File Number: 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**

Appellant
(Respondent)

- and -

**HOWARD PLATNICK**

Respondent
(Appellant)

A N D B E T W E E N:

**LERNERS LLP**

Appellant
(Respondent)

- 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'S SUPPORT SERVICES ASSOCIATION, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTER, 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 and POSTMEDIA NETWORK INC.**

Interveners

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**FACTUM OF THE INTERVENER**
**BARBRA SCHLIFER COMMEMORATIVE CLINIC**
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW

1. The Barbra Schlifer Commemorative Clinic (the "Clinic") presents the perspective of survivors of sexual violence, who constitute some of the most vulnerable targets of retaliatory lawsuits. Women who disclose sexual violence are increasingly facing retaliatory lawsuits or threats of retaliatory lawsuits by their abusers, including in defamation, malicious prosecution, and breach of contract. This is true in contexts where the disclosure is made in confidence to trusted friends or family, to escape a violent sponsored immigration relationship, or to persons in authority such as to police, employers, or educational institutions. These lawsuits, or threats of lawsuits, are intended to intimidate and silence the individual women involved. They also have a serious systemic impact, adding yet another significant barrier to disclosing and reporting sexual violence.[1]

2. Anti-SLAPP legislation offers important protection to survivors of violence. Anti-SLAPP measures simultaneously advance the public good and the integrity of the justice system by supporting a culture in which it is safer for women to disclose and possible to hold perpetrators accountable. The development of anti-SLAPP jurisprudence in this appeal will have a significant impact on the fulfilment of these important societal goals.

3. The Clinic's intervention is focused on two principal submissions.

4. First, disclosures of sexual violence are disclosures on matters in the "public interest" under s. 137.1(3) of the *Courts of Justice Act* ("*CJA*"). Yet cases from Ontario and the United States under anti-SLAPP legislation demonstrate the real risk that courts in Canada may nevertheless rely on long-discredited thinking and characterize sexual violence as a "private" matter between two individuals that does not engage anti-SLAPP protection. In considering the content and scope of "public interest" expressions under anti-SLAPP provisions in this appeal, this Court has an opportunity to disavow this outdated approach. In providing guidance to lower courts on the interpretation and application of anti-SLAPP provisions in this appeal, it should be made clear that as a threshold issue, disclosures of sexual violence are communications in the "public interest," captured by anti-SLAPP legislation.

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[1] A "disclosure" refers to telling someone, whether publicly or privately, about an experience of sexual violence; a "report" refers to a formal report intended to access a legal remedy, such as a report to an employer, educational institution or police.

5. Second, whether anti-SLAPP legislation will provide meaningful protection to women who disclose sexual violence depends greatly on the substantive *and* procedural development of s. 137.1. Defending an anti-SLAPP motion should not permit the plaintiff to impose the very harm the legislation is intended to prevent: inflicting further abuse through invasive and protracted discovery processes. To prevent this harm and ensure the anti-SLAPP regime holds meaningful promise for survivors, no adverse inference should be drawn from a survivor's decision not to adduce her own affidavit in support of an anti-SLAPP motion. This procedural approach engages the proper application of the "no valid defence" (s.137.1(4)(a)(ii)) and "balancing of interests" (s.137.1(4)) arms of the Ontario anti-SLAPP test.

## PART II – POSITION ON QUESTIONS IN ISSUE

6. The Clinic intervenes only to provide submissions on the interpretation of Ontario's anti-SLAPP regime. It takes no position on the outcome of the appeal.

## PART III – ARGUMENT

### A. Disclosures of sexual violence are communications in the "public interest"

#### *i. The broad Scope of "expressions" on "matters of public interest" under the* CJA

7. The interpretation of "public interest" in the context of anti-SLAPP legislation has significant consequences. Any party seeking to rely on this legislation must show that the communication at issue relates to a matter of "public interest." The first arm of the test for an anti-SLAPP motion, s. 137.1(3), sets out a threshold requirement that distinguishes between claims that arise from an expression relating to a matter of public interest and other claims.[2]

8. The public interest is again implicated by s. 137.1(4)(b), which requires a balancing between the public interest considerations engaged by the communication.[3]

9. The phrase "a matter of public interest" is not defined in the legislation.[4] The Clinic urges the Court to provide clarity on what matters are "in the public interest", taking into account the open-ended nature of "public interest" as set out in the legislation itself.

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[2] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at paras. 54-56 [*Pointes*].
[3] *Pointes* at paras. 42, 54.
[4] *Pointes* at para. 40.

10. There are good policy reasons for broadly defining communications made in the "public interest". As the Anti-SLAPP Advisory Report to the Attorney General observed,[5] a broad definition of "public interest" captures the different types of instances in which public participation may arise:

> The Panel prefers a broad scope of protection. It does not consider it wise to distinguish between "public" and "private" forums of discussion. A conversation among neighbours about a new development and a communication made to influence government both involve expression on matters of public interest.
>
> … [T]he broader test will ensure that the full scope of legitimate participation in public matters is made subject to [anti-SLAPP regimes]. In the light of the variety of instances in which legitimate public participation may arise, an appropriate protection of public participation should be established on a broad foundation.[6]

11. This Court has already instructed that the "public interest" in defamation law should be approached from a broad perspective. To be of public interest, "the subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached."[7] This definition of the "public interest" as involving a matter "about which the public has some substantial concern" applies with equal if not greater force to what is captured by expressions in the "public interest" under anti-SLAPP legislation.

***ii. The public has a substantial concern about disclosures of sexual violence***

12. Disclosures of sexual or domestic violence always engage the public interest.[8] Sexualized and other violence against women directly impact women's and girls' social, political, and economic participation in Canadian society. As Parliament affirmed in 1997 when it amended the *Criminal Code*:

> …the Parliament of Canada recognizes that violence has a particularly disadvantageous impact on the equal participation of women and children in society and on the rights of

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[5] Ontario Ministry of the Attorney Generral, *Anti-SLAPP Advisory Panel Report to the Attorney General* (October 2010) ["Advisory Report"].

[6] Advisory Report at paras. 28-31.

[7] *Grant v. Torstar Corp*., 2004 SCC 61 at para. 105.

[8] *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 158; *R. v. Seaboyer*; *R v. Gayme*, [1991] 2 S.C.R. 577 at para. 256 [*Seaboyer*].

> women and children to security of the person, privacy and equal benefit of the law as guaranteed by sections 7, 8, 15 and 28 of the *Canadian Charter of Rights and Freedoms*.[9]

13. The short and long-term impacts of violence against women, including on women's individual health, the health of their children, and society as a whole, are well-known: "Violence against women in Canada is a serious, pervasive problem … It remains a significant barrier to women's equality and has devastating impacts on the lives of women, children, families and Canadian society as a whole."[10] Moreover, women who experience multiple inequalities are at greater risk of being targeted for sexual violence, whether due to poverty, disability, race, Indigeneity, sexual orientation, gender identity, age or other grounds of oppression.

14. For this reason, over the past two decades, federal and provincial governments have initiated and continue to initiate legislative and policy reforms to encourage reporting.[11] Yet sexual assault remains seriously under-reported in Canada and is still the most under-reported of all crimes.[12] This Court has repeatedly recognized that chronic under-reporting of sexual assault is a matter of public interest in that it "undermines the effectiveness of the criminal justice system."[13]

15. Ending sexual violence is impossible if perpatrators enjoy effective impunity because women fear disclosing and reporting.[14]

16. Silencing victims of sexual violence by retaliatory lawsuits exacerbates the already significant shame and stigma associated with sexual violence, and further deters disclosure,

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[9] *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 32.

[10] Statistics Canada, *Measuring Violence Against Women: Statistical Trends*, Maire Sinha, ed. (Ottawa: Statistics Canada, 2013) at Foreward.

[11] Women and Gender Equality Canada, *It's Time: Canada's Strategy to Prevent and Address Gender-based Violence 2018-2019* (Ottawa: Women and Gender Equality Canada, 2019); Government of Ontario, *It's Never Okay: an Action Plan to Stop Sexual Violence and Harassment* (March 2015); see also: Ontario Ministry of the Attorney General*, Independent Legal Advice for Survivors of Sexual Assault Pilot Program* (November 2018).

[12] *Seaboyer* at para. 256; Statistics Canada, *Self-reported sexual assault in Canada, 2014* (Ottawa: Canadian Centre for Justice Statistics, 2017) at p. 4. See also: Alana Prochuk, *We Are Here: Women's Experiences of the Barriers to Reporting Sexual Assault* (Vancouver: West Coast Leaf, 2018) [We Are Here]; see also Marie Deschamp, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (2015); Government of Alberta, *Best Practices for Investigating and Prosecuting Sexual Assault* (Edmonton: Alberta Justice and Solictor General, 2013); *R. v. Barton*, 2017 ABCA 216, fn 3; David M Tanovich, "'Whack' No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases" (2015) 45:3 Ottawa L. Rev. 495.

[13] *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 at para. 58 ["*A. (L.L.)*"].

[14] We Are Here at pp. 5-6.

including initial help-seeking from friends, family, mentors, or trusted colleagues. Disclosures made even in relative private should be recognized as expressions in the "public interest" under anti-SLAPP regimes. This is particularly important for women who are vulnerable – whether due to factors such as financial dependence, spiritual violence, precarious immigration status, race, disability, or LGBTQ2S identity – and who may not report to police or other authority.

17. Anti-SLAPP legislation has been enacted because "simply a threat of defamation action is enough to stop people from speaking."[15] For women, particularly women who are multiply disempowered due to age, race, social location, immigration status, disability, Indigenous or trans identity, or numerous other reasons, the fear of retaliation is paralyzing. Women who wish to report their experiences to protect others, such as from predatory or harassing conduct by those in positions of power, whether in workplaces, universities/colleges, or due to their professional or religious status, require robust protection as a matter of social good.

***iii. Public interest includes matters of "substantial concern" to the public***

18. Governments and courts have recognized the public and social importance in encouraging disclosures of sexual violence. Accordingly, disclosures of sexual violence have been identified as matters about which the public has a substantial concern and thus expressions protected by *CJA* s. 137.1(3) and engaged in s. 137.4(b).

19. Yet some caselaw in the United States, and one case decided in Ontario, are out of step with this recognition of sexual violence as a serious public issue. In *Rizvee v. Newman*, a case decided prior to the Court of Appeal for Ontario's decision in the present case, the Ontario Superior Court dismissed an anti-SLAPP motion brought by a woman who had been sued for malicious prosecution when she laid an information for a peace bond against her abusive ex-spouse. The Court held that the malicious prosecution suit related to a "private matter" between two individuals and did not engage s. 137.1.[16] This ruling is particularly surprising because in the very same case, the Court granted the same defendant's anti-SLAPP motion in response to a defamation suit claiming damages for public disclosure of the domestic violence on social media.

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[15] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 4th Sess (14 February 2019 afternoon) at 7028 (Hon D. Eby).

[16] *Rizvee v. Newman*, 2017 ONSC 4024. Troublingly, the ONCA in *Pointes* may have directly or indirectly endorsed this approach in a footnote: *Pointes* at para. 60, footnote 6.

20. The United States' experience with anti-SLAPP legislation in cases of sexual violence is similarly out of sync with Canadian legal and social norms. For example, some states draw a distinction between "public" and "private" communications, and some U.S. courts have relegated disclosures of sexual violence to the "private" sphere. Communications regarding a public figure or made to government actors (*i.e.,* the police or judiciary) in the context of prosecution are topics of public interest.[17] However, communications about sexual violence regarding a non-public figure or made to private actors (e.g., an employer, to an institution, to friends and family etc.) concern what some courts have considered to be strictly a "private matter".[18] Courts in the United States have concluded that this latter category of communications does not relate to the public interest and therefore does not fall under the purview of anti-SLAPP legislation.

21. The Canadian approach to sexual violence does not limit "public interest" disclosures only to expressions in fora that may be viewed as the marketplace of ideas – a "marketplace" in which the disempowered or marginalized have traditionally been excluded in any event. A survivor-defendant needs protection from retaliatory lawsuits even if the perpetrator does not happen to be famous. In Canada, we have long understood that violence between intimate partners "is not a private matter."[19]

22. In the current cultural context in which survivors are confronted with retaliatory suits for speaking about the sexual violence against them, it is urgent that this Court re-emphasize that disclosing or reporting sexual violence is in the public interest. While the appeals before the Court do not specifically involve gender-based violence, they do mark this Court's first opportunity to address the scope of the "public interest" captured by s. 137.1. Given the immediate importance of this Court's ruling to the large number of women in this country who have experienced sexual violence, it would be appropriate to provide broader guidance on the issue of "public interest" to lower courts. Women cannot afford to wait years until the next case reaches an appellate court.

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[17] Alyssa R. Leader, "A SLAPP in the Face of Free Speech: Protecting Survivors' Rights to Speak up in the Me Too Era" (2019) 17 First Amend. L. Rev. 441 at pp. 459-461 ["A SLAPP in the Face"]; see *e.g. Conroy v. Spitzer*, 83 Cal. Rptr. 2d. 443.

[18] A SLAPP in the Face at pp. 459-461; see *e.g. Steep Hill Labs., Inc. v. Moore*, 2018 WL 1242182 at 7; *Olaes v. Nationwide Mut. Ins*., 38 Cal. Rptr. 3d 467.

[19] *R. v. Inwood*, 1989 CanLII 263 (Ont CA) at pp. 12-13.

**B. No adverse inference should be drawn from a survivor's choice not to adduce her own affidavit on a s. 137.1 motion**

23. Anti-SLAPP legislation allows defendants to ask a court to dismiss a lawsuit as contrary to the public interest before the defendant is forced to endure discovery. This is critical for survivors of sexual violence. The anti-SLAPP motion is neither a summary judgment motion nor a mini-trial.[20] Its purpose is to prevent invasive and expensive litigation that suppresses public participation. This Court has recognized that testifying to sexual assault can be harmful and traumatizing to complainants.[21] The adversarial tactics that plague the prosecution of sexual violence and create such a high barrier to reporting should not be available on an anti-SLAPP motion in cases of sexual violence.

24. Sexual violence frequently involves acts to which there are no witnesses and in which the credibility of the complainant has been seen in law to be "central". Core to the plaintiff's allegations in retaliatory lawsuits (and as is often the defence in criminal and civil sexual violence cases) is that the complainant is lying out of spite or gain, is exaggerating or troubled, mentally unstable, and/or unreliable. If survivors are subjected to invasive and re-traumatizing questioning on their credibility and reliability, the anti-SLAPP protections will, in practice, afford little protection, and will not achieve the goal of advancing and protecting this socially valuable expression.

25. In *A. (L.L.) v. B. (A.)*, Justice L'Heureux-Dubé held that the "[t]he legal system has a direct and vital interest in promoting the reporting of sexual assaults" and noted the importance of recognizing the "impact that procedural and substantive rules have upon the resolve of sexual assault victims to obtain treatment and upon the reporting of crimes of this nature."[22] The relationship between the substantive import and goal of s. 137.1 of the *CJA*, on one hand, and the procedure by which this provision is accessed, on the other, is particularly acute in cases of sexual violence.

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[20] *Pointes* at para. 73.
[21] *R. v. R.V.*, 2019 SCC 41 at para. 33, citing Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen's University Press, 2018) at p. 4.
[22] *A. (L.L.)* at para. 60.

26. The procedural issues arise most critically in anti-SLAPP motions in relation to the "no valid defence" arm of the s. 137.1 test. If the "no valid defence" test is a high threshold for the plaintiff to meet, as suggested by the statutory language, the test ought generally only to be met in cases of sexual violence where it is obvious that no defence is available, without significant probing. It is open to this Court, as argued by the intervener BC Coalition, to recognize disclosures of sexual violence as an express category of expression protected by qualified privilege. In the alternative, the pleadings and the factual context of the disclosure of sexual violence (e.g., to police, an immigration worker, an employer, a counsellor, a supportive friend or community member) will in most cases provide sufficient basis for a determination as to whether, for example, there is qualified privilege.

27. However the test developed by the Court of Appeal for Ontario – that the plaintiff must demonstrate that a finder of fact might, on a balance of probabilities, reject the defences relied on by the defendant – significantly lowers that threshold and may place the burden on the survivor-defendant to adduce evidence or respond to detailed questions about the facts of the case in support of her asserted defences.[23] In defamation and malicious prosecution, the plaintiff will almost certainly argue that the available defences (of qualified privilege or a good faith report) may be rejected by a trier-of-fact because of the plaintiff's assertion that the survivor-defendant lied or was motivated by malice. In sexual violence cases, allegations of malice uniquely risk engaging discriminatory assumptions about women who disclose sexual assault.

28. Any approach that opens the door to broad evidentiary probing of the defences that might be accepted or rejected by a trier-of-fact exposes a survivor-defendant to the risk of significant revictimization in the context of an anti-SLAPP motion. Under the guise of responding to an anti-SLAPP motion, the plaintiff may force the survivor-defendant to recount the details of sexual violence and to endure invasive and re-traumatizing cross-examination. Yet it is the fear, shame, and trauma of having to tell and retell the humiliating and personal details of sexual violence, and to defend or explain one's responses to those events that so frequently prevents survivors from disclosing in the first place.[24] The deterrent effect of retaliatory litigation is not reduced when the process for accessing anti-SLAPP protections reproduces these steps.

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[23] *Pointes* at para. 83.

[24] We Are Here at pp. 54-62.

29. Moreover, if the procedure for the anti-SLAPP motion is not tailored to match the legislative goals, the anti-SLAPP motion, even if successful, may well achieve the desired effect of emotionally, psychologically and financially devastating the survivor-defendant, and systemically silencing and intimidating others.

30. The Clinic is not asking this Court to address the full nuances of the procedure on anti-SLAPP motions in this appeal. It does, however, propose a solution that may be incorporated into the Court's more general discussion of the substance and procedure of anti-SLAPP motions.

31. Specifically, the Clinic submits that this Court should recognize that it is open and appropriate for defendants in some cases, and in particular sexual violence cases, not to proffer an affidavit sworn by the defendant-survivor in an anti-SLAPP motion and that no adverse inference should be drawn from this choice. The Court should also clarify that except in exceptional cases, the survivor-defendant should similarly not be compelled to testify by the summons to witness on a pending motion.

32. This proposal is in keeping with the spirit and purposes of the legislation, as well as case law to date. The Court of Appeal for Ontario was correct in *Pointes* that the anti-SLAPP record and procedure are intended to be abbreviated, with limited weighing of the evidence and assessments of credibility.[25] As Justice Copeland of the Ontario Superior Court held in *Papa v. Zeppieri,* the legal tests are "for the most part, based on an objective reading of the statements in their full context" and it is not necessary in every case for the defendant to swear an affidavit as part of the record.[26]

33. The Court in *Papa v. Zeppieri* did acknowledge that, in general, an affidavit is necessary to demonstrate subjective intent. However, even evidence of subjective intent for the purposes of an anti-SLAPP motion may be available on the record from other sources in sexual violence cases, for example from a detailed written complaint to an employer or educational institution or the transcript of a statement to the police.

34. In cases where the survivor-defendant has not filed an affidavit on her own behalf, the motion will generally turn on the "substantial merit" of the plaintiff's case and the "balancing of interests", which the Court of Appeal for Ontario correctly identified as "the heart" of the anti-

[25] *Pointes* supra at para. 76-82.
[26] *Papa v. Zeppieri*, 2018 ONSC 7068 at paras. 10, 11.

SLAPP legislation. The Court of Appeal has implicitly endorsed this approach, by noting that the Court may end its inquiry under s. 137.1 if the plaintiff fails to meet any of the three branches.[27]

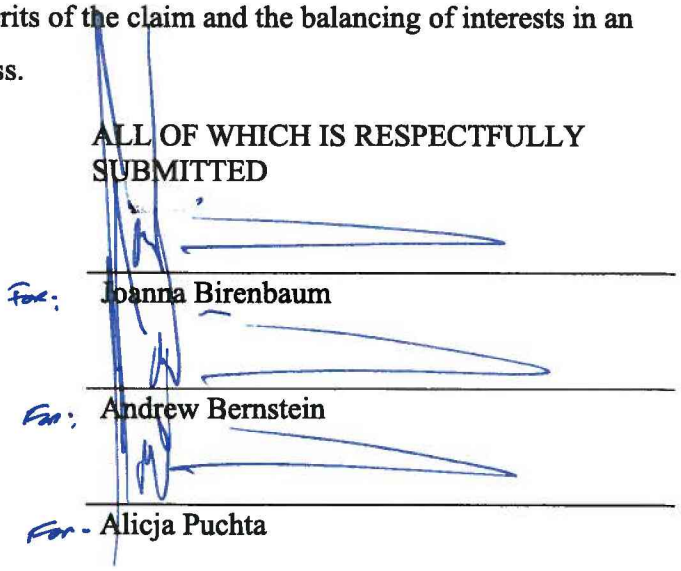
35. The public interest in disclosure and reporting, particularly to access supports or legal remedies (*e.g.*, to police, an employer, an educator, in family law proceedings, for protection in immigration and refugee contexts), should be given significant weight without forcing individual women to endure further revictimization in the litigation of the anti-SLAPP motion.

36. Particularly if the Court of Appeal's "no valid defence" test is upheld, the threshold for the plaintiff to meet under s. 137.1(3)(a)(ii) is effectively so low, and sexual violence cases so notoriously difficult to prosecute/litigate, that the success of the motion for the survivor-applicant will not rest on the s. 137.1(3)(a)(ii) stage of the test.

37. Functionally, anti-SLAPP legislation must be applied in a manner that affords real – as opposed to illusory – protection for women who have disclosed sexual violence. Just as lawsuits against Greenpeace or other public interest advocates ought to be summarily determined without crushing the organizations in protracted and expensive litigation of the anti-SLAPP motion, so too should disclosures of sexual violence be protected in the public interest, with the plaintiff bearing the burden of proving the merits of the claim and the balancing of interests in an expeditious and non-traumatic process.

October 22, 2019

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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[27] *Pointes* at para. 99.

## PART VII – TABLE OF AUTHORITES

| CASES | |
|---|---|
| **Name** | **Cited in paras.** |
| *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 | 7, 8, 9, 19, 28, 33, 35 |
| *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 | 14, 25 |
| *Conroy v. Spitzer*, 83 Cal. Rptr. 2d. 443 (Westlaw) | 20 |
| *Grant v. Torstar Corp.*, 2009 SCC 61 | 11 |
| *Olaes v. Nationwide Mut. Ins.*, 135 Cal.App.4th 1501 (Westlaw) | 20 |
| *Papa v. Zeppieri*, 2018 ONSC 7068 | 23-24 |
| *R. v. Barton*, 2017 ABCA 216 | 14 |
| *R. v. Inwood*, 1989 CanLII 263 (Ont CA) | 21 |
| *R. v. Mills*, [1999] 3 S.C.R. 668 | 12 |
| *R. v. O'Connor*, [1995] 4 S.C.R. 411 | 12 |
| *R. v. R.V.*, 2019 SCC 41 | 23 |
| *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577 | 12, 14 |
| *Rizvee v. Newman*, 2017 ONSC 4024 | 19 |
| *Steep Hill Labs., Inc. v. Moore*, 2018 WL 1242182 (Westlaw) | 20 |
| **SECONDARY SOURCES** | |
| Alana Prochuk, *We Are Here: Women's Experiences of the Barriers to Reporting Sexual Assault* (Vancouver: West Coast Leaf, 2018) (West Coast Leaf) | 14-15, 28 |
| Alyssa R. Leader, "A SLAPP in the Face of Free Speech: Protecting Survivors' Rights to Speak up in the Me Too Era" (2019) 17 First Amend. L. Rev. 441 (HeinOnline) | 20 |

## PART VII – STATUTORY PROVISIONS

| **Name** | **Cited in paras.** |
|---|---|
| *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1 | 4, 18, 25, 38 |