

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

B E T W E E N:

MAIA BENT and LERNERS LLP

Appellants
(Respondents)

- and -

HOWARD PLATNICK

Respondent
(Appellant)

- and -

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, GREENPEACE CANADA,
CANADIAN CONSTITUTION FOUNDATION, ECOJUSTICE CANADA SOCIETY,
WEST COAST LEGAL EDUCATION AND ACTION FUND, ATIRA WOMEN'S
RESOURCE SOCIETY, B.W.S.S. BATTERED WOMEN SUPPORT SERVICES
ASSOCIATION, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS,
CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN BROADCASTING
CORPORATION, BARBRA SCHLIFER COMMEMORATIVE CLINIC, AD IDEM /
CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN JOURNALISTS FOR
FREE EXPRESSION, CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS, A
DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, ABORIGINAL
PEOPLES TELEVISION NETWORK, POSTMEDIA NETWORK INC.**

SCC File No. 38376

BETWEEN:

1704604 ONTARIO LIMITED

Appellant
(Respondent)

-and-

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

Respondents
(Appellants)

- and -

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, GREENPEACE CANADA,
CANADIAN CONSTITUTION FOUNDATION, ECOJUSTICE CANADA SOCIETY,
WEST COAST LEGAL EDUCATION AND ACTION FUND, ATIRA WOMEN'S
RESOURCE SOCIETY, B.W.S.S. BATTERED WOMEN SUPPORT SERVICES
ASSOCIATION, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS,**

CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN BROADCASTING CORPORATION, BARBRA SCHLIFER COMMEMORATIVE CLINIC, AD IDEM / CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERHSIP, ABORIGINAL PEOPLES TELEVISION NETWORK, POSTMEDIA NETWORK INC.

Intervenors

FACTUM OF THE INTERVENERS, WEST COAST LEGAL EDUCATION AND ACTION FUND, ATIRA WOMEN'S RESOURCE SOCIETY, B.W.S.S. BATTERED WOMEN'S SUPPORT SERVICES ASSOCIATION, WOMEN AGAINST VIOLENCE AGAINST WOMEN RAPE CRISIS CENTRE

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

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

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

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

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

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

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

Atira Women's Resource Society

Legal Advocacy Program
101 East Cordova Street
Vancouver, BC V6A 1K7

Amber Prince

Tel.: 604-331.1407 x.108
Fax: 604-688-1799
Email: amber_prince@atira.bc.ca

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

ORIGINAL TO: **REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

Winkler Dispute Resolution
39 Glenayr Road
Toronto, ON M5P 3B9

Howard Winkler
Eryn Pond
Tel.: 416-519-2344
Fax: 416-915-6325
Email: hwinkler@winklerlawllp.com

**Counsel for the Appellant, Maia Bent
(38374)**

Borden Ladner Gervais LLP
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel.: 613-787-3562
Fax: 613-230-8842
Email: kperron@blg.com

**Ottawa Agent for Counsel for the
Appellant, Maia Bent (38374)**

AND TO: **Lax O'Sullivan Lissus Gottlieb LLP**
2750 – 145 King Street West
Toronto, ON M5H 1J8

Terrence J. O'Sullivan
Andrew Winton
Tel.: 416-644-5359
Fax: 416-598-3730
Email: tosullivan@lolg.ca
awinton@lolg.ca

**Counsel for the Appellant,
Lerners LLP (38374)**

Borden Ladner Gervais LLP
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron
Tel.: 613-787-3562
Fax: 613-230-8842
Email: kperron@blg.com

**Ottawa Agent for Counsel for the
Appellant, Lerners LLP (38374)**

AND TO: **Danson Recht LLP**
2000 – 700 Bay Street
Toronto, ON M5G 1Z6

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

**Counsel for the Respondent, Howard
Platnick (38374)**

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel.: 613-695-8855 Ext: 101
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

**Ottawa Agent for Counsel for the
Respondent, Howard Platnick (38374)**

AND TO: **Wishart Law Firm LLP**
390 Bay Street, 5th Floor
Sault Ste. Marie, ON P6A 1X2

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

**Counsel for the Appellant, 1704604
Ontario Limited (38376)**

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.
Tel.: 613-695-8855 Ext: 101
Fax: 613-695-8580
Email: emeehan@supremeadvocacy.ca

**Ottawa Agent for Counsel for the
Appellant, 1704604 Ontario
Limited (38376)**

AND TO: **Wiffen Litigation**
181 University Avenue, Suite 2200
Toronto, ON M5H 3M7

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

**Counsel for the Respondents, Pointes
Protection Association, Peter
Gagnon, Lou Simionetti, Patricia
Grattan, Gay Gartshore, Rick
Gartshore and Glen Stortini (38376)**

Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6

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

**Ottawa Agent for Counsel for the
Respondents, Pointes Protection
Association, Peter Gagnon, Lou
Simionetti, Patricia Grattan, Gay
Gartshore, Rick Gartshore and Glen
Stortini (38376)**

AND TO: **Maia Tsurumi**
154 West 18th Avenue
Vancouver, BC V5Y 2A5
Tel : 604-736-8703
Email : mtsurumi@legalanalysis.ca

Goodmans LLP
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Peter Kolla
Amanda Bertucci
Tel : 416-979-2211
Fax : 416-979-1234
Email: pkolla@goodmans.ca
abertucci@goomans.ca

**Counsel for the Intervener British
Columbia Civil Liberties Association
(38374 and 38376)**

Goldblatt Partners LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4
43 Florence Street
Ottawa, ON K2P 0W6

Colleen Bauman
Tel: 613-235-5327
Fax: 613-235-3042
Email: cbauman@goldblattpartners.com

**Ottawa Agent for the Counsel for the
Intervener British Columbia Civil
Liberties Association in (38374 and 38376)**

AND TO: **STOCKWOODS LLP**
77 King Street West, Suite 4130
Toronto, ON M5H 1H1

Nader R. Hasan
Carlos di Carlo
Tel : 416-593-1668
Fax : 416-593-9345
Email : naderh@stockwoods.c

**Counsel for the Intervener
Greenpeace Canada (38374 and
38376)**

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

Maxine Vencelette
Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

**Ottawa Agent for the Counsel for the
Intervener Greenpeace Canada (38374
and 38376)**

AND TO: **MCCARTHY TÉTRAULT LLP**
Suite 5300, 66 Wellington Street, West
Toronto, ON M5K 1E6

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

**Counsel for the Intervener Canadian
Constitution Foundation (38374 and
38376)**

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

Darius Bossé
Tel: 613-702-5566
Fax: 613-702-5566
Email: dbosse@juristespowerlaw.ca

**Ottawa Agent for the Counsel for the
Intervener Canadian Constitution
Foundation (38374 and 38376)**

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

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

**Counsel for the Intervener Ecojustice
Canada Society (38374 and 38376)**

AND TO: **ST. LAWRENCE BARRISTERS
LLP**
144 King Street East
Toronto, ON M5C 1G8

Alexi N. Wood
Jennifer P. Saville
Tel : 647-245-8283
Fax : 647-245-8285
Email : alex.wood@stbarristers.ca

**Counsel for the Intervener Canadian
Civil Liberties Association (38374
and 38376)**

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

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email: lynne.watt@gowlingwlg.com

**Ottawa Agent for the Counsel for the
Intervener Canadian Civil Liberties
Association (38374 and 38376)**

AND TO: **LINDEN & ASSOCIATES**
200 Bay Street, Suite 2010
Toronto, ON M4J 2J1

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

**Counsel for the Intervener 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, Postmedia
Network Inc. (38374 and 38376)**

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

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

**Ottawa Agent for the Counsel for the
Intervener 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, Postmedia Network
Inc. (38374 and 38376)**

AND TO: **CANADIAN BROADCASTING
CORPORATION LEGAL
SERVICES**
250 Front Street West
Toronto, ON M5V 3G7

Sean A. Moreman
Tel : 416-205-6496
Fax : 416-205-2723
Email : sean.moreman@cbc.ca

**Counsel for the Intervener Canadian
Broadcasting Corporation (38374)**

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

Guy Régimbald
Tel: 613-786-0197
Fax: 613-563-9869
Email: guy.regimbald@gowlingwlg.com

**Ottawa Agent for Counsel for the
Intervener Canadian Broadcasting
Corporation (38374)**

AND TO: **BIRENBAUM LAW**
555 Richmond St. W, Suite 1200
Toronto, ON M5V 3B1

Joanna Birenbaum
Tel : 647-500-3005
Fax : 416-968-0325
Email : joanna@birenbaumlaw.ca

**Counsel for the Intervener Barbara
Schlifer Commemorative Clinic
(38374)**

AND TO: **STOCKWOODS LLP**
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

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

**Counsel for the Intervener Centre for
Free Expression, Canadian
Association of Journalists,
Communications Workers of
America/Canada (38376)**

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

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

**Ottawa Agent for Counsel for the
Interveners Barbara Schlifer
Commemorative Clinic (38374)**

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

Maxine Vencelette
Tel: 613-702-5573
Fax: 613-702-5573
Email: mvincelette@powerlaw.ca

**Ottawa Agent for the Counsel for the
Intervener Centre for Free Expression,
Canadian Association of Journalists,
Communications Workers of
America/Canada (38376)**

TABLE OF CONTENTS

TAB	PAGE
1	FACTUM
	PART I – OVERVIEW 1
	PART II – STATEMENT OF POSITION 2
	PART III – ARGUMENT 2
	Public interest in the disclosure of gender based violence 2
	(a) Shame and Stigma 2
	(b) Lack of Confidence in the Judicial System 3
	(c) Myths, Stereotypes and Rarity of False Allegations 4
	Striking a fair balance under section 137.1(4) of the <i>CJA</i> 5
	(a) Section 137.1(4)(a): Strength of the Case 6
	(b) Section 137.1(4)(b): Weighing Public Interest and Private Harm
	PART IV and V – AUTHORITIES and STATUTES 11
A	Appendix A - Elaine Craig, "The Inhospitable Court" (2016) 66:2 UTLJ 197
B	Appendix B - Peter A. Downard, <i>Libel</i> , 3 rd ed (Markham: LexisNexis Canada, 2014) at 3, 4, 19, 165-166
C	Appendix C - Kateryna M. Sylaska and Katie M. Edwards, "Disclosure of Intimate Partner Violence to Informal Social Support Network Members: A Review of the Literature" (2014) 15:1 <i>Trauma, Violence & Abuse</i>
D	Appendix D - <i>Stuart v. Doe</i> , 2019 YKSC 53

PART I. OVERVIEW

1. Survivors¹ of gender based violence experience many barriers to reporting, disclosing or seeking support related to that violence². As recently and aptly stated by Justice Moldaver:

We live in a time where myths, stereotypes, and sexual violence against women — particularly Indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made [...] more needs to be done. Put simply, we can — and *must*— do better³.

2. This echoes statements made two decades ago by Chief Justice Lamer, dissenting in part:

The history of the treatment of sexual assault complainants by our society and our legal system is an unfortunate one. Important change has occurred through legislation aimed at both recognizing the rights and interests of complainants in criminal proceedings, and debunking the stereotypes that have been so damaging to women and children, but the treatment of sexual assault complainants remains an ongoing problem. If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament’s attempt to respond to such voices⁴.

3. If our society and the legal system is to do better, we submit that anti-SLAPP legislation⁵ be read in a manner that empowers survivors to report, disclose and seek support related to gender based violence without fear of being sued or otherwise silenced by the legal system.

¹ This factum uses the term “survivor” to refer to people who have been sexually assaulted both for the sake of concision and in recognition that many people who experience sexual assault live beyond this traumatic event. These interveners recognize that not everybody who has experienced sexual assault identifies as a “survivor.” Some people may prefer “victim” or another term, while others do not wish to label themselves based on their experience.

² Gender-based violence, or GBV, is violence that is committed against someone based on their gender identity, gender expression or perceived gender. GBV is not limited to physical abuse but includes words, actions, or attempts to degrade, control, humiliate, intimidate, coerce, deprive, threaten, or harm another person. See e.g. Status of Women Canada, “About Gender-Based Violence” (December 10, 2018), online: <https://cfc-swc.gc.ca/violence/knowledge-connaissance/about-apropos-en.html>

³ *R. v. Barton*, 2019 SCC 33 at para 1 [*Barton*].

⁴ *R. v. Mills*, [1999] 3 SCR 668 at para 58 [*Mills*].

⁵ *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23 (the “*Ontario Act*”) and the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (the “*BC Act*”), which is modeled after and is nearly identical to the *Ontario Act* (see: British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl, 4th Sess (“*Hansard*”) (13 February 2019) at 6974 (Hon D Eby)).

PART II. STATEMENT OF POSITION

4. Suing a survivor of gender based violence for reporting, disclosing, or seeking basic assistance and support is *prima facie* strategic litigation against public participation (“SLAPP”). The reporting and disclosure of gender based violence are expressions relating to matters of public interest, to which anti-SLAPP legislation applies. Survivors who invoke the legislation’s protection need to feel confident that courts will apply a test that does not, in the name of formal equality, prefer the plaintiff over the defendant-survivor. These interveners, the B.C. Coalition⁶, submits that substantively equality is needed⁷. This can be achieved by recognizing the reporting and disclosure of gender based violence as an express category of qualified privilege under the merits based inquiry⁸, and by recognizing in the balancing stage⁹ the superordinate public interest in promoting and facilitating the reporting, disclosure, and discussion of gender based violence, such that it will rarely be outweighed by purported harm to the plaintiff.

PART III. ARGUMENT

A. Public interest in the disclosure of gender based violence

5. Gender based violence is about power and control.¹⁰ It disproportionately impacts genders that are traditionally marginalized by society: trans; non-binary; two-spirit people; Black; racialized and Indigenous; women; other gender diverse persons¹¹; those living in northern, rural, and remote communities; people with disabilities; newcomers; children and youth; and seniors.¹²

⁶ West Coast Legal Education and Action Fund, Atira Women’s Resource Society, B.W.S.S. Battered Women’s Support Services Association, and Women Against Violence Against Women Rape Crisis Centre (collectively, the “B.C. Coalition”)

⁷ See for example *Barton* (a case about gender based violence) at para 202, where this Court emphasizes the need for substantive equality and confirms it as a core concept of our justice system.

⁸ Section 137.1(4)(a) of the *Court of Justice Act*, R.S.O. 1990, c. C.43 (“*CJA*”) and section 4(2)(a) of the *BC Act*.

⁹ Section 137.1(4)(b) of the *CJA* and section 4(2)(b) of the *BC Act*.

¹⁰ See *Status of Women Canada*, *supra* note 2.

¹¹ Gender diverse is an umbrella term for gender identities and/or gender expressions that differ from cultural or societal expectations based on assigned sex. Other common terms associated with gender diversity are gender variance and gender non-conformity. Gender variance, diversity or non-conformity is different from transgender, which refers to a specific identity. A transperson does not identify either fully or in part with the gender associated with the sex assigned to them at birth. See Egale Canada Human Rights Trust, “Glossary of Terms” (March, 2017), online: <https://egale.ca/wp-content/uploads/2017/03/Egales-Glossary-of-Terms.pdf>; WAVAW, “Queering Language and Resisting Perfection” (May 3, 2018), online: <https://www.wavaw.ca/queering-language-and-resisting-perfection/>

¹² *Status of Women Canada*, *supra* note 2; Shana Conroy and Adam Cotter, *Self-reported sexual assault in Canada, 2014*, (Ottawa: Canadian Centre for Justice Statistics, 2017) at 7 and 8 (<https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/14842-eng.pdf?st=qQIo-7pV>) (“Statistics Canada Report”).

Any time these identities overlap there is a greater likelihood of being targeted for gender based violence.

6. Many survivors of gender based violence experience symptoms consistent with post-traumatic stress disorder¹³. The trauma experienced by survivors is compounded when they are sued, or threatened with suits, for speaking with their family, friends, neighbours, or co-workers, or for reporting gender based violence within judicial or quasi-judicial systems¹⁴. Survivors find themselves traumatized by gender based violence and then re-traumatized by their assailants and the legal system via SLAPP suits. The *CJA* and *BC Act* provide a mechanism for the early dismissal of such claims, mitigating some of the harm to survivors who have decided to disclose or make reports about their experience of gender based violence.

(a) Shame and Stigma

7. Gender based violence has long been recognized as being under-reported due to the shame, stigma, and fear of reprisal experienced by those targeted¹⁵. The statements of Chief Justice Lamer and Justice Moldaver above speak to society's persistent view that those who have experienced gender based violence have done something to deserve it. This narrative is predicated on the notion that sexual violence is about sex and not power, and that gender roles dictate who has power and who does not. Such a narrative only re-entrenches the notion that each person is responsible for their own safety and therefore, if gender based violence happens, it is the survivor's fault.

(b) Lack of Confidence in the Judicial System

8. A common reason for not reporting gender based violence is a lack of confidence in the legal system¹⁶. Survivors commonly fear that they will not be believed¹⁷. For Indigenous, Black, racialized, trans and gender diverse survivors, usual sources of reporting gender based violence

¹³ Statistics Canada Report at 13-15.

¹⁴ See for example *Galloway v. A.B.*, 2019 BCSC 395 [*Galloway*], where A.B. was sued in her own name in defamation because she came forward with claims of sexual assault and sexual harassment at the University of British Columbia and for confiding in trusted friends. A.B. was publicly named as a sexual assault complainant and learned of the lawsuit through the media, causing her profound harm (see *Galloway* at paras 13 and 16); See also *Stuart v. Doe*, 2019 YKSC 53 [*Stuart*], an action against a survivor of sexual assault for making a Facebook post about the result of her complaint to Yukon College regarding sexual assault of her by a faculty member. The Facebook post mentions neither the educational institution nor the plaintiff (*Stuart* at para 1).

¹⁵ Statistics Canada Report at 4 and 6; Alana Prochuk, *Women's Experiences of the Barriers to Reporting Sexual Assault* (Vancouver: West Coast LEAF, 2018) (<http://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf>) ("West Coast Leaf Report").

¹⁶ Elaine Craig, "The Inhospitable Court" (2016) 66:2 UTLJ 197.

¹⁷ Statistics Canada Report at 17; West Coast Leaf Report at 6.

are largely unavailable, in the context of historical and ongoing systemic violence and oppression committed against them¹⁸. The effect is that many survivors of gender based violence do not report to police or consult with support services.

9. Survivors of gender based violence make disclosures and seek support from networks outside of the legal system. According to a 2014 Statistics Canada report, while many survivors of gender based violence did not report the incident to the police, many did speak with someone. Nearly two-thirds stated that they talked to a friend or neighbour about their victimization. Over 40% stated that they talked to a family member, and nearly 25% stated that they talked to a co-worker. Victims of physical assault were more likely to report speaking to a family member (69%) or a co-worker (58%)¹⁹. Underlying these statistics is the desire of many survivors, especially those experiencing multiple forms of oppression, to disclose to community members for their own safety and well-being, and for the safety and well-being of other community members.²⁰

10. There has been a considerable evolution in the law and trial process when it comes to gender based violence, particularly sexual assault. Nonetheless, further attention to substantive equality as opposed to formal equality is required, especially when it comes to dispelling myths and stereotypes. This Honourable Court has an important role to play in ensuring its reasoning, including in civil matters such as these, aligns with its existing equality jurisprudence²¹.

(c) Myths, Stereotypes and Rarity of False Allegations

11. False allegations of gender based violence are very rare, occurring at a rate similar to other offences²². Yet, there remains culturally entrenched and pervasive skepticism about disclosures of gender based violence, resulting in further silencing and harm to survivors. Evidence of the “unchaste woman”, a delayed complaint, and a failure to fight back demonstrating consent, continue to be adduced in criminal and civil proceedings²³.

¹⁸ Caroline White and Joshua Goldberg, “Expanding our Understanding of Gendered Violence: Violence against Trans People and their Loved Ones” (2006) 25.1-2 *Canadian Women’s Studies* at 125.

¹⁹ Statistics Canada Report at 16 and 18.

²⁰ Kateryna M. Sylaska and Katie M. Edwards, “Disclosure of Intimate Partner Violence to Informal Social Support Network Members: A Review of the Literature” (2014) 15:1 *Trauma, Violence, & Abuse*.

²¹ Emma Cunliffe, “Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?” (2012) 57 *Sup Ct L Rev* (2d) 295.

²² West Coast LEAF Report at 5.

²³ Elaine Craig, “The Ethical Obligations of Defence Counsel in Sexual Assault Cases” (2014) 51:2 *Osgoode Hall LJ* 427.

12. Such evidence of victim blaming and “slut shaming”²⁴ is now impermissible in criminal proceedings²⁵. There is no juridical basis to allow such evidence to be advanced in civil cases. This includes in response to a dismissal application to demonstrate that the claim has substantial merit and that a defendant-applicant has no valid defence.

B. Striking a fair balance under section 137.1(4) of the CJA

13. The statements of Justice McLachlin (as she then was) in *R. v. O’Connor*²⁶ inform these appeals:

What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice²⁷.

14. This Court faces a similar task in these appeals. A dismissal application pursuant to the *CJA* and *BC Act* requires an assessment, at a preliminary stage, of competing interests. For the plaintiff, it is rehabilitation of reputation. For the defendant, it is freedom of expression. For survivors of gender based violence, that expression is engaged to secure safety, support, dignity, and equality. A third interest, the public interest, is in whether the expression at issue reflects or is close to the core values protected by freedom of expression such that it should not be restricted despite alleged individual harm. All are important interests. The legislation, however, requires that one or more prevail over the other. As sections 137.1(4)(a) and (b) are conjunctive, the legislature intended that meritorious claims may be dismissed. In other words, anti-SLAPP legislation anticipates imperfect justice in pursuit of fairness.

15. In the words of Justice McLachlin in *O’Connor*, fairness includes a consideration of the interests of the defendant, society, and the administration of justice. Considering the need to

²⁴ West Coast LEAF Report at 21.

²⁵ See *Barton*; See also *R. v. Goldfinch*, 2019 SCC 38.

²⁶ *R. v. O’Connor*, [1995] 4 SCR 411 [*O’Connor*] where this Court was tasked with devising a test for the production of records held by third parties which preserves the right of an accused to a fair trial while respecting individual and public interest in privacy and the efficient administration of justice (*O’Connor* at para 193).

²⁷ *O’Connor* at para 193. McLachlin J. went on to compare what perfect justice looks like from different perspectives, and emphasized, amongst other things, “[t]he need for a system of justice which is workable, affordable, and expeditious” (*O’Connor* at para 194).

balance competing rights, in the absence of evidence of false reporting, a plaintiff's pursuit of reputational rehabilitation must give way to the greater societal interest in ensuring justice for survivors of gender based violence, and dismantling rather than entrenching impunity for perpetrators. Creating a mechanism for early dismissal of SLAPP suits provides a start.

(a) **Section 137.1(4)(a): Strength of the Case**

16. Assessing whether a proceeding has substantial merit and whether an applicant has no valid defence requires evaluation of the strength of the underlying claim. This will likely be required at an early stage of the proceeding, similar to interlocutory injunctions. In such circumstances, the words of Lambert J.A. are apposite:

[T]he assessment of the relative strength of the parties' cases must recognize the degree to which those cases have not yet been revealed because of the nature of the evidence and the way it has been presented on the injunction application, which may be markedly different from the way it would be presented at trial²⁸.

17. Lambert J.A. went on to adopt the reasons of Justice Beetz in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, and the reasons of Justice McLachlin (as she then was) in *British Columbia (Attorney General) v. Wale*. The interlocutory injunction test requires consideration of all "relevant factors at one time and in one unified context"²⁹, and making a decision accepting that the whole case is unknown. A similar contextual approach is required to applications for dismissal under anti-SLAPP legislation.

18. In defamation claims, context includes that the plaintiff has a low burden, needing to establish only: (1) the expression at issue refers to the plaintiff; (2) the expression has been published to a third party; and (3) the expression is defamatory in that it would tend to lower the plaintiff's reputation in the community in the estimation of reasonable persons. Once these elements are established, falsity and damages are presumed. The burden then shifts to the defendant to prove any number of defences³⁰, including truth and qualified privilege. For a survivor of gender based violence defending a defamation suit, this forces a difficult choice, in

²⁸ See *Canadian Broadcasting Corp. v. CKPG Television Ltd.*, 1992 CarswellBC 31, [1992] 3 W.W.R. 279, at para 24 [CKPG].

²⁹ CKPG at para 25.

³⁰ Peter A. Downard, *Libel*, 3rd ed (Markham: LexisNexis Canada, 2014) at 3 and 4 [Downard].

particular, whether to defend a claim in a way that requires publicly retelling and reliving an extremely traumatic event, in other words, re-traumatization.

19. The ease with which a plaintiff can advance a defamation claim lends itself to exploitation for improper purposes. Anti-SLAPP legislation is a response to this potential exploitation and provides a counterbalance to the disproportionate burden on the defendant³¹.

20. In circumstances where the defendant is a survivor of gender based violence, both the risk of abuse and the burden on the defendant is amplified, for all of the reasons stated in Part III. A., above. As stated by the Honourable Attorney General of British Columbia during the second reading of the *BC Act*, “simply the threat of defamation action is enough to stop people from speaking”³². This is particularly true in cases of gender based violence, where there is often an inherent power imbalance between a wrongdoer and a survivor and a deep institutional mistrust of the legal system.

21. This can be addressed, at least in part, by viewing defamation claims arising from the reporting or disclosure of gender based violence, as *prima facie* SLAPP suits. We urge this Court to recognize disclosure and reporting of gender based violence as a category of expression entitled to protection as qualified privilege, that can only be overcome with real and cogent evidence of malice, in particular falsity.

22. While appreciating that these two appeals do not concern claims of gender based violence, the following two cases from the Ontario Court of Appeal highlight the need to recognize the reporting and disclosure of gender based violence as an express category of qualified privilege, if anti-SLAPP legislation is to have utility or efficacy for gender based violence survivors: *Whitfield v. Whitfield*, 2016 ONCA 581,³³ and *D’Addario v. Smith*, 2018 ONCA 163³⁴.

³¹ See for example *Hansard*, (14 February 2019) at 7018 (Hon D Eby).

³² *Hansard*, (14 February 2019) at 7028 (Hon D Eby).

³³ *Whitfield v. Whitfield*, 2016 ONCA 581, leave to appeal ref’d. In this defamation and sexual assault case, the Ontario Court of Appeal overturned the trial judge’s finding of qualified privilege, holding that the trial judge erred in law in finding that the sister’s former friend had a duty or interest in receiving communications from the survivor about the alleged sexual assault.

³⁴ *D’Addario v. Smith*, 2018 ONCA 163 [*D’Addario*]. In this defamation and sexual assault case, the Ontario Court of Appeal questions whether communications to a priest are a recognized occasion protected by qualified privilege, and further held that the defendants did not have a duty to make statements regarding the sexual assault to the priest (*D’Addario* at paras 30 and 33).

23. In both cases, the Ontario Court of Appeal rejected the defences of qualified privilege as asserted by survivors of gender based violence over communications with (a) a friend (*Whitfield*) and (b) a priest (*D'Addario*)³⁵. These defences did not fail because the plaintiff failed to adduce evidence of malice or evidence that the scope of the privilege was exceeded, as is required to defeat qualified privilege³⁶; they failed because the Court held that an occasion of privilege had not been established. In other words, these communications were not worthy of protection. The Ontario Court of Appeal's approach to the defence of qualified privilege in such circumstances is contrary to the need for our society and legal system to ensure that the dignity, safety, and equality rights of survivors of gender based violence are meaningfully protected and that myths and stereotypes of the reporting and disclosure of gender based violence no longer prevail.

24. *Whitfield* and *D'Addario*, will act as deterrents to reporting and disclosing by survivors of gender based violence. In the face of these decisions, and without the protections encouraged by the B.C. Coalition, all that a plaintiff would have to show is that there were communications regarding gender based violence to a third party, such as a priest, friend, neighbour, or co-worker, or a benefits program³⁷. A court would then likely conclude that the plaintiff's claim has substantial merit, and that the defence of qualified privilege is not a valid defence. This would put the defendant in an untenable position of advancing other defences, including truth. Forcing a survivor of gender based violence to make such decisions upon having been sued discourages reporting and is antithetical to fundamental fairness.

25. Instead, we urge this Honourable Court to establish an express category of qualified privilege for the reporting and disclosure of gender based violence. This is analogous to the protection afforded to informants as considered in *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45. There is an important public interest in informants being protected so that they may come forward without fear of legal retribution³⁸. The same principles apply to the disclosure of gender based violence. As with informer privilege, we submit that qualified privilege for disclosure of gender based violence be near absolute. This protection from SLAPP suits will promote disclosure of underreported gender based violence.

³⁵ See *Whitfield* at paras 59-60, 78, and *D'Addario* at paras 16, 30-34.

³⁶ *Downard* at 165-166.

³⁷ For example, the BC Crime Victim Assistance Program meant to provide supports to victims of violent crimes such as gender based violence.

³⁸ *R. v. Durham Regional Crime Stoppers Inc.*, 2017 SCC 45.

26. In order to defeat this qualified privilege, the plaintiff on a dismissal application must adduce real and cogent evidence of malice, falsity in particular, rather than victim blaming and “slut shaming” evidence.

(b) Section 137.1(4)(b): Weighing Public Interest and Private Harm

27. When considering the harm suffered or likely to be suffered by a respondent, courts may take guidance from the factors to be considered when assessing general damages in defamation, as, in effect, what the legislation requires under the balancing stage is a preliminary assessment of the plaintiff’s damages. These factors are notorious, and include: the conduct of the plaintiff; the plaintiff’s position and standing; the nature of the libel; the mode and extent of publication; the absence or refusal of any retraction or apology; the conduct of the defendant; and evidence of aggravation or mitigation of damages³⁹.

28. When considering whether it is in the public interest to dismiss a claim, courts may consider a number of factors: the scope of the expression (this will be inversely related to the plaintiff’s damages); prevailing but discredited and erroneous socio-cultural attitudes and myths surrounding false allegations of gender based violence; the rarity of false allegations of gender based violence; any power imbalances between the plaintiff and defendant; harm to the defendant and similarly situated defendants if the claim is not dismissed; and the quality of the expression.

29. As a threshold question, a court is required by section 137.1(3) of the *CJA* to consider whether the expression relates to a matter of public interest. This, we submit, is a low threshold. The court must then go on, though, to consider the quality of the expression by weighing the public interest in the expression under section 137.1(4)(b). Once again, the words of Chief Justice McLachlin, in *Grant v. Torstar*, 2009 SCC 61⁴⁰, are informative to this exercise.

30. In *Torstar*, this Court established the defence of responsible communications on matters of public interest. Part of the test to determine whether the communication was made responsibly requires considering the public importance of the matter. Chief Justice McLachlin stated: “The subject matter will, however, already have been deemed by the trial judge to be a matter of public interest. However, not all matters of public interest are of equal importance.”⁴¹

³⁹ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, at para 182.

⁴⁰ *Grant v. Torstar Corp.*, 2009 SCC 61 [*Torstar*].

⁴¹ *Torstar* at para 112.

31. As apparent from Justice McLachlin's reasons, not all expressions are equal. The further the expression is from the core values protected by freedom of expression, the greater the justification to restrict that expression⁴². This *Charter* principle informs the development of common law, including the law of defamation. The reporting and discussion of gender-based violence is a core value that must be assiduously protected and fostered⁴³. Given the barriers survivors face in accessing the justice system, as well as the pervasiveness and grave harms of gender based violence, it is critical that survivors have networks of support and avenues to share information to keep themselves safe. It follows that, notwithstanding the seriousness of an allegation of gender based violence, of greater public importance is facilitating the reporting, disclosure and discussion of gender based violence against women, particularly Indigenous women, and trans and gender diverse people.

32. Accepting that perfect justice cannot be achieved when balancing competing values, there is greater individual and societal benefit from encouraging survivors of gender based violence to report, than accepting a respondent's plea for reputational rehabilitation. The proper administration of justice will benefit from courts facilitating the reporting and disclosure of gender based violence. The B.C. Coalition submits that interpreting anti-SLAPP legislation, as proposed above, would be an incremental step towards substantive equality in civil proceedings.

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

Per:

David Wotherspoon

Per:

Rajit Mittal

Per:

Amber Prince

⁴² *Downard* at 19.

⁴³ See also *Barton*, 2019 SCC 33, at paras 1, 58, 74; See *Galloway* at para 32.

PART IV. AUTHORITIES

NO.	AUTHORITY	PARAGRAPH REFERENCE
1.	<i>Canadian Broadcasting Corp. v. CKPG Television Ltd.</i> , 1992 CanLII 560 , [1992] 3 W.W.R. 279 (BC CA)	16, 17
2.	<i>D’Addario v. Smith</i> , 2018 ONCA 163	22, 23, 24
3.	<i>Galloway v. A.B.</i> , 2019 BCSC 395	6, 31
4.	<i>Grant v. Torstar Corp.</i> , 2009 SCC 61	29, 30
5.	<i>Hill v. Church of Scientology of Toronto</i> , [1995] 2 S.C.R. 1130 , [1995] S.C.J. No. 64	27
6.	<i>R. v. Barton</i> , 2019 SCC 33	1, 4, 31
7.	<i>R. v. Durham Regional Crime Stoppers Inc.</i> , 2017 SCC 45	25
8.	<i>R. v. Goldfinch</i> , 2019 SCC 38	12
9.	<i>R. v. Mills</i> , [1999] 3 SCR 668	2
10.	<i>R. v. O’Connor</i> , [1995] 4 SCR 411	13, 15
11.	<i>Stuart v. Doe</i> , 2019 YKSC 53	6
12.	<i>Whitfield v Whitfield</i> , 2016 ONCA 581	22, 23, 24

NO.	OTHER REFERENCES	PARA REF.
13.	British Columbia, <i>Official Report of Debates of the Legislative Assembly (Hansard)</i> , 41st Parl, 4th Sess (13 February 2019) at 6974 , (14 February 2019) at 7018	3, 19, 20
14.	Shana Conroy and Adam Cotter, <i>Self-reported sexual assault in Canada, 2014</i> , (Ottawa: Canadian Centre for Justice Statistics, 2017) at 4, 6-8, and 13-18 (https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/14842-eng.pdf?st=qQIo-7pV)	5, 6, 7, 8, 9
15.	Elaine Craig, “The Inhospitable Court” (2016) 66:2 UTLJ 197	8
16.	Elaine Craig, “The Ethical Obligations of Defence Counsel in Sexual Assault Cases” (2014) 51:2 Osgoode Hall LJ 427 (https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2729&context=ohlj)	11
17.	Emma Cunliffe, “Sexual Assault Cases in the Supreme Court of Canada: Losing Sight of Substantive Equality?” (2012) 57 Sup Ct L Rev (2d) 295 (https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1241&context=sclr)	10

NO.	OTHER REFERENCES	PARA REF.
18.	Peter A. Downard, <i>Libel</i> , 3rd ed (Markham: LexisNexis Canada, 2014) at 3, 4, 19, 165-166	18, 23, 31
19.	Egale Canada Human Rights Trust, “Glossary of Terms” (March, 2017), online (2017): https://egale.ca/wp-content/uploads/2017/03/Egales-Glossary-of-Terms.pdf	5
20.	Alana Prochuk, <i>Women’s Experiences of the Barriers to Reporting Sexual Assault</i> (Vancouver: West Coast LEAF, 2018) at 5 (http://www.westcoastleaf.org/wp-content/uploads/2018/10/West-Coast-Leaf-dismantling-web-final.pdf) (“West Coast Leaf Report”)	7, 8, 11, 12
21.	Status of Women Canada, “About Gender-Based Violence” (December 10, 2018), online: https://cfc-swc.gc.ca/violence/knowledge-connaissance/about-apropos-en.html	1, 5
22.	Kateryna M. Sylaska and Katie M. Edwards, “Disclosure of Intimate Partner Violence to Informal Social Support Network Members: A Review of the Literature” (2014) 15:1 <i>Trauma, Violence, & Abuse</i>	9
23.	WAVAW, “Queering Language and Resisting Perfection” (May 3, 2018), online: https://www.wavaw.ca/queering-language-and-resisting-perfection/	5
24.	Caroline White & Joshua Goldberg, “Expanding our Understanding of Gendered Violence: Violence against Trans People and their Loved Ones” (2006) 25:1,2 <i>Canadian Woman Studies</i> 124 (https://cws.journals.yorku.ca/index.php/cws/article/viewFile/5968/5157)	8

PART V. STATUTES

NO.	STATUTES	SECTION
1.	<i>Canadian Charter of Rights and Freedoms Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11</i>	
	<i>Charte canadienne des droits et libertés partie I du la Loi constitutionnelle de 1982, constituant l’annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c. 11</i>	
2.	<i>Court of Justice Act, R.S.O. 1990, c. C.43</i>	137.1(4)(a) and (b)
	<i>Tribunaux judiciaire (Loi sur les), L.R.O. 1990, chap. C.43</i>	137.1(4)(a) and (b)
3.	<i>Protection of Public Participation Act, 2015, S.O. 2015, c 23</i>	

NO.	STATUTES	SECTION
	<i>Protection du droit à la participation aux affaires publiques</i> (Loi de 2015 sur la), L.O. 2015, chap. 23 – projet de Loi 52	
4.	<i>Protection of Public Participation Act</i> , SBC 2019, c 3, ss 4(2)(a) and (b)	