

COURT OF APPEAL FOR ONTARIO

CITATION: 1704604 Ontario Ltd. v. Pointes Protection Association, 2018 ONCA  
685

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Doherty, Brown and Huscroft JJ.A.

BETWEEN

1704604 Ontario Ltd.

Plaintiff (Respondent)

and

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

Defendants (Appellants)

Mark Wiffen, for the appellants

J. Paul R. Cassan and Tim Harmar, for the respondent

Heard: December 19, 2016, and June 27, 2017.

On appeal from the order of Justice Edward E. Gareau of the Superior Court of  
Justice, dated May 9, 2016, with reasons reported at 2016 ONSC 2884, 84  
C.P.C. (7th) 298.

**Doherty J.A.:**

## A. INTRODUCTION

[1] Freedom of expression is a constitutionally-protected right in Canada. The free and open expression of divergent, competing, and strong viewpoints on matters of public interest is essential to personal liberty, self-fulfillment, the search for the truth, and the maintenance of a vibrant democracy.

[2] From time to time, those who are the target of criticism resort to litigation, not to vindicate any genuine wrong done to them, but to silence, intimidate, and punish those who have spoken out. Litigation can be a potent weapon in the hands of the rich and powerful. The financial and personal costs associated with defending a lawsuit, particularly one brought by a deep-pocketed plaintiff determined to maximize the costs incurred in defending the litigation, can deter even the most committed and outspoken critic.

[3] Lawsuits brought to silence and/or financially punish one's critics have come to be known as Strategic Lawsuits Against Public Participation ("SLAPP"). Defamation lawsuits, perhaps because of the relatively light burden the case law places on the plaintiff, have proved to be an ideal vehicle for SLAPPs.

[4] SLAPPs have been part of the litigation landscape in North America for decades: Michaelin Scott & Chris Tollefson, "Strategic Lawsuits Against Public Participation: The British Columbia Experience" (2010) 19:1 R.E.C.I.E.L. 45, at 45. They have evoked various legislative responses sometimes referred to as

Anti-SLAPP legislation. This appeal and the others heard with it require this court, for the first time, to interpret Ontario's Anti-SLAPP legislation.

[5] The first Anti-SLAPP legislation in Ontario was introduced in December 2008 by way of a private member's bill. That Bill did not get past first reading: Bill 138, *Protection of Public Participation Act 2008*, 1st Sess., 39th Leg., Ontario, 2008. In 2010, Ontario struck an advisory panel to examine the SLAPP phenomenon and make recommendations as to the appropriate legislative response. In October 2010, that panel recommended Anti-SLAPP legislation: Anti-SLAPP Advisory Panel, *Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010). In November 2015, Bill 52, the *Protection of Public Participation Act, 2015*, came into force: S.O. 2015, c. 23 (the "Act"). The Act applied to any action commenced on or after December 1, 2014.

[6] The Act amended various statutes, including the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("CJA"). Section 3 of the Act introduced ss. 137.1 to 137.5 to the CJA. Those sections created a new pretrial procedure allowing defendants to move expeditiously and early in the litigation for an order dismissing claims arising out of expressions by defendants on matters of public interest. The sections are attached as Appendix A to these reasons.

[7] Stripped to its essentials, s. 137.1 allows a defendant to move any time after a claim is commenced for an order dismissing that claim. The defendant

must demonstrate that the litigation arises out of the defendant's expression on a matter relating to the public interest. If the defendant meets that onus, the onus shifts to the plaintiff to demonstrate that its lawsuit clears the merits-based hurdle in s. 137.1(4)(a) and the public interest hurdle in s. 137.1(4)(b). The details of the legislation are analyzed below.

## **B. THE SECTION 137.1 APPEALS BEFORE THE COURT**

[8] In April 2016, the appellants, Pointes Protection Association ("Pointes") and individual members of its executive committee (referred to collectively as "Pointes" or "the defendants"), brought a motion under s. 137.1 of the *CJA* to dismiss an action that had been brought against them by 1704604 Ontario Ltd. ("170 Ontario") for breach of contract. In that lawsuit, 170 Ontario alleged that the defendants had breached the terms of a Settlement Agreement (the "Agreement") when one of the defendants gave evidence in a proceeding before the Ontario Municipal Board ("OMB"). 170 Ontario claimed that the terms of the Agreement prohibited the defendants from advancing, through the evidence of one of the defendants, the opinions offered before the OMB.

[9] The motion judge dismissed the defendants' motion and ordered that the action proceed. The defendants appealed to this court pursuant to s. 6(1)(d) of the *CJA*. That section provides a right of appeal from "an order made under s. 137.1".

[10] The appeal was argued in December 2016. This court had not previously considered s. 137.1 of the *CJA*. During oral argument, counsel referred to decisions made on s. 137.1 motions brought in other proceedings. Some of those decisions were under appeal to this court.

[11] After oral argument, the panel reserved judgment. Upon further consideration, the panel decided that, in fairness to all concerned, the outstanding appeals involving the proper interpretation of s. 137.1 should be heard together before the same panel. Unfortunately, that meant that this appeal had to be reargued before a different panel.

[12] Six appeals were heard together.<sup>1</sup> The court reserved judgment. All of the appeals require an interpretation of various components of s. 137.1. There are also discrete issues raised in each appeal.

[13] In these reasons, I will set out my understanding of the various provisions of s. 137.1. I will also address the specific arguments raised in this appeal. When I consider the other appeals, I will not repeat my s. 137.1 analysis. I will, however, address the specific issues raised in those appeals.

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<sup>1</sup> In addition to this appeal, those appeals are *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686; *Platnick v. Bent*, 2018 ONCA 687; *Veneruzzo v. Storey*, 2018 ONCA 688; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689; *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690.

### **C. THE POINTES LITIGATION**

[14] 170 Ontario wanted to develop a 91-lot subdivision in the west end of Sault Ste. Marie. It needed the approval of the Sault Ste. Marie Region Conservation Authority (“SSMRCA”) and the Sault Ste. Marie City Council (“City Council”).

[15] Pointes is a not-for-profit corporation incorporated in 2008 specifically to provide a coordinated response on behalf of some area residents to 170 Ontario’s development proposal. Pointes opposed the proposed development on environmental grounds.

[16] 170 Ontario first went to the SSMRCA. Its initial application failed, but a second succeeded and SSMRCA passed the necessary resolutions.

[17] Pointes brought an application for judicial review of the SSMRCA’s decision. Pointes sought a declaration that the SSMRCA resolutions were “illegal” and beyond the SSMRCA’s jurisdiction.

[18] While the judicial review application was pending in the Divisional Court, 170 Ontario sought the approval of the City Council. The proposed development required an amendment to the City’s official plan. In July 2013, the City Council turned down 170 Ontario’s application. 170 Ontario appealed to the OMB. Pointes was granted standing in the proceeding before the OMB.

[19] In September 2013, while Pointes’s application for judicial review and 170 Ontario’s appeal to the OMB were both pending, the parties settled the judicial

review proceeding. The signatories to the Agreement included 170 Ontario, Pointes, and the individual members of Pointes's executive committee. Each of the individual members acknowledged that he or she was bound by the terms of the Agreement.

[20] Under the terms of the Agreement, Pointes's judicial review application was to be dismissed on consent without costs. 170 Ontario agreed that it would not seek the costs of an earlier successful motion it had brought in the Divisional Court for security for costs on the judicial review application. In December 2013, the judicial review application was dismissed on consent in accordance with the terms of the Agreement.

[21] In addition to bringing the judicial review proceedings to an end, the terms of the Agreement also put limitations on the future conduct of Pointes and the individual members of the executive who signed the Agreement. In para. 4 of the Agreement, the defendants agreed that they would take no further court proceedings seeking the same or similar relief that had been sought in their judicial review application. In para. 6, the key provision in 170 Ontario's subsequent breach of contract action, the defendants promised that in any proceeding before the OMB, or in any other subsequent legal proceeding, they would not advance the position that the SSMRCA resolutions were illegal, invalid, or contrary to the relevant environmental legislation. The defendants also undertook to not advance any claim that the SSMRCA had exceeded its

jurisdiction by acting without reasonable evidence to support its decision, or by considering extraneous factors in passing the resolutions allowing the development to proceed.

[22] 170 Ontario proceeded with its appeal to the OMB from the City Council's refusal to amend the official plan. In the course of the OMB hearing, Pointes called Peter Gagnon, its president and a signator of the Agreement. Over the objection of counsel for 170 Ontario, Mr. Gagnon testified that, in his opinion, the proposed development would result in significant loss of coastal wetlands, thereby causing substantial environmental damage. Mr. Gagnon had given similar evidence before the SSMRCA.

[23] In February 2015, the OMB dismissed 170 Ontario's appeal. In doing so, Member Taylor held that the proposed development did not "have appropriate regard for the effective development on matters of provincial interest", and specifically that the proposed development was "not in the public interest as it relates to the loss of coastal wetland". Member Taylor preferred Mr. Gagnon's opinions to those of 170 Ontario's expert. The development has not proceeded.<sup>2</sup>

[24] About six months after the OMB dismissed 170 Ontario's appeal, 170 Ontario sued the defendants for breach of contract. In its Statement of Claim,

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<sup>2</sup> The Divisional Court refused leave to appeal from the OMB decision: *Avery v. Pointes Protection Association*, 2016 ONSC 6463, 60 M.P.L.R. (5th) 70. The leave application was filed in March 2015, but decided in November 2016, after this action was commenced and the s. 137.1 ruling made.

170 Ontario asserted that the defendants had breached the terms of the Agreement when Mr. Gagnon gave evidence at the OMB concerning the proposed development's negative impact on the wetlands and the associated environmental consequences. 170 Ontario claimed that those very matters had been considered by the SSMRCA. According to the Statement of Claim, it was "implicit in the [Agreement] ... that the wetlands issue was settled".

[25] The defendants did not file a defence, but responded with a motion under s. 137.1 for an order dismissing 170 Ontario's claim. The defendants alleged that Mr. Gagnon's testimony, which provided the factual basis for the alleged breach of contract, related to the environmental impact of the proposed development, a matter of public interest. The defendants further argued that 170 Ontario could not meet its onus under either branch of s. 137.1(4), and thus that the action should be dismissed.

[26] The motion judge accepted that the lawsuit related to expression on a matter of public interest. The burden therefore fell on 170 Ontario to demonstrate that the action should be allowed to proceed. The motion judge concluded that 170 Ontario had discharged that burden. He dismissed the defendants' s. 137.1 motion and directed that the action should proceed.

## D. THE LEGISLATION

### (i) The Legislative History of Section 137.1

[27] The language of a statute must take centre stage in the statutory interpretation process. However, legislative purpose and intent provide important context in discerning the meaning of the legislation. Legislative history, including Hansard evidence to a limited extent, can provide insight into legislative purpose and intent: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 31 and 35; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 51. Unlike many statutory provisions, s. 137.1 has a clear legislative history. I will briefly review that history before turning to the language of s. 137.1.

[28] The pertinent history of Ontario's Anti-SLAPP legislation begins with the 2010 Report of the Anti-SLAPP Advisory Panel to the Attorney General. Many of the Panel's recommendations ultimately found their way into the legislation.

[29] In the Report, the Panel recognized the need to protect and foster a broad spectrum of expression relating to matters of public interest. The Panel proposed a pretrial procedure designed to quickly and inexpensively identify and dismiss those unmeritorious claims that unduly entrenched on an individual's right to freedom of expression on matters of public interest. The Panel observed, at para. 18 of its Report:

The legislation should therefore state that the purpose of the statute is to expand the democratic benefits of

broad participation in public affairs and to reduce the risk that such participation will be unduly hampered by fear of legal action. It would seek to accomplish these purposes by encouraging the responsible exercise of free expression by members of the public on matters of public interest and by discouraging litigation and related legal conduct that interferes unduly with such expression.

[30] The Panel recognized, however, that other interests that could conflict with freedom of expression also deserved vindication through the legal process, stating, at paras. 36-37:

The fact that a legal action may have an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff's action from proceeding. The protection and promotion of such expression should not be a cover for expression that wrongfully harms reputational, business or personal interests of others.

Conversely, the fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed. If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve.

[31] The Panel identified a two-pronged approach for distinguishing between those claims that sought to unduly limit a defendant's freedom of expression and those claims that legitimately sought to vindicate a wrong suffered as a result of a defendant's exercise of his or her freedom of expression. The first prong looked to the merits of the plaintiff's claim. The second sought to measure the public

interest served by allowing the plaintiff's action to proceed against the harm caused by that action to the defendant's freedom of expression: see paras. 37-38.

[32] Ultimately, the two-pronged approach suggested by the Panel was tracked in Ontario's Anti-SLAPP legislation, although the public interest balancing described in the legislation is somewhat different than that proposed by the Panel: see ss. 137.1(4)(a) and (b).

[33] The comments of the Attorney General at the time the proposed legislation received second reading shed further light on its purpose and intent:

[TRANSLATION:] The purpose of the Bill is to protect freedom of expression.... It aims to achieve a significant balance, to the benefit of all parties to a dispute.... *Balance is a constant theme: the need to strike a balance that will end abusive litigation while allowing legitimate actions.*

...

[The Bill] does not create a so-called "licence to slander". Instead, the Bill aims to protect expression on matters of public interest. What the Bill would do is let a court review lawsuits brought against such expression at an early stage. It would then be up to the court to decide whether the expression at issue is likely to cause serious harm. If so, the court may allow the lawsuit to continue in the normal course of litigation.

*I strongly believe that the law must defend reputation, but not at any cost and not in every case. I do not believe that a mere technical case – without actual harm – should be allowed to suppress the kind of democratic expression that is crucial for our democracy: Ontario,*

Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 1st Sess., No. 41A (10 December 2014), at pp. 1971-72 (Hon. Madeleine Meilleur). [Emphasis added.]

[34] At third reading, the Attorney General again emphasized that the purpose of the legislation was not to short-circuit actions involving “truly harmful defamatory attack[s]”. She explained:

This Bill would provide a process for the courts to evaluate whether free expression on a matter of public interest should be subject to a lawsuit by having the courts make an evaluation in several steps. First, the views expressed by a citizen must be on a matter of public interest and not simply a private quarrel or personal allegations. Second, there must be grounds to believe that the case can succeed on its merits. Finally, there must be some likely harm to the party that starts the lawsuit. [TRANSLATION:] *Thus, a citizen cannot be silenced or punished for the simple reason that the person who is the target of the expression is not happy. The court must be satisfied that the harm done is more than the value of freedom of expression in the public interest.* Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 1st Sess., No. 112 (27 October 2015), at p. 6017 (Hon. Madeleine Meilleur). [Emphasis added.]

## (ii) Overview of the Legislation

[35] The section of the Act that introduced ss. 137.1 to 137.5 into the CJA is entitled “*Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)*”. While the title of a legislative provision is far from determinative of its meaning, this title explicitly indicates that the purpose

of the legislation is to prevent the use of litigation to “gag” those who would speak out or who have spoken out on matters of public interest.

[36] Section 137.1(1) begins with a statement of the purposes of the provision:

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[37] The purposes set down in s. 137.1(1) leave no doubt that the legislation was intended to promote free expression on matters of public interest by “discouraging” and “reducing the risk” that litigation would be used to “unduly” limit such expression.

[38] To achieve the purposes set down in s. 137.1(1), s. 137.1(3) creates a new pretrial remedy. A defendant may move at any time after the proceeding is commenced for an order dismissing the proceeding: s. 137.2(1). Section 137.1(3) reads, in part:

[A] judge shall, subject to subsection (4), 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.

[39] The word “expression” is defined broadly in s. 137.1(2) as:

[A]ny communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

[40] The phrase “a matter of public interest” in s. 137.1(3) is not defined in the legislation.

[41] Standing alone, s. 137.1(3) would lead to the dismissal of many meritorious claims. To achieve the appropriate balance described by the Panel and the Attorney General at the time, subsection (3) is subject to subsection (4). That section provides that claims that would otherwise be dismissed under subsection (3) shall not be dismissed if the plaintiff (the responding party on the motion) satisfies the motion judge of two things. First, the plaintiff must clear a merits-based hurdle in s. 137.1(4)(a). That subsection requires that the plaintiff satisfy the motion judge that:

[T]here are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding.

[42] If the plaintiff clears the merits hurdle in s. 137.1(4)(a), it must also clear the public interest hurdle in s. 137.1(4)(b). That provision requires that the plaintiff satisfy the motion judge that:

[T]he harm likely to be or have been suffered by the responding party [plaintiff] as a result of the moving party's [defendant's] expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[43] Various provisions in s. 137.1 contain procedural rules intended to expedite the hearing of the s. 137.1 motion and reduce the costs associated with bringing the motion: see ss. 137.1(6), 137.2, and 137.3. Other provisions stay the action in which the motion is brought pending the outcome of the motion: see ss. 137.1(5) and 137.4. Still other provisions potentially impose significant cost consequences on plaintiffs whose claims are dismissed on a s. 137.1 motion, while at the same time providing that plaintiffs who successfully defeat s. 137.1 motions should not, in the normal course, receive their costs of the motion: see ss. 137.1(7) and 137.1(8).

[44] Section 137.1(9) is a unique provision. It allows the motion judge to award damages to the defendant (moving party) if the defendant is successful in having the proceedings dismissed and satisfies the motion judge that the plaintiff brought the proceedings "in bad faith or for an improper purpose".

[45] The purpose of s. 137.1 is crystal clear. Expression on matters of public interest is to be encouraged. Litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage. Plaintiffs who

commence a claim alleging to have been wronged by a defendant's expression on a matter of public interest must be prepared from the commencement of the lawsuit to address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression.

[46] Significantly, the Act does not, except in a minor way, alter the substantive law as it relates to claims based on expressions on matters of public interest.<sup>3</sup> There are no new defences created for those who speak out on matters of public interest. The law of defamation remains largely unchanged. Similarly, nothing in the Act affects the substantive law applicable to 170 Ontario's breach of contract claim.

[47] Nor does s. 137.1 invoke the abuse of process model favoured in the now repealed British Columbia Anti-SLAPP legislation.<sup>4</sup> Aside from the discretionary damages provision in s. 137.1(9), s. 137.1 does not fix on the plaintiff's purpose or motive in bringing the claim as the determining factor, but instead assesses the potential merits of the claim and the effects of permitting the claim to proceed on competing components of the public interest. The emphasis on the litigation's

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<sup>3</sup> Section 4 of the Act made a modest change to the qualified privilege defence found in s. 25 of the *Libel and Slander Act*, R.S.O. 1990, c. L.10.

<sup>4</sup> See *Protection of Public Participation Act*, S.B.C. 2001, c. 19, s. 5(1), repealed by the *Miscellaneous Statutes Amendment Act, 2001*, S.B.C. 2001, c. 32, s. 28. See also Uniform Law Conference of Canada, *Uniform Prevention of Abuse of Process Act, 2010*. The Attorney General of British Columbia re-introduced Anti-SLAPP Legislation in May of 2018. The proposed legislation appears to be more in line with Ontario's approach: see Bill 32, *Protection of Public Participation Act*, 3d Sess., 41st Parl., British Columbia, 2018 (first reading 15 May 2018).

effect over its purpose is said to provide a more streamlined and accurate assessment of the legitimacy of the claims: Anti-SLAPP Advisory Panel, at paras. 32-35. That said, the purpose of the lawsuit can be an important consideration on a s. 137.1 motion. If the motion judge determines that the plaintiff's actual purpose in bringing in the lawsuit was to "gag" the target of the lawsuit on a matter of public interest, it seems highly unlikely that the lawsuit would clear the public interest hurdle in s. 137.1(4)(b).

[48] Instead of creating new defences, removing or modifying existing causes of action, or providing for a more vigorous abuse of process remedy, s. 137.1 seeks to achieve the purposes stated in s. 137.1(1) by first, distinguishing between claims that arise from an expression that relates to a matter of public interest and other claims, and second, by providing for the early and inexpensive dismissal of claims based on expressions relating to matters of public interest, either because those claims lack sufficient merit to proceed, or because the public interest is, on balance, not served by allowing the action to proceed to an adjudication on the full merits.

[49] While the purpose of s. 137.1 is clear, as is often the case, the devil is in the details of the procedure created by s. 137.1. I turn now to those details.

**(iii) Section 137.1(3): The Threshold Requirement**

[50] For convenience, I repeat the section:

[A] judge shall, subject to subsection (4), 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.

[51] Section 137.1(3) puts the onus on the defendant (moving party) to satisfy the motion judge that: (i) the proceedings arise from an expression made by the defendant, and (ii) the expression relates to a matter of public interest. The word “satisfies” indicates that the defendant must establish both criteria on the balance of probabilities.

[52] Expression, as defined in s. 137.1(2) (see above at para. 39), includes non-verbal communication and private communications.<sup>5</sup> A legal proceeding arises from an expression if that expression grounds the plaintiff’s claim in the litigation. A motion judge reviewing the claim should have little difficulty deciding whether the defendant has established that a claim arises from an expression made by the defendant. Only those claims are subject to s. 137.1.

[53] If the claim arises from an “expression”, the defendant must also show, on the balance of probabilities, that the expression “relates to a matter of public interest”. That phrase is not defined.

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<sup>5</sup> As broad as the definition appears to be, it presumably does not capture expressive conduct that is beyond the pale of s. 2(b) of the *Canadian Charter of Rights and Freedoms*, e.g. hate speech as defined in s. 319(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, acts of violence, or threats of violence against others: see *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at paras. 67-70.

[54] The phrase “public interest” is used in two different ways in s. 137.1. In s. 137.1(4)(b), the phrase is used as a noun to refer to evaluations of the societal interests served by each of the defendant’s expression and the plaintiff’s claim. The phrase “public interest” as used in s. 137.1(3) (and s. 137.1(1)) has a different meaning. It modifies the word “matter”, which refers to the subject matter of the expression giving rise to the claim. The subject matter of the expression must be one that is “of public interest”. The “public interest” as referred to in s. 137.1(3) is determined by asking – what is the expression about, or what does it pertain to?

[55] The phrase “public interest” in s. 137.1(3) is not qualified in any way. It does not require that the expression actually furthers the public interest. A qualitative assessment of the expression’s impact on the issue to which it is directed is not part of the s. 137.1(3) inquiry. Nothing in the section justifies any distinction among expressions based on the quality, merits, or manner of the expression. An expression that relates to a matter of public interest remains so if the language used is intemperate or even harmful to the public interest. For example, a statement relating to a matter of public interest that is demonstrably false is nonetheless an expression relating to a matter of public interest: see Anti-SLAPP Advisory Panel, at paras. 28-31.

[56] In reading s. 137.1(3) expansively to capture all expressions that relate to matters of public interest, one must bear in mind that the defendant who satisfies

its onus under that subsection is not entitled to any relief. A finding in favour of the defendant under s. 137.1(3) only opens the claim to examination under both components of s. 137.1(4). That section provides the mechanism for separating claims arising from expressions on matters relating to public interest that should be allowed to proceed from those that should not. Nonetheless, passing the threshold requirement in s. 137.1(3) is significant in that it moves the burden of persuasion to the plaintiff (responding party) to satisfy the motion judge that the action should proceed.

[57] A broad reading of the phrase “public interest” in s. 137.1(3) is consistent with the purposes described in s. 137.1(1). Any lawsuit that attacks a defendant’s expression on a matter of public interest has the potential to unduly discourage public discourse on matters of public interest. Mitigating that risk is best achieved by allowing wide access to the pretrial remedy provided by s. 137.1. The ultimate availability of the remedy will depend on the proper application of s. 137.1(4).

[58] What is “a matter of public interest”? Like virtually all of the motion judges who have wrestled with this issue, I find considerable assistance in the judgment of the Supreme Court of Canada in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640. In that case, the court, following the path cut by this court in *Cusson v. Quan*, 2007 ONCA 771, 87 O.R. (3d) 241, at paras. 133-44, rev’d on other grounds, 2009 SCC 62, [2009] 3 S.C.R. 712, recognized a defence of responsible communication on matters of public interest. Chief Justice

McLachlin's analysis of the meaning of "matters of public interest", at paras. 99-109, in the context of establishing the borders of the new defence, is properly applied to the interpretation of the phrase, "a matter of public interest" in s. 137.1(3).

[59] There is no exhaustive list of topics that fall under the rubric "public interest". Some topics are inevitably matters of public interest. The conduct of governmental affairs and the operation of the courts come to mind. Other topics may or may not raise matters of public interest, depending on the specific circumstances: *Grant v. Torstar Corp.*, at paras. 103-106.

[60] The context of a particular expression can be crucial in determining whether that expression relates to a matter of public interest. If the expression that gives rise to the lawsuit is part of a broader communication, the subject matter of the impugned expression is determined by reference to the communication as a whole: *Grant v. Torstar Corp.*, at para. 101. There is a distinction between statements or other expressions that make a reference to something of public interest and expressions that relate to a matter of public interest. Section 137.1(3) captures only the latter. A brief incidental reference to a topic capable of relating to a matter of public interest, in the course of a lengthy exchange of communications devoted to a purely private dispute between the parties, may not be regarded as an expression relating to a matter of public interest. However, the same comment in another context may be regarded as

relating to a matter of public interest.<sup>6</sup> The distinction lies in the answer to the question – what is the expression, when placed in its context and taken as a whole, about?

[61] A matter of public interest must be distinguished from a matter about which the public is merely curious or has a prurient interest: *Grant v. Torstar Corp.*, at paras. 102, 105. Public people are entitled to private lives. Expressions that relate to private matters are not converted into matters relating to the public interest merely because those expressions concern individuals in whom the public have an interest or involve topics that may titillate and entertain.

[62] An expression can relate to a matter of public interest without engaging the interest of the entire community, or even a substantial part of the community. It is enough that some segment of the community would have a genuine interest in the subject matter of the expression: *Grant v. Torstar Corp.*, at paras. 102 and 105.

[63] Public interest does not turn on the size of the audience. Especially in today's world, communications on private matters can find very large audiences quickly. On the other hand, statements between two people can relate to matters that have a strong public interest component.

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<sup>6</sup> The importance of context in the s. 137.1(3) analysis is evident in *Rizvee v. Newman*, 2017 ONSC 4024. In that case, the motion judge found that the same comments made by the defendant in two very different contexts led to different conclusions under s. 137.1(3). In one context, the comments did relate to matters of public interest, and in the other the same comments did not.

[64] Finally, since the promotion of the open exchange of information and opinions on matters of public interest is one of the overarching purposes animating s. 137.1, the characterization of the expression as a matter of public interest will usually be made by reference to the circumstances as they existed when the expression was made.

[65] In summary, the concept of “public interest” as it is used in s. 137.1(3) is a broad one that does not take into account the merits or manner of the expression, nor the motive of the author. The determination of whether an expression relates to a matter of public interest must be made objectively, having regard to the context in which the expression was made and the entirety of the relevant communication. An expression may relate to more than one matter. If one of those matters is a “matter of public interest”, the defendant will have met its onus under s. 137.1(3).

[66] When deciding whether an expression relates to a matter of “public interest”, the motion judge will apply the legal principles from *Grant v. Torstar Corp.* to the relevant circumstances of the case as determined by the motion judge. The application of a legal standard to a set of facts raises a question of mixed fact and law. Absent the identification of an extricable error of law or a palpable and overriding factual error, an appellate court will defer to the motion judge’s assessment: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 33-35; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance*

Co., 2016 SCC 37, [2016] 2 S.C.R. 23, per Wagner J., as he then was, at paras. 35-36, and per Cromwell J. (concurring), at paras. 100-101; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paras. 36-39.

**(iv) Section 137.1(4)(a): The Merits-Based Hurdle**

[67] If the defendant (moving party) clears s. 137.1(3), the inquiry moves on to s. 137.1(4)(a). That section reads:

A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceedings.

[68] The section puts the onus on the plaintiff (responding party). The word “satisfies” indicates that the balance of probabilities is the applicable standard of proof. The more difficult question is, what is it that the plaintiff must prove on the balance of probabilities?

[69] Before examining the specific language of ss. 137.1(4)(a)(i) and (ii), I will address one argument made by some counsel in the six appeals. They submit that the absence of the modifier “reasonable” in front of the phrase “grounds to believe” in s. 137.1(4)(a) is significant and signals a lower standard than would be applicable if the section required “reasonable grounds to believe”. I reject this

argument. Although the word “reasonable” does not appear in the text, I think it is implicit. The section requires a judicial assessment of the potential strength of the plaintiff’s claim and the availability of any valid defence to the claim. Judicial decision-making is antithetical to decisions based on unreasonable or speculative grounds. A statute that requires a judge to have “grounds to believe” implicitly requires that those grounds be reasonable.

[70] Broadly speaking, s. 137.1(4)(a) speaks to the potential merits of the lawsuit. Section 137.1(4)(a)(i) refers explicitly to the “merit” of the “proceeding”, which I take to be the merits of the claim the plaintiff must prove to succeed in the litigation. Section 137.1(4)(a)(ii) addresses the absence of any “valid defence”, which I take to mean any affirmative defence found in the statement of defence, if one has been filed, or specifically advanced in the material filed on the s. 137.1 motion by the defendant. I will explain this further below.

[71] The distinction drawn in s. 137.1(4)(a) between the merits of the plaintiff’s claim and the validity of any defence can be artificial in some circumstances. For example, in this case, 170 Ontario alleges a breach of contract and the dispute between the parties revolves around the proper interpretation of their Agreement. It is impossible to separate the merits of 170 Ontario’s claim from the validity of any defence advanced by the defendants.

[72] In defamation cases, however, the distinction drawn in s. 137.1(4)(a) makes sense. In those claims, there is a clear demarcation between the elements of the tort that the plaintiff must prove, and the various affirmative defences that the defence must prove if the plaintiff meets its initial onus: see *Grant v. Torstar Corp.*, at paras. 28-29; Anti-SLAPP Advisory Panel, at para. 69.

[73] Turning to the specific language of ss. 137.1(4)(a)(i) and (ii), the interpretation must begin by recognizing the purpose of s. 137.1. It provides a judicial screening or triage device designed to eliminate certain claims at an early stage of the litigation process. Sections 137.1(4)(a) and (b) identify the criteria to be used in that screening process. Section 137.1 does not provide an alternate means by which the merits of a claim can be tried, and it is not a form of summary judgment intended to allow defendants to obtain a quick and favourable resolution of the merits of allegations involving expressions on matters of public interest. Instead, the provision aims to remove from the litigation stream at an early stage those cases, which under the criteria set out in the section, should not proceed to trial for a determination on the merits.

[74] Judicial screening of claims at a pretrial stage occurs in both criminal and civil litigation. The purpose of the screening process varies, as do the screening criteria. Judges engaged in pretrial screening generally do not make, however, findings of fact in relation to the issues on which the litigation turns, credibility determinations, or any ultimate assessment of the merits of a claim or a defence.

[75] Put in the context of s. 137.1(4)(a), the motion judge must decide whether a trier could reasonably conclude that the plaintiff's claim has "substantial merit", and that the defendant has "no valid defence". If the motion judge decides that both fall within the range of conclusions reasonably available on the motion record, the plaintiff has met the onus under s. 137.1(4)(a). If the plaintiff does not meet that onus, its claim will be dismissed.

[76] The evaluation required by s. 137.1(4)(a) must be done having regard to both the context in which s. 137.1 motions are brought and the procedures controlling those motions. A s. 137.1 motion is intended to be brought at an early stage of the proceeding. The defendant is not even required to serve a statement of defence: s. 137.2(1). The motion must be heard within 60 days: s. 137.2(2). Cross-examination on affidavits or documentary evidence will usually be limited to a total of seven hours for each side: s. 137.2(4). The timing of the motion and the limits on cross-examination are not conducive to either party putting its "best foot forward", as is expected in summary judgment proceedings.

[77] The motion records compiled by the parties on s. 137.1 motions will be more abbreviated than would be expected at a later point in the proceedings. When assessing the merits for the purposes of s. 137.1(4)(a), the motion judge cannot approach the record as if it were a trial record or even a r. 20 summary judgment record: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Those records undoubtedly allow for a more fulsome and thorough scrutiny of the merits

of the claim and the validity of any defence. The merits inquiry under s. 137.1(4)(a) will reflect the limits imposed by the nature of the record.

[78] Motion judges must be careful that s. 137.1 motions do not slide into *de facto* summary judgment motions. If the motion record raises serious questions about the credibility of affiants and the inferences to be drawn from competing primary facts, the motion judge must avoid taking a “deep dive” into the ultimate merits of the claim under the guise of the much more limited merits analysis required by s. 137.1(4)(a). If it becomes apparent to the motion judge that a proper merits analysis would go beyond what could properly be undertaken within the confines of a s. 137.1 motion, I think the motion judge should advise the parties that a motion for summary judgment would provide a more suitable vehicle for an expeditious and early resolution of the claim.<sup>7</sup>

[79] The specific inquiries required of the motion judge under s. 137.1(4)(a) must be responsive to the language of the section. The motion judge must first satisfy himself or herself that there are reasonable grounds to believe that the claim has “substantial merit”. Again, I emphasize that it is not for the motion judge to decide whether he or she thinks that the claim has “substantial merit”. It

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<sup>7</sup> In its 2010 Report, the Advisory Panel did not make reference to the enhanced summary judgment rule as offering an effective tool to deal with “abusive suits relating to expressions on matters of public interest”. Perhaps, the Panel did not foresee the enhanced role played by r. 20 motions after the Supreme Court of Canada’s decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

is for the motion judge to determine whether it could reasonably be said, on an examination of the motion record, that the claim has substantial merit.

[80] The use of the word “substantial” to modify “merit” in s. 137.1(4)(a)(i) signals that the plaintiff must do more than simply show that its claim has some chance of success. Attempts to give meaning to the phrase “substantial merit” by referencing synonyms to the word “substantial” adds little to the interpretative exercise. A claim has “substantial merit” for the purposes of s. 137.1 if, upon examination, the claim is shown to be legally tenable and supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success.

[81] The word “substantial”, however, like the rest of the provision, takes its meaning from the nature of the s. 137.1 procedure and the procedural limitations imposed by s. 137.1. It is one thing to describe a claim as having “substantial merit” in the context of a motion brought in the early days of the litigation and on less than a full record. It is quite another to describe a fully litigated claim at the end of a trial, or even on a motion for summary judgment, as having “substantial merit”. Plaintiffs are not expected to present a fully developed case in response to a s. 137.1 motion. A determination of whether the claim shows “substantial merit” must take into account what can reasonably be expected of the plaintiff at that point in the litigation.

[82] While I have stressed that s. 137.1 motions are not a form of summary judgment, nor the proper forum in which to make a detailed assessment of the ultimate merits of the case, I do not mean to suggest that a motion judge must simply take at face value the allegations put forward by the parties on the motion. An evaluation of potential merit based on a “grounds to believe” standard contemplates a limited weighing of the evidence, and, in some cases, credibility evaluations. Bald allegations, unsubstantiated damage claims, or unparticularized defences are not the stuff from which “grounds to believe” are formulated. Similarly, if on a review of the entirety of motion material, the motion judge concludes that no reasonable trier could find a certain allegation or piece of evidence credible, the motion judge will discount that allegation or evidence in making his or her evaluation under s. 137.1(4)(a). Once again, the question is not whether the motion judge views the evidence as credible, but rather whether, on the entirety of the material, there are reasonable grounds to believe that a reasonable trier could accept the evidence.

[83] I would add two further observations with respect to the “no valid defence” requirement in s. 137.1(4)(a)(ii). That provision requires the plaintiff to satisfy the motion judge that there are reasonable grounds to believe that the defendant has “no valid defence” to the plaintiff’s claim. The section would be unworkable if the plaintiff were required to address all potential defences and demonstrate that none had any validity. I think the section contemplates an evidentiary burden on

the defendant to advance any proposed “valid defence” in the pleadings, and/or in the material filed on the s. 137.1 motion. That material should be sufficiently detailed to allow the motion judge to clearly identify the legal and factual components of the defences advanced. Once the defendant has put a defence in play, the persuasive burden moves to the plaintiff to satisfy the motion judge that there are reasonable grounds to believe that none of the defences put in play are valid.

[84] My second observation relates to the word “valid”. I would interpret “valid” as meaning successful. The onus rests on the plaintiff to convince the motion judge that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the plaintiff has met its onus.

**(v) Section 137.1(4)(b): The Public Interest Hurdle**

[85] For ease of reference, I repeat the section:

A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

...

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest

in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[86] In some ways, s. 137.1(4)(b) is the heart of Ontario's Anti-SLAPP legislation. The section declares that some claims that target expression on matters of public interest are properly terminated on a s. 137.1 motion, even though they could succeed on their merits at trial. The "public interest" hurdle reflects the legislature's determination that the success of some claims that target expression on matters of public interest comes at too great a cost to the public interest in promoting and protecting freedom of expression. As explained by the Anti-SLAPP Advisory Panel, at para. 37 of its Report:

If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve. The value of public participation would make any remedy granted to the plaintiff an unwarranted incursion into the domain of protected expression. In such circumstances, the action may also be properly regarded as seeking an inappropriate expenditure of the public resources of the court system. Where these considerations clearly apply, the court should have the power to dismiss the action on this basis.

[87] Under s. 137.1(4)(b), the plaintiff (responding party) has the persuasive burden. The plaintiff must satisfy the motion judge that the harm caused to it by the defendant's expression is "sufficiently serious" that the public interest

engaged in allowing the plaintiff to proceed with the claim outweighs the public interest in protecting the defendant's freedom of expression.

[88] The harm suffered or likely to be suffered by the plaintiff as a consequence of the defendant's expression will be measured primarily by the monetary damages suffered or likely to be suffered by the plaintiff as a consequence of the impugned expression. However, harm to the plaintiff can refer to non-monetary harm as well. The preservation of one's good reputation or one's personal privacy have inherent value beyond the monetary value of a claim. Both are tied to an individual's liberty and security interests and can, in the appropriate circumstances, be taken into account in assessing the harm caused to the plaintiff by the defendant's expression: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 117-21; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 79-80.

[89] In this case, 170 Ontario rests its case for the harm done to it by the defendants' expression, in part, on the assertion that the defendants have interfered with 170 Ontario's reasonable expectation that its Agreement with the defendants had brought their litigation to an end. 170 Ontario argues that the promotion of finality in litigation is an important societal and individual goal and is properly reflected as part of the "public interest". I accept that interference with a reasonable expectation of finality in litigation can amount to a harm suffered by

the plaintiff, for the purposes of the balancing exercise required under s. 137.1(4)(b).

[90] On the s. 137.1 motion, the plaintiff must provide a basis upon which the motion judge can make some assessment of the harm done or likely to be done to it by the impugned expression. This will almost inevitably include material providing some quantification of the monetary damages. The plaintiff is not, however, expected to present a fully-developed damages brief. Assuming the plaintiff has cleared the merits hurdle in s. 137.1(4)(a), a common sense reading of the claim, supported by sufficient evidence to draw a causal connection between the challenged expression and damages that are more than nominal will often suffice.

[91] The plaintiff cannot, however, rely on bald assertions in the statement of claim relating to damages, or on unsourced, unexplained damage claims contained in the pleadings or affidavits filed on the s. 137.1 motion. The motion judge must be able to make an informed assessment, at least at a general or “ballpark” level, about the nature and quantum of the damages suffered or likely to be suffered by the plaintiff: see *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, at paras. 85-95, aff’d 2018 ONCA 690; *Thompson v. Cohodes*, 2017 ONSC 2590, at paras. 33-38.

[92] Equally important to the quantification of damages, the plaintiff must provide material that can establish the causal link between the defendant's expression and the damages claimed. Evidence of this connection will be particularly important when the motion material reveals sources apart from the defendant's expression that could well have caused the plaintiff's damages.

[93] Turning to the other side of the balancing exercise in s. 137.1(4)(b), the public interest in protecting the defendant's freedom of expression, the motion judge must assess the public interest in protecting the actual expression that is the subject matter of the lawsuit. On a general level, the importance of freedom of expression, especially on matters of public interest, both to the individual and to the community, is well understood: see *Grant v. Torstar Corp.*, at paras. 32-57. However, if the defendant asserts a public interest in protecting its expression beyond the generally applicable public interest, the evidentiary burden lies on the defendant to establish the specific facts said to give added importance in the specific circumstances to the exercise of freedom of expression.

[94] Unlike the "public interest" inquiry in s. 137.1(3), in which the quality of the expression or the motivation of the speaker are irrelevant (see above at para. 65), both play an important role in measuring the extent to which there is a public interest in protecting that expression. Not all expression on matters of public interest serves the values underlying freedom of expression in the same way or to the same degree. For example, a statement that contains deliberate

falsehoods, gratuitous personal attacks, or vulgar and offensive language may still be an expression that relates to a matter of public interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, vitriol, and obscenities: *Able Translations Ltd.*, at paras. 82-84 and 96-103.

[95] In addition to the quality of the expression and the defendant's motivation for making the expression, the consequences of the plaintiff's claim will figure into the weight to be given to the public interest in protecting that expression. Evidence of actual "libel chill" generated by the plaintiff's claim can be an important factor in the public interest evaluation required under s. 137.1(4)(b): *Able Translations Ltd.*, at para. 102.

[96] The public interest evaluations required under s. 137.1(4)(b) cannot be reduced to an arithmetic-like calculation. It would be misleading to pretend they can be. The assessments are qualitative and, to some extent, subjective. Because the balancing of the competing public interests will often be determinative of the outcome of the s. 137.1 motion, and because the analysis contains an element of subjectivity, it is crucial that motion judges provide full reasons for their s. 137.1(4)(b) evaluations.

[97] If a motion judge provides full reasons, an appeal court must defer to the motion judge's balancing of the competing interests under s. 137.1(4)(b), absent

an identifiable legal error, or a palpable and overriding factual error. Deference is important, as there is no reason to think that a simple recalibration of the competing interests by an appeal court will provide a more accurate assessment.

[98] In making the determination required under s. 137.1(4)(b), the motion judge will bear in mind that the plaintiff has the onus under the legislation. In applying that burden, however, the motion judge must appreciate the very significant consequences to the plaintiff if the motion is allowed under s. 137.1(4)(b). The courtroom door will be closed on the plaintiff even though the claim may have ultimately succeeded on the merits. The Anti-SLAPP Advisory Panel envisioned this result only if the plaintiff had a “technically valid cause of action” and had suffered “insignificant harm”. The language of s. 137.1(4)(b) does not contain those limitations. However, I think the Panel’s words do describe the kind of case that should be removed from the litigation process through s. 137.1(4)(b).

[99] I will conclude my analysis of ss. 137.1(4)(a) and (b) with two observations that will hopefully be of some practical use. First, the plaintiff’s claim will be dismissed if the plaintiff cannot meet its persuasive burden under either ss. 137.1(4)(a) or (b). A motion judge is under no obligation to address both. In some cases, and I think this may have particular application to defamation claims, the public interest analysis under s. 137.1(4)(b) may well be more straightforward than the merits-based analysis required under s. 137.1(4)(a). For example, if the

defendant has demonstrated that the plaintiff has not suffered any significant harm and has brought the lawsuit to silence or punish the defendant, the public interest analysis should be straightforward and lead to a dismissal of the action without the need to engage in the more difficult and time-consuming merits-based analysis.

[100] Second, cases like the present, in which the claim turns on the interpretation of the language in a contract, do not fit comfortably within the s. 137.1 analysis. The balancing of the public interest required under s. 137.1(4)(b) depends largely on how one assesses the merits of the allegation that the defendant breached the contract. There would be little public interest in protecting a defendant's right to make certain statements if the defendant had made a fully informed decision to bargain away his or her right to make those statements in exchange for something of value to the defendant. Similarly, an assessment of the harm suffered by the plaintiff by dismissing the claim would depend entirely on whether the plaintiff's interpretation of the contract was correct.

[101] Cases that turn on the interpretation of a contract are routinely addressed expeditiously and efficiently by way of summary judgment motions under r. 20. With the benefit of hindsight, I would suggest that this is a case that could have been more efficiently and expeditiously resolved by way of a timely summary judgment motion.

## **E. THE MERITS OF THIS APPEAL**

[102] 170 Ontario submits that s. 137.1 is intended to apply only to true SLAPPs, that is, lawsuits with at best technical merit brought in order to silence the defendant. 170 Ontario submits that this lawsuit was brought to recover damages for Pointes's breach of contract. 170 Ontario notes that Pointes has fully and successfully participated in the various proceedings related to 170 Ontario's proposed land development. Pointes's participation preceded this lawsuit. 170 Ontario asks: how could bringing this lawsuit, after Pointes had successfully opposed the development, silence or deter Pointes in its opposition to the development?

[103] It may well be that this litigation does not have the clear markings of a classic SLAPP. However, nothing in the language of s. 137.1 limits the provision to claims, normally defamation actions, that fit squarely within the traditional notion of a SLAPP. 170 Ontario's claim against Pointes clearly targets expression as defined in s. 137.1(2).

[104] The motion judge concluded that Mr. Gagnon's testimony, directed at the potential environmental impact of the proposed development, constituted expression relating to a matter of public interest as required under s. 137.1(3): see paras. 29-40 of his reasons. He went on, however, to hold that 170 Ontario

had cleared both the merits-based hurdle and the public interest hurdle in ss. 137.1(4)(a) and (b) and, consequently, that the matter should proceed.

[105] On appeal, 170 Ontario does not challenge the motion judge's finding that Mr. Gagnon's testimony constituted expression relating to public interest under s. 137.1(3). However, Pointes contends that the motion judge made significant errors in his interpretation of both ss. 137.1(4)(a) and (b). It argues that, on a proper interpretation of those provisions, 170 Ontario failed to meet its onus under both subsections.

**(i) The Motion Judge's Interpretation of Section 137.1(4)(a)**

[106] The motion judge's interpretation of the provisions found in s. 137.1 raises questions of law that are reviewable on a correctness standard: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at para. 78.

[107] In holding that 170 Ontario had satisfied him that its claim had "substantial merit", the motion judge said, at para. 47:

The claim of the plaintiff involves the sanctity of agreements made between parties. This is not a claim that is frivolous or fleeting. It is a claim of importance involving a serious matter to be considered by the court. In other words, it is a claim of substance. In my view, the claim advanced by the plaintiff has substantial merit and is a claim that should be considered by the court.

[108] Later, at para. 50, the motion judge added a further observation:

In my view, the threshold for the responding party [170 Ontario] to meet in Section 137.1(4)(a)(i) and (ii) of the *Courts of Justice Act* must be a low one given the significant remedies in Section 137.1 and the protection for litigants to bring legitimate claims before the court.

[109] The motion judge did not examine the record to determine if there were reasonable grounds to believe that 170 Ontario's claim had substantial merit. In fact, he never considered whether, in all of the circumstances, and having regard to the wording of the Agreement, the Agreement could plausibly be read as precluding Mr. Gagnon's testimony at the OMB. Without some consideration of the relevant principles of contractual interpretation as applied in the circumstances, the motion judge could not properly determine whether there were reasonable grounds to believe that 170 Ontario's claim had substantial merit: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 50.

[110] The motion judge's failure to examine the potential merits of 170 Ontario's claim is explained by his interpretation of the phrase "substantial merit" in s. 137.1(4)(a)(i) as referring to the seriousness of the subject matter of the claim and not the potential merits of the claim. With respect, the subject matter of a claim does not determine whether there are grounds to believe that the claim has substantial merit. Claims involving very serious matters can be self-evidently devoid of any merit.

[111] To the extent that the motion judge's reasons refer to the merits of 170 Ontario's claim, as opposed to the subject matter of the claim, the motion judge required the claim to pass a "frivolous or fleeting" standard. Neither word appears in s. 137.1(4)(a)(i). For the reasons set out above at para. 80, the "substantial merit" requirement sets a higher bar.

[112] The motion judge should have considered whether, on a proper application of the principles of contractual interpretation, a trier could reasonably conclude that 170 Ontario's interpretation of the Agreement, as applying to Mr. Gagnon's testimony before the OMB, had substantial merit in the sense that it had a real chance of being accepted. If there were grounds to believe that 170 Ontario's interpretation had "substantial merit", it followed that there were also reasonable grounds to believe that Pointes's conflicting interpretation of the contract did not raise a valid defence.

[113] In para. 46 of the Statement of Claim, 170 Ontario asserts:

Implicit in the [Agreement] was the commitment by the Defendants that the wetland issue was settled....

A similar assertion is found in paras. 49 and 53 of the Statement of Claim.

[114] 170 Ontario's reliance on an "implicit" term in the Agreement to preclude the defendants from raising the wetlands issue in testimony before the OMB is not, in my view, an interpretation of the Agreement that flows reasonably from the language or the factual context of the Agreement. When the parties entered into

the Agreement, Pointes had standing at the OMB and 170 Ontario knew that the defendants would oppose the development at the OMB. Nothing in the Agreement touched on the defendants' participation in the OMB proceedings. Specifically, nothing in the Agreement suggested that Pointes could not oppose 170 Ontario's development at the OMB. 170 Ontario must be taken to have known full well the range of factual issues that could be raised on its appeal before the OMB. Those issues included some that had been considered, albeit in a different regulatory context, by the SSMRCA.

[115] The very precise language used in the Agreement was the product of considerable negotiation between counsel for the parties. In light of that language, and particularly the language of para. 6 (see above at para. 21), the surrounding factual context, and the ongoing adversarial relationship between 170 Ontario and Pointes, I do not think the Agreement could reasonably be read as imposing any obligations on the defendants beyond those expressly set out in the language used. The words of the Agreement ultimately chosen by the parties speak exclusively to challenges by Pointes to the legitimacy of the SSMRCA resolutions. The words do not focus on the underlying factual issues that arose in the SSMRCA proceedings and would arise again in the proceedings before the OMB.

[116] I would hold that there is no reasonable prospect that 170 Ontario could convince a reasonable trier that there was substantial merit to its claim that the Agreement foreclosed Mr. Gagnon’s testimony before the OMB.

[117] My conclusion that 170 Ontario did not meet its onus under s. 137.1(4)(a)(i) is sufficient to determine the appeal against 170 Ontario. Pointes was entitled to an order dismissing the action. For completeness, I will briefly address the second component of the merits hurdle.

[118] The motion judge’s interpretation of s. 137.1(4)(a)(ii), which refers to the existence of a “valid defence”, is set out in para. 50 of his reasons:

The defendant has not pleaded its defence in this proceeding. Without a pleading there is no way for the court to be satisfied that it has a “valid defence” in the proceeding and I am not satisfied that the defendant has a “valid defence” based on the material before me on the motion.

[119] The motion judge wrongly put the onus on Pointes to satisfy him that it had a “valid defence”. Section 137.1(4)(a)(ii) put the persuasive onus on 170 Ontario to satisfy him that there were grounds to believe that Pointes had “no valid defence” (see above at para. 84). Nor is the absence of a statement of defence determinative: see s. 137.2(1). In any event, the conclusion that 170 Ontario could not show that there were grounds to reasonably believe that its interpretation of the Agreement had substantial merit leads inevitably to the conclusion that 170 Ontario also could not show that there were reasonable

grounds to believe that the defendants' interpretation of the contract had no validity.

**(ii) The Motion Judge's Interpretation of Section 137.1(4)(b)**

[120] In weighing the harm suffered by 170 Ontario as a result of the defendants' expression against the public interest in protecting the defendants' expression, the motion judge focused almost exclusively on the harm caused to 170 Ontario by the loss of its reasonable expectation that its litigation with the defendants over the proposed development was finished. While finality in litigation is an important public value, I repeat that 170 Ontario's reasonable expectation of finality is dependent entirely on the correctness of its interpretation of the Agreement. As explained above, I do not think that the Agreement could reasonably be read as foreclosing Mr. Gagnon's testimony before the OMB.

[121] Even accepting that interference with 170 Ontario's reasonable expectation of finality in the litigation could be viewed as causing some harm to 170 Ontario for the purposes of s. 137.1(4)(b), there is no evidence of any other harm. In particular, there is no evidence of any damages suffered or likely to be suffered by 170 Ontario as a result of the alleged breach of the Agreement.

[122] The motion material provides little, if any, insight into either the nature of 170 Ontario's damage claim, or the quantum of that claim. Having reviewed the material several times, I remain uncertain as to 170 Ontario's damages theory. I do not understand 170 Ontario to argue that it is entitled to damages from the defendants because the failure to obtain the OMB's approval for the development can be laid at the defendants' feet.

[123] The motion judge could not make any informed assessment of the monetary damages, if any, suffered or likely to be suffered by 170 Ontario as a result of the defendants' alleged breach of contract. Without that assessment, 170 Ontario's claim of harm caused to it by Mr. Gagnon's testimony was weak indeed.

## **F. CONCLUSION**

[124] I would allow the appeal, set aside the order below, and make an order dismissing the action.

[125] Unless the parties can agree on costs, they should exchange and file their submissions within 30 days of the release of these reasons. The submissions should not exceed ten pages. The submissions should address:

- the scale and quantum of costs on the appeal;
- the scale of costs in the Superior Court;

- whether this court or the Superior Court should fix the quantum of costs in the Superior Court;
- the quantum of costs in the Superior Court.

Released: "DD" "AUG 30 2018"

"Doherty J.A."  
"I agree D.M. Brown J.A."  
"I agree Grant Huscroft J.A."

## APPENDIX A

### Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)

#### Dismissal of proceeding that limits debate

##### Purposes

- 137.1 (1)** The purposes of this section and sections 137.2 to 137.5 are,
- (a) to encourage individuals to express themselves on matters of public interest;
  - (b) to promote broad participation in debates on matters of public interest;
  - (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
  - (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

##### Definition, “expression”

- (2)** In this section,
- “expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

##### Order to dismiss

- (3)** On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), 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.

##### No dismissal

- (4)** A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
- (a) there are grounds to believe that,
    - (i) the proceeding has substantial merit, and
    - (ii) the moving party has no valid defence in the proceeding; and
  - (b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

**No further steps in proceeding**

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

**No amendment to pleadings**

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding.

**Costs on dismissal**

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

**Costs if motion to dismiss denied**

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

**Damages**

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

**Procedural matters**

**Commencement**

**137.2 (1)** A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced.

**Motion to be heard within 60 days**

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court.

**Hearing date to be obtained in advance**

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served.

**Limit on cross-examinations**

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants.

**Same, extension of time**

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice.

**Appeal to be heard as soon as practicable**

**137.3** An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal.

**Stay of related tribunal proceeding**

**137.4 (1)** If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal.

**Notice**

(2) The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),

- (a) notice of the stay; and
- (b) a copy of the notice of motion that was filed with the tribunal.

**Duration**

(3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4).

**Stay may be lifted**

(4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

- (a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or

(b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay.

**Same**

**(5)** A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of the Court of Appeal.

**Statutory Powers Procedure Act**

**(6)** This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*.

**Application**

**137.5** Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading.