Court File No. COA-22-CV-0306

COURT OF APPEAL FOR ONTARIO
(ON APPEAL FROM THE ONTARIO SUPERIOR COURT OF JUSTICE)

B E T W E E N:

40 DAYS FOR LIFE

Plaintiff
(Respondent)

– AND –

BROOKE DIETRICH, JOHN DOE, JANE DOE and PERSONS UNKNOWN

Defendants
(Appellant)

– AND –

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

(Intervener)

FACTUM OF THE INTERVENER, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

June 6, 2023

ORR TAYLOR LLP
500 – 200 Adelaide St. W.
Toronto, ON M5H 1W7

Zohar R Levy (LSO: 59861O)
zlevy@orrtaylor.com
Tel: (647) 576-4335

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Toronto ON M5H 2T6
Fax: (416) 364-7813

Rachel Laurion (LSO: 67831R)
rlaurion@fasken.com
Tel: (416) 868-3460

Lawyers for the Intervener,
The Canadian Civil Liberties Association

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

Andrew Bernstein (LSO: 42191F)
Tel: (416) 865-7678
abernstein@torys.com

Sarah Whitmore (LSO: 61104E)
Tel: (416) 865-7315
swhitmore@torys.com

Julie Lowenstein (LSO: 82273E)
Tel: (416) 865-7686
jlowenstein@torys.com

GILLIAN HNATIW & CO.
67 Yonge Street
Second Floor
Toronto ON M5E 1J8
Fax: (416) 352-1526

Anna Matas (LSO: 55305R)
anna@gillianandco.ca

Kelsey Gordon (LSO: 75484A)
kelsey@gillianandco.ca

Lawyers for the Appellant (Defendant),
Brooke Dietrich

AND TO: **PHILIP HORGAN LAW OFFICE**
120 Carlton Street
Suite 301
Toronto ON MSA 4K2
Fax: (416) 777-9921

Philip H. Horgan (LSO: 28471Q)
phorgan@carltonlaw.ca
Tel: (416) 777-9994

Raphael T.R. Fernandes (LSO: 78347J)
rfernandes@carltonlaw.ca

Lawyers for the Respondent (Plaintiff),
40 Days for Life

TABLE OF CONTENTS

PART I - INTRODUCTION

1. The right to protest and debate issues of public importance is foundational in a free and democratic society. Restrictions on this right, whether in the form of municipal bylaws, criminal consequences, or civil proceedings, must be limited and narrowly tailored. The Canadian Civil Liberties Association ("**CCLA**") intervenes in this appeal to make submissions on the legal analysis that should be brought to bear when the right to protest is exercised online. In particular, the submissions focus on instances where the protest is alleged to be tortious or otherwise unlawful.

2. The Appellant alleges that the Judge below made several errors in applying s. 137.1 of the *Courts of Justice Act.* While the CCLA takes no position on the disposition of the appeal, its submissions with respect to online expression are relevant to the Court's consideration of the weighing exercise required by s. 137.1.[1] The CCLA's submissions aim to assist the Court in ensuring that the expression at issue is appropriately characterized before being weighed against the public interest in allowing the litigation to proceed.

PART II - OVERVIEW OF THE FACTS

3. Brooke Dietrich appeals from an order of the Honourable Justice MacNeil, dated September 30, 2022.[2]

4. The order dismissed Dietrich's motion under s. 137.1 of the *Courts of Justice Act*. The motion was brought to dismiss the underlying action of the plaintiff (respondent) 40 Days for Life.

---

[1] See, for example, *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, para 53: "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.**" [Emphasis added.]

[2] *40 Days for Life v. Dietrich et. al.*, 2022 ONSC 5588.

Among other things, the plaintiff alleged that Dietrich engaged in the torts of internet harassment, defamation, and conspiracy.

5. The CCLA relies on the facts as set out by the motion judge and the parties. It takes no position on any contested questions of fact.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

6. The CCLA's submissions are focused on the analysis required to appropriately characterize the expression at issue on a motion to dismiss pursuant to s. 137.1 of the *Courts of Justice Act*, in two main areas:

- How does the current jurisprudence regarding location of protest apply in the context of online expression?

- How should the tort of internet harassment be informed by existing case law on freedom of expression?

A. Canadian law provides broad protection for expressive freedom to protest in many forms

7. Canadian law provides broad, principled protection for freedom of expression and the right to engage in political protest. Indeed, strong protections for expressive freedom are essential to meaningful and informed political debate and discussion. Traditional protests are often intended to cause disruption and can take numerous forms to achieve that end.

8. The simplest form of protest may be through the oral or written dissemination of information about a subject. For example, distributing leaflets or shouting messages through a megaphone in space accessible to the public are well known and widely accepted forms of

expression protected by both common law and (in the public context) the *Canadian Charter of Rights and Freedoms* (the "*Charter"*).

9. Another archetypal form of a disruptive protest is a consumer boycott. Those engaged in consumer boycotts are communicating in a manner that invites consumers to engage in an issue by refusing to purchase the target of the boycott's products. Despite their economic impact on the target, the common law has not restrained consumer boycotts where the purpose and effect of the expression "is to persuade the listener to use his or her economic power to challenge a corporation's position on an important economic and public policy issue."[3]

10. The common law also offers strong protection of protests in the form of pickets. As the Supreme Court has recognized:[4]

> In the labour context it runs the gamut from workers walking peacefully back and forth on a sidewalk carrying placards and handing out leaflets to passers by, to rowdy crowds shaking fists, shouting slogans, and blocking the entrances to buildings. **Beyond the traditional labour context, picketing extends to consumer boycotts and political demonstrations**. A picket line may signal labour strife. But it may equally serve as a physical demonstration of individual or group dissatisfaction on an issue.

11. While protest activities can be "inherently or deliberately disruptive", "that disruption may be central to their efficacy."[5] Indeed, certain academics have noted that disruption "is the essence of an assembly's power and transformative potential".[6] The disruptive nature of a protest does not alter the protections available to protesters engaging their rights of freedom of expression,

---

3 *Daishowa Inc. v. Friends of the Lubicon* (1998), 39 OR (3d) 620, para 82.

4 *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8, para 30.

5 Commissioner Rouleau, Paul S. "Report of the Public Inquiry into the 2022 Public Order Emergency", 17 Feb. 2023, Vol. 2, p. 52.

6 Commissioner Rouleau, Paul S. "Report of the Public Inquiry into the 2022 Public Order Emergency", 17 Feb. 2023, Vol. 5, p. 4-23.

assembly, and association. The protection of these freedoms can provide a collective dimension to expression. Protest actions may represent the views of a single individual, but more frequently they highlight collective beliefs and are aimed at collective goals.

B. Where protest or other expression is in public spaces, it attracts a greater degree of protection

12. In strongly affirming the value of free speech, Canadian courts have also traditionally considered the location of speech as a factor when asked to consider whether to restrain that expression. For example, expression on private property does not attract the same protections as those same communications or activities would if they were made in a public or quasi-public space.[7]

13. The location analysis is contextual and pragmatic, focusing on the historical and *actual* functions of the place where the expression occurs.[8] In *City of Montreal,*[9] the Supreme Court presciently commented on the possibility that developments in communications technology might require a modified analysis, noting:[10]

> A final concern is whether the proposed test is flexible enough to accommodate future developments. Changes in society will inevitably alter the specifics of the debate about the venues in which the guarantee of free expression will apply. Some say, for example, that the increasing privatization of government space will shift the debate to the private sector. **Others say that the new spaces for communication created by electronic communication through the Internet will raise new questions on the issue of where the right to free speech applies**. We do not suggest how the problems of the future will be answered. But it seems to us that a test that focuses on historical and actual functions as markers for public and private domains, adapted as necessary to accord with new situations

---

7 *RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, paras 76-77, 103; *Daishowa Inc v Friends of the Lubicon* (1998), 39 OR (3d) 620 (Sup Ct); *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, para. 61.

8 *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, paras. 74-76.

9 *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62.

10 *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, para. 80.

> and the values underlying the s. 2(b) guarantees, will be sufficiently flexible to meet the problems of the future. [Emphasis added.]

14. As noted by the Court, the traditional jurisprudence needs to be considered in light of the current reality of communications.

C. Freedom of expression on social media is prima facie protected

15. When a form of expression occurs in a virtual environment, the court ought to make inquires into the historical and actual function of the space. The questions posited by the Supreme Court in *City of Montreal* are apt: "[i]s the function of the space — the activity going on there — compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity?"[11] Where social media sites or other virtual environments bear the hallmark of a public space, the court ought to make inquiries into whether that virtual place is a space where free expression has traditionally occurred. There is no principled difference between the traditional forms of protest in public spaces – long recognized at common law[12] – and online expressions on social media or other virtual environments.

16. Posting statements or video recordings on a topic online and encouraging others to take action on an issue of public importance, serve the same democratic goals, and must attract the same protection, as standing in the public square or the speakers' corner with a megaphone.

---

[11] *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, para. 76.

[12] See for example *Montréal (City) v. 2952-1366 Québec Inc*., 2005 SCC 62, para. 61: "[T]he public square and the speakers' corner have by tradition become places of protected expression".

17. Protest activity today is rarely confined to action "in the streets" and is likely to have an online component or even take place exclusively on social media.[13] For the protection of freedom of expression to be effective, courts must consider the nature of the online platform or other virtual environment at issue, the different purposes and functions they may serve, and the expectations of users that flow from the unique features of a platform's operation.

18. Platforms like Instagram, Facebook, Twitter and TikTok, or other social media sites which are widely available to the public and intended to convey information to members of the public, bear many of the hallmarks of a public space. Despite being owned and operated by private corporations, many of these platforms have become *de facto* public squares, used by government actors and institutions, private individuals, corporations, and non-profit organizations as venues for advertising, debate, discussion, artistic expression and, significantly, protest.

19. These platforms also make communication to a broad audience accessible at a low cost. In *R v Guignard*[14] the Supreme Court noted that "…simple means of expression such as posting signs or distributing pamphlets or leaflets or, these days, posting messages on the Internet are the optimum means of communication" for those without sufficient economic resources to use more costly and less accessible means.[15]

20. In the CCLA's submission, platforms that allow for (and generally default to) broad dissemination of expression are akin to public spaces that have traditionally been used for expressive purposes. The use of these spaces for virtual protests is in keeping with their historical

---

13 *40 Days for Life v. Dietrich*, 2023 ONCA 379, para. 14.

14 2002 SCC 14.

15 *R v Guignard*, 2002 SCC 14, para 25.

and actual use and does not displace the fundamental values enshrined in the Charter, including the *prima facie* protection provided by s. 2(b) of the *Charter.*[16] This is consistent with the existing, limited jurisprudence dealing with freedom of expression as applied to social media.[17]

21. While online platforms have the power to magnify many forms of protest and reach a broader group of like-minded individuals, this increased potential for disruption should not change the analysis, balancing the importance of the protest speech against the claims of the party seeking to restrain that speech. Put simply, the law has long tolerated disruptions associated with protest, and the fact that the internet may be a more effective amplifier than a megaphone should not result in different treatment of conduct that would not otherwise be actionable.

22. For example, in *Strom v Saskatchewan Registered Nurses' Association,*[18] the Saskatchewan Court of Appeal considered the issue of whether it was appropriate for a regulatory body (i.e., the Saskatchewan Registered Nurses' Association) to find a registered nurse guilty of professional misconduct on the basis of posts that she made on Facebook and Twitter regarding the care that her grandfather received at a long-term care facility. The Saskatchewan Court of Appeal held that the Court of Queen's Bench failed to give sufficient weight to the appellant's

---

[16] See *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8, paras. 18 and 19: "The *Charter* constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. *Charter* rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. **The *Charter* must thus be viewed as one of the guiding instruments in the development of Canadian law**…The reasons of McIntyre J. emphasize that the common law does not exist in a vacuum. **The common law reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future. As such, it does not grow in isolation from the *Charter*, but rather with it**." [Emphasis added.]

[17] *Cooper Creek Cedar Ltd v Ogden*, 2023 BCSC 465 at paras 65, 81-84; *Bakan v Attorney General of Canada*, 2022 ONSC 7090; *R v Skelly*, 2021 ONSC 555 at para 27; *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at paras 3, 115, 124, 126, 159, and 166; *Crouch v Snell*, 2015 NSSC 340 at paras 101-106, 112-116.

[18] *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112.

right to freedom of expression and also the public's interest in the underlying expression.[19] The Court noted the chilling effect that such disciplinary orders might have and rejected the idea that the appellant was required to raise her concerns through formal channels rather than (or prior to) posting on social media.[20] It held that restricting the ability to communicate online is a violation of the right to choose one's means of communication and audience – a serious impact on freedom of expression.[21]

23. In a very different context, an Ontario court recognized the variety of forms of communication that may take place on social media. In *R v Skelly*,[22] the Superior Court reviewed a bail decision which imposed, among other conditions, broad social media restrictions.[23] Mr. Skelly had used social media to announce that he would be opening his restaurant, including for indoor dining, to protest against the Ontario government's lockdown order.[24] In finding that the social media condition was too broad, the Court reasoned that a ban on all forms of expression was incompatible with the criminal law's principle of restraint[25] because there were many "perfectly legitimate forms of expression on social media" that remained available, including "expressing a political view about the lockdown measures, or advertising a lawful takeout business, or even streaming a demonstration of barbequing techniques as a form of business promotion – not to

---

19 *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112, paras. 124 and 126.

20 *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112, paras. 164-166 and 168.

21 *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112, paras. 164 and 167-169.

22 2021 ONSC 555.

23 *R v Skelly*, 2021 ONSC 555, see para. 4: "Justice of the Peace Scarfe released him on the following conditions…Not to post or communicate on any Internet social media platform, including but not limited to Twitter, Facebook, Instagram, and Tiktok."

24 *R v Skelly*, 2021 ONSC 555, para. 2.

25 *R v Skelly*, 2021 ONSC 555, para. 15.

mention merely sharing family photos on Instagram".[26] The Court also noted that "[s]ocial media as a medium of expression has become increasingly important. An individual citizen's right to express him or herself on social media is arguably as important as freedom of the press itself".[27]

D. The tort of internet harassment must evolve in accordance with Charter *values*

24. While the *Charter* does not apply directly to civil proceedings between private parties, it has long been recognized that the judiciary should still "apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."[28] The right to free expression is a "fundamental Canadian value […] quite apart from the *Charter*" that independently informs the common law.[29]

25. The values underlying section 2(b) of the *Charter* have been the basis for changes to the common law. Put simply, the common law must comply, and be consistent, with *Charter* values and the values enshrined in the *Charter* provide "the guidelines for any modification to the common law which the court feels necessary".[30]

26. While internet harassment is a relatively new tort, it is somewhat analogous to defamation since the activity or communication complained of may be or contain expressive content. As such, when considering whether the tort of internet harassment has been made out, the court is tasked with reaching a "proper equilibrium" between freedom of expression and the allegedly harassing

---

26 *R v Skelly*, 2021 ONSC 555, para. 15.
27 *R v Skelly*, 2021 ONSC 555, para. 27.
28 *RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at para 19.
29 *RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at para 20.
30 *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, para. 92.

conduct, especially where the expression may relate to matters of public interest.[31] In order to establish the correct balance between protecting individuals from internet harassment and protecting freedom of expression, it is helpful to look to the evolution of the common law's expanding protection of freedom of expression.

27. Over the last two decades, the common law has given greater prominence to the necessity of protecting freedom of expression. For example, in *WIC Radio Ltd. v. Simpson,*[32] the Supreme Court modified the defence of fair comment to recalibrate the balance between protecting free expression and protecting reputation. As Binnie J. noted for the majority:[33]

> An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest.

28. Similarly, in *Grant v Torstar*,[34] the Supreme Court revisited the conclusion it reached in *Hill v. Church of Scientology*.[35] In *Hill v. Church of Scientology*, the Supreme Court found that the common law of defamation struck an appropriate balance between the competing interests of expressive freedom and reputational protection.[36] In *Grant v Torstar*, the Supreme Court accepted that freedom of expression encompasses more than statements which fit within the defences of fair comment or of qualified privilege.[37] Further, the Supreme Court found that there were times when untrue statements may advance the purposes of section 2(b) of the *Charter* "because of the

---

31 *Hansman v. Neufeld*, 2023 SCC 14, para. 1.

32 *WIC Radio Ltd. v. Simpson*, 2008 SCC 40.

33 *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, para. 2.

34 2009 SCC 61.

35 [1995] 2 SCR 1130.

36 *Hill v Church of Scientology*, [1995] 2 SCR 1130, paras. 137 and 141.

37 *Grant v Torstar*, 2009 SCC 61, paras 53-56.

importance of robust debate on matters of public interest…or the importance of discussion and disclosure as a means of getting at the truth".[38] Accordingly, the Supreme Court limited the application of *Hill v Church of Scientology* and found that it was "simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth."[39]

29. In 2015, Ontario amended the *Courts of Justice Act* by introducing sections 137.1 – 137.5 for the purpose of preventing proceedings that limit freedom of expression on matters of public interest (gag proceedings). In recommending that Ontario develop legislation to combat strategic litigation against public participation ("**SLAPP**"), the Advisory Panel on anti-SLAPP legislation opined that the protection afforded by the legislation ought to be broad, with the only limit being that the expression cannot cause substantial harm that outweighs the public interest in free expression.[40] In this respect, the Panel commented that **"[a] technical trespass or even nominal property damage may not require a halt to public participation. The technical lawfulness of the activity is not the key point.** It should be up to the court in each case to weigh the competing interests of the parties and the public interest, as courts are often called to do in other cases. Courts by definition are devoted to the rule of law, and can be trusted to ensure that **truly harmful lawless behaviour is not encouraged in the name of public participation**."[41] [Emphasis added.] An

---

38 *Grant v Torstar*, 2009 SCC 61, para. 55.

39 *Grant v Torstar*, 2009 SCC 61, para. 57.

40 Anti-Slapp Advisory Panel Report to the Attorney General, Ministry of the Attorney General, 28 Oct. 2010, para 56.

41 Anti-Slapp Advisory Panel Report to the Attorney General, Ministry of the Attorney General, 28 Oct. 2010, para 59.

approach that ignores or undermines the underlying purpose of the anti-SLAPP legislation should not be countenanced by this Court.

30. Most recently, in *Hansman v. Neufeld*,[42] the Supreme Court confirmed that the characteristics of a particular expression are relevant when balancing freedom of expression and its allegedly tortious content. In particular, the Supreme Court held that the nature of an expression, its subject matter, the motivation behind it, and the form through which it is expressed are all relevant factors to consider when assessing whether and to what extent limits on a particular expression may be justified or appropriate.[43] The closer the impugned expression lies to the core values of s. 2(b), including truth-seeking, participation in political decision-making and diversity in the forms of self-fulfillment and human flourishing, "the greater the public interest in protecting it".[44] This is so, even where the expression may contain spirited or controversial words such as bigoted, intolerant, transphobic, or hateful.[45]

31. While *Hansman v Neufeld* was a defamation action, the Supreme Court's findings (along with the common law's rigorous protection of freedom of expression more generally) are equally applicable to claims of internet harassment. That new tort is intended to capture "communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff."[46] It should not become a catchall for any and all online

---

42 *Hansman v. Neufeld*, 2023 SCC 14

43 *Hansman v Neufeld*, 2023 SCC 14, para 79.

44 *Hansman v Neufeld*, 2023 SCC 14, para 79, quoting from *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, para. 77.

45 *Hansman v Neufeld*, 2023 SCC 14, para. 92.

46 *Caplan v. Atas*, 2021 ONSC 670, para 171.

behaviour which may be viewed as objectionable or annoying. As described above, even technically tortious activities may not require a halt to public participation.[47]

32. The importance of vigorous debate on matters of public interest, including access to abortion, cannot be doubted. While the tort of defamation lies at the heart of many lawsuits brought against those involved in public participation, courts must discourage *any* use of litigation that unduly limits freedom of expression. Torts such as internet harassment, therefore, should not be allowed to have an undue adverse impact on public participation.

PART IV - ORDER REQUESTED

33. The CCLA takes no position on the ultimate disposition of this appeal. The CCLA seeks no costs and requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of June 2023.

Zohar R. Levy

Rachel Laurion

[47] Anti-Slapp Advisory Panel Report to the Attorney General, Ministry of the Attorney General, 28 Oct. 2010, para 59.

ORR TAYLOR LLP
500 – 200 Adelaide St. W.
Toronto, ON M5H 1W7

Zohar R Levy (LSO: 59861O)
zlevy@orrtaylor.com
Tel: (647) 576-4335

FASKEN MARTINEAU DuMOULIN LLP
Barristers and Solicitors
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON   M5H 2T6
Fax: 416 364 7813

Rachel Laurion (LSO: 67831R)
rlaurion@fasken.com
Tel: (416) 868-3460

Lawyers for the Intervener,
The Canadian Civil Liberties Association

SCHEDULE "A"

LIST OF AUTHORITIES

1. *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22.
2. *40 Days for Life v Dietrich et al*, 2022 ONSC 5588.
3. *Daishowa Inc v Friends of the Lubicon* (1998), 39 OR (3d) 620.
4. *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8.
5. *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62.
6. *40 Days for Life v Dietrich*, 2023 ONCA 379.
7. *R v Guignard*, 2002 SCC 14.
8. *Cooper Creek Cedar Ltd v Ogden*, 2023 BCSC 465.
9. *Bakan v Attorney General of Canada*, 2022 ONSC 709.
10. *R v Skelly*, 2021 ONSC 555.
11. *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112.
12. *Crouch v Snell*, 2015 NSSC 340.
13. *Hill v Church of Scientology*, [1995] 2 SCR 1130.
14. *Hansman v Neufeld*, 2023 SCC 14.
15. *WIC Radio Ltd v Simpson*, 2008 SCC 40.
16. *Grant v Torstar*, 2009 SCC 61.
17. Anti-Slapp Advisory Panel Report to the Attorney General, Ministry of the Attorney General, 28 Oct 2010.
18. *Caplan v Atas*, 2021 ONSC 670.
19. Commissioner Rouleau, Paul S "Report of the Public Inquiry into the 2022 Public Order Emergency", 17 Feb 2023, Vol. 2, Vol. 5.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Courts of Justice Act, RSO 1990, c C. 43, s. 137.1

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

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;
(b) to promote broad participation in debates on matters of public interest;
(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

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

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

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

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

Court File No. COA-22-CV-0306

40 DAYS FOR LIFE Plaintiff (Respondent)	-and-	BROOKE DIETRICH et al. Defendants (Appellant)

E-Service Detail:
Philip H. Horgan, *Philip Horgan Law Office* (phorgan@carltonlaw.ca)
Raphael T.R. Fernandes, *Philip Horgan Law Office* (rfernandes@carltonlaw.ca)
Anna Matas, *Gillian Hnatiw & Co.* (anna@gillianandco.ca)
Andrew Bernstein, *Torys LLP* (abernstein@torys.com)
Sarah Whitmore, *Torys LLP* (swhitmore@torys.com)
Julie Lowenstein, *Torys LLP* (jlowenstein@torys.com)

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Kitchener

FACTUM OF THE INTERVENER, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

ORR TAYLOR LLP
500 – 200 Adelaide St. W.
Toronto, ON M5H 1W7

Zohar R Levy LSO# 59861O
zlevy@orrtaylor.com
Tel: (647) 576-4335

FASKEN MARTINEAU DuMOULIN LLP
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

Rachel Laurion LSO# 67831R
rlaurion@fasken.com
Tel: (416) 868-3460

Lawyers for the Intervener,
The Canadian Civil Liberties Association