP
144 King Street East
Toronto ON M5C 1G8

Alexi N. Wood
Jennifer P. Saville
Tel: 647.245.8283
Fax: 647.245.8285
Email: alexi.wood@stlbarristers.ca
jennifer.saville@stlbarristers.ca

Lawyers for the Intervener, Canadian Civil Liberties Association

GOWLING WLG (CANADA) LLP
2600-160 Elgin St
Box 466 Station D
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613.786.8695
Fax: 613.788.3509
E-mail: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Canadian Civil Liberties Association

LINDEN AND ASSOCIATES
Royal Bank Plaza
200 Bay Street, North Tower, Suite 2010
Toronto, ON M5J 2J1

Iain A.C. MacKinnon
Tel.: 416-861-9338 ext 231
Fax.: 416-861-9973
Email: imackinnon@lindenlex.com

Counsel for the Interveners, 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.

CONWAY BAXTER WILSON LLP
400 – 411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David P. Taylor
Tel.: 613-691-0368
Fax.: 613-688-0271
Email: dtaylor@conway.pro

Counsel for the Interveners, 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
250 Front Street West
Toronto, Ontario M5V 3G7

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa ON K1P 1C3

Sean Moreman
Tel: (416) 205-6494
Fax: (416) 205-2723
Email: sean.moreman@cbc.ca

**Counsel for the Intervener,
Canadian Broadcasting Corporation**

Guy Régimbald
Tel: (613) 786-0197
Fax: (613) 788-3559
Email: guy.regimbald@gowlingwlg.com

**Ottawa Agent for the Intervener,
Canadian Broadcasting Corporation**

BIRENBAUM LAW
Barrister & Solicitor
555 Richmond St. W., Suite 1200
Toronto, Ontario M5V 3B1

Joanna Birenbaum
Tel: 647.500.3005
Fax: 416.968.0325
Email: joanna@birenbaumlaw.ca

**Co-Counsel for the Intervener,
Barbra Schlifer Commemorative Clinic**

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Andrew Bernstein
Tel: 416.865.7678
Email: abernstein@torys.com

Alicja Puchta
Tel: 416.865.8156
Email: apuchta@torys.com

**Co-Counsel for the Intervener,
Barbra Schlifer Commemorative Clinic**

STOCKWOODS LLP
TD North Tower
77 King Street West, Suite 4130
Toronto, Ontario M5K 1H1

Justin Safayeni
Tel: 416-593-7200
Fax: 416-593-9345
Email: justins@stockwoods.ca

Counsel for the Interveners, Centre for Free Expression, Canadian Association of Journalists and Communications Workers of America/Canada

POWER LAW
Suite 1103 - 130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette
Tel: 613-702-5573
Fax: 1-888-604-2227
Email: mvincelette@powerlaw.ca

**Ottawa Agent for the Interveners,
Centre for Free Expression, Canadian
Association of Journalists and
Communications Workers of
America/Canada**

TABLE OF CONTENTS

PART I – OVERVIEW

1. Litigation, or the threat of litigation, should not be allowed to stifle expression on matters of public interest. The *Protection of Public Participation Act*, 2015 introduced sections 137.1-137.5 of the *Courts of Justice Act*, RSO 1990, c C.43 (the "CJA") ("s. 137.1 motions") to that end. Section 137.1 motions are meant to combat the problem of "SLAPPs" – strategic lawsuits against public participation. These appeals will clarify the scope of those motions and the interpretation of the underlying legislation.

2. The Ontario Court of Appeal in *1704604 Ontario Ltd. v. Pointes Protection Association*[1] chose a narrow interpretation of s. 137.1 that amounts to an undue reading down of the legislation, contrary to its purposes. On a plain and purposive reading, s. 137.1 motions can apply to all litigation that limits expression on matters of public interest no matter what the underlying cause of action. Further, the context of an expression, in addition to its content, is deeply relevant to the assessment of the "public interest". Motion judges and parties would benefit from contextual guidance as to the types of expression that will weigh heavily in the public interest determination.

PART II – ECOJUSTICE'S POSITION ON THE QUESTIONS ON APPEAL

3. Ecojustice Canada Society ("Ecojustice") submits:

   a. Section 137.1 should not be read or applied narrowly so as to limit its application.

   b. This Court should construe the meaning of "public interest" in ss. 137.1(3) and 137.1(4)(b) broadly and with appropriate weight on the occasion or context of the expression, and with reference to public interest categories:

      i. to ensure that the purposes of s. 137.1 are met, and

      ii. to ensure that any evidentiary burden on the defendant under ss. 137.1(4)(b) does not alter or disturb the statutory onus on the plaintiff.

[1] *17046404 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685 ("*Pointes*").

PART III – CONCISE STATEMENT OF ARGUMENT

A. Section 137.1 can and should be applied broadly

4. In the environmental movement's experience, SLAPPs are cloaked in a variety of causes of action many of which are legally and factually complex. The Court of Appeal sees complex claims as a problem for s. 137.1 motions at both the s. 137.1(4)(a) "merits hurdle"[2] and the s. 137.1(4)(b) "public interest hurdle". [3] It accordingly directed motion judges and parties to deal with such claims under Rule 20 summary judgment rather than s. 137.1 motions.[4]

5. The Court of Appeal's direction to divert complex claims to summary judgment motions will restrict the ability of defendants to access the procedural protections against SLAPPs in sections 137.1 through 137.5 of the CJA. Section 137.1 motions may be brought at any time[5] and defendants have access to special costs provisions.[6] Significantly, in a s. 137.1 motion, the plaintiff bears the burden of proof to demonstrate that the matter should proceed. By contrast, the defendant bears the onus in a Rule 20 motion and there are no special costs provisions. Given these consequences, the Court of Appeal's direction must be carefully assessed against the reality of SLAPPs and the legislation itself.

The legislation covers all SLAPPs, whatever the cause of action

6. Section 137.1 does not contain language restricting its application to defamation or any other cause of action, a fact that the Court of Appeal readily acknowledges.[7] To the contrary, the statutory language is broad and inclusive, speaking generally of "litigation" and "proceedings."[8] The Legislature wanted s. 137.1 motions to operate across all causes of action – "libel *or* tort", in the words of Government House Leader Yasir Naqvi[9] – and that intention is reflected in the Advisory Panel report that informed the drafting of the legislation.[10] Further, the purposes of s.

---

[2] *Ibid* at para 78.
[3] *Ibid* at paras 100-101.
[4] *Ibid*, at para 78.
[5] *Courts of Justice Act*, RSO 1990, c C 43, s 137.2(1) ("*CJA*")
[6] *Ibid*, s 137.1(7) and (8)
[7] *Pointes*, *supra* note 1 at para 103.
[8] *CJA*, *supra* note 4, s. 137.1.
[9] Ontario, Legislative Assembly, Hansard, 41st Parl. 1st Sess. No. 58 (March 23, 2015) (Hon. Yasir Naqvi) at 2949
[10] Anti-SLAPP Advisory Panel, "Report to the Attorney General of Ontario" (October 28, 2010) at paras 57-59

137.1 motions are proactive and wide-ranging: to encourage and promote expression and participation on matters of public interest and to discourage use of litigation, or even fear of that use, to limit that type of expression.

7. Groups and individuals who engage in public interest environmental advocacy have faced SLAPPs founded in many different causes of action. For example, in the first lawsuit in Canada to be characterized as a SLAPP by the Court, the plaintiffs alleged an illegal conspiracy between the defendant environmental group, a local council, and three councillors.[11] In another well-known SLAPP, a resource company alleged a number of economic torts in response to a consumer boycott opposing logging operations on traditional Indigenous territory.[12] More recently, a SLAPP against a conservation group alleged a slew of torts including injurious falsehood, conspiracy to injure, unlawful interference with economic relations, trespass, and nuisance.[13] Many if not most of these claims are more complex, both factually and legally, than the average defamation claim. The Court of Appeal's direction, if it stands, would remove such SLAPPs from the purview of s. 137.1.

Court of Appeal's concerns about the merits and public interest hurdles not supported

8. The Court of Appeal was concerned that claims for breach of contract[14] and those involving "serious questions" of credibility or competing inferences to be drawn from facts[15] (not hallmarks of defamation claims, which focus on the words said to have harmed reputation) "do not fit comfortably within the s. 137.1 analysis".[16] The Court of Appeal saw the alleged breach of contract claim in *Pointes* as a matter that "could have been more efficiently and expeditiously resolved by way of a timely summary judgment motion."[17]

9. In fact, as the appellant Lerners LLP has noted, s. 137.1 allows more rigour than the Court of Appeal suggests. [18] The statutory regime contemplates the filing of documentary affidavit

---

[11] *MacMillan Bloedel v. Galiano Conservancy Association et al.*, 1994 CanLII 265 (BC CA); [1994] BCJ 2477.
[12] *Daishowa Inc. v. Friends of the Lubicon*, 1998 CanLII 14828 (ON SC); [1998] OJ 1429 (ONGD).
[13] *Scory v. Krannitz*, 2011 BCSC 674 (CanLII); [2011] B.C.J. No. 954. See also *Resolute Forest Products Inc. v. 2471256 Canada Inc.*, 2013 ONSC 5822; *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309; and *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395.
[14] *Pointes*, supra note 1 at para 100-101
[15] *Ibid* at para 78
[16] *Ibid* at para 100.
[17] *Ibid* at para 101.
[18] Factum of the appellant, Lerners LLP at para 60

evidence and cross-examinations.[19] The depth of the merits analysis possible under s. 137.1 accordingly falls closer to the summary judgment end of the spectrum between summary judgment and "judicial screening".[20]

10. Further, the merits and public interest hurdles are disjunctive. After the defendant has met its onus under ss. 137.1(3), the plaintiff must clear *both* in no particular order, with failure to cross either resulting in dismissal.[21] A defendant might elect to focus entirely on the public interest hurdle, and seek dismissal on that front alone.[22]

11. The public interest hurdle balances the harm suffered or likely to have been suffered by the plaintiff against the public interest in protecting the expression *without mentioning merit*. The Court of Appeal's reasons on the other hand improperly bind the harm assessment tightly to the merits of the claim.[23] The public interest hurdle should not be a second assessment of the merits. In fact, the public interest hurdle tests for SLAPPs that may have some merit, but involve alleged harms that are disproportionate to the public interest in the expression. Importing a merits analysis in to this stage of the exercise would run counter to the clear drafting of the provision.

12. Concerns about merits analyses accordingly have no application to the public interest hurdle. Defendants and motion judges should be encouraged to use, not warned away from, the public interest hurdle branch of s. 137.1 motions even in complex cases.

13. The Court of Appeal's direction, if allowed to stand, would signal to plaintiffs that they can avoid the application of s. 137.1 motions so long as they can adduce enough credibility issues or competing facts. This result would run counter to the intention of Legislature, the reality of the SLAPPs faced by the environmental movement, and a plain and purposive reading of the legislation. Plaintiffs must not be permitted to wield complexity as weapon to defeat the Legislature's intention of protecting the public against SLAPPs.

---

[19] *CJA, supra* note 4, s. 137.2(4)
[20] *Pointes, supra* note 1 at paras 74-77.
[21] *Ibid* at para 99.
[22] *Ibid* at para 100
[23] *Ibid*

B. "Public interest" must be interpreted broadly and contextually

14. The context of an expression, in addition to its content, is deeply relevant to the assessment of the "public interest" under s. 137.1 motions. However, the Court of Appeal relies exclusively on a content-focused test – the principles in *Grant v Torstar Corp*[24] – to ground its public interest analysis. The *Grant* factors are relevant but they omit an important part of what gives expression its public interest character. This Court can provide additional guidance, without which the evidentiary burden on the defendants under the public interest hurdle might effectively displace the statutory onus on the plaintiff.

Considering context is necessary to meet statute's purposes

15. The overarching purpose of s. 137.1 motions is to prevent the use of litigation to "gag" a particular subset of expression, namely expression on matters of public interest.[25] More specifically, the purposes of the provisions are to encourage and protect *individual expression* on matters of public interest[26] *and* encourage and protect participation in *debate* on matters of public interest.[27] In this way, s. 137.1 motions protect public participation in the democratic process, one of the "core" values protected by s. 2(b) of the *Charter of Rights and Freedoms*.[28] On a plain and ordinary reading of the statute, if the expression at issue under the provisions arose in the context of a public interest debate that fact alone must have significance quite apart from the actual content of the expression.

16. The context of an expression can reveal relevant considerations that its content may obscure. For example, a person concerned about a proposed industrial project may criticize the proponent of the project. Based only on a reading of the document in which that criticism appears, the criticism may have no apparent public interest. However, if the comments were made in the context of a statutory public comment period soliciting the views of persons potentially affected by the project, the public interest in them becomes clearer – indeed, they might attract a defence of qualified privilege if the speaker were sued in defamation.[29] Even where the comments are not part

---

[24] 2009 SCC 61 ("*Grant*")
[25] *Pointes*, *supra* note 1 at para 35.
[26] *CJA*, *supra* note 4, s. 137.1(1)(a) and (c).
[27] *Ibid*, s. 137.1(1)(b) and (d).
[28] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480, at para 63; *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CanLII 64 at para 72.
[29] *Botiuk v Toronto Free Press Publications Ltd*., [1995] 3 SCR 3, at paras 78-81; *McLoughlin v Kutasy*, [1979] 2

of an official process, the fact that the expression relates to government approval of an activity by a regulated industry indicates a public interest occasion in which wide latitude and protection for expression is important.

17. In order to achieve the purposes of the legislation, the jurisprudence must be clear that context is at least as important as content when the Court is considering a motion s.137.1. The Court of Appeal's reasons, relying exclusively on *Grant* do not achieve this result.

Grant v Torstar Corp as test for "public interest"

18. In *Grant*, the Court was principally concerned with the question of whether the protection accorded to factual statements published in the public interest should be strengthened, and if so, how.[30] After considering the then-current law, and the arguments for and against changing it,[31] the Court went on to create the defence of responsible communication on matters of public interest, distinct from the existing defence of qualified privilege.[32]

19. The Court of Appeal in *Pointes* directs[33] motion judges to apply paragraphs 99-109 of *Grant* (where the Court laid out the new defence of responsible communication) when evaluating the public interest in an expression at the threshold stage. Later, at the ss. 137.1(4)(b) public interest hurdle, the ONCA references paragraphs 32-57 of *Grant* (where the Court surveys the current law and the case for changing it) for "general" guidance on the importance expression on matters of public interest.[34]

20. The "matter of public interest" test articulated in *Grant* was developed as part of the new libel defence of responsible communication on matters of public interest. That defence, being distinct from the defence of privilege, focused on the "substance of the publication itself" and not the "occasion" on which it arose.[35] *The Grant* analysis of whether a particular communication or expression is on a matter of public interest was correspondingly focused on the content of the

S.C.R. 311 at para 13; *Prud'homme v Prud'homme*, 2002 SCC 85 at paras 50 and 53; *Wells v Sears*, 2007 NLCA 21

[30] *Grant, supra* note 24 at para 26.
[31] *Ibid* at paras 38-87.
[32] *Ibid* at paras 88-109.
[33] *Pointes, supra* note 1 at para 66.
[34] *Ibid* at para 93.
[35] *Grant, supra* note 24 at para 100.

expression and had little regard for context.[36] The only discussion of the context of expression in *Grant* to which the Court of Appeal refers is very high level and is not specifically concerned with the question of public interest.[37]

Broader guidance on meaning of "public interest" needed

21. The evidentiary burden on defendants under the ss. 137.1(4)(b) public interest balancing exercise amplifies the absence of broader guidance than *Grant* on the meaning of the "public interest." [38] The Court of Appeal directs defendants who assert "a public interest in protecting [their] expression beyond the generally applicable public interest" to set out the facts that give added importance to their situation.[39] However, besides its reference to *Grant*, the only additional guidance from the Court of Appeal at the public interest hurdle focuses on *content* of the expression that will *reduce* the weight accorded to the public interest in that speech (such as deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language).[40]

22. First, vulgar or "offensive" speech can be of significant public interest depending on its context. Democratic discourse is not always polite. Indeed, sometimes it is the vulgarity or "offensiveness" of the speech that makes it effective. As the Ontario Court of Appeal noted with respect to a by-law that prohibited the use of coarse language in public parks, a requirement that language be temperate may diminish its message and therefore its effect on democratic discourse:

> Over some range of cases at least, 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. The exercise of free expression is diminished by restrictions on the means that make it effective. So it is no answer for the respondent to say there is no limit on one's exercise of freedom of expression – that everyone is free to convey whatever ideas they want – provided they use appropriately temperate language. To take a familiar example from US First Amendment case law, the meaning conveyed by shouting "fuck the draft" does not translate, without significant loss of meaning, to the quiet declaration, "I am implacably opposed to the draft": *Cohen v. California* (1971), 403 U.S. 15. [41]

---

[36] *Ibid* at paras 101-109. This court's admonition to avoid narrow characterizations at para 107 may import context to some extent, but not squarely.

[37] *Grant*, *supra* note 24 at paras 32-57
[38] *Ibid.*
[39] *Pointes*, *supra* note 1 at para 93.
[40] *Ibid* at paras 94-101.
[41] *Bracken v Niagara Parks Police*, 2018 ONCA 261 at para 57

23. Second, the Court of Appeal provides only negative examples which leaves its guidance unbalanced. Guidance as to when expression is *more likely* to weigh heavily in the public interest is also needed. As already mentioned, the purposes of s. 137.1 motions are proactive. To be proactive, the operation of the provisions must be as clear as possible to both potential plaintiffs and defendants in order to deter SLAPPs and their chilling effect.

24. Setting out categories of cases that are presumptively in the public interest would provide the needed clarity. Jurisprudence under the *Class Proceedings Act 1992*, S.O. 1992, c. 6 provides a template. That statute requires the court, in determining cost awards, to consider whether a case concerns a "matter of public interest".[42] To make that determination, courts have considered the context or occasion upon which a class action suit may be brought and identified categories of cases that are in the public interest.[43] Those categories include cases that:

a. Have "some specific, special significance for, or interest to, the community at large";[44]

b. Are aimed at improving the situation of persons or groups who or are historically disadvantaged in our society;[45] or

c. Concern a regulated industry.[46]

These categories are not closed, but they suggest a generalizable principle: courts recognize litigants as acting in the public interest where they seek the vindication of public rights, the enforcement of a Crown obligation or regulatory compliance, or target a subject which is a common or public good.

25. The categories used to identify public interest litigation apply equally to public interest expression. Employing such categories in s.137.1 motions would amplify or explain – without purporting to be comprehensive or exhaustive – the more broad guidance referenced in *Grant*.[47] For example, expression in relation to the exercise of a governmental body's authority on a matter

[42] *Class Proceedings Act*, 1992, SO 1992, c 6., s.31(1).
[43] *Ruffalo et al., v Sun Life Assurance*, 2008 CanLII 5962, [2008] OJ No 599 at para 73.
[44] *Williams v. The Mutual Life Assurance Co. of Canada*, [2001] O.J. No. 445, 6 C.P.C. (5th) 194 (S.C.J.). at para 24
[45] *Vennell v. Barnado's*, 2004 CanLII 33357 (ON SC)
[46] *Caputo v Imperial Tobacco Ltd*, 2005 CanLII 63806 (ONSC)
[47] *Supra* paragraph 19.

that will impact the public or public rights should be recognized as a weighted category of expression in the ss. 137.1(4)(b) exercise. In *Mohammed v United Soils Ltd,* the Ontario Court of Appeal recognized a "strong case for protecting the defendant's freedom of expression" based on the existence of ongoing political dialogue in the local community on an environmental matter, and found "no doubt" that both the subject matter and the manner in which they advanced the defendants advanced their expression constituted expression that engaged the public interest.[48]

26. The "categorical" approach promotes certainty in the application of the legislation. Without such guidance, there is a possibility that in practice the onus on the plaintiff under ss. 137.1(4)(b) will lose meaning, and the balancing exercise will instead operate as the weighing of two competing but equal interests, notwithstanding the legislative purpose of promoting free expression over maintaining lawsuits with only technical merit.

27. Ecojustice proposes an additional category; one at issue in this appeal – expressions related to participation in environmental decision and policy-making. Expression made on such occasions should attract significant weight in the public interest balancing exercise not only because they relate to the exercise of governmental authority, the control of a regulated industry, and the use and disposition of public resources, but also because public participation in environmental decision-making is well recognized: many environmental statutes have included specific provisions to create such procedural rights.[49]

28. In Ontario, sections 137.1-137.5 of the CJA have greater significance since they further the public participation rights of Ontario's Environmental Bill of Rights ("EBR").[50] The EBR enshrines "means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario".[51] Its public participation rights are sweeping: they entitle every person in Ontario to receive prior notice of and be consulted on government proposals with a significant environmental effect. As the Ontario Divisional Court recently held, the EBR elevates expressions on environmental matters by "[placing] environmentally significant

---

[48] 2019 ONCA 128 at para 26.
[49] See for example, *Impact Assessment Act,* SC 2019, c 28, c 1, *preamble;* B.C.'s *Environmental Assessment Act,* SBC 2002, c 43, s 11(2)(f); Manitoba's *Environment Act,* CCSM c E125, s 1(1)(d); Nova Scotia's *Environment Act,* SNS 1994-95, c 1, s 2(h);
[50] *Environmental Bill of Rights*, 1993, SO 1993, c 28
[51] *Ibid,* s. 2(3)(a).

proposals in a different position than other government actions. Environmental issues – not just facing Ontarians – but facing the entire world – are a defining issue of our time. Successive Ontario governments have left the EBR in place in recognition that matters affecting the environment have a special place on the public agenda, one that requires public participation".[52] Expression in furtherance of such rights should attract the highest level of protection.

Conclusion on contextual approach to assessment of the "public interest"

29. The judge hearing a motion under s.137.1 should consider the overall public importance of the occasion on which the expression was made with regard to whether that context has indicia of public interest. This Court can provide guidance as to when an occasion is one of public interest, such as expressions related to participation in environmental decision and policy-making.

PART IV – SUBMISSIONS ON COSTS

30. Ecojustice requests that there be no costs awarded to or against it in relation to the appeals.

PART V – ORDER SOUGHT

31. Ecojustice takes no position on the disposition of the appeals but respectfully requests that the Court take into consideration the foregoing submissions.

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

Joshua Ginsberg
Julia Croome
Sue Tan
Lawyers for the Intervener, Ecojustice Canada Society

[52] *Greenpeace Canada v Minster of the Environment (Ontario)*, 2019 ONSC 5629 at para 64 (in majority on this issue)

PART VII – TABLE OF AUTHORITIES

AUTHORITIES	PARA(S)
CASE LAW	
17046404 Ontario Ltd v Pointes Protection Association, 2018 ONCA 685	2, 4, 5, 6, 7, 8, 9, 10, 11, 15, 19, 21
Botiuk v Toronto Free Press Publications Ltd., [1995] 3 SCR 3	16
Bracken v Niagara Parks Police, 2018 ONCA 261	22
Canadian Broadcasting Corp. v New Brunswick (Attorney General), [1996] 3 SCR 480	15
Caputo v Imperial Tobacco Ltd, 2005 CanLII 63806	24
Daishowa Inc. v Friends of the Lubicon, 1998 CanLII 14828 (ON SC); [1998] OJ 1429 (ONGD)	7
Grant v Torstar Corp, 2009 SCC 61	14, 17, 18, 19, 20, 21, 25
Greenpeace Canada v Minster of the Environment (Ontario), 2019 ONSC 5629	28
MacMillan Bloedel v. Galiano Conservancy Association et al., 1994 CanLII 265 (BC CA); [1994] BCJ 2477	7
McLoughlin v Kutasy, [1979] 2 S.C.R. 311	16
Mohammed v United Soils Ltd, 2019 ONCA 128	25
Northwest Organics, Limited Partnership v Fandrich, 2019 BCCA 309	7
Prud'homme v Prud'homme, 2002 SCC 85	16
Resolute Forest Products Inc. v 2471256 Canada Inc., 2013 ONSC 5822	7
RJR-MacDonald Inc. v Canada (Attorney General), [1995] 3 SCR 199, 1995 CanLII 64	15
Ruffalo et al., v Sun Life Assurance, 2008 CanLII 5962, [2008] OJ No 599	24

AUTHORITIES	PARA(S)
Scory v Krannitz, 2011 BCSC 674 (CanLII); [2011] B.C.J. No. 954	7
Vancouver Aquarium Marine Science Centre v Charbonneau, 2017 BCCA 395	7
Vennell v Barnado's, 2004 CanLII 33357 (ON SC)	24
Wells v Sears, 2007 NLCA 21	16
Williams v The Mutual Life Assurance Co. of Canada, [2001] OJ No 445, 6 CPC (5th) 194 (SCJ) [*See Book of Authorities*]	24
LEGISLATION	
Class Proceedings Act 1992, S.O. 1992, c. 6, s 31(1)	24
Courts of Justice Act, RSO 1990, c C.43, ss 137.1-137.5	1, 5, 6, 8, 9, 15, 28
Environmental Assessment Act, SBC 2002, c 43, s 11(2)(f)	27
Environment Act, CCSM c E125, s 1(1)(d)	27
Environment Act, SNS 1994-95, c 1, s 2(h)	27
Environmental Bill of Rights, 1993, SO 1993, c 28, s 2(3)(a)	28
Impact Assessment Act, SC 2019, c 28, c 1, Preamble	27
Protection of Public Participation Act, 2015, SO 2015, c 23	1
SECONDARY SOURCES	
Anti-SLAPP Advisory Panel, "Report to the Attorney General of Ontario" (October 28, 2010) at paras 57-59	6
Ontario, Legislative Assembly, Hansard, 41st Parl. 1st Sess. No. 58 (March 23, 2015) (Hon. Yasir Naqvi) at 2949	6