SUPREME COURT OF CANADA

CITATION: 1704604 Ontario Ltd. *v.* Pointes Protection Association, 2020 SCC 22

APPEAL HEARD: November 12, 2019
JUDGMENT RENDERED: September 10, 2020
DOCKET: 38376

BETWEEN:

1704604 Ontario Limited
Appellant

and

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

- and -

British Columbia Civil Liberties Association, Greenpeace Canada, Canadian Constitution Foundation, Ecojustice Canada Society, Centre for Free Expression, Canadian Association of Journalists, Communications Workers of America / Canada, West Coast Legal Education and Action Fund, Atira Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, Women Against Violence Against Women Rape Crisis Center, Canadian Civil Liberties Association, 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

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 129)
Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ. concurring)

1704604 Ontario Limited *Appellant*

v.

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

and

British Columbia Civil Liberties Association,
Greenpeace Canada,
Canadian Constitution Foundation,
Ecojustice Canada Society,
Centre for Free Expression,
Canadian Association of Journalists,
Communications Workers of America / Canada,
West Coast Legal Education and Action Fund,
Atira Women's Resource Society,
B.W.S.S. Battered Women's Support Services Association,
Women Against Violence Against Women Rape Crisis Center,
Canadian Civil Liberties Association,
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*

Indexed as: 1704604 Ontario Ltd. *v.* Pointes Protection Association

2020 SCC 22

File No.: 38376.

2019: November 12; 2020: September 10.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Dismissal of proceeding that limits debate — Freedom of expression — Matters of public interest — Proper interpretation and application of Ontario's framework for dismissal of strategic lawsuits against public participation (SLAPPs) — Courts of Justice Act, R.S.O. 1990, c. C. 43, s. 137.1.

In 2015, Ontario amended the *Courts of Justice Act* ("*CJA*") by introducing ss. 137.1 to 137.5, occasionally referred to as anti-SLAPP legislation. These provisions were aimed at mitigating the harmful effects of strategic lawsuits against public participation ("SLAPPs"), a phenomenon used to describe lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression and deter that party, or other potential interested parties, from participating in public affairs.

Pointes Protection Association, a not-for-profit corporation, and six of its members (collectively, "Pointes Protection") relied on s. 137.1 of the *CJA* to bring a pre-trial motion to have a $6 million action for breach of contract initiated against them by a land developer dismissed. The action was brought in the context of Pointes Protection's opposition to a proposed subdivision development by the developer. The developer claimed that the testimony of the association's president, at a hearing of the Ontario Municipal Board, to the effect that the developer's proposed development would result in ecological and environmental damage to the region, breached an agreement between the developer and Pointes Protection that imposed limitations on Pointes Protection's conduct in respect of the approvals sought by the developer from the relevant authorities for its development. Pointes Protection's s. 137.1 motion was dismissed by the motion judge, who allowed the developer's action against Pointes Protection to proceed. The Court of Appeal allowed Pointes Protection's appeal, granted its s. 137.1 motion, and dismissed the developer's lawsuit.

Held: The appeal should be dismissed.

Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society. Section 137.1 of the *CJA* was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that

is public participation in democracy. Applying this framework in this case, Pointes Protection's s. 137.1 motion should be granted and the developer's underlying breach of contract action dismissed.

Section 137.1(3) places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the motion judge that the proceeding initiated against them arises from an expression relating to a matter of public interest. This burden is a threshold one, meaning it is necessary for the moving party to meet in order to even proceed to s. 137.1(4) for the ultimate determination of whether the underlying proceeding should be dismissed. While the term "expression" is expressly defined in the statute, other terms are in need of elaboration. First, in accordance with the jurisprudence interpreting the word, "satisfies" requires the moving party to meet its burden on a balance of probabilities. Second, a broad and liberal interpretation of "arises from" is warranted, which does not limit proceedings arising from an expression to those directly concerned with expression, such as defamation suits. Third, the text of s. 137.1(2) makes it abundantly clear that "expression" is defined expansively. Fourth, and finally, the term "relates to a matter of public interest" should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1. Importantly, it will not be legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest — there is no qualitative assessment of the expression at this stage. The only question is whether the expression pertains to any matter of public interest, defined broadly. The principles from *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R.

640, apply in the present context. Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about.

To the extent that the threshold burden under s. 137.1(3) is met by the moving party (i.e. the defendant in the underlying proceeding), then the burden shifts to the responding party — (i.e. the plaintiff) — to avoid having their proceeding dismissed. Under s. 137.1(4), the plaintiff must satisfy the motion judge that (a) there are grounds to believe that their underlying proceeding has substantial merit and the defendant has no valid defence, and that (b) the harm likely to be or have been suffered and the corresponding public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If either (a) or (b) is not met, then this will be fatal to the plaintiff discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both are met, then the proceeding will be allowed to continue.

Unlike with s. 137.1(3), s. 137.1(4)(a) — the merits-based hurdle — is statutorily circumscribed by an express standard: "grounds to believe". These words plainly refer to the existence of a basis or source (i.e. "grounds") for reaching a belief or conclusion that the legislated criteria have been met. Accordingly, "grounds to believe" requires that there be a basis in the record and law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence. This assessment must be made from the motion judge's perspective.

In consideration of the statutory text, the statutory context, and legislative intent, for an underlying proceeding to have "substantial merit" under s. 137.1(4)(a)(i), it must be legally tenable and supported by evidence that is reasonably capable of belief such that it can be said to have a real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. This standard is more demanding than the one applicable on a motion to strike, which requires that the claim have some chance of success or a reasonable prospect of success. It is, however, less stringent than the likely to succeed standard, the strong *prima facie* case threshold, or the test for summary judgment. It is critical to recall that a s. 137.1 motion is not a determinative adjudication of the merits of the proceeding and the motion judge should be acutely aware of the stage of the litigation process at which a s. 137.1 motion is brought. Motion judges should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. It must be borne in mind that even if a lawsuit clears the merits-based hurdle at s. 137.1(4)(a), it remains vulnerable to summary dismissal as a result of the public interest weighing exercise under s. 137.1(4)(b), which provides courts with a robust backstop to protect freedom of expression.

Under s. 137.1(4)(a)(ii), the plaintiff must also satisfy the motion judge that there are "grounds to believe" that the defendant has "no valid defence" in the

underlying proceeding. The word "no" is absolute, and the corollary is that if there is any defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. Mirroring the "substantial merit" prong, the "no valid defence" prong requires the plaintiff to show that there are grounds to believe that the defences put in play by the defendant have no real prospect of success.

The final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis. Section 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: it is intended to optimize the balance between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest by open-endedly engaging with the overarching public interest implications that this statute, and anti-SLAPP legislation generally, seek to address.

Harm is principally important in order for the plaintiff to meet its burden under s. 137.1(4)(b). As a prerequisite to the weighing exercise, the statutory languages requires (i) the existence of harm and (ii) causation — the harm was suffered as a result of the defendant's expression. Either monetary harm or non-monetary harm can be relevant, and harm is not synonymous with the damages alleged. Since s. 137.1(4)(b) is a weighing exercise, there is no threshold requirement for the harm to be worthy of consideration: the magnitude of the harm simply adds weight to one side of the weighing exercise. The plaintiff need not prove harm or causation, but must simply provide evidence for the motion judge to draw an

inference of likelihood in respect of the existence of the harm and the relevant causal link.

Once harm has been established and shown to be causally related to the expression, s. 137.1(4)(b) requires that the harm and corresponding public interest in permitting the proceeding to continue be weighed against the public interest in protecting the expression. The term "public interest" is used differently here in s. 137.1(4)(b) than in s. 137.1(3). Under s. 137.1(3), the query is concerned with whether the expression relates to a matter of public interest; the assessment is not qualitative. Under s. 137.1(4)(b), in contrast, the public interest must be relevant to specific goals: permitting the proceeding to continue and protecting the impugned expression. Therefore, not just any matter of public interest will be relevant. Instead, the quality of the expression, and the motivation behind it, are relevant. While judges should be wary of conducting a moralistic taste test, not all expression is created equal, thus the weighing exercises can be informed by considerations underlying s. 2(*b*) of the *Charter of Rights and Freedoms*, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing: the closer the expression is to any of these core values, the greater the public interest in protecting it.

Additional factors may also prove useful in guiding the weighing exercise. For example, the following factors, in no particular order of importance, may be relevant to consider: the importance of the expression, the history of litigation

between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the moving party's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. However, because the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP, the only factors that might be relevant in guiding the weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

Fundamentally, s. 137.1(4)(b) allows judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy. The burden is on the plaintiff to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious

effects on expression and public participation. The provision expressly requires that one consideration outweigh the other; this is substantively different than simply balancing the considerations against one another.

In the present case, Pointes Protection meets its threshold burden under s. 137.1(3) with little difficulty, as the relevant expression — testimony on the environmental impact and ecological consequences of the proposed development — relates to a matter of public interest and the land developer's breach of contract action arises from that expression. The land developer's action must be dismissed, however, as the developer cannot meet its burden under s. 137.1(4).

First, the developer's action lacks substantial merit: it is not legally tenable and not supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success. The land developer's claim is based solely on an alleged breach of a contract by Pointes Protection, but the interpretation advanced by the land developer does not flow from the plain language of the contract or the factual matrix surrounding it; the reading urged by the land developer would distort the ordinary meaning of the words in a manner that exceeds the bounds of appropriate judicial intervention in matters of contractual interpretation.

Second, regardless, the land developer's underlying action can nonetheless be dismissed on the independent ground that the developer cannot establish on a balance of probabilities that the weighing of the public interest favours permitting the proceeding to continue under s. 137.1(4)(b). The harm likely to be or

have been suffered by the developer as a result of Pointes Protection's expression lies at the very low end of the spectrum and, correspondingly, so too does the public interest in allowing the proceeding to continue. Indeed, the land developer's theory of harm is conjecture and its interest in finality is dependent entirely on the correctness of its interpretation of the contract. In contrast, the public interest in protecting Pointes Protection's expression is significant and falls at the higher end of the spectrum. The public has a strong interest in the subject matter — which relates to the ecological impact and environmental degradation associated with a proposed large-scale development — and strengthening the integrity of the justice system by encouraging truthful and open testimony is inextricably linked to the freedom of participants to express themselves in the forums concerned without fear of retribution.

For these reasons, Pointes Protection's s. 137.1 motion should be granted on either of the independent grounds that the land developer's action lacks substantial merit and that the land developer is unable to demonstrate that the weighing of the public interest favours permitting the proceeding to continue. Consequently, the land developer's underlying action should be dismissed.

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By Côté J.

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S.C.R. 27; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575; *R. v. Topp*, 2011 SCC 43, [2011] 3 S.C.R. 119; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Shannon v. 1610635 Alberta Inc.*, 2014 ABCA 393, 588 A.R. 76; *R. v. Driscoll* (1987), 79 A.R. 298; *Allstate Insurance Co. of Canada v. Aftab*, 2015 ONCA 349, 335 O.A.C. 172; *Sheppard v. Co-operators General Insurance Co.* (1997), 33 O.R. (3d) 362; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100; *Ontario (Alcohol and Gaming Commission) v. 751809 Ontario Inc.*, 2013 ONCA 157, 115 O.R. (3d) 24; *Ontario (Environment and Climate Change) v. Geil*, 2018 ONCA 1030, 371 C.C.C. (3d) 149; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60; *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211; *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1; *Veneruzzo v. Storey*, 2018 ONCA 688, 23 C.P.C. (8th) 352; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54; *Housen*

v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688; *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Avery v. Pointes Protection Assn.*, 2016 ONSC 6463, 60 M.P.L.R. (5th) 70; *Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38.

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Orlando M. Rosa, *Paul R. Cassan* and *Tim J. Harmar*, for the appellant.

Mark Wiffen, for the respondents.

Peter Kolla, *Amanda Bertucci* and *Maia Tsurumi*, for the intervener the British Columbia Civil Liberties Association.

Nader R. Hasan and *Priyanka Vittal*, for the intervener Greenpeace Canada.

Adam Goldenberg and *Simon Cameron*, for the intervener the Canadian Constitution Foundation.

Julia Croome, *Joshua Ginsberg* and *Sue Tan*, for the intervener the Ecojustice Canada Society.

Justin Safayeni and *Pam Hrick*, for the interveners the Centre for Free Expression, the Canadian Association of Journalists and the Communications Workers of America / Canada.

David Wotherspoon, *Rajit Mittal* and *Amber Prince*, for the interveners the West Coast Legal Education and Action Fund, the Atira Women's Resource Society, the B.W.S.S. Battered Women's Support Services Association and the Women Against Violence Against Women Rape Crisis Center.

Alexi N. Wood and *Jennifer P. Saville*, for the intervener the Canadian Civil Liberties Association.

Iain A. C. MacKinnon and *Justin Linden*, for the interveners the Ad IDEM / Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, the Aboriginal Peoples Television Network and Postmedia Network Inc.

The judgment of the Court was delivered by

CÔTÉ J. —

[1] Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society. This case is about what happens when individuals and organizations use litigation as a tool to quell such expression, which, in turn, quells participation and engagement in matters of public interest. More specifically, this Court is being asked to decide whether an action brought by 1704604 Ontario Limited ("170 Ontario") against the Pointes Protection Association and six of its members (collectively "Pointes Protection") can proceed, or whether it must be dismissed under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). For the reasons that follow, I am of the view that 170 Ontario's lawsuit must be dismissed. I would accordingly dismiss the appeal before this Court.

I. Introduction

[2] Strategic lawsuits against public participation ("SLAPPs") are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court

process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.

[3] In light of the increased proliferation of SLAPPs, provincial legislatures (in Ontario, British Columbia, and Quebec) have enacted laws to mitigate their harmful effects. These laws are occasionally referred to as "anti-SLAPP" legislation (2018 ONCA 685, 142 O.R. (3d) 161; *Galloway v. A.B.*, 2019 BCCA 385, 30 B.C.L.R. (6th) 245; *Klepper v. Lulham*, 2017 QCCA 2069 (CanLII); B. Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (2014)).

[4] At issue here is such a law. In November 2015, the Ontario *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23 ("Act"), came into force. The Act amended the *CJA*, by introducing, in relevant part, ss. 137.1 to 137.5.

[5] In this appeal, the Court is effectively being asked to shed light and offer guidance on how to properly apply the framework set out in s. 137.1 of the *CJA*. Accordingly, I endeavour to do so below, but not without first providing some background on the legislation at issue in Part II. Subsequently, in Part III, I set out the proper legal framework for dealing with s. 137.1 motions. Finally, in Part IV, I apply the established legal framework to the facts of this case.

II. Background

[6] Before I explain the parameters of the s. 137.1 framework, it is necessary, as part of the exercise of statutory interpretation, to outline the legislative background of the bill which brought s. 137.1 into effect. Such legislative background and history offer contextual clues to and insight into the legislative purpose of the bill, as well as indicia of the proper interpretation of the provisions at issue, which will be explored in turn below. Indeed, this Court has reiterated on numerous occasions that the modern approach to statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[7] In 2010, the Attorney General of Ontario mandated an Anti-SLAPP Advisory Panel ("Panel") to advise the government on how to respond to the proliferation of SLAPPs. The Panel was chaired by experts and examined a plethora of materials, including legal articles, relevant statutes from other jurisdictions, and advocacy documents. The Panel also invited comments and submissions from the public and interested parties. All of this culminated in the *Anti-Slapp Advisory Panel: Report to the Attorney General* ("APR"), which was published in October 2010.

[8] The APR "concluded that it is desirable for Ontario to enact legislation against the use of legal processes that affect people's ability or willingness to express

views or take action on matters of public interest" (para. 10). The APR looked extensively at the need for such legislation (paras. 6-16), then provided suggestions on the content of the legislation and outlined the concerns underlying that content.

[9] The APR advocated a "broad scope of protection" (para. 29) that would "ensure that the full scope of legitimate participation in public matters is made subject to the special procedure" (para. 31). Fundamental to the APR's proposal was the theme of balancing and proportionality. While "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" (para. 36), "the fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed" (para. 37). To reconcile these considerations, the APR proposed a multi-step test that ended up being substantively similar to the one later adopted by the legislature.

[10] In November 2015, Ontario brought into force Bill 52, *Protection of Public Participation Act, 2015*, 1st Sess., 41st Leg., 2015, which, as noted above, amended the *CJA* by introducing ss. 137.1 to 137.5. The purposes of those provisions were specified in the legislation itself, in s. 137.1(1) of the *CJA*:

> **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.

[11] This was prompted by the APR, which stated that the "legislation should include a purpose clause for the benefit of judicial interpretation" (Summary of Recommendations, para. 2). While legislative purpose bears on the exercise of statutory interpretation regardless of whether a purpose clause exists, the fact that the APR explicitly urged legislators to include such a clause for the *benefit of judicial interpretation*, and that legislators consciously obliged, demonstrates that the purpose clause in s. 137.1(1) commands considerable interpretative authority.

[12] Further indications of legislative intention can be gleaned from the debates in the Legislative Assembly of Ontario. At second reading of the bill, the Attorney General of Ontario at the time, the Hon. Madeleine Meilleur, stated the following:

> If passed, this legislation will allow courts to quickly identify and deal with strategic lawsuits, minimizing the emotional and financial strain on defendants, as well as the waste of court resources.
>
> . . .
>
> Our proposed legislation strikes a balance that will help ensure abusive litigation is stopped, but legitimate action can continue.
>
> This proposed legislation is about preventing strategic lawsuits. Anyone who has a legitimate claim of libel or slander should not be discouraged by this legislation.

> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 41A, 1st Sess., 41st Parl., December 10, 2014, at p. 1975)

[13] Ultimately, the legislative debates preceding the passage of the Act echoed the same concerns expressed by the Panel in the APR. Indeed, parliamentarians acknowledged as much: "[t]his bill came forward as a result of a report from 2010" (p. 1975 (Ms. Sylvia Jones)); "a made-in-Ontario approach to address the issue of strategic lawsuits based on consensus, recommendations of an expert advisory panel and extensive stakeholder consultation" (p. 1975 (Hon. Madeleine Meilleur)). Accordingly, it should come as no surprise that the final test adopted in the legislation was very similar substantively to the test proposed in the APR. This makes it clear that the APR had a considerable influence on the legislation which was enacted and which is now at issue before this Court.

[14] For this reason, the Panel and its APR are persuasive authority for the purposes of statutory interpretation. It must be remembered that "[l]egislative history includes material relating to the conception, preparation and passage of the enactment", and this "may often be [an] important par[t] of the context to be examined as part of the modern approach to statutory interpretation" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43 ("*CHRC*")). Indeed, the late Peter W. Hogg defined legislative history as including the following:

> 1. [T]he report of a royal commission or law reform commission or parliamentary committee recommending that a statute be enacted;

. . .

> 3. a report or study produced outside government which existed at the time of the enactment of the statute and was relied upon by the government that introduced the legislation . . . .
>
> (*Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at pp. 60-1 to 60-2)

While reports like the APR are generally "admissible for any purpose the court thinks appropriate", the weight accorded to them depends on the circumstances (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 685; see also *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 51). As I have explained, the APR was the clear impetus for the legislation, and was relied upon heavily by the legislature in drafting s. 137.1 of the *CJA*. Accordingly, it is a persuasive source that "provide[s] helpful information about the background and purpose of the legislation" (*CHRC*, at para. 44).

[15] In light of the foregoing, I turn in Part III below to the interpretation of the statutory text of s. 137.1(3) and (4), informed by the legislative history and the purposes that animate these provisions. As already mentioned, this is in accordance with what this Court has referred to as the modern approach to statutory interpretation.

III. Framework

[16] As indicated above, s. 137.1 is the provision in the *CJA* that is meant to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. The final statutory language adopted makes it clear how the APR and the legislative debates informed the drafting of the provision: there is an invocation of the need for the expression to relate to a matter of public interest; the underlying proceeding must have substantial merit (beyond "technical validity", as the APR noted, at para. 37); and the public interest in protecting the expression must be weighed against the public interest in permitting the underlying proceeding to continue (echoing the importance of balance repeatedly noted in the APR and the legislative debates).

[17] The relevant portions of s. 137.1 are reproduced below:

> (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.
>
> (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.

[18] In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed. It is important to recognize that the final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis: as noted repeatedly above, the APR and the legislative debates emphasized balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest. Section 137.1(4)(b) is intended to optimize that balance.

[19] In the following section, I offer an explanation of each step of the s. 137.1 analysis, including what is expected of each party and how the relevant terms used in the provision must operate. This analysis of the framework is grounded in the words of the statute read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, while remaining mindful of the

legislative background and informed particularly by the APR and the legislative debates.

A. *Section 137.1(3) — Threshold Burden on the Moving Party*

[20] Section 137.1(3) is reproduced for convenience below, with my own emphasis placed on the terms requiring further illumination:

> (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.

[21] Fundamentally, this is a two-part analysis. The burden is on the moving party to show that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. This is a threshold burden, which means that it is necessary for the moving party to meet this burden in order to even proceed to s. 137.1(4) for the ultimate determination of whether the proceeding should be dismissed.

[22] However, while the term "expression" is expressly defined in the statute, other terms are in need of elaboration in order to understand how the moving party can satisfy its threshold burden.

[23] First, what does "satisfies" require? I am in agreement with Doherty J.A. of the Court of Appeal for Ontario that "satisfies" requires the moving party to meet

its burden on a balance of probabilities (C.A. reasons, at para. 51). This is in accordance with the jurisprudence interpreting the word "satisfied" (*R. v. Topp*, 2011 SCC 43, [2011] 3 S.C.R. 119, at paras. 24-25; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 49 and 53; *Shannon v. 1610635 Alberta Inc.*, 2014 ABCA 393, 588 A.R. 76, at paras. 14-15; *R. v. Driscoll* (1987), 79 A.R. 298, at paras. 17-18). Accordingly, the moving party must be able to demonstrate on a balance of probabilities that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest.

[24] Second, what does "arises from" require? By definition, "arises from" implies an element of causality. In other words, if a proceeding "arises from" an expression, this must mean that the expression is somehow causally related to the proceeding.[1] What is crucial is that many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework. This means that proceedings arising from an expression are not limited to those *directly* concerned with expression, such as defamation suits. A good example of a type of proceeding that is not a defamation suit, but that nonetheless arises from an expression and falls within the ambit of s. 137.1(3), is the underlying proceeding here, which is a breach of contract claim premised on an expression made by the defendant (this is explored in further detail in Part IV of these reasons). Indeed, the

[1] I do not believe that a precise level of causation needs to be identified, as courts have consistently been able to grapple with and apply the "arising from" standard (*Allstate Insurance Co. of Canada v. Aftab*, 2015 ONCA 349, 335 O.A.C. 172; *Sheppard v. Co-operators General Insurance Co.* (1997), 33 O.R. (3d) 362 (C.A.); *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420).

APR explicitly discouraged the use of the term "SLAPP" in the final legislation in order to avoid narrowly confining the s. 137.1 procedure (para. 22), and the legislature obliged.

[25] Third, what does "expression" mean? The term "expression" is defined broadly in s. 137.1(2) of the *CJA* itself: "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." This is not in need of further clarification, as the text makes it abundantly clear that "expression" is defined expansively.

[26] Fourth, and finally, what does "relates to a matter of public interest" mean? These words should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1(3). Indeed, the APR clearly stated that a "broader test will ensure that the full scope of legitimate participation in public matters is made subject to the special procedure" (at para. 31) and that therefore a "broad scope of protection" is preferable (para. 29).

[27] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a "matter of public interest". The same principles apply in the present context. The expression should be assessed "as a whole", and it must be asked whether "some segment of the community would have a

genuine interest in receiving information on the subject" (paras. 101-2). While there is "no single 'test'", "[t]he public has a genuine stake in knowing about many matters" ranging across a variety of topics (paras. 103 and 106). This Court rejected the "narrow" interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, "[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence" (para. 106).

[28] The statutory language used in s. 137.1(3) confirms that "public interest" ought to be given a broad interpretation. Indeed, "public interest" is preceded by the modifier "*a matter* of". This is important, as it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest — there is no qualitative assessment of the expression at this stage. The question is only whether the expression pertains to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one.

[29] Nonetheless, expression that *relates* to a matter of public interest must be distinguished from expression that simply *makes reference* to something of public interest, or to a matter about which the public is merely curious. Neither of the latter two forms of expression will be sufficient for the moving party to meet its burden under s. 137.1(3) (see *Torstar*, at para. 102).

[30] Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about. The animating purpose of s. 137.1 should not be

forgotten: s. 137.1 was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that is public participation in democracy. If the bar is set too high at s. 137.1(3), the motion judge will never reach the crux of the inquiry that lies in the weighing exercise at s. 137.1(4)(b). Thus, in light of the legislative purpose and background of s. 137.1, it is important to interpret an "expression" that "relates to a matter of public interest" in a generous and expansive fashion.

[31] In conclusion, s. 137.1(3) places a threshold burden on the moving party to show on a balance of probabilities (i) that the underlying proceeding does, in fact, arise from its expression, regardless of the nature of the proceeding, and (ii) that such expression relates to a matter of public interest, defined broadly. To the extent that this burden is met by the moving party, then s. 137.1(4) will be triggered and the burden will shift to the responding party to show that its underlying proceeding should not be dismissed. I proceed to analyze that provision below.

B. *Section 137.1(4) — Shifting of the Burden to the Responding Party*

[32] Section 137.1(4) is reproduced for convenience below:

> (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.

[33] As the text of this provision makes explicit, the burden is on the *responding party* (i.e. the plaintiff in the underlying proceeding) to satisfy the motion judge of *both* (a) *and* (b). Therefore, if *either* (a) *or* (b) is not met, then this will be fatal to the plaintiff[2] discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both (a) *and* (b) are met, then the proceeding will be allowed to continue. While (a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence, (b) is open-endedly concerned with what is at the heart of the legislation at issue and anti-SLAPP legislation generally: the weighing of the public interest in vindicating legitimate claims through the courts against the resulting potential for quelling expression that has already been determined under s. 137.1(3) to be related to a matter of public interest.

(1) Section 137.1(4)(a) — Merits-Based Hurdle

[2] I will refer to the "moving party" as the "defendant", and the "responding party" as the "plaintiff" in these reasons interchangeably. This is for convenience and clarity, and should not be taken as restricting the statutory language in any future case.

[34] In brief, s. 137.1(4)(a) requires the plaintiff to "satisf[y] the judge" that there are "grounds to believe" that (i) its underlying proceeding has "substantial merit" and that (ii) the defendant has "no valid defence".

[35] Unlike with s. 137.1(3), "satisfies" is statutorily circumscribed in s. 137.1(4)(a) by an express standard: "grounds to believe". In other words, since the statutory language of s. 137.1(3) required that the motion judge simply be "satisfie[d]", this necessitated a determination of what is sufficient to satisfy the motion judge. What is sufficient for the motion judge to be satisfied for the purposes of s. 137.1(4)(a)? Here, the legislature has expressly answered the question — the motion judge must be satisfied that there are *grounds to believe*. Therefore, at this juncture, before I explore what exactly is required by s. 137.1(4)(a)(i) and (ii), it must be determined what "grounds to believe" requires. This necessitates a consideration of the words themselves and their statutory context.

[36] The words "grounds to believe" plainly refer to the existence of a basis or source (i.e. "grounds") for reaching a *belief* or conclusion that the legislated criteria have been met. In the context of a s. 137.1 motion, that basis or source must be anchored in the nature of the procedure and record contemplated by the legislative scheme. It must be borne in mind that a s. 137.1 motion can be brought at "<u>any time</u>" after a proceeding has commenced (see s. 137.2(1)).

[37] Accordingly, in determining whether there exist grounds to believe at the s. 137.1(4)(a) stage, courts must be acutely aware of the limited record, the timing of

the motion in the litigation process, and the potentiality of future evidence arising. Introducing too high a standard of proof into what is a preliminary assessment under s. 137.1(4)(a) might suggest that the *outcome* has been adjudicated, rather than the *likelihood* of an outcome. To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence.

[38] Section 137.1(4)(a) may therefore be interpreted by distinguishing a motion made under s. 137.1 from a motion to strike and a motion for summary judgment, both of which are tools that remain available to parties notwithstanding the existence of s. 137.1. The very fact that the legislature created s. 137.1 as a mechanism indicates that a s. 137.1 motion was meant to fulfil a different purpose than these other motions. While a summary judgment motion allows parties to file a more extensive record and a motion to strike is adjudicated solely on the pleadings, s. 137.1 contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that lends itself to the inquiry mandated under s. 137.1(4)(a). Thus, although the limited record at this stage does not allow for the ultimate adjudication of the issues, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record (the extent of such consideration will be explored further in the next section).

[39] Accordingly, I conclude that "grounds to believe" requires that there be a basis in the record and the law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence.

[40] The foregoing conclusion is consistent with the interpretation this Court has given to the expression "grounds to believe" in other contexts. Indeed, this standard has been found to require "something more than mere suspicion, but less than . . . proof on the balance of probabilities" (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114). This interpretation has been adopted in the regulatory context as well (see, e.g., *Ontario (Alcohol and Gaming Commission) v. 751809 Ontario Inc.*, 2013 ONCA 157, 115 O.R. (3d) 24, at paras. 18-24; *Ontario (Environment and Climate Change) v. Geil*, 2018 ONCA 1030, 371 C.C.C. (3d) 149).

[41] Importantly, the assessment under s. 137.1(4)(a) must be made from the motion judge's perspective. With respect, I am of the view that the Court of Appeal for Ontario incorrectly removed the motion judge's assessment of the evidence from the equation in favour of a theoretical assessment by a "reasonable trier" (para. 82). The clear wording of s. 137.1(4) requires "the judge" hearing the motion to determine if there exist "grounds to believe". Making the application of the standard depend on a "reasonable trier" improperly excludes the express discretion and authority

conferred on the motion judge by the text of the provision. The test is thus a subjective one, as it depends on the motion judge's determination.

[42] Taking all of the foregoing together, what s. 137.1(4)(a) asks, in effect, is whether the motion judge concludes from his or her assessment of the record that there is a basis in fact and in law — taking into account the context of the proceeding — to support a finding that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

[43] I turn now to consider what s. 137.1(4)(a)(i) and (ii) mean in substantive terms and how the plaintiff can satisfy its burden under s. 137.1(4)(a).

(a) *Section 137.1(4)(a)(i) — Substantial Merit*

[44] The question under s. 137.1(4)(a)(i) is whether the underlying proceeding has "substantial merit". I proceed to elucidate what "substantial merit" means and what the responding party (i.e. plaintiff) needs to show in order to satisfy its burden.

[45] I begin with an analysis of the statutory text. The legislature's express choice to use the specific word *substantial* as a qualifier must be given effect. Indeed, the use of the word *substantial* functions markedly differently than a qualifier such as having *some* merit, *any* merit, or just *merit* absent a qualifier. *Black's Law Dictionary* acts as an interpretive aid in discerning the exact meaning of "substantial", which it defines as follows:

> 1. Of, relating to, or involving substance, material <substantial change in circumstances>. 2. Real and not imaginary; having actual, not fictitious, existence <a substantial case on the merits>. 3. Important, essential, and material; of real worth and importance <a substantial right>.
>
> (*Black's Law Dictionary* (11th ed. 2019), at p. 1728)

[46] This definition of "substantial" must be read in the context of s. 137.1(4)(a)(i), in which this word modifies "merit". Accordingly, it must be asked what is meant by "merit". The use of the word "merit" in the context of a s. 137.1 motion fundamentally calls for a determination of the prospect of success of the underlying proceeding. Indeed, what is at stake here is the potential dismissal of the proceeding without any opportunity to amend it: while the threshold burden under s. 137.1(3) is concerned with identifying an expression relating to a matter of public interest for protection, s. 137.1(4) engages the competing interest at play — ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it; this is why the burden is on the *plaintiff* to ensure that its claim is not dismissed. Thus, given its ordinary meaning and when read in context, "merit" refers fundamentally to the strength of the underlying claim, as a stronger claim corresponds with a weaker justification to dismiss the underlying proceeding.

[47] Legislative intent provides a further indication of how "substantial merit" ought to be interpreted. Indeed, "statutory interpretation cannot be founded on the wording of the legislation alone" (*Rizzo & Rizzo Shoes*, at para. 21). The APR did not offer much guidance on the meaning of "substantial merit". It stated, however, that "the fact that a plaintiff's claim may have only technical validity should not be

sufficient to allow the action to proceed" (para. 37 (emphasis added)). This was echoed in the Legislative Assembly of Ontario: "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" (at p. 1972 (emphasis added) (Hon. Madeleine Meilleur)); "[i]t is also important that we recognize the strain that frivolous lawsuits place on our province's busy court system" (at p. 1973 (emphasis added) (Mr. Lorenzo Berardinetti)); "this legislation protects the people from frivolous lawsuits" (at p. 1975 (emphasis added) (Mr. Randy Pettapiece)); "if someone does have a legitimate claim that is not frivolous . . . you can still bring that type of lawsuit" (*Official Report of Debates (Hansard)*, No. 112, 1st Sess., 41st Parl., October 27, 2015, at p. 6025 (emphasis added) (Mr. Jagmeet Singh)). While I acknowledge that the above excerpt from the APR is from the "Balancing interests" section of that report, the consistency of the language used in the legislative debates shows that the same concern informed the legislature's understanding of how s. 137.1 would operate. It was clearly of the view that even if a proceeding was not merely frivolous or vexatious, or was technically valid, this should not be sufficient to allow the proceeding to continue. This is fundamentally a question that depends on the *merits* of the underlying proceeding, which makes the foregoing references well-suited as an interpretive aid under s. 137.1(4)(a)(i) given the statutory language ultimately used in the provision. Accordingly, it is clear from the legislative context that the words "substantial merit" are animated by a concern with making sure that, at a minimum, neither "frivolous" suits nor suits with only "technical" validity are

sufficient to withstand a s. 137.1 motion. Substantial merit must mean something more.

[48] However, while frivolous suits are clearly insufficient, "something more" cannot require a showing that a claim is likely to succeed either, as some parties have posited. Neither the plain meaning nor the legal definition of "substantial" comports with a "likely to succeed" standard. The legislative and statutory context does not support such a standard either. If "substantial merit" requires a showing of being likely to succeed, this could unduly prevent cases from proceeding to the crux of the inquiry that is the weighing exercise under s. 137.1(4)(b). Given the importance of the weighing exercise in the legislative history, this cannot possibly be what the legislature contemplated. Indeed, nothing in the legislative history — whether in the APR or in the legislative debates — points to a "likely to succeed" standard as the threshold for the plaintiff to prevail at the merits-based hurdle of s. 137.1. While the plaintiff need not definitively demonstrate that its claim is more likely than not to succeed, the claim must nonetheless be sufficiently strong that terminating it at a preliminary stage would undermine the legislature's objective of ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim.

[49] Therefore, I conclude from the foregoing exercise of statutory interpretation that for an underlying proceeding to have "substantial merit", it must have a real prospect of success — in other words, a prospect of success that, while not

amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law — taking into account the stage of the proceeding — for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

[50] Importantly, this standard is more demanding than the one applicable on a motion to strike, which requires that the claim have *some* chance of success under the "plain and obvious" test (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). It is also more demanding than requiring that the claim have a *reasonable* prospect of success, which is a standard that this Court has also used to animate the "plain and obvious" test (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-20). In light of the existence of a record, the substantial merit standard calls for an assessment of the evidentiary basis for the claim — this is why the claim must be supported by evidence that is reasonably capable of belief. This is consistent with the APR's references to "substant*ive*" merit, which inherently calls for an assessment of the basis or evidentiary foundation for a claim. I reiterate, however, that a claim with merely *some* chance of success will not be sufficient to prevail. Nor will a claim that has been merely nudged over the line of having some chance of success. A real prospect of success means that the plaintiff's success is more than a possibility; it requires more than an arguable case. As I said in the preceding paragraph, a real prospect of success requires that the claim have a prospect of

success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. For a judge undertaking this inquiry, it is critical to recall that a s. 137.1 motion is not a determinative adjudication of the merits of the proceeding and, rather than having to be established on a balance of probabilities, substantial merit is instead tempered by a "grounds to believe" burden.

[51] The substantial merit standard is less stringent, however, than the "strong *prima facie* case" threshold, which requires a "strong likelihood of success" (*R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196), or the test for summary judgment, under which a legally sound claim supported by evidence reasonably capable of belief may nonetheless raise "no genuine issue requiring a trial" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87). While *Hryniak* was admittedly decided in the context of summary judgment motions, which call for an ultimate determination of the merits of a proceeding, that case is relevant at this juncture in order to assess the role of s. 137.1 motions: such motions do not exist in a vacuum and must necessarily be fulfilling a function different than other motions. Although too low a standard risks defeating the purpose of the distinct process for dismissal established by s. 137.1, too high a standard risks promoting a counter-productive culture whereby parties are forced to routinely compile detailed records similar to those expected on summary judgment motions or even trials.

[52] It is therefore important to recognize how s. 137.1 motions differ from summary judgment motions, as briefly touched on in the preceding section.

Section 137.1 motions are made at an earlier stage in the litigation process, with much more limited evidence and corresponding procedural limitations (see s. 137.2). As a result, a motion judge deciding a s. 137.1 motion should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced. This might also include a preliminary assessment of credibility — indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgment motion, which would be insurmountable at this stage of the proceedings.

[53] Finally, in determining the ambit of "substantial merit", the statutory context of s. 137.1 must be borne in mind: even if a lawsuit clears the merits-based hurdle at s. 137.1(4)(a), it remains vulnerable to summary dismissal as a result of the public interest weighing exercise under s. 137.1(4)(b), which provides courts with a robust backstop to protect freedom of expression.

[54] In summary, in light of the foregoing analysis, to discharge its burden under s. 137.1(4)(a)(i), the plaintiff must satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success.

(b) *Section 137.1(4)(a)(ii) — No Valid Defence*

[55] Section 137.1(4)(a)(ii) requires the responding party (i.e. plaintiff) to satisfy the motion judge that there are "grounds to believe" that the moving party (i.e. defendant) has "no valid defence" in the underlying proceeding.

[56] While the burden has admittedly shifted to the plaintiff under s. 137.1(4), it would be unreasonable to encumber the plaintiff at the s. 137.1(4)(a)(ii) stage with the task of anticipating every defence the defendant might raise and then rebutting those defences. Instead, s. 137.1(4)(a)(ii) operates as a *de facto* burden-shifting provision in itself, under which the moving party (i.e. defendant) must *first* put in play the defences it intends to present and the responding party (i.e. plaintiff) must *then* show that there are grounds to believe that those defences are not valid.

[57] In other words, once the moving party has put a defence in play, the onus is back on the responding party (i.e. plaintiff) to demonstrate that there are grounds to believe that there is "no valid defence".

[58] The word *no* is absolute, and the corollary is that if there is *any* defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. As with the substantial merit prong, the motion judge here must make a determination of validity on a limited record at an early stage in the litigation process — accordingly, this context should be taken into account in assessing whether a defence is valid. The motion judge must therefore be able to engage in a limited assessment of the evidence in determining the validity of the defence.

[59] I interpret the query on *validity* under s. 137.1(4)(a)(ii) as mirroring the query on substantial merit under s. 137.1(4)(a)(i). Fundamentally, both entail an assessment by the motion judge of the strength of the claim or of any defences as part of an overall assessment under s. 137.1(4)(a) of the prospect of success of the underlying claim. Having (i) and (ii) mirror each other to the extent possible makes sense given the fact that a prototypical s. 137.1 motion will be made in relation to a defamation or tort action and that affirmative defences to such an action normally involve well-articulated tests. The legislative drafting that nests both (i) and (ii) under s. 137.1(4)(a) confirms this interpretation. Indeed, in a defamation action, for example, a claim must be made out, and then the burden shifts to the defendant to identify any affirmative defences to the claim. The way that (i) and (ii) are nested under (a) reflects this: the substantial merit of the claim is analyzed and then the validity of any potential defences. For this reason, I interpret (ii) as an extension of (i), and I would analyze both in a similar fashion whereby the motion judge must first determine whether the plaintiff's underlying claim is legally tenable and supported by

evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success, and must then determine whether the plaintiff has shown that the defence, or defences, put in play are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. In other words, "substantial merit" and "no valid defence" should be seen as constituent parts of an overall assessment of the prospect of success of the underlying claim.

[60] In summary, s. 137.1(4)(a)(ii) operates, in effect, as a burden-shifting provision in itself: the moving party (i.e. defendant) must put potential defences in play, and the responding party (i.e. plaintiff) must show that *none* of those defences are valid in order to meet its burden. Mirroring the "substantial merit" prong, under which the plaintiff must show that there are grounds to believe that its claim has a real prospect of success, the "no valid defence" prong requires the plaintiff, who bears the statutory burden, to show that there are grounds to believe that the defences have no real prospect of success. This makes sense, since s. 137.1(4)(a) as a whole is fundamentally concerned with the strength of the underlying proceeding.

(2) Section 137.1(4)(b) — Public Interest Hurdle

[61] At last, I arrive at what is the crux of the analysis. Section 137.1(4)(b) provides that, to avoid having its proceeding dismissed, the responding party must satisfy the motion judge that

> the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[62] As I have often mentioned in these reasons, this provision is the core of s. 137.1. The purpose of s. 137.1 is to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. While s. 137.1(4)(a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence in order to ensure that the proceeding is meritorious, s. 137.1(4)(b) open-endedly engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications. In this way, s. 137.1(4)(b) is the key portion of the s. 137.1 analysis, as it serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue.

[63] Statutory interpretation is a contextual exercise that requires reading a provision with and in light of other provisions: accordingly, if the bar is set too high at s. 137.1(4)(a)(i) or (ii), a motion judge will never reach s. 137.1(4)(b) — this cannot possibly be what the legislature contemplated given the legislative history and intent behind s. 137.1. The legislature repeatedly emphasized proportionality as the paramount consideration in determining whether a lawsuit should be dismissed. Weighing the public interest in freedom of expression and public participation against

the public interest in vindicating a meritorious claim is a theme that runs through the entire legislative history, and this informs how s. 137.1 should be judicially understood.

[64] The import of s. 137.1(4)(b) is made abundantly evident by looking at the context in which s. 137.1 was enacted. For example, the APR urged that "[t]here should be no special safeguards to prevent abuse. The balancing of interests at the heart of the remedy will allow appropriate disposition of cases" (Summary of Recommendations, para. 20 (emphasis added)). This goal of achieving balance was echoed during the readings of the bill in the Legislative Assembly of Ontario. At second reading, the Attorney General of Ontario stated the following:

> [TRANSLATION] Balance has been a recurring theme: the need to strike a balance that will dismiss abusive lawsuits while permitting legitimate actions. I can assure you that we have heard everything that has been said to us. Balance is a key feature of this bill.
>
> (Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur))

The theme of balance was raised frequently throughout the debates by multiple members across party lines (Legislative Assembly of Ontario (2014), at pp. 1972-74 (Mr. Lorenzo Berardinetti); p. 1974 (Mr. Chris Ballard); p. 1975 (Hon. Madeleine Meilleur)). (See also Legislative Assembly of Ontario (2015), at p. 6017 (Hon. Madeleine Meilleur); p. 6021 (Mr. Lorenzo Berardinetti); pp. 6025-27 (Mr. Jagmeet Singh).)

[65] I pause here to explain my use of the expression "weighing exercise" and to briefly address whether there is a substantive difference between a *weighing* exercise and a *balancing* exercise, and which exercise s. 137.1(4)(b) requires. This concern was raised by the British Columbia Civil Liberties Association as an intervener before this Court.

[66] Here, the provision *expressly* requires that one consideration "outweig[h]" the other. I am of the view that this is substantively different than if the statute had required that the two considerations be *balanced* against one another. The difference can be illustrated by the following quantification of weighing and balancing: where one factor must *outweigh* the other, the ratio between the two must be at least 51/49; in contrast, where one factor must be *balanced* against the other, a ratio of 50/50, or even 45/55, might be sufficient for a judge to rule in favour of the former. The word "outweighs" necessarily precludes such a conclusion.

[67] While I do not purport to decide for all statutes the definitive difference between weighing and balancing, the fact that the statute *here* requires that one consideration outweigh the other, and not simply that the considerations be balanced against one another, should be relevant to a motion judge's consideration of whether the plaintiff has satisfied its burden under s. 137.1(4)(b).

(a) *Harm Analysis*

[68] Harm is principally important in order for the plaintiff to meet its burden under s. 137.1(4)(b). The statutory provision expressly contemplates the *harm* suffered by the responding party *as a result* of the moving party's expression being weighed against the public interest in protecting that expression. As a prerequisite to the weighing exercise, the statutory language therefore requires two showings: (i) the existence of harm and (ii) causation — the harm was suffered *as a result* of the moving party's expression.

[69] Either monetary harm or non-monetary harm can be relevant to demonstrating (i) above. I am in agreement with the Attorney General of Ontario at the time the legislation was debated, who recognized at second reading "that reputation is one of the most valuable assets a person or a business can possess" (Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur)). Accordingly, harm is not limited to monetary harm, and neither type of harm is more important than the other. Nor is harm synonymous with the damages alleged. The text of the provision does not depend on a particular *kind* of harm, but expressly refers only to *harm* in general.

[70] Further, since s. 137.1(4)(b) is, in effect, a weighing exercise, there is no threshold requirement for the harm to be sufficiently worthy of consideration. The magnitude of the harm becomes relevant when the motion judge must determine whether it is "sufficiently serious" that the public interest in permitting the proceeding

to continue outweighs the public interest in protecting the expression. In other words, the magnitude of the harm simply adds weight to one side of the weighing exercise.

[71] This does not mean that the harm pleaded by the plaintiff should be taken at face value or that bald assertions are sufficient. But I would not go so far as to require a fully developed damages brief, nor would I require that the harm be monetized, as the question here relates to the *existence* of harm, not its quantification. The statutory language employed in s. 137.1(4)(b) is "harm likely to", which modifies both "be" and "have been"; this indicates that the plaintiff need not *prove* harm or causation, but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link. The evidentiary burden might depend on the nature of the substantive law that is applied, although it must be borne in mind that a s. 137.1 motion is not an adjudication on the merits: for example, in a defamation action, harm (and therefore general damages) is presumed, but the plaintiff would still have to support a claim for special damages. Importantly, though, no definitive determination of harm or causation is required.

[72] I add that, naturally, evidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant's expression that may have caused the plaintiff harm (C.A. reasons, at para. 92). Causation is not, however, an all-or-nothing proposition, in the sense that while the causal chain between the defendant's expression and the harm suffered by

the plaintiff may be weaker for *some* elements of the harm suffered, it might nonetheless be strong for *other* elements. This is a case-by-case inquiry undertaken by the motion judge.

(b) *Weighing of the Public Interest*

[73] Once harm has been established and shown to be causally related to the expression, s. 137.1(4)(b) requires that the harm and corresponding public interest in permitting the proceeding to continue be weighed *against* the public interest in protecting the expression. Therefore, as under s. 137.1(3), public interest becomes critical to the analysis.

[74] However, the term "public interest" is used differently in s. 137.1(4)(b) than in s. 137.1(3). Under s. 137.1(3), the query is concerned with whether the expression relates to a *matter* of public interest. The assessment is not qualitative — i.e. it does not matter whether the expression helps or hampers the public interest. Under s. 137.1(4)(b), in contrast, the legislature expressly makes the public interest relevant to specific goals: permitting the proceeding to continue and protecting the impugned expression. Therefore, not just *any matter* of public interest will be relevant. Instead, the *quality* of the expression, and the *motivation* behind it, are relevant here.

[75] Indeed, "a statement that contains deliberate falsehoods, [or] gratuitous personal attacks . . . 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, [or] vitriol" (C.A. reasons, at para. 94, citing *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, at paras. 82-84 and 96-103, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568).

[76] While judges should be wary of the inquiry descending into a moralistic taste test, this Court recognized as early as *R. v. Keegstra*, [1990] 3 S.C.R. 697, that not all expression is created equal: "While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*)" (p. 760).

[77] The weighing exercise under s. 137.1(4)(b) can thus be informed by this Court's s. 2(*b*) *Canadian Charter of Rights and Freedoms* jurisprudence, which grounds the level of protection afforded to expression in the nature of the expression (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 181). For example, the inquiry might look to the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing (*Sharpe*, at para. 182; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 24). The closer the

expression is to any of these core values, the greater the public interest in protecting it.

[78] I outline below some further factors that may bear on the public interest weighing exercise under s. 137.1(4)(b). I note that in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99, Doherty J.A. made reference to recognized "indicia of a SLAPP suit" (emphasis omitted). He recognized four indicia in particular: (1) "a history of the plaintiff using litigation or the threat of litigation to silence critics"; (2) "a financial or power imbalance that strongly favours the plaintiff"; (3) "a punitive or retributory purpose animating the plaintiff's bringing of the claim"; and (4) "minimal or nominal damages suffered by the plaintiff" (para. 99). Doherty J.A. found that where these indicia are present, the weighing exercise favours granting the s. 137.1 motion and dismissing the underlying proceeding. The Court of Appeal for Ontario has since applied these indicia in a number of cases (see, e.g., *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211).

[79] I am of the view that these four indicia may bear on the analysis *only to the extent* that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature. This is because the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP. Therefore, for this reason, the only factors that might be relevant in guiding that weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially

suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

[80] Accordingly, additional factors may also prove useful. For example, the following factors, in no particular order of importance, may be relevant for the motion judge to consider: the importance of the expression, the history of litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise.

[81] Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of

expression and its corresponding influence on public discourse and participation in a pluralistic democracy.

[82] In conclusion, under s. 137.1(4)(b), the burden is on the plaintiff — i.e. the responding party — to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is *a result* of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a s. 137.1 motion.

IV. Application to This Case

[83] In the following section, I apply the s. 137.1 framework to the facts of this case. I provide first an overview of the facts and procedural history, and subsequently apply the s. 137.1 framework to those facts. I ultimately reach the conclusion that Pointes Protection's s. 137.1 motion should be granted and consequently that 170 Ontario's underlying action should be dismissed.

A. *Factual Overview*

[84] The appellant, 170 Ontario, wanted to develop a 91-lot subdivision in the city of Sault Ste. Marie. In order to do so, it was necessary for 170 Ontario to obtain the approval of both the Sault Ste. Marie Region Conservation Authority ("SSMRCA") and the Sault Ste. Marie City Council ("City Council").

[85] Pointes Protection Association and six members of its executive committee are the respondents before this Court. Pointes Protection Association is a not-for-profit corporation created to provide a coordinated response to 170 Ontario's development proposal on behalf of affected residents. Pointes Protection opposed the proposed development, particularly on environmental grounds.

[86] 170 Ontario successfully obtained the SSMRCA's approval, which Pointes Protection then contested by bringing an application for judicial review of the SSMRCA's decision. While that application was pending, 170 Ontario sought approval from the City Council. Its application to the City Council was rejected, and it appealed to the Ontario Municipal Board ("OMB), which granted Pointes Protection standing to participate.

[87] This context is important, because while Pointes Protection's application for judicial review of the SSMRCA's decision and 170 Ontario's appeal to the OMB were both pending, the parties settled the judicial review proceeding by way of minutes of settlement ("Agreement").

[88] Under the terms of the Agreement, Pointes Protection's judicial review application was to be dismissed on consent without costs. Crucial to this appeal, however, is the fact that the Agreement also imposed limitations on Pointes Protection's future conduct. In particular, arts. 4 and 6 of the Agreement provided as follows:

> 4) The Pointes Protection Association (hereinafter the "PPA") and its executive committee members comprised of Peter Gagnon, Lou Sim[i]onetti, Pat Gratton and Gay Gartshore together with Rick Gartshore, and Glen Stortini (the named individuals hereinafter referred to collectively as the "PPA members") undertake and agree not to take any further court proceeding seeking the same or similar relief as set out in the within Notice of Application;
>
> . . .
>
> 6) The PPA and the PPA members undertake and agree that in any hearing or proceeding before the Ontario Municipal Board (OMB) or any other subsequent legal proceeding that they will not advance the position that the Resolutions passed by the SSMRCA on December 13th 2012 in regards to the Pointe Estates Development under subsection 3(1) of Ontario Reg. 176/06 are illegal or invalid or contrary to the provisions of the Conservation Authorities Act R.S.O. 1990 c. C.27 and Ontario Reg. 176/06 being the Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses or that the SSMRCA exceeded its jurisdiction by passing the above noted Resolutions with no reasonable evidence to support its decision and considered factors extraneous to those set out in subsection 3(1) of Ont. Reg. 176/06 . . . . [Emphasis added.]
>
> (A.R., vol. II, at pp. 196-97)

[89] At the OMB hearing of 170 Ontario's appeal from the City Council's refusal, Peter Gagnon, the president of Pointes Protection Association and a signatory of the Agreement, testified. This testimony is the root of the breach of contract action

later initiated by 170 Ontario against Pointes Protection, which gives rise to this appeal. Mr. Gagnon testified that 170 Ontario's proposed development would result in a loss of wetland area and in environmental damage to the region. Though 170 Ontario objected at the time to Mr. Gagnon's testimony, the OMB Member hearing the appeal permitted him to give evidence on the wetland issue insofar as it was relevant to the planning merits question and not to the conservation question, which was within the purview of the SSMRCA. Following the hearing, the OMB eventually dismissed 170 Ontario's appeal and thereby upheld the City Council's refusal of its development plan. 170 Ontario has accordingly not moved forward with that plan.

[90] What gives rise to this appeal is what followed the OMB's dismissal of 170 Ontario's appeal: 170 Ontario initiated a breach of contract action against Pointes Protection. In its statement of claim, 170 Ontario took the position that Mr. Gagnon's testimony at the OMB hearing on behalf of Pointes Protection breached the Agreement because (1) the defendants sought the same relief as in their judicial review application, (2) the defendants gave evidence regarding the wetland issue, which had been "[i]mplicit[ly]" (A.R., vol. II, at p. 33) settled by the Agreement, and (3) the defendants advanced the position that the SSMRCA approval was contrary to the *Conservation Authorities Act*, R.S.O. 1990, c. C.27. 170 Ontario claimed $6 million in damages, that is, $5 million in general damages and $1 million in punitive and aggravated damages.

[91] Pointes Protection, for its part, did not file a statement of defence, but instead brought a motion under s. 137.1 of the *CJA* to have the action dismissed.

B. *Procedural History*

(1) Ontario Superior Court (Gareau J.), 2016 ONSC 2884, 84 C.P.C. (7th) 298

[92] The motion judge, Gareau J., dismissed Pointes Protection's s. 137.1 motion and allowed 170 Ontario's action to proceed. First, on the threshold burden, he concluded that Mr. Gagnon's testimony concerning the potential environmental impact of the proposed development constituted an expression relating to a matter of public interest as required by s. 137.1(3) (paras. 29-40). However, turning to the merits-based and public interest hurdles in s. 137.1(4)(a) and (b), Gareau J. found that 170 Ontario had met its burden (paras. 41-56).

(2) Court of Appeal for Ontario (Doherty, Brown and Huscroft JJ.A.)

[93] Pointes Protection's appeal was heard together with five other appeals[3] before a single panel of the Court of Appeal for Ontario. This was in light of the fact that the Court of Appeal had not previously considered s. 137.1 of the *CJA* and that each of the appeals involved the proper interpretation of the s. 137.1 framework. Therefore, while each of the appeals raised discrete issues, the Court of Appeal's

[3] Those appeals were *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1; *Platnick*; *Veneruzzo v. Storey*, 2018 ONCA 688, 23 C.P.C. (8th) 352; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54; and *Able Translations* (C.A.).

reasons in Pointes Protection's appeal were controlling as regards the appropriate analysis of the s. 137.1 framework.

[94] Doherty J.A., writing for a unanimous court, allowed Pointes Protection's appeal, granted its s. 137.1 motion, and dismissed 170 Ontario's lawsuit (para. 124). First, on the threshold burden, he noted that 170 Ontario was not challenging Gareau J.'s finding that Mr. Gagnon's testimony constituted an expression relating to a matter of public interest under s. 137.1(3), and therefore it was not in dispute that Pointes Protection had met its burden on this prong.

[95] Doherty J.A. disagreed with the motion judge's findings on s. 137.1(4)(a) and (b). With regard to substantial merit, Doherty J.A. found that the motion judge had erred by not examining the record and considering the relevant principles of contractual interpretation. Turning to substantial merit himself, he held that 170 Ontario's action lacked substantial merit (paras. 113-17). Acknowledging that this alone would be sufficient to dismiss the action, he nonetheless analyzed the other prongs of s. 137.1(4) for completeness (para. 117). He quickly disposed of the motion judge's finding that there was no valid defence by pointing out that the judge had "wrongly put the onus on Pointes [Protection]" (para. 119). Finally, on the public interest hurdle, Doherty J.A. identified no harm to 170 Ontario aside from interference with its reasonable expectation of finality in the litigation, an expectation that was dependent entirely on the correctness of its interpretation of the Agreement

(paras. 120-21). Therefore, Doherty J.A. found that 170 Ontario could not meet its burden on any of the s. 137.1(4) prongs.

[96] The Court of Appeal for Ontario accordingly allowed Pointes Protection's appeal, set aside the motion judge's order, and entered an order dismissing 170 Ontario's action (para. 124).

C. *Application of the Section 137.1 Framework*

[97] Applying the framework set out in Part III of these reasons, I ultimately reach the same conclusion as the Court of Appeal: 170 Ontario's action lacks substantial merit, and the harm likely to be or have been suffered by 170 Ontario and the corresponding public interest in allowing the proceeding to continue do not outweigh the public interest in protecting Pointes Protection's expression. I review the findings of both the motion judge and the Court of Appeal on a standard of correctness because — as the reasons outlined in Part III made clear — their interpretation of the s. 137.1 framework raises questions of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8 and 36; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at para. 78).

(1) Section 137.1(3) — Threshold Burden

[98] Mr. Gagnon's testimony constitutes an expression that relates to a matter of public interest, and 170 Ontario's breach of contract action arises from that

expression. Therefore, Pointes Protection meets its threshold burden under s. 137.1(3) with little difficulty.

[99] First, Mr. Gagnon's testimony is captured by the statutory definition of expression, as it is a verbal communication made publicly (s. 137.1(2)).

[100] Second, the materials before the motion judge support a finding that the expression relates to a matter of public interest. Mr. Gagnon's testimony focused on the environmental impact of a proposed private development. A large group of residents and voters was deeply invested in the ecological consequences of the Pointe Estates development. There was extensive evidence in the record concerning the broad local media coverage of the development proposal itself, as well as the proceedings of the SSMRCA, the City Council, and the OMB. This was a matter that affected "people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others" (per Lord Denning in *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), at p. 198, cited in *Torstar*, at para. 104).

[101] Accordingly, I am in agreement with both the motion judge and the Court of Appeal that Mr. Gagnon's testimony at the OMB constitutes an expression on a matter of public interest.

[102] I also agree with the courts below that the proceeding brought by 170 Ontario "arises from" that expression. It is a breach of contract action premised

on an alleged breach of the Agreement resulting from Mr. Gagnon's testimony at the OMB. There is thus a clear nexus between Mr. Gagnon's expression and the underlying proceeding.

[103] Therefore, I am satisfied on a balance of probabilities that 170 Ontario's breach of contract action arises from an expression that relates to a matter of public interest.

(2) Section 137.1(4)(a) — Merits-Based Hurdle

[104] Since Pointes Protection has met its onus on the threshold question, the burden now shifts to 170 Ontario to show that there are grounds to believe that its breach of contract action has substantial merit and that Pointes Protection has no valid defence.

[105] I agree with the Court of Appeal's conclusion that 170 Ontario's action lacks substantial merit. 170 Ontario's claim is based solely on a breach of the Agreement. Accordingly, whether or not the action has "substantial merit" rests solely on the interpretation of the Agreement, which is fundamentally a contract. Applying the customary principles of contractual interpretation, which the motion judge failed to do, I find that 170 Ontario's action is not legally tenable and supported by evidence that is reasonably capable of belief such that its claim can be said to have a real prospect of success; it thus does not have substantial merit.

[106] It is well established that the interpretation of a written contractual provision must be grounded in the text and that the provision must be read in light of the entire contract. The surrounding circumstances can be relied on in the interpretive process, but not to the point that they distort the explicit language of the agreement (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57).

[107] In this case, the interpretation advanced by 170 Ontario does not flow from the plain language of the Agreement or from the factual matrix surrounding it. The reading urged by 170 Ontario would distort the ordinary meaning of the words in a manner that exceeds the bounds of appropriate judicial intervention in matters of contractual interpretation.

[108] The language of the Agreement is clear on its face: it restricts Pointes Protection's expression only as it relates to the SSMRCA's decision and to judicial review of that decision. 170 Ontario's argument is tantamount to asking this Court to read in *ex post* a term that does not exist in the Agreement. The Agreement expressly bars Pointes Protection from "advanc[ing] the position" that the SSMRCA's decision was "illegal or invalid or contrary to" the *Conservation Authorities Act* (A.R., vol. II, at p. 197). The Agreement also prohibits Pointes Protection from "seeking the same or similar relief as set out in the within Notice of Application", in which it was alleged that the SSMRCA had erred in the course of its decision-making process (p. 196). The Agreement is expressly limited to settling and foreclosing the foregoing.

There is *nothing* in its plain language which could possibly foreclose Pointes Protection from advancing an argument, as here, that does not pertain to the SSMRCA's decision. That argument might admittedly depend on the same evidence, but there is nothing in the Agreement that suggests that the evidentiary foundation of Pointes Protection's challenge to the SSMRCA's decision is precluded from being used in a proceeding unrelated to that decision.

[109] 170 Ontario's submission that any argument raised with the SSMRCA is covered by an *implied* term of the Agreement stretches the Agreement beyond any reasonable parameter. Pointes Protection specifically sought to preserve its right to participate in the OMB proceeding during the negotiations leading to the Agreement (A.R., vol. II, at pp. 192-93). Common sense indicates that its purpose in participating in the OMB proceeding would have been to advance its ultimate position against 170 Ontario's proposed land development. It is unclear what Pointes Protection would have raised at the OMB hearing other than the issues that were its primary concern: wetland destruction, flooding, drainage, and other environmental impacts. The Agreement expressly settled the application for judicial review of the SSMRCA's decision and, correspondingly, prevented any future use of arguments to the effect that the SSMRCA had erred in that decision; the Agreement did not contemplate or preclude Pointes Protection's advancement of its concerns generally.

[110] In my view, Doherty J.A.'s characterization of the situation at para. 114 of his reasons was apt and correct:

> 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. [Emphasis added.]

[111] Accordingly, 170 Ontario's breach of contract action cannot be seen as legally tenable and supported by evidence that is reasonably capable of belief such that its claim can be said to have a real prospect of success.

[112] I therefore reach the conclusion under s. 137.1(4)(a)(i) that there is no substantial merit to 170 Ontario's action. Given this conclusion, it is not necessary to consider s. 137.1(4)(a)(ii) and the defences raised by Pointes Protection (absolute privilege and estoppel). This is because 170 Ontario's failure to satisfy s. 137.1(4)(a)(i) is sufficient to say that it has failed to satisfy s. 137.1(4)(a) as a whole. In any case, the conclusion that 170 Ontario's interpretation of the Agreement has no substantial merit inevitably leads to the conclusion that it would not be able to show that Pointes Protection's interpretation of the Agreement is not valid (C.A. reasons, at para. 119).

(3) Section 137.1(4)(b) — Public Interest Hurdle

[113] Even if there were grounds to believe that 170 Ontario's action has substantial merit, and setting aside the issue of whether there are grounds to believe that Pointes Protection has no valid defence available, I would nonetheless conclude independently that the action should be dismissed because the harm, if any, to 170 Ontario resulting from the expression and the corresponding public interest in permitting the proceeding to continue do not outweigh the public interest in protecting Pointes Protection's expression in this particular case.

(a) *Harm Allegedly Suffered and Public Interest in Permitting 170 Ontario's Action to Continue*

[114] 170 Ontario claims two sources of harm that arise from Mr. Gagnon's testimony at the OMB. The first harm alleged is financial. Not only has 170 Ontario claimed $6 million in damages, but it also points out that it gave up its right to costs on the security for costs motion when it settled the judicial review application. The second harm is non-pecuniary and rests on the importance of courts fostering the principle of finality of litigation through contractual mechanisms, such as the Agreement here.

[115] Turning first to the financial damages alleged to have been suffered, I note that 170 Ontario has not provided any theory concerning the nature or quantum of those damages. I acknowledge that a fully developed damages brief is not necessary on a s. 137.1 motion. I also acknowledge that a motion judge is not required to make definite findings of fact on issues of causation. However, in this

case, there is simply a dearth of evidence on the motion linking Mr. Gagnon's testimony to any of the undefined damages that are claimed.

[116] Assuming quantifiable and demonstrable harm, 170 Ontario's argument presupposes that 170 Ontario suffered a loss as a result of Mr. Gagnon's testimony at the OMB (i.e. the expression). However, it is nearly impossible to conjecture that Mr. Gagnon's testimony was the reason why the OMB upheld the City Council's refusal of 170 Ontario's development application. Indeed, Mr. Gagnon was only one of six witnesses who testified in opposition to the development (A.R., vol. III, at p. 31). Moreover, the OMB identified several grounds for dismissing the appeal in its entirety: the development application did not have appropriate regard for matters of provincial interest, was not consistent with the Provincial Policy statement, was contrary to the Official Plan of the City of Sault Ste. Marie, did not have appropriate regard for the provisions of s. 51(24) of the *Planning Act*, R.S.O. 1990, c. P.13, and the development application in its entirety did "not represent good planning" (A.R., vol. III, at pp. 13-14). Though the OMB explicitly accepted Mr. Gagnon's evidence, that evidence was merely one of many contributing factors in its ultimate dismissal of 170 Ontario's appeal, and may not have been a factor at all in the constellation that comprise of why the City Council refused 170 Ontario's development plan in the first place.

[117] To be absolutely clear, the preceding paragraph should not be taken to be an affirmation of the reasonableness of the OMB's decision, which is not before this

Court and in respect of which leave to appeal to the Divisional Court was denied (*Avery v. Pointes Protection Assn.*, 2016 ONSC 6463, 60 M.P.L.R. (5th) 70). Rather, it is simply meant to demonstrate that 170 Ontario cannot convincingly show that any harm it might have suffered as a result of Mr. Gagnon's expression was in fact sufficient to establish any significant public interest in allowing its breach of contract action to proceed.

[118] The second harm alleged by 170 Ontario has to do with finality in litigation, which is undoubtedly an important value. However, the value of finality in litigation is relevant at the s. 137.1(4)(b) stage only to the extent that it relates to harm suffered by the plaintiff, not harm in general. Here, I am willing to accept that this is the case, since 170 Ontario alleges that it is being deprived of a benefit for which it bargained in settling the judicial review proceeding with Pointes Protection. Nonetheless, in my view, finality in litigation is not compromised by dismissing 170 Ontario's breach of contract action: the Agreement continues to be binding between the parties, and Pointes Protection continues to be foreclosed from advancing the position that the SSMRCA's decision was invalid or illegal. I am in agreement with the Court of Appeal that "170 Ontario's reasonable expectation of finality is dependent entirely on the correctness of its interpretation of the agreement" (para. 120). As I discussed above, the Agreement cannot reasonably be read as precluding Mr. Gagnon's testimony before the OMB. Therefore, finality in litigation is not squarely engaged and cannot be given any significant weight at this stage.

[119] In summary, in light of the foregoing, I must conclude that the harm likely to be or have been suffered by 170 Ontario as a result of Mr. Gagnon's expression lies at the very low end of the spectrum and, correspondingly, so too does the public interest in allowing the proceeding to continue.

(b) *Public Interest in Protecting Pointes Protection's Expression*

[120] The public interest in protecting Mr. Gagnon's expression is significant for two reasons. First, the public has a strong interest in the subject matter of the expression, which relates to the ecological impact and environmental degradation associated with a proposed large-scale development. Second, the form of the expression, namely testimony before an adjudicative tribunal, militates in favour of protecting it.

[121] First, with respect to the subject matter of the impugned expression in this case, it must be borne in mind that Mr. Gagnon was providing evidence regarding a matter of local and ecological significance. The express purpose of s. 137.1 is to "encourage" and "promote" public participation in debates on matters which invite this kind of public attention.

[122] Further, the OMB is required to carry out its obligations under the *Planning Act* with regard to "matters of provincial interest", which are defined as including the protection of ecological systems, the conservation of features with significant interest, and the orderly development of safe and healthy communities

(s. 2). These "matters of provincial interest" intersect to a large degree with the public interest, and the opportunity to express an opinion on these issues during what is a public deliberative process ought to be encouraged.

[123] Second, with respect to the form of expression, courts have closely guarded the principle of participation in the process of tribunal decision making. Where a claim is founded on evidence to be provided before a tribunal, there is a risk that witnesses will be deterred from participating in the adjudicative process because of a fear of legal retaliation. For this reason, courts recognize, for example, an absolute privilege that attaches to testimony given "in the ordinary course of any proceedings", regardless of whether it is relevant or irrelevant, malicious or not (*Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38, at para. 34, citing *Halsbury's Laws of England* (4th ed. 1997), vol. 28, at para. 97). Indeed, here, reducing the "risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action" is an express statutory purpose set out in s. 137.1(1).

[124] Strengthening the integrity of the justice system by encouraging truthful and open testimony is inextricably linked to the freedom of participants to express themselves in the forums concerned without fear of retribution. I accordingly consider that the public interest in protecting Pointes Protection's expression falls at the higher end of the spectrum.

(c) *Weighing of the Public Interest*

[125] As I have discussed, the harm likely to be or have been suffered by 170 Ontario lies at the very low end of the spectrum, and so too then does the public interest in allowing the proceeding to continue. On the other hand, the public interest in Pointes Protection's expression is at the higher end of the spectrum.

[126] It is thus clear that 170 Ontario cannot establish on a balance of probabilities that the harm suffered as a result of Pointes Protection's expression is sufficiently serious that the public interest in permitting the proceeding to continue *outweighs* the public interest in protecting that expression.

(4) Conclusion on the Application of the Framework

[127] For the foregoing reasons, I would grant Pointes Protection's s. 137.1 motion on either of the independent grounds that 170 Ontario's action lacks substantial merit and that 170 Ontario is unable to demonstrate that the weighing of the public interest favours permitting the proceeding to continue. Accordingly, the Court of Appeal for Ontario was correct in dismissing 170 Ontario's underlying breach of contract action.

V. Conclusion

[128] The appeal is dismissed.

[129] With regard to costs, the legislature expressly contemplated a costs regime for s. 137.1 motions. Indeed, s. 137.1(7) sets out an award of costs as the default rule if a s. 137.1 motion is granted, unless a judge determines that "such an award is not appropriate in the circumstances." That would not be the case here. I would therefore simply award party-and-party costs to the respondents, as per this Court's ordinary practice.

Appeal dismissed with costs.

Solicitors for the appellant: Wishart Law Firm, Sault Ste. Marie.

Solicitors for the respondents: Wiffen Litigation, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Goodmans, Toronto; Maia Tsurumi, Vancouver.

Solicitors for the intervener Greenpeace Canada: Stockwoods, Toronto; Greenpeace Canada, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Ecojustice Canada Society: Ecojustice Canada Society, Toronto; Ecojustice Environmental Law Clinic at the University of Ottawa, Ottawa.

Solicitors for the interveners the Centre for Free Expression, the Canadian Association of Journalists and the Communications Workers of America / Canada: Stockwoods, Toronto.

Solicitors for the interveners the West Coast Legal Education and Action Fund, the Atira Women's Resource Society, the B.W.S.S. Battered Women's Support Services Association and the Women Against Violence Against Women Rape Crisis Center: Dentons Canada, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: St. Lawrence Barristers, Toronto.

Solicitors for the interveners the Ad IDEM / Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, the Aboriginal Peoples Television Network and Postmedia Network Inc.: Linden & Associates Professional Corporation, Toronto.