

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

B E T W E E N:

MAIA BENT

Appellant
(Respondent)

- and -

HOWARD PLATNICK

Respondent
(Appellant)

A N D B E T W E E N:

LERNERS LLP

Appellant
(Respondent)

- and -

HOWARD PLATNICK

Respondent
(Appellant)

MOTION RECORD OF
THE BARBRA SCHLIFER COMMEMORATIVE CLINIC
(Motion by the Barbra Schilfer Commemorative Clinic for Leave to Intervene
pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

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TAB1

IN THE SUPREME COURT OF CANADA
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NOTICE OF MOTION TO A JUDGE
(Motion by the Barbra Schlifer Commemorative Clinic for Leave to Intervene pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Barbra Schlifer Commemorative Clinic (the “**Clinic**”) hereby applies to a judge of the Court under Rules 47 and 55 of the *Rules of the Supreme Court of Canada* for an order:

- (a) granting the Clinic leave to intervene in this appeal;
- (b) permitting the Clinic to file a factum not exceeding 10 pages;
- (c) permitting the Clinic to present oral argument at the hearing of the appeal;

or any further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. ***The Clinic.*** The Clinic is a multi-disciplinary, front-line service provider to women experiencing violence. It was established in the memory of Barbra Schlifer, who was sexually assaulted and murdered on the night of her call to the bar. The Clinic's objective is to support women who have experienced violence by, among other things, offering avenues for redressing the harms they have suffered. As part of its mandate, the Clinic works to change the legal conditions that threaten women's safety, dignity, and equality, and advocates to improve access to justice for survivors of sexual violence.
2. ***The Clinic has a long history of intervention.*** The Clinic has a long history of intervening to provide assistance to this Court, as well as other courts in Canada, in proceedings where the outcome may influence women's safety, dignity, and equality.
3. ***The Clinic has an interest in this appeal.*** The Clinic has a significant interest in the interpretation and application of legislation addressing allowing for the summary dismissal of strategic lawsuits against public participation ("SLAPP"). The Clinic represents women who are survivors of sexual violence, many of whom are directly impacted by retaliatory lawsuits. Retaliatory suits are often used by perpetrators of violence to suppress survivors from reporting or seeking help and support from others. These suits are emotionally, psychologically, and financially devastating to survivors.
4. Anti-SLAPP legislation provides an important zone of protection to survivors of sexual violence, insulating them from the fear of retaliation or actual retaliation in the form of a lawsuit. How this Court approaches anti-SLAPP legislation will therefore have a direct impact on the ability of survivors to report and disclose sexual violence, and to obtain access to justice through the pursuit of legal remedies against their abusers.
5. ***The Clinic can make useful and different submissions.*** If granted leave to intervene, the Clinic will bring a useful, distinct, and crucial perspective to this appeal that is different from that of the parties. The Clinic's regular and direct contact with survivors of sexual violence means it understands how survivors perceive and interact with the justice system, enabling it to provide this Court with useful submissions infused with these perspectives. The Clinic is

therefore uniquely positioned to assist the Court by explaining the impact of retaliatory lawsuits on survivors of sexual violence.

6. ***The Clinic’s proposed submissions.*** If granted leave to intervene, the Clinic will make submissions on two points.

7. First, the Clinic will argue that this Court should interpret the “public interest” set out in subsection 137.1(3) and paragraph 137(4)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “*CJA*”) as being broader than simply freedom of expression, and as including the strong public interest in reporting sexual violence to an authority or trusted person.

8. Second, the Clinic will argue that this Court should recognize that, in the context of the “no valid defence” requirement under subparagraph 137(4)(a)(i) of the *CJA*, it will rarely be appropriate for a survivor of sexual violence to be compelled to testify, and that no adverse inference should be drawn when she chooses not to swear an affidavit.

9. An overview of the Clinic’s proposed submissions appears at paragraphs 25 to 40 of the Clinic’s memorandum of argument. The Clinic will coordinate with the other interveners to ensure that there is no duplication of submissions.

Dated at Toronto, Ontario this 16th day of August, 2019.

SIGNED BY

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NOTICE TO THE RESPONDENTS TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge.



TAB2

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

B E T W E E N:

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A N D B E T W E E N:

LERNERS LLP

Appellant

- and -

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Respondent

AFFIDAVIT OF DEEPA MATTOO

**(Motion by Barbra Schlifer Commemorative Clinic for Leave to Intervene
pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)**

I, Deepa Mattoo, of the City of Oakville, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Executive Director of the Barbra Schlifer Commemorative Clinic (the “Schlifer Clinic” or the “Clinic”). As such, I have personal knowledge of the matters to which I depose in this affidavit. To the extent that any information contained herein is based on information and belief, I have stated the source of that information and I believe such information to be true.
2. I have been the Executive Director of the Clinic since May 2019. I have over 20 years of experience in multiple roles as a lawyer, manager and law reform advocate on behalf of women’s equality and women victims of violence. I have a long history of working in the field of violence against women and representing marginalized communities.

3. I completed my BA in Law (1995) and LLB (1998) from MDU Rohtak, India. After completion of my legal education, I registered as a member of the Delhi Bar Council (1998). I completed my LLB equivalency certification with the National Committee on Accreditation (NCA), a standing committee of the Law Societies of Canada (2010) and became a member of the law society of Ontario (2011). I hold a Master's Degree in Business Administration with a specialization in Corporate Social Responsibility from Leeds Beckett University (2004) and a Post-Graduate Certificate in Fundraising and Volunteer Management from Humber College (2007). I was the Law Foundation of Ontario's Community Leadership in Justice Fellow at the Factor-Inwentash Faculty of Social Work at the University of Toronto (2017). I am currently an Adjunct and visiting faculty at Faculty of Law, University of Toronto and am appointed as Adjunct Professor at Osgoode Hall Law School.

4. In various positions, working globally and more recently as Project Coordinator, Staff Lawyer, interim Executive Director at the South Asian Legal Clinic of Ontario and as Director of Legal Services at the Schlifer Clinic and now as Executive Director, I have gained specialized experience and expertise in the violence and barriers faced by immigrant and refugee women. This expertise includes an understanding of the very significant barriers faced by these women in reporting or disclosing sexual and other violence.

5. I have trained thousands of service providers for best practices and legal education to work with forced marriage survivors, racialized Non-Status women, and immigration law clients in the context of gender-based violence across Canada. I collaborated with multiple government and non-government organizations for developing best practices, research, and resources for assisting survivors of violence, particularly within the context of forced marriage and "honour"-based violence. I appeared before parliamentary committees and commissions on a wide range of social justice and human rights issues as well as acted as an observer at various forums.

The Schlifer Clinic

The Schlifer Clinic and Its Legal, Policy, Counselling and Interpretation Services and Advocacy

6. The Schlifer Clinic was established in 1985 to commemorate the life and work of Barbra Schlifer, a lawyer who was sexually assaulted and murdered on the night of her call to the Bar.

7. The Schlifer Clinic is, first and foremost, a multi-disciplinary, front-line service provider to women who have experienced violence, including sexual violence. It provides legal representation, professional counselling, and language interpretation services to women from a broad cross-section of racial, ethno-cultural, and socio-economic backgrounds. As such, the Clinic has a deep and integrated understanding of the intersecting and multiple inequalities that exist in women's lives and the impact that sexual offences have on women. The Clinic also has a deep understanding of the barriers to accessing the justice system faced by women who have experienced sexual violence, and the financial, emotional, psychological and other burdens that participating in legal proceedings imposes on individual survivors.

8. Since 1985, the Clinic has provided services to over 60,000 women in the Greater Toronto area. In 2016-2017, the Clinic's legal department assisted 1,801 clients, the counselling department assisted 1,126 women, and the Language Interpretation Service assisted 1,776 clients.

9. Many of our clients are survivors of sexual violence. In the years 2016 and 2017, the Clinic experienced a 100% increase in calls from sexual violence survivors seeking counselling and/or legal information and advice.

10. The Schlifer Clinic provides legal representation in administrative, family and immigration law, as well as advocacy services (such as summary legal advice) in administrative, criminal and civil law. In addition to legal services, the Clinic provides a variety of group-based and individual counselling programs. The Clinic also offers a language interpretation service, which provides language interpreters in over 100 languages to service providers that are working with women survivors in shelters, hospitals or Toronto's Domestic Violence Courts serving Toronto.

11. The breadth of services and activities engaged in by the Clinic is unique in Canada amongst social service organizations.

12. In 2016, the Clinic was selected by the Ministry of the Attorney General as a pilot site for the Independent Legal Advice (“ILA”) program for sexual violence survivors, as part of the Ministry’s broader mandate to end sexual harassment and violence in the province. Through this program, the province provides independent legal advice to men, women and non-binary sexual violence survivors in Toronto, Ottawa and Thunder Bay. These services are designed to assist survivors in seeking meaningful legal remedies (both civil and otherwise) and ensuring access to justice to secure legal protections and redress from violence. In addition, the Province contracted the Clinic to train the private bar lawyers whom the province is funding to provide this advice on a voucher system.

13. The Clinic’s objective is to support women who have experienced violence by, among other things, offering avenues for redressing the harms they have suffered. These avenues include participating as complainants in criminal sexual violence proceedings and as plaintiffs in civil sexual violence proceedings.

14. The Clinic also advances and protects the rights of women who have experienced violence through systemic legal advocacy. In 2014, the Clinic commenced *Charter* litigation as a public interest litigant in *Barbra Schlifer Commemorative Clinic v. Canada* 2014 ONSC 5140, to challenge the eradication of the long-gun registry. The Clinic submitted that changes to gun control laws violated women’s constitutional rights to equality and security of the person by increasing women’s risk of harm, including lethal harm, in situations of domestic violence. The Clinic chose to act as a test case litigant in this case due to the importance of the issue and the reality that shouldering *Charter* litigation is extremely difficult for individual plaintiffs, particularly without institutional support.

15. The Clinic also engages in various public advocacy initiatives, including public legal education, professional development for legal professionals, clinical education for law students, law reform and participating as a party and/or friend of the court in litigation.

16. In 2015 and 2016, the Clinic was one of the key organizations consulted by the Minister's Task Force on the Prevention of Sexual Abuse of Patients under the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18. In this regard, the Task Force recognized the Clinic's "experience and expertise in providing summary advice to patients who have been sexually abused by regulated health professionals."¹

17. Prior to the recent provincial election in Ontario, the Clinic sat on the Premier's Roundtable on Violence Against Women as part of the Province of Ontario's *Sexual Violence and Harassment Action Plan* ("SVHAP"), implemented in March 2015. Among other initiatives, the SVHAP involved amendments to certain provincial statutes such as the *Limitations Act, 2002*, S.O. 2002, c.24, to make the legal and justice systems more responsive to the needs of survivors. As part of that work, the Roundtable – including the Clinic – reviewed and commented on proposed legislative changes to those statutes before those changes were reviewed by the legislature.

18. In addition to our work on legal and policy reforms, the Clinic has a long record of community education and collaborations on issues of sexual violence against women. We have participated in numerous multi-sector committees, coalitions and consultation groups. The Clinic regularly engages in various service-delivery partnerships and consultations with a wide range of service providers that represent diverse communities in Toronto. Through this work, we have gained extensive knowledge and expertise in the systemic access to justice barriers faced by members of diverse communities.

Mandate and Organizational Structure

19. The Clinic's institutional objectives are set out in its Mission Statement:

The Barbra Schlifer Clinic offers legal representation, professional counseling and multilingual interpretation to women who have experienced violence. Our diverse, skilled and compassionate staff accompany women through personal and practical transformation, helping them to build lives free from violence.

¹ *To Zero: Independent Report of the Minister's Task Force on Sexual Abuse of Patients* http://www.health.gov.on.ca/en/common/ministry/publications/reports/sexual_health/taskforce_prevention_of_sexual_abuse_independent_report.pdf (September 2016).

We are a centre by, for and about women. We amplify women's voices, and cultivate their skills and resilience. Together with our donors and volunteers, we are active in changing the conditions that threaten women's safety, dignity and equality.

20. The Clinic is overseen by a volunteer Board of Directors consisting of up to 14 members, and it employs 40 full-time staff members. The legal department of the Clinic has a staff of twelve full-time employees, comprised of the Director of Legal Services, three lawyers, one articling student, two legal assessment counsellors, two administrative staff and three Family Court Support Workers. The Clinic also has two project lawyers and retained two independent consultant lawyers to support the independent legal advice for sexual violence survivors program.

21. The Family Court Support Workers facilitate women survivors' greater participation in the family law system and help to promote the legal rights of clients with other justice system professionals, including the Victim Witness Assistance Program, Crown Attorneys and the police.

22. The Clinic's Director of Legal Services, Staff Lawyers and contracted consultant lawyers have extensive experience providing services to women survivors of violence who are from highly marginalized communities. The regular duties of the lawyers at the Clinic include providing general legal information and advice, as well as representation in family and immigration law matters, to women who have been or are being sexually assaulted or abused.

The Schlifer Clinic's Expertise as a Public Interest Advocate on Issues of Violence Against Women

23. For over 30 years, the Schlifer Clinic has been and continues to be consulted by the provincial and federal government on proposed legislation and initiatives related to sexual violence. In 1987-88, the Clinic was a member of Attorney General Ian Scott's Access to Civil Justice Advisory Committee.

24. Since the Clinic's early days and work with the Civil Justice Advisory Committee, it has made representations on issues related to sexual violence and gender equality to the Senate and House of Commons Standing Committees, as well as to the Quebec General Assembly.

25. Outside of the domestic context, the Clinic has (Non-Governmental) status with The United Nations Economic and Social Council and has made submissions and presentations to various bodies. In 2018, the Clinic presented at the Universal Periodic Review pre-session at the United Nations. As part of that presentation, the Clinic recommended that governments should be required to ensure that existing judges (in addition to newly appointed judges) received mandatory judicial training for sexual violence.

26. The Clinic has significant experience intervening in legal proceedings as a public interest intervener. In 1988 and 1991, following the enactment of the *Charter of Rights and Freedoms* (“*Charter*”), the Schlifer Clinic participated in two landmark constitutional cases concerning the *Charter* rights and interests of sexual violence survivors. The Schlifer Clinic was a member of a coalition of interested organizations that intervened at the Supreme Court in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 and *R v. Seaboyer; R v. Gayme*, [1991] 2. S.C.R. 577.

27. Since that time, the Clinic has been granted standing as an intervener and has participated in numerous proceedings in the federal and Ontario courts and at the Supreme Court of Canada, including (but not limited to):

- (a) As an intervener in *Office of the Children's Lawyer v. John Paul Balev, et al.*, S.C.C. Case No. 37250, a Supreme Court appeal of an Ontario Court of Appeal decision that ordered the return of two children and their mother to Germany pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction*. In this case, the Clinic offered the perspective of survivors of gender-based violence engaged in transnational family law proceedings;
- (b) As an intervenor in *S.C. v. N.S.*, 2017 ONSC 5566, an appeal involving whether and how evidence collected from sexual violence survivors through the civil discovery process could be used in subsequent criminal proceedings;
- (c) As an intervener in *R. v. Quesnelle*, 2014 SCC 46, where the Supreme Court granted leave to make written and oral submission on the privacy rights and interests of sexual violence complainants, particularly those most heavily

documented as a result of their marginalization and multiple experiences of inequality;

- (d) As an intervener in *R. v. N.S.*, 2012 SCC 72, where the Supreme Court granted leave to make oral and written submissions on the barriers to access to justice faced by sexual violence survivors who wear the niqab;
- (e) As an intervener, in coalition with Women Against Violence Against Women, in the *Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp* on the impacts of Justice Camp's conduct and comments in *R. v. Wagar* on sexual violence survivors, and in particular the underreporting of sexual violence;
- (f) As discussed above, as the applicant in *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140, a *Charter* application to strike down amendments to the *Criminal Code* and *Firearms Act* (eradicating the long-gun registry); and
- (g) As a plaintiff, alongside two individual claimants, in a constitutional challenge currently before the Ontario Superior Court of Justice against the London Police Service for its discriminatory investigation and dismissal of sexual assault cases between 2010-2017. The Clinic's involvement is based on its multi-decade experience of the ongoing and systemic discrimination sexual assault survivors face when seeking legal redress for sexual assault.

The Barriers to Access to Justice for Individual Survivors of Sexual Violence

28. The women who seek the Clinic's assistance rely on the Clinic to advise them about legal processes and how they can obtain redress for incidents of violence they have suffered, including sexual violence. Clients often ask the Clinic's legal intake workers and lawyers about the consequences of interacting with both the civil and criminal justice systems, including: what the likelihood is of a charge or prosecution; what role victims have in the criminal justice context; whether the criminal justice system can protect them from offenders in the future; what discriminatory responses they may face in reporting to the police; and how survivors of sexual violence can hold their perpetrators or other institutional actors (such as employers, hospitals and the police) accountable outside of the criminal justice context.

29. Both before and after the official launch of the ILA for sexual violence survivors program, the Clinic has worked with thousands of women who are either considering reporting sexual violence to the police or who have sought assistance and support (legal and/or counselling) as criminal charges for sexual violence proceed to a preliminary hearing and/or trial. The Clinic also regularly sees clients who have reported to the police but the police have not laid charges. The Clinic's clients frequently experience the criminal justice process as traumatizing, which trauma is often experienced as a direct extension of the sexual violence itself.

30. The Clinic's regular and direct contact with women survivors of sexual violence has given it significant knowledge about how women survivors of sexual violence perceive and interact with the justice system.

31. There are a variety of factors that create access to justice barriers for survivors of sexual violence in criminal and civil contexts, including:

- (a) the highly invasive and personal nature of the alleged violence;
- (b) social stigmas that are imposed on victims of sexual violence;
- (c) perceptions that the crime, even if reported, will not result in a conviction (in the criminal context) or a finding of liability (in the civil context);
- (d) fear of further victimization through engagement with the justice system;
- (e) fear of reputational damage;
- (f) lack of resources; and,
- (g) a fear of retribution or retaliation, either by the perpetrator or institutional actors (in particular, institutional actors on whom the survivor is or may be dependent for security or protection, such as employers, health care providers or police).

The Clinic's Interest in this Appeal

32. This appeal presents this Court with its first-ever opportunity to consider Ontario's legislation allowing for the summary dismissal of so-called strategic lawsuits against public participation ("SLAPP") and specifically the test to be met on motions brought under subsections

173.1(3) and (4) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the “CJA”). The Clinic has a significant interest in the interpretation and application of anti-SLAPP legislation.

33. The fear of retribution and retaliation that survivors of sexual violence experience cannot be overstated. The Clinic’s clients routinely ask whether and how their abusers can “come after them” if they report or disclose violence. Fear of reprisal and retaliation, including through retaliatory lawsuits, are significant barriers to disclosure and reporting for the Clinic’s clients. Many survivors reconsider pursuing charges or other forms of legal recourse, or even avoid discussing what happened to them, because their abuser is threatening them with a lawsuit or because they fear the abuser will bring one.

34. Further, in my experience, this fear of reprisal from reporting is increasingly realized. The Clinic has worked with clients who have been subjected to litigation or threats of litigation as a result of having reported sexual violence. These retaliatory suits or threats of retaliatory suits include “cease and desist” letters to university students or employees of business who have made a report to their institution, with the threat intended to prevent the client’s participation in the adjudication or investigation of their complaint. Other clients have been served with malicious prosecution or defamation suits.

35. Often those who are subject to the retaliatory threats or lawsuits are the most vulnerable or systemically disempowered, whether due to poverty, precarious immigration status, the sequelae of abuse, or other barriers. For example, immigrant women who disclose violence at the hands of their sponsor have faced lawsuits for the return of a dowry or the costs and expenses associated with the sponsorship. Not only do isolation, economic dependence, fear of deportation, and cultural and language barriers make it difficult for immigrant women to report violence, they also face the terrifying risk of being sued.

36. Retaliatory suits can have profound effects on survivors of sexual violence, and defending a retaliatory lawsuit can be especially difficult for them. The emotional and mental health toll on survivors from retaliatory lawsuits is enormous. Defending against a defamation, malicious prosecution or other suit may require them to frequently describe the sexual violence and re-experience associated trauma. Moreover, the costs of defending a retaliatory suit can be staggering. The lower income, systemically marginalized individuals who, in the Clinic’s

experience, frequently face these kinds of suits have a disproportionately heavy financial burden placed on them.

37. The enactment of anti-SLAPP legislation served as an important step for increasing access to justice for survivors of sexual violence. Anti-SLAPP motions provide some measure of protection for survivors, offering them a tool they can use if named in a retaliatory lawsuit. Knowing they have some legal recourse, in turn, encourages survivors to disclose and report sexual violence more readily.

38. How this Court approaches anti-SLAPP protections will have a direct impact on the ability of survivors to come forward and pursue legal remedies against their abusers.

The Clinic's Position will be Useful and Different

39. If granted leave to intervene, the Clinic will bring a useful, distinct, and crucial perspective to this appeal. The Clinic's perspective on this appeal is different from the parties'. The Clinic's regular and direct contact with survivors of sexual violence means it understands how survivors perceive and interact with the justice system. If granted leave to intervene, the Clinic will provide useful submissions infused with these perspectives.

40. The Clinic is therefore uniquely positioned to assist the Court by explaining the impact of anti-SLAPP legislation on sexual violence survivors, and to provide the perspective of these survivors – some of the most vulnerable people who face retaliatory lawsuits.

41. The Clinic has been engaged on the issue of promoting access to justice for sexual violence survivors for many years. As noted above, the interpretation and application of anti-SLAPP legislation, and subsections 173.1(3) and (4) of the *Courts of Justice Act* in particular, will have a significant impact on the ability of sexual violence survivors to discuss and report sexual violence, and to pursue legal recourse against their abusers.

42. If permitted to intervene in this appeal, the Clinic will cooperate with the other interveners to avoid repeating arguments.

Outline of the Clinic's Proposed Submissions

43. If this Court grants the Clinic leave to intervene in this appeal, I anticipate that the Clinic will make submissions on two points.

44. First, the Clinic will argue that this Court should interpret the “public interest” set out in subsection 137.1(3) and paragraph 137(4)(b) of the *CJA* as being broader than simply freedom of expression, and as including the strong public interest in reporting sexual violence to an authority or trusted person.

45. Second, the Clinic will argue that this Court should recognize that, in the context of the “no valid defence” requirement under subparagraph 137(4)(a)(i) of the *CJA*, it will rarely be appropriate for a survivor of sexual violence to be compelled to testify, and that no adverse inference should be drawn when she chooses not to swear an affidavit.

46. The Clinic's intended submissions on these two points are more fully set out in the Clinic's Memorandum of Argument for leave to intervene.

SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario
on August 15, 2019



Callandra Cochrane
Barrister and Solicitor



Deepa Mattoo



TAB3

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

B E T W E E N:

MAIA BENT

Appellant
(Respondent)

- and -

HOWARD PLATNICK

Respondent
(Appellant)

A N D B E T W E E N:

LERNERS LLP

Appellant
(Respondent)

- and -

HOWARD PLATNICK

Respondent
(Appellant)

**MEMORANDUM OF ARGUMENT OF
THE BARBRA SCHLIFER COMMEMORATIVE CLINIC**

(Motion by the Barbra Schlifer Commemorative Clinic for Leave to Intervene
pursuant to Rules 47 and 55 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This is a motion by the Barbra Schlifer Commemorative Clinic (the “**Clinic**”) for leave to intervene in this appeal. The Clinic seeks permission to file a 10 page factum and present oral argument at the hearing of the appeal.
2. The Clinic is a multi-disciplinary, front-line service provider to women experiencing violence. It was established in the memory of Barbra Schlifer, who was sexually assaulted and murdered on the night of her call to the bar. As part of its mandate, the Clinic works to change the legal conditions that threaten women’s safety, dignity, and equality. In fulfilling its mission, the Clinic has developed a long history of intervention in Canadian courts.
3. The Clinic represents women who are survivors of sexual violence, many of whom are directly impacted by the rising tide of retaliatory lawsuits known as strategic lawsuits against public participation (“**SLAPP**”). In the Clinic’s experience, retaliatory suits or threats of retaliatory suits are weapons used by perpetrators of violence to suppress survivors from reporting or seeking help and support from others. These suits are emotionally, psychologically, and financially devastating to survivors, who are often already vulnerable, whether due to poverty, precarious immigration status, the sequelae of abuse, or other barriers.
4. Anti-SLAPP legislation provides an important zone of protection to survivors of sexual violence. To ensure the Legislature’s intended purpose is given meaning, the legislation must be interpreted in a manner that gives special consideration to the unique circumstances of women who risk retaliation by disclosing or reporting sexual violence. This appeal raises access to justice issues for survivors of sexual violence; how this Court approaches anti-SLAPP protections will have a direct impact on the ability of survivors to come forward and pursue legal remedies against their abusers.
5. The Clinic is well-placed to provide this Court with useful submissions that are different from those of the parties and the other interveners. The women whom the Clinic represents rely on anti-SLAPP legislation to protect them from retaliation and to discourage retaliatory suits as a matter of public policy. The Clinic therefore seeks leave to intervene to assist this Court by

presenting the issues in this appeal from the broader perspective of these survivors, who are some of the most vulnerable targets of retaliatory suits.

6. If it is granted leave to intervene in this appeal, the Clinic will propose that the “public interest” portions of anti-SLAPP legislation be interpreted as not only protecting free expression, but also as protecting the strong public interest in encouraging the reporting of sexual violence.

7. The Clinic will also make submissions to help ensure that anti-SLAPP legislation cannot be used by the plaintiff to impose the very harm the legislation intends to prevent – that is, as a sword to inflict further abuses through invasive and protracted discovery processes. To this end, the Clinic will make submissions on the analytic approach to s. 137.1(4)(a)(ii) of the *Courts of Justice Act*¹ (the “CJA”) and will propose that, in appropriate instances (such as where the defendant to a retaliatory suit is a survivor of sexual violence) no adverse inference should be drawn in the context of s. 137.1(4)(a)(ii) from the survivor’s decision not to adduce affidavit evidence detailing her defences on the main suit.

The History and Mandate of the Clinic

8. The Clinic was established in 1985 to honour Barbra Schlifer, who was sexually assaulted and murdered on the night of her call to the bar.² The Clinic assists approximately 4,000 women a year to build lives free from violence through a number of measures, including legal representation and counselling services for women who have experienced sexual violence, and advocating for law reform and social change that benefits women.³ The women the Clinic works to support come from diverse racial, ethno-cultural, and socioeconomic backgrounds, and include some of the most vulnerable and systemically disempowered individuals in society.⁴

9. The Clinic supports women who have experienced violence by, among other things, offering avenues for redressing the harms they have suffered.⁵ The Clinic’s institutional objectives are captured by its Mission Statement:

¹ R.S.O. 1990, c. C.43.

² Affidavit of Deepa Mattoo at para. 6, Motion Record, Tab 2 [“Mattoo Affidavit”].

³ Mattoo Affidavit at paras. 8, 10-18.

⁴ Mattoo Affidavit at para. 7.

⁵ Mattoo Affidavit at para. 13.

The Barbra Schlifer Clinic offers legal representation, professional counselling and multilingual interpretation to women who have experienced violence. Our diverse, skilled and compassionate staff accompany women through personal and practical transformation, helping them to build lives free from violence.

We are a centre by, for and about women. We amplify women's voices, and cultivate their skills and resilience. Together with our donors and volunteers, we are active in changing the conditions that threaten women's safety, dignity and equality.⁶

10. The mandate of the Clinic includes intervening in court proceedings where the outcome may influence women's safety, dignity, and equality. The Clinic often seeks leave where a case – like this one – raises an issue of national importance related to violence against women.⁷

11. The Clinic seeks leave to intervene in the present appeal because of the significant impact that this Court's ruling may have on the ability of survivors of sexual violence to report and speak about the crimes they have lived through, as well as their ability to defend themselves when faced with retaliatory suits.⁸

The Clinic has expertise in advocacy

12. The Clinic has considerable experience intervening in legal proceedings. In 1988 and 1992, the Clinic intervened in two landmark constitutional cases concerning the rights and interests of sexual violence survivors: *Canadian Newspapers Co v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, and *R v. Seaboyer; R v. Gayme*, [1991] 2 S.C.R. 577.⁹

13. Since that time, the Clinic has been granted standing as an intervener and has participated in numerous proceedings in the federal and Ontario courts and at this Court, including but not limited to:

- (a) *Office of the Children's Lawyer v. Balev*, 2018 SCC 16
- (b) *S.C. v. N.S.*, 2017 ONSC 5566
- (c) *R. v. Ururyar*, 2017 ONSC 4428
- (d) *R. v. Quesnelle*, 2014 SCC 46

⁶ Mattoo Affidavit at para. 19.

⁷ Mattoo Affidavit at paras. 26-27.

⁸ Mattoo Affidavit at para. 38.

⁹ Mattoo Affidavit at para. 26.

- (e) *R. v. N.S.*, 2012 SCC 72
- (f) *Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp*¹⁰

14. In 2014, the Clinic also commenced litigation as a public interest litigant in *Barbra Schlifer Commemorative Clinic v. Canada*, 2014 ONSC 5140, to challenge the repeal of the long-gun registry. In 2017, the Clinic commenced a constitutional challenge as a co-plaintiff with two sexual violence survivors brought against the London Police Services Board for systemic discrimination in the investigation of sexual assault.¹¹

PART II - STATEMENT OF QUESTIONS IN ISSUE

15. The issue on this motion is whether the Clinic should be granted leave to intervene in this appeal. The Clinic submits that the answer is “yes”.

PART III – ARGUMENT

The test for leave to intervene

16. The Rules of this Court authorize the Court to grant leave to intervene to any person interested in an appeal. Leave to intervene will be granted if the prospective intervener shows (1) that it has an interest in the appeal and (2) that it will make submissions that will be useful and different from those of the parties.¹²

The Clinic has an interest in this appeal

17. The Clinic has an interest in this appeal.¹³ The Clinic’s mandate and the individual services it provides are designed to address the need for legal protection for women vulnerable to violence; the systemic problem of underreporting of sexual violence against women; the ineffectiveness of systemic responses to survivors of sexual violence; and the social exclusion of already-marginalized women.¹⁴ This case has a direct impact on these needs and issues.

¹⁰ Mattoo Affidavit at para. 27.

¹¹ Mattoo Affidavit at para. 27.

¹² *Rules of the Supreme Court of Canada*, rr. 55, 57(2); *R v. Finta*, [1993] 1 S.C.R. 1138 at 1142; *Reference re Workers’ Compensation Act, 1983 (Nfld.)*, [1989] 2 S.C.R. 335 at 339 [*Reference re Workers’ Compensation*].

¹³ Mattoo Affidavit at para. 32.

¹⁴ Mattoo Affidavit at paras. 7, 13-14, 28-31.

18. The interpretation and application of anti-SLAPP legislation is of great importance to the Clinic and the women it serves. The use of retaliatory suits against survivors of violence is a serious problem. The Clinic’s experience shows that women are confronted with retaliatory suits for nothing more than reporting or speaking out about the sexual violence against them.¹⁵

19. Defending a retaliatory lawsuit can be especially difficult for survivors of sexual violence. These survivors often face greater emotional and mental health burdens than other defendants, particularly because defending against a defamation, malicious prosecution, or other suit may require frequent retelling of sexual violence and reliving associated trauma.¹⁶ Moreover, the costs of defending a retaliatory suit can be staggering. Because lower income, systemically marginalized individuals typically face higher rates of sexual violence,¹⁷ retaliatory suits place a disproportionate financial burden on survivors.¹⁸

20. As a result, retaliatory suits have profound effects on the survivor who is sued. But they also indirectly hurt other victims by serving as a warning against reporting or speaking out. Many survivors reconsider pursuing charges or other forms of legal recourse or avoid speaking about what happened to them because they have been silenced by the threat of a lawsuit or otherwise fear legal retaliation by the perpetrator.¹⁹

The Clinic will make useful and different submissions

21. The criterion of useful and different submissions “is easily satisfied by an applicant who has a history of involvement in the issue giving the applicant an expertise which can shed fresh light or provide new information on the matter.”²⁰ An applicant should be allowed to intervene when it can “present argument from a different perspective with respect to some of the issues.”²¹

¹⁵ Mattoo Affidavit at paras. 33-34.

¹⁶ Mattoo Affidavit at paras. 33-34; Alyssa R. Leader, “A SLAPP in the Face of Free Speech: Protecting Survivors’ Rights to Speak up in the Me Too Era” 17 First Amend. L. Rev. (2019) 441 at 448 [“A SLAPP in the Face”].

¹⁷ Cecilia Benoit *et al.*, *Issue Brief: Sexual Violence Against Women in Canada* (Ottawa: Statistics Canada, 2015) at pp. 14, 17-23.

¹⁸ Mattoo Affidavit at paras. 35-36.

¹⁹ Mattoo Affidavit at para. 33.

²⁰ *Reference re Workers’ Compensation*, [1989] 2 S.C.R. 335 at 340.

²¹ *Norberg v. Wynrib*, [1992] 2 S.C.R. 224 at 225.

22. The Clinic’s perspective on this appeal is different from that of the parties and other interveners. The Clinic’s regular and direct contact with survivors of sexual violence means it understands how survivors perceive and interact with the justice system. If granted leave to intervene, the Clinic will provide useful submissions infused with these perspectives.²²

23. These submissions will differ from those of the parties. The submissions of Ms. Bent and Lerner LLP focus primarily on the proper scope of the evidentiary threshold constituting “grounds to believe” and the Court of Appeal’s interference with the factors a motion judge can consider on an anti-SLAPP motion. If the Clinic is granted leave to intervene, in making its submissions, it will cooperate with the other interveners to avoid repetition of argument and materials, and to provide distinct and useful analyses.²³

24. In its proposed submissions, the Clinic will argue that: 1) this Court should interpret the “public interest” set out by ss. 137.1(3) and 137.1(4)(b) of the *CJA* as being broader than simply freedom of expression, and as including the strong public interest in reporting sexual violence to an authority or trusted person; and 2) this Court should recognize that, in the context of the “no valid defence requirement” set out by s. 137.1(4)(a)(i), it will rarely be appropriate for a survivor of sexual violence to be compelled to testify, and that no adverse inference should be drawn when she chooses not to swear an affidavit.²⁴

The Clinic’s Proposed Submissions

Public Interest Need not be Limited to Free Expression

25. The first arm of the test for an anti-SLAPP motion, s. 137.1(3), sets out a threshold requirement intended to distinguish between claims that arise from an expression that relates to a matter of public interest and other claims.²⁵ The public interest is again implicated by s. 137.1(4)(b), which requires a balancing between public interest considerations engaged by the

²² Mattoo Affidavit at paras. 39-40.

²³ Mattoo Affidavit at para. 42.

²⁴ Mattoo Affidavit at paras. 43-45.

²⁵ *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at paras. 54-56 [*Pointes*].

communication.²⁶ As the Court of Appeal for Ontario has observed, the phrase “a matter of public interest” is not defined in the legislation.²⁷

26. When considering what relates to the “public interest” in the defamation context, this Court has stated that the inquiry should be approached from a broad perspective. To be of public interest, “the subject matter must be shown to be one inviting public attention, or about which the public has some substantial concern because it effects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.”²⁸

27. True to this Court’s recognition of a broad definition “public interest”, if permitted to intervene, the Clinic will propose that the assessment of public interest not be limited to the public interest in free expression, but also include matters about which the public has a substantial concern, including the interest in encouraging the reporting and investigation of sexual violence, and the public interest in protecting victims of sexual violence.

28. The Clinic’s proposed submissions reflect recent Ontario caselaw, which demonstrates that anti-SLAPP protections can easily be eroded if “public interest” is not interpreted robustly. In *Rizvee v. Newman*, the Ontario Superior Court of Justice dismissed a defamation action against a defendant for her social media communications about domestic violence, but considered the defendant’s disclosure of that very same violence in the criminal courts in support of a peace bond to relate to a “private matter” between two individuals and therefore unable to engage anti-SLAPP protections.²⁹

29. The Clinic’s proposed submissions are also informed by the United States’ experience with anti-SLAPP legislation. There, survivors who disclose sexual violence cannot always invoke anti-SLAPP protections because they are often unable show that their communications are in the public interest. U.S. courts have held that communications regarding a public figure or made to government actors (i.e. the police or judiciary) in the context of a prosecution are topics

²⁶ *Pointes* at paras. 42, 54.

²⁷ *Pointes* at para. 40.

²⁸ *Grant v. Torstar Corp.*, 2004 SCC 61 at para. 105.

²⁹ *Rizvee v. Newman*, 2017 ONSC 4024; In *Pointes*, the Court of Appeal for Ontario commented favourably on this outcome: see para. 60, fn 6.

of public interest.³⁰ However, communications about sexual violence regarding a non-public figure or that have been made to private actors (i.e. to an employer, to an institution, to friends and family etc.) concern what the courts consider to be strictly a “private matter”.³¹ This latter category of communications does not relate to the public interest and therefore does not fall under the purview of anti-SLAPP legislation.

30. *Rizvee* and the U.S. experience serve as cautionary tales against a narrow approach that limits the “public interest” to circumstances where the rationales for free expression are engaged. Some communications have value not because they inform, but rather because they serve other goals consistent with the public’s interest.

31. First, as Parliament and the provincial Legislatures, as well as this Court, have long recognized,³² disclosing sexual violence is generally of interest to the public, particularly because sexual violence is known to be under-reported in Canada.³³ Communications regarding sexual violence encourage the reporting and prosecution of sexual violence, and therefore inherently relate to the public interest.

32. Second, communications about sexual violence have broad social implications and instill public good in a way that fundamentally links them to the public interest. Unless it is safe for women to come forward, abusers cannot be held accountable. Suppressing communications about sexual violence perpetuates a culture of impunity for abusers and shame and stigma for survivors. On the other hand, hearing others discuss their experiences may reduce shame and stigma for other survivors while also having a synergistic effect, encouraging them to come forward themselves.

33. As a result, the Clinic will propose that this Court should specifically say that the public interest under anti-SLAPP legislation is broader than the interest in freedom of expression and

³⁰ A SLAPP in the Face, at 459, 460; see *e.g. Conroy v. Spitzer*, 83 Cal. Rptr. 2d. 443.

³¹ A SLAPP in the Face, at 459, 460; see *e.g. Steep Hill Labs., Inc. v. Moore*, 2018 WL 1242182 at 7; *Olaes v. Nationwide Mut. Ins.*, 38 Cal. Rptr. 3d 467.

³² *R. v. O’Connor*, [1995] 4 S.C.R. 411 at para. 158; *R. v. Seaboyer*; *R v. Gayme*, [1991] 2 S.C.R. 577 at para. 256.

³³ *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at para. 256; Canada, Statistics Canada, Self-reported sexual assault in Canada, 2014, (Ottawa: Canadian Centre for Justice Statistics, 2017) at 4. See also: West Coast LEAF, Women’s Experiences to the Barriers to Reporting Sexual Assault (Vancouver: West Coast LEAF, 2018).

will almost invariably include communications regarding sexual violence to someone in authority or a trusted person.

This Court should recognize that it is appropriate for certain defendants to not adduce affidavit evidence in the context of s. 137.1(4)(a)(ii)

34. The Clinic also proposes to make submissions aimed at minimizing the potential abuse of sexual assault survivors litigating an anti-SLAPP motion, particularly in regard to s. 137.1(4)(a)(ii), which requires a plaintiff to show the defendant has no valid defence.

35. Anti-SLAPP legislation allows defendants to ask the courts to decide whether a lawsuit has any legal merit before the defendant is forced to endure discovery. This is particularly critical for survivors of sexual violence, who, as discussed above, typically face far greater emotional and mental health burdens than other defendants.

36. However, because anti-SLAPP motions require a plaintiff to show that the defendant has no valid defence, these motions can themselves be used by a plaintiff as a means of inflicting further emotional and mental harm on a survivor-defendant.

37. On its face, the onus on a plaintiff to demonstrate that “the moving party has no valid defence” is a high one. The test developed by the Court of Appeal for Ontario – that the plaintiff must demonstrate that a finder of fact might, on a balance of probabilities, reject the defences relied on by the defendant – lowers that threshold and places the burden on the defendant to adduce detailed evidence about the facts of the case in support of his or her asserted defences.³⁴ This, in turn, opens the defendant up to significant probing on cross-examination, which, for sexual assault survivors, can be harassing, invasive, and re-traumatizing.

38. With this evidentiary threshold in mind, the Clinic proposes to make submissions aimed at ensuring that, functionally, the protections of anti-SLAPP legislation are applied in a manner that affords real protection for women who have disclosed sexual violence.

39. Specifically, the Clinic intends to submit that this Court should recognize that it is open and appropriate for defendants in some cases, and in particular sexual violence cases, not to proffer an affidavit on the “no valid defence stage” of an anti-SLAPP motion, and that no

³⁴ *Pointes*, 2018 ONCA 685, para. 83.

adverse inference should be drawn from this choice. Similarly, the Court should make it clear that except in the clearest of cases, the defendant should not be compelled to testify by summons to witness on a pending motion.

40. The option not to put forward an affidavit or be compelled to testify will protect the survivor from having to detail the sexual violence she experienced and from being cross-examined about it. Simultaneously, it will not significantly impede the plaintiff's ability to show that the survivor has no valid defence, as the court will be able to take into account the full record before it and, as necessary, move on to the heart of the s. 137.1 test: the balancing of interests embedded in s. 137.1(4)(b).

PART IV – SUBMISSIONS CONCERNING COSTS

41. The Clinic will not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

42. The Clinic requests an order granted it leave to intervene in this appeal, to submit a factum not exceeding 10 pages in length, and to present oral submissions at the hearing.

August 16, 2019

ALL OF WHICH IS RESPECTFULLY
SUBMITTED

 for:

Joanna Birenbaum



Andrew Bernstein



Alicja Puchta

Counsel for the Proposed Intervener,
The Barbra Schlifer Commemorative Clinic

PART VI – TABLE OF AUTHORITIES

CASES	
Name	Cited in paras.
<i>1704604 Ontario Ltd. v. Pointes Protection Association</i> , 2018 ONCA 685	25, 28, 37
<i>Conroy v. Spitzer</i> , 83 Cal. Rptr. 2d. 443 (Westlaw)	29
<i>Grant v. Torstar Corp.</i> , 2009 SCC 61	26
<i>Norberg v. Wynrib</i> , [1992] 2 S.C.R. 224	21
<i>Olaes v. Nationwide Mut. Ins.</i> , 135 Cal.App.4th 1501 (Westlaw)	29
<i>R v. Finta</i> , [1993] 1 S.C.R. 1138	16
<i>R. v. O'Connor</i> , [1995] 4 S.C.R. 411	31
<i>R. v. Seaboyer; R. v. Gayme</i> , [1991] 2 S.C.R. 577	31-32
<i>Reference re Workers' Compensation Act, 1983 (Nfld.)</i> , [1989] 2 S.C.R. 335	16, 21
<i>Rizvee v. Newman</i> , 2017 ONSC 4024	28
<i>Steep Hill Labs., Inc. v. Moore</i> , 2018 WL 1242182 (Westlaw)	30
SECONDARY SOURCES	
Alyssa R. Leader, "A SLAPP in the Face of Free Speech: Protecting Survivors' Rights to Speak up in the Me Too Era" 17 First Amend. L. Rev. (2019) 441 (HeinOnline)	19, 29
Canada, Statistics Canada, <i>Self-reported sexual assault in Canada, 2014</i> (Ottawa: Canadian Centre for Justice Statistics, 2017) (Government of Canada)	31
Cecilia Benoit et al., <i>Issue Brief: Sexual Violence Against Women in Canada</i> (Ottawa: Statistics Canada, 2015) (Government of Canada)	19
West Coast LEAF, <i>Women's Experiences to the Barriers to Reporting Sexual Assault</i> (Vancouver: West Coast LEAF, 2018) (West Coast LEAF)	31

PART VII – STATUTORY PROVISIONS

Name	Cited in paras.
<i>Courts of Justice Act</i> , R.S.O. 1990, c. C.43, ss. 137.1	7
<i>Rules of the Supreme Court of Canada</i> , SOR/2006-203, rr. 55, 57(2)	11