

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

DR. KULVINDER KAUR GILL and DR. ASHVINDER KAUR LAMBA

Appellants / Plaintiffs

and

DR. ANGUS MACIVER, DR. NADIA ALAM, ANDRE PICARD, DR.  
MICHELLE COHEN, DR. ALEX NATAROS, DR. ILAN SCHWARTZ, DR.  
ANDREW FRASER, DR. MARCO PRADO, TIMOTHY CAULFIELD, DR.  
SAJJAD FAZEL, ALHELI PICAZO, BRUCE ARTHUR, DR. TERRY  
POLEVOY, DR. JOHN VAN AERDE, DR. ANDREW BOOZARY, DR.  
ABDU SHARKAWY, DR. DAVID JACOBS, TRISTAN BRONCA, CARLY  
WEEKS, THE POINTER, THE HAMILTON SPECTATOR, SOCIÉTÉ  
RADIO-CANADA, THE MEDICAL POST

Respondents / Defendants

**FACTUM OF THE MOVING PARTY,  
THE POINTER GROUP INCORPORATED  
(Motion for Security for Costs returnable October 26, 2023)**

October 17, 2023

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The Pointer Group Incorporated

TO: **SERVICE LIST**

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## PART I - OVERVIEW

1. The Pointer Group Incorporated (“**The Pointer**”) seeks an order, under Rules 61.06(1)(a) and (c), requiring the appellant, Dr. Kulvinder Kaur Gill (“**Dr. Gill**”), to post security for: (i) costs of this appeal of \$20,000 and, (ii) costs of the action in Court File No. CV-20-00652918-0000 (the “**Action**”), including the SLAPP Motion, as defined below, of \$64,170.15.
2. Dr. Gill appeals Justice Stewart’s order dismissing the Action against all defendants pursuant to section 137.1 of the *Courts of Justice Act* (the “**CJA**”). Dr. Gill also seeks leave to appeal Justice Stewart’s order awarding the respondents’, including The Pointer, costs of their motions on a full indemnity basis.<sup>1</sup>
3. The appellants commenced the underlying action against 23 defendants, including The Pointer, for libel, slander and negligence. The appellants collectively claimed damages of \$10.75 million against the defendants. The defendants were sued in relation to numerous separate publications, most of which were related to Twitter postings in response to Dr. Gill’s controversial tweets about COVID-19 or Twitter postings about a controversy regarding the Canadian Medical Association.
4. The Pointer was not sued in relation to Twitter postings. The Pointer was sued in relation to an article it published on the controversy caused by Dr. Gill’s COVID-19 tweets.
5. Dr. Gill should be ordered to post security for costs:
  - (a) Dr. Gill’s appeal against The Pointer is devoid of merit. In her notice of appeal, and factum for her appeal, Dr. Gill has not identified or alleged that

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<sup>1</sup> The appellant, Dr. Ashvinder Lamba, also appeals, but does not appeal the order dismissing her action against The Pointer.

Justice Stewart committed any error in relation to The Pointer, and Justice Stewart committed no error.

- (b) Dr. Gill's appeal is vexatious. Dr. Gill has brought this appeal for the purpose of obtaining leverage to avoid paying some or all of the costs awarded to The Pointer on the SLAPP Motion.
- (c) Dr. Gill has insufficient assets to satisfy the costs of the appeal. The Pointer asked Dr. Gill about the sufficiency of her assets to pay the costs awarded against her and Dr. Gill refused to provide this information. Moreover, on this motion, Dr. Gill has not presented any evidence about her financial situation and, instead, relies on the evidence of a law clerk at the law firm representing her to assert that there is \$20,000 being held in trust on her behalf with the law firm. The mere existence of \$20,000 being held for her apparent benefit is far from the robust particularity required to demonstrate that she has sufficient assets to pay the costs of the appeal. There is no guarantee that these funds can or will be used to satisfy any cost award made in favor of The Pointer. Dr. Gill owes over \$1 million in costs, in total, for the Action as against all of the defendants, including The Pointer.
- (d) There is other good reason to order security for costs. The Action, and this appeal, have caused The Pointer significant financial hardship and hurt its ability to report on matters of public interest. If security for costs are not ordered to be posted, Dr. Gill will have achieved her objective of silencing The Pointer. This fundamentally undermines the purpose of section 137.1 of the *CJA* and should not be permitted. The Pointer is entitled to some assurance that its costs for the Action and the appeal will be paid and Dr. Gill should not be permitted to pursue this appeal without any risk of having to pay cost awards.

## PART II - FACTS

### A. Background

#### *i. Procedural History*

6. The appellants, Dr. Gill and Dr. Ashvinder Kaur Lamba ("**Dr. Lamba**" and together with Dr. Gill, the "**Appellants**"), commenced the Action on December 11, 2020, against 23 defendants, including The Pointer.<sup>2</sup>

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<sup>2</sup> Statement of Claim, **Exhibit C**, Affidavit of San Grewal sworn March 25, 2021 ("**2021 Grewal Affidavit**"), Motion Record ("**MR**"), pp. 29-114, Joint Appeal Book and Compendium ("**ABCO**"), Tab 22, pp. 2162-2246.

7. The statement of claim alleged that an article published by The Pointer on August 13, 2020 (the “**Article**”) contained defamatory statements about Dr. Gill.<sup>3</sup> Dr. Gill’s claim against The Pointer was unrelated to her claims against the other defendants.

8. All of the defendants brought motions to dismiss the Action under section 137.1 of the *CJA*, for being a strategic lawsuit against public participation (the “**SLAPP Motion(s)**”). The SLAPP Motions were heard over three days in September, 2021.

9. By reasons and order dated February 24, 2022, Justice Stewart granted the SLAPP Motions and dismissed the Action (the “**Dismissal Order**”).<sup>4</sup>

10. By reasons and order dated October 31, 2022, Justice Stewart awarded the defendants their full indemnity costs (the “**Costs Order**”), consistent with section 137.1 of the *CJA*.<sup>5</sup> The costs awarded to the defendants, Dr. MacIver and Dr. Alam, are payable by Dr. Gill and Dr. Lamba, jointly and severally. The costs awarded to the other defendants, including The Pointer, are payable by Dr. Gill severally.

11. The Pointer was awarded costs in the all-inclusive sum of \$64,710.15. Dr. Gill is subject to an aggregate costs award of \$1,109,288.80 under the Costs Order. The costs owing to The Pointer have not been paid.<sup>6</sup>

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<sup>3</sup> Statement of Claim at paras 183 to 189, **Exhibit C**, 2021 Grewal Affidavit, MR, pp. 29-114, ABCO, Tab 22, pp. 2221-2222.

<sup>4</sup> [Decision of Justice Stewart dated February 24, 2022](#) (“**Motion Decision**”); Order of Justice Stewart dated February 24, 2022, **Exhibit C**, Affidavit of San Grewal sworn August 28, 2023 (“**2023 Grewal Affidavit**”), Motion Record dated August 28, 2023 (“**2023 MR**”), Tab 2, p. 291.

<sup>5</sup> [Costs Decision of Justice Stewart dated October 31, 2022](#) (“**Costs Decision**”); Order of Justice Stewart dated October 31, 2022, **Exhibit D**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 347.

<sup>6</sup> 2023 Grewal Affidavit at para. 23, 2023 MR, Tab 2, p. 17.

*ii. The Pointer's Article*

12. The article (the "**Article**") was published on August 13, 2020, and reported on:<sup>7</sup>
- (a) Tweets published by Dr. Gill on August 4, 5, 6 and 12, 2020, which appeared in the Article in their entirety and which expressed her view that lockdowns were unwarranted and promoted the use of hydroxychloroquine as a treatment for the COVID-19 virus.
  - (b) Twitter removing Dr. Gill's tweet on August 6, 2020, because it violated Twitter's policies. The August 6, 2020 tweet is set out in the Article even though it was removed on Twitter. That tweet promoted T-cell immunity (i.e. herd immunity) and hydroxychloroquine as humanity's effective defences against COVID-19.
  - (c) Dr. Gill defending the use of a hydroxychloroquine and promoting it as "effective in the fight against COVID-19".
  - (d) A complaint made to the College of Physicians and Surgeons of Ontario about Dr. Gill's tweets.
  - (e) The fact there were medical studies that questioned the use of hydroxychloroquine as a treatment for COVID-19.
  - (f) Health Canada's position that it did not support the use of hydroxychloroquine to prevent or treat COVID-19 without a prescription and warning Canadians about false and misleading claims.
  - (g) Concerns expressed by Dr. David Juurlink, head of clinical pharmacology and toxicology at the University of Toronto, regarding Dr. Gill's tweets including that her advice in her tweets was dangerous. Dr. Juurlink's comments in the Article were not the subject of Dr. Gill's claim and Dr. Juurlink was not a defendant to Dr. Gill's action.

**B. Justice Stewart's Reasons for the Dismissal Order**

13. Justice Stewart set out the correct statutory framework applicable to a motion to dismiss under section 137.1 of the *CJA*, and the law in relation to that statutory framework.<sup>8</sup>

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<sup>7</sup> Motion Decision at [para. 268](#); 2021 Grewal Affidavit at para. 17, MR, p.15, ABCO, Tab 22, p. 2147; **Exhibits D and E**, Grewal Affidavit, MR, pp. 115-131, ABCO, Tab 22, p. 2248 and 2255.

<sup>8</sup> Motion Decision at [paras. 1-17](#).

14. In describing the applicable legal framework, Justice Stewart addressed and rejected the Appellants' submission that the court must: (i) adopt a narrow approach to the section 137.1 analysis; (ii) avoid drawing any inferences; and (iii) not arrive at any conclusions based on a qualitative assessment of the evidence tendered by the parties. Justice Stewart correctly held that a court should not adopt an "overly rigid and narrow approach" on a motion under section 137.1 of the *CJA*.<sup>9</sup>

15. Justice Stewart held that the material filed on the motion required "very little or nothing by the way of credibility assessments to dispose of the motions." In other words, Justice Stewart was not required to engage in the type of analysis a summary motion judge might have to engage in.<sup>10</sup>

16. Justice Stewart concluded that all expressions in issue were made on matters of public interest.<sup>11</sup> The Appellants concede the public interest element on this appeal.

17. Justice Stewart then analyzed the impugned expressions independently under the correct legal framework. With respect to the Article, Justice Stewart made the following key findings:<sup>12</sup>

- (a) The Article reported on Dr. David Juurlink's concerns expressed regarding Dr. Gill's tweets, including that her advice in her tweets was dangerous.
- (b) Dr. Juurlink's comments were not the subject of Dr. Gill's claim and he was not a defendant in the Action.
- (c) There was nothing in the Article that was not true, including that the Article reported on Dr. Gill's own tweets, which were publicly available and repeated verbatim in the Article, that there was research and statements that contradicted her views, that complaints had been made about her

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<sup>9</sup> Motion Decision at [paras 55-57](#).

<sup>10</sup> Motion Decision at [paras 55-57](#).

<sup>11</sup> Motion Decision at [para 58](#).

<sup>12</sup> Motion Decision at [paras 266-277](#).

public statements and the impact the statements would have on members of the public.

- (d) The Article was a fair and accurate report about Dr. Gill's tweets and the controversy created by them, and was based on true underlying fact.
- (e) Dr. Gill's submission that her tweets were taken out of context was rejected.
- (f) Dr. Gill's submission that the Article repeated and echoed the defamation of others was rejected.
- (g) Dr. Gill did not dispute The Pointer's evidence that it attempted to contact her before publishing the Article.
- (h) The public had an interest in receiving competing viewpoints to those expressed publicly by Dr. Gill.
- (i) Journalists at large must have the freedom to responsibly report on the COVID-19 pandemic, including Dr. Gill's comments and the criticism of them, irrespective of whether Dr. Gill had a valid basis to assert that lockdowns are ineffective or that hydroxychloroquine is effective against COVID-19.
- (j) The Appellants should not be permitted to stifle public discourse and participation in public health debates caused by their own comments.

18. Justice Stewart concluded, in addition to the fact the Article was true, that the evidence supported a very strong defence of responsible journalism.<sup>13</sup>

19. In applying the balancing test, Justice Stewart held that it resulted in "an assessment very much in favour of The Pointer and the public interest concerns it has advanced." As a result, the action against The Pointer was dismissed.<sup>14</sup>

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<sup>13</sup> Motion Decision at [para 281](#).

<sup>14</sup> Motion Decision at [para 282](#).



**C. Dr. Gill's Appeal**

*i. Dr. Gill's Appeal Lacks Merit*

20. The Appellants appeal the Dismissal Order.<sup>15</sup> They seek leave to appeal the Costs Order.<sup>16</sup>

21. Dr. Gill makes only a single reference to The Pointer in her Fresh as Amended Notice of Appeal,<sup>17</sup> and only two nominal references to The Pointer in her factum on the appeal.<sup>18</sup> Dr. Gill does not substantively address her appeal in relation to The Pointer and does not identify any error made by Justice Stewart in respect of her decision on The Pointer's SLAPP Motion.

22. As noted above, Dr. Gill's claim against The Pointer is not related to her claims against the other defendants. Justice Stewart dismissed Dr. Gill's claim against The Pointer for different reasons than for the other defendants.

*ii. Delay in Pursuing this Appeal*

23. The Appellants initially commenced this appeal through their former lawyer, Rocco Galati ("**Galati**"), by serving a joint notice of appeal on March 22, 2022.<sup>19</sup> However, due to the following delays, Dr. Gill did not perfect her appeal until September 8, 2022:

- (a) On March 28, 2022, Galati delivered responding cost submissions in relation to the costs of the SLAPP Motion.<sup>20</sup>

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<sup>15</sup> Dr. Gill's Fresh as Amended Notice of Appeal dated September 8, 2022, **Exhibit P**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 352.

<sup>16</sup> Dr. Gill's Supplementary Notice of Appeal re Costs dated November 29, 2022, **Exhibit R**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 406.

<sup>17</sup> Dr. Gill's Fresh as Amended Notice of Appeal dated September 8, 2022 at para 6s., **Exhibit P**, 2023 Grewal Affidavit, 2023 MR, Tab 2, pp. 355-356.

<sup>18</sup> Dr. Gill's Appeal Factum dated September 8, 2022 at para 14s. and Schedule C, **Exhibit Q**, 2023 Grewal Affidavit, 2023 MR, Tab 2, pp. 374 and 403.

<sup>19</sup> Joint Notice of Appeal dated March 22, 2022, **Exhibit D**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 295.

<sup>20</sup> 2023 Grewal Affidavit at para 11, 2023 MR, Tab 2, p. 13.

- (b) On April 19, 2022, Galati served a motion record to remove him and his firm as counsel of record for the Appellants.<sup>21</sup>
- (c) By notice dated May 9, 2022, the Registrar of the Court of Appeal notified the parties of the Court of Appeal's intention to dismiss the Appellants' appeal for delay.<sup>22</sup>
- (d) By endorsement dated May 11, 2022, Justice Gillese made an order (the "**Removal Order**") removing Galati and his law firm as counsel for the Appellants and extended the deadline for perfecting the appeal to 90 days from May 11, 2022, to allow the Appellants time to retain and instruct new lawyers.<sup>23</sup>
- (e) On July 15, 2022, or over two months after the Removal Order was made, Dr. Gill's new counsel, Jeff Saikaley ("**Saikaley**") of Caza Saikaley LLP ("**Caza LLP**") wrote to Justice Stewart to request leave to file supplementary responding cost submissions.<sup>24</sup>
- (f) By endorsement dated August 3, 2022, Justice Stewart granted the Appellants' request to file supplementary cost submissions. Justice Stewart directed submissions to be made within two weeks of her endorsement and any reply submissions to be delivered two weeks after receipt of the Appellants' submissions.<sup>25</sup>
- (g) On September 8, 2022, Dr. Gill perfected her appeal and delivered a fresh as amended notice of appeal.<sup>26</sup>
- (h) On October 31, 2022, the Costs Order was made.<sup>27</sup>
- (i) On November 29, 2022, Dr. Gill delivered a supplementary notice of appeal by which she seeks leave to appeal the Costs Order.<sup>28</sup>

24. Dr. Gill has not pursued this appeal diligently and expeditiously, meaning it will not be heard until approximately 21 months after it was commenced. The Pointer has been

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<sup>21</sup> 2023 Grewal Affidavit at para 12, 2023 MR, Tab 2, p. 13.

<sup>22</sup> Notice of Registrar dated May 9, 2022, **Exhibit E**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 305.

<sup>23</sup> Removal Order dated May 11, 2022, **Exhibit F**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 310.

<sup>24</sup> Letter from Jeff Saikaley dated July 15, 2022 to Justice Stewart, **Exhibit J**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 325.

<sup>25</sup> Endorsement of Justice Stewart dated August 3, 2022, **Exhibit M**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 336.

<sup>26</sup> Dr. Gill's Fresh as Amended Notice of Appeal dated September 8, 2022, **Exhibit P**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 352.

<sup>27</sup> Costs Order dated October 31, 2022, **Exhibit O**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 347.

<sup>28</sup> Dr. Gill's Supplementary Notice of Appeal dated November 29, 2022, **Exhibit R**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 406.

forced to incur significant legal expense, while Dr. Gill has not been required to pay the significant costs that she owes to The Pointer.

**D. This Motion for Security for Costs**

25. Since commencing the appeal in March, 2022, Dr. Gill has abandoned her appeal against 11 of the 22 respondents. It is apparent that she has successfully leveraged her appeal to favorably resolve costs owing by her to several of the respondents.<sup>29</sup>

26. On February 24, 2023, The Pointer's counsel requested from Dr. Gill's counsel evidence that Dr. Gill has sufficient assets to cover all of the potential costs awards against her.<sup>30</sup> Dr. Gill's counsel did not respond to this request, nor has she provided any evidence in response to this motion, including in relation to her financial affairs.

27. The Pointer estimates that its partial indemnity costs for the appeal, not including this motion, will total \$25,000, all-inclusive.<sup>31</sup>

28. Given the potentially extensive costs awards payable by Dr. Gill for the Action, her abandonment of her appeal as against 11 of the 22 respondents, her failure to identify any error made by Justice Stewart in granting The Pointer's SLAPP Motion, the delay in pursuing this appeal and The Pointer's limited resources, it is apparent that Dr. Gill has brought this appeal for the purpose of obtaining leverage in negotiations with The Pointer to avoid paying some or all of the costs awarded to The Pointer.<sup>32</sup>

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<sup>29</sup> 2023 Grewal Affidavit at para 27, 2023 MR, Tab 2, p. 18.

<sup>30</sup> Email from Brian Radnoff to Jeff Saikaley dated February 24, 2023, **Exhibit T**, 2023 Grewal Affidavit, 2023 MR, Tab 2, p. 440.

<sup>31</sup> 2023 Grewal Affidavit at para 37, 2023 MR, Tab 2, pp. 20-21.

<sup>32</sup> 2023 Grewal Affidavit at para 32, 2023 MR, Tab 2, p. 19.

### PART III - ISSUES

29. Dr. Gill should be ordered to post security for:
- (a) costs of this appeal in the amount of \$20,000;
  - (b) costs of the Action, including the SLAPP Motion, in the amount of \$64,170.15,

within 30 days, failing which, her appeal will be dismissed.

### PART IV - SUBMISSIONS

#### A. The Test for Security for Costs

##### *i. Legislative Framework for Security for Costs Orders*

30. Rules 61.06(1)(a) and 61.06(1)(c) of the *Rules of Civil Procedure* provide that a judge of Court of Appeal may order security for costs of the proceeding and appeal where it appears that:<sup>33</sup>

- (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal (rule 61.06(a)).
- (b) for other good reason, security for costs should be ordered (rule 61.06(1)(c)).

##### *ii. Rule 61.06(1)(a) – Frivolous, Vexatious, and Insufficient Assets*

31. The standard imposed by “good reason to believe” in Rule 61.06(1)(a) does not demand that the motion judge reach a definitive conclusion, make an affirmative finding or actually determine that the appeal is frivolous and vexatious and that the appellant

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<sup>33</sup> *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 61.06(1). See also: [Health Genetic Center Corp. v. New Scientist Magazine](#), 2019 ONCA 968 at para 16 where the Court of Appeal confirms that it may order security to be posted for both the proceeding below and the present appeal.

lacks sufficient Ontario assets to pay the appeal costs. Rather, “good reason to believe” suggests a tentative conclusion of absence of merit and assets.<sup>34</sup>

32. A “frivolous” appeal is one readily recognizable as devoid of merit or as one having little prospect of success. A “vexatious” appeal is one taken to annoy or embarrass the opposite party, sometimes fuelled by the hope of financial benefit in return for relieving the respondent’s aggravation.<sup>35</sup>

33. In examining the evidence as to the sufficiency of assets, the following factors apply: (i) the court must consider critically the quality as well as the sufficiency of the assets presently held and whether they are *bona fide* assets; (ii) there must be demonstrated exigible assets; (iii) the court must consider liabilities as well as assets and in particular whether the assets to which the defendant is expected to look are secured to another creditor; and (iv) the failure of a plaintiff to respond to a defendant’s inquiry as to the availability of assets may raise a doubt as to the existence of assets.<sup>36</sup>

*iii. Rule 61.06(1)(c) – Other Good Reason*

34. The bases on which the Court of Appeal can order security for costs under Rule 61.06(1)(c) is not a closed list.<sup>37</sup> “Good reason” can exist where:

- (a) the appeal has a low prospect of success, in circumstances where it would be nearly impossible to collect costs from the appellants;<sup>38</sup> or

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<sup>34</sup> [Pickard v. London Police Services Board](#), 2010 ONCA 643 at para 18.

<sup>35</sup> [Pickard v. London Police Services Board](#), 2010 ONCA 643 at para 19.

<sup>36</sup> [Health Genetic Center Corp. v. Reed Business Information Ltd.](#), 2014 ONSC 6449 at para 5.

<sup>37</sup> [Tsai v. Dugal](#), 2021 ONCA 170 at para 12.

<sup>38</sup> [Henderson v. Wright](#), 2016 ONCA 89, at para 27; [Groja & Company Professional Corporation v. Cardillo](#), 2019 ONCA 165, at paras 7 and 35.

- (b) the conduct of the appellants in the lower court, in particular a demonstrated lack of respect for court orders and procedure, warrants an order for security for costs.<sup>39</sup>

35. The Court has broad discretion to award security for costs where it is just.<sup>40</sup>

36. The “good reason” should be related to the purpose behind an order for security for costs, namely that a respondent is entitled to some measure of protection for costs incurred and to be incurred in the proceeding.<sup>41</sup>

**B. Security for Costs Are Justified Under Rule 61.06(1)(a)**

*i. Dr. Gill’s Appeal is Devoid of Merit*

37. Dr. Gill’s appeal in relation to The Pointer is devoid of merit.

38. Dr. Gill does not identify any errors allegedly made by Justice Stewart in her reasons granting The Pointer’s motion. Her appeal is a generalized attack on Justice Stewart’s reasons in relation to the defendants who made Twitter postings, alleging that Justice Stewart erred in: (i) failing to assess the expressions independently and whether they were defamatory of Dr. Gill; (ii) her consideration of the defences of fair comment and qualified privileged; and (iii) assessing whether Dr. Gill suffered harm as a result of the defendants’ expressions.

39. None of Dr. Gill’s submissions deal with the issues concerning the claim against The Pointer and whether Justice Stewart’s decision to dismiss that claim should be overturned. She has failed to identify any error in Justice Stewart’s decision as it relates

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<sup>39</sup> [Astley v. Verdun](#), 2013 ONSC 2998, at para 10; [Astley v. Verdun](#), 2015 ONCA 225, at para 5.

<sup>40</sup> [Novak v. St. Demetrius \(Ukrainian Catholic\) Development Corporation](#), 2017 ONCA 693, at para 9.

<sup>41</sup> [Tsai v. Dugal](#), 2021 ONCA 170 at para 12; [Thrive Capital Management Ltd. v. Noble 1324 Queen Inc.](#), 2021 ONCA 474 at para 19.

to The Pointer. It is unclear why The Pointer is being dragged into this appeal. It is clear Dr. Gill has no basis to appeal Justice Stewart's decision in relation to The Pointer.

40. In any event, there is no basis to interfere with Justice Stewart's decision. She committed no errors of law and made no palpable and overriding errors in her decision. On the contrary, Justice Stewart's reasons were entirely consistent with the law of defamation and section 137.1 of the *CJA*, including with respect to the assessment of harm. She applied the legal principles correctly to the record before her in concluding that this action should be dismissed. It is apparent that Dr. Gill's purpose in bringing this action was to silence her critics and The Pointer reporting on the controversy she caused.

41. Regarding the appeal of the Costs Order, there is a high threshold to obtain leave to appeal a cost award. In any event, Justice Stewart's cost award to The Pointer was consistent with the statutory framework and applicable legal principles.<sup>42</sup>

*ii. Dr. Gill Brought this Appeal for an Improper Purpose*

42. Dr. Gill has brought this appeal for the purpose of obtaining leverage to avoid paying some or all of the costs awarded to The Pointer.<sup>43</sup> Dr. Gill has not denied this in response to this motion. In the circumstances, there is good reason to believe that Dr. Gill's appeal is vexatious.

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<sup>42</sup> [Costs Decision](#) at paras 6-8 and 23; [The Catalyst Capital Group Inc. v. West Face Capital Inc.](#), 2023 ONCA 381 at para 167.

<sup>43</sup> 2023 Grewal Affidavit at para 32, 2023 MR, Tab 2, p. 19.

*iii. Dr. Gill Has Insufficient Assets*

43. There is good reason to believe that Dr. Gill has insufficient assets to pay the costs of the appeal.

44. Despite being asked in February, 2023, to provide evidence of sufficient assets to satisfy the cost awards against her, Dr. Gill has provided no such evidence. She has not met her onus to demonstrate, with “robust particularity”, that she has sufficient assets in Ontario to pay the costs the costs that have been and might be awarded against her.<sup>44</sup>

45. Dr. Gill relies on the evidence of Sacha Van Loon (“**Van Loon**”), a law clerk with Caza LLP. Van Loon’s evidence is that, on October 6, 2023, Caza LLP received \$20,000 from Dr. Gill to be held in trust on her behalf. Van Loon deposes that she was “advised by Mr. Jeff Saikaley, counsel to Dr. Gill, and verily believe to be true, that he undertakes not to use or otherwise release these funds until the appeal is heard, and further direction is provided by the Court with respect to these funds.”<sup>45</sup>

46. Leaving aside that Van Loon’s evidence is inadmissible hearsay, Saikaley’s undertaking does not demonstrate that Dr. Gill has sufficient assets to pay the costs of the appeal. \$20,000 is not going to be sufficient to pay all of the respondents’ costs of the appeal and it is a small fraction of the total amount Dr. Gill owes as a result of the Costs Order. Putting \$20,000 in her counsel’s trust account provides no assurance that The Pointer will receive any of its appeal costs, let alone the costs Dr. Gill owes The Pointer

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<sup>44</sup> [Chemical Vapour Metal Refinishing v Terekhov](#), 2016 ONSC 7080 at paras 14-19 and 27.

<sup>45</sup> Affidavit of Sacha Van Loon sworn October 6, 2023 at para 4.



due to the Costs Order. All of the respondents will likely try to claim these funds to satisfy costs awards Dr. Gill owes to them.

47. Moreover, there is no evidence as to the actual exigibility of the monies held in trust by Caza LLP. There is no evidence about other creditors with potentially higher priority or better claims against the funds held by Caza LLP, in trust. For example, Caza LLP itself could claim these funds to pay unpaid legal fees for Dr. Gill's appeal. All Caza LLP has promised is that the funds will not be released until the appeal is heard and further direction is provided by the Court regarding these funds. Dr. Gill has promised or undertaken nothing.

**C. Security for Costs Are Justified Under Rule 61.06(1)(c)**

48. There is good reason to order Dr. Gill to post security for costs of the appeal and the Action, including the SLAPP Motion.

49. The purpose of ordering security for costs, namely the entitlement to a measure of protection for costs incurred and to be incurred in a proceeding, is amplified on a defendant's motion under section 137.1 of the CJA:

- (a) Section 137.1 of the CJA prescribes a unique costs regime relative to the costs regimes applicable to other civil proceedings. A successful defendant is presumptively entitled to recover its full indemnity costs. This Court observed that the legislature's choice for this unique costs regime was driven by the following two factors: (i) to reduce the adverse impact on constitutional values of unmeritorious litigation; and (ii) to deter the commencement of "such actions".<sup>46</sup>
- (b) Sections 137.2 and 137.3 of the CJA requires the hearing of the motions to be heard within 60 days of delivering a notice of motion and to hear any appeals expeditiously.

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<sup>46</sup> [Levant v. DeMelle](#), 2022 ONCA 79 at para 78.

50. In other words, to fulfil the legislature's intent behind section 137.1 of the CJA, there should be a greater measure of protection afforded for the costs incurred by a successful defendant on a motion under section 137.1 and a corresponding appeal.

51. The Pointer has incurred and paid significant legal costs as a result of the Action and this appeal. Although the Action was dismissed on February 24, 2022, the Costs Order was not made until October 31, 2022. Although the Costs Order was made on October 31, 2022, The Pointer has not recovered any of its costs due to Dr. Gill's delay in pursuing this appeal. The Pointer has had to pay its counsel for the Action, the SLAPP Motion and for the work done so far on this appeal.<sup>47</sup>

52. It is apparent that this appeal is brought for an ulterior purpose, to put pressure on The Pointer to compromise the costs it was awarded. Dr. Gill's conduct in bringing an appeal against The Pointer, when she has failed to address or point to any error the motion judge made in relation to The Pointer's motion, is, effectively, an abuse of process.

53. This Court cannot permit a party to do what Dr. Gill is doing without some guarantee that the party will pay an adverse cost award. If Dr. Gill is going to bring a tactical appeal for an ulterior purpose, she should have to post security for the costs of the party that is the target of that appeal.

54. The Pointer is a small, local, subscription-based, electronic news publication. It has limited resources. The costs of the Action and this appeal are a significant burden

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<sup>47</sup> 2023 Grewal Affidavit at para 33, 2023 MR, Tab 2, p. 19.

and make it difficult for The Pointer to operate. The delay in recovering its costs of the Action is causing financial hardship for The Pointer.<sup>48</sup>

55. In addition, this appeal, and Dr. Gill's delay in pursuing it, impedes The Pointer's ability to report on issues that are a matter of public interest. As a small news-journal, with no external interests, ownership or funding, The Pointer has to carefully manage the risks of defamation actions. A defamation action creates a real disincentive to report on matters of public interest. The Pointer has to be careful in any reporting of the matters that gave rise to the Action so as not to make the situation worse and to prevent incurring more legal costs than necessary. As a result, The Pointer has been careful in reporting on this matter of significant public interest.<sup>49</sup>

56. For its financial health and ability to keep reporting on matters of public interest, The Pointer needs to be able to recover the costs awarded to it in the Action and this appeal. Otherwise, Dr. Gill will have effectively achieved her objective of silencing The Pointer. This is fundamentally contrary to the purpose of section 137.1 of *CJA*. Accordingly, it is critical for The Pointer's operations as a going concern news-journal, and to uphold the legislative intent of mitigating the adverse impact on constitutional values of unmeritorious litigation, that Dr. Gill be ordered to post security for costs of the Action and this appeal.<sup>50</sup>

#### **PART V - ORDER REQUESTED**

57. The Pointer respectfully requests an order that:

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<sup>48</sup> 2023 Grewal Affidavit at para 34, 2023 MR, Tab 2, p. 19.

<sup>49</sup> 2023 Grewal Affidavit at para 35, 2023 MR, Tab 2, p. 20.

<sup>50</sup> 2023 Grewal Affidavit at para 36, 2023 MR, Tab 2, p. 20.

- (a) Dr. Gill post security for costs of her appeal in relation to The Pointer in the amount of \$20,000 within 30 days, failing which her appeal will be dismissed as against The Pointer;
- (b) Dr. Gill post security for The Pointer's costs of the Action, including the SLAPP Motion, in the amount of \$64,170.15, within 30 days, failing which her appeal will be dismissed as against The Pointer; and
- (c) costs of this motion, plus applicable taxes.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 17<sup>th</sup> day of October, 2023.



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**Brian N. Radnoff**



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**David Z. Seifer**

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Health Genetic Center Corp. v. New Scientist Magazine*, 2019 ONCA 968
2. *Pickard v. London Police Services Board*, 2010 ONCA 643
3. *Health Genetic Center Corp. v. Reed Business Information Ltd.*, 2014 ONSC 6449
4. *Tsai v. Dugal*, 2021 ONCA 170
5. *Henderson v. Wright*, 2016 ONCA 89
6. *Groia & Company Professional Corporation v. Cardillo*, 2019 ONCA 165
7. *Astley v. Verdun*, 2013 ONSC 2998
8. *Astley v. Verdun*, 2015 ONCA 225
9. *Novak v. St. Demetrius (Ukrainian Catholic) Development Corporation*, 2017 ONCA 693
10. *Thrive Capital Management Ltd. v. Noble 1324 Queen Inc.*, 2021 ONCA 474
11. *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2023 ONCA 381
12. *Chemical Vapour Metal Refinishing v Terekhov*, 2016 ONSC 7080
13. *Levant v. DeMelle*, 2022 ONCA 79

**SCHEDULE “B”  
RELEVANT STATUTES**

*Courts of Justice Act, R.S.O. 1990, c. C.43,*

**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. 2015, c. 23, s. 3.

**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. 2015, c. 23, s. 3.

**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. 2015, c. 23, s. 3.

**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. 2015, c. 23, s. 3.

#### **No further steps in proceeding**

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

#### **No amendment to pleadings**

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

- (a) in order to prevent or avoid an order under this section dismissing the proceeding; or
- (b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

#### **Costs on dismissal**

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

#### **Costs if motion to dismiss denied**

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

#### **Damages**

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

#### **Section Amendments with date in force (d/m/y)**

#### **Procedural matters**

##### **Commencement**

**137.2** (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

**Motion to be heard within 60 days**

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

**Hearing date to be obtained in advance**

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

**Limit on cross-examinations**

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

**Same, extension of time**

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

**Section Amendments with date in force (d/m/y)**

[2015, c. 23, s. 3](#) - 03/11/2015

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

**137.3** An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal. 2015, c. 23, s. 3.

*Rules of Civil Procedure, R.R.O. 1990, Reg. 194*

**Where Available**

**56.01** (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;



- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
- (f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

### **Declaration of Plaintiff's or Applicant's Place of Residence**

**56.02** The lawyer for the plaintiff or applicant shall, forthwith on receipt of a demand in writing from any person who has been served with the originating process, declare in writing whether the plaintiff or applicant is ordinarily resident in Ontario and, where the lawyer fails to respond to the demand, the court may order that the action or application be stayed or dismissed. R.R.O. 1990, Reg. 194, r. 56.02; O. Reg. 575/07, s. 1.

### **Motion for Security**

**56.03** (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend. R.R.O. 1990, Reg. 194, r. 56.03 (1).

(2) In an application, a motion for security for costs may be made only after the respondent has delivered a notice of appearance and shall be made on notice to the applicant and every other respondent who has delivered a notice of appearance. R.R.O. 1990, Reg. 194, r. 56.03 (2).

### **Amount and Form of Security and Time for Furnishing**

**56.04** The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court. R.R.O. 1990, Reg. 194, r. 56.04.

### **Form and Effect of Order**

**56.05** A plaintiff or applicant against whom an order for security for costs (Form 56A) has been made may not, until the security has been given, take any step in the proceeding except an appeal from the order, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 56.05.

### **Default of Plaintiff or Applicant**

**56.06** Where a plaintiff or applicant defaults in giving the security required by an order, the court on motion may dismiss the proceeding against the defendant or respondent who obtained the order, and the stay imposed by rule 56.05 no longer applies unless another defendant or respondent has obtained an order for security for costs. R.R.O. 1990, Reg. 194, r. 56.06.

### **Amount may be Varied**

**56.07** The amount of security required by an order for security for costs may be increased or decreased at any time. R.R.O. 1990, Reg. 194, r. 56.07.

### **Notice of Compliance**

**56.08** On giving the security required by an order, the plaintiff or applicant shall forthwith give notice of compliance to the defendant or respondent who obtained the order, and to every other party. R.R.O. 1990, Reg. 194, r. 56.08.

### **Security for Costs as Term of Relief**

**56.09** Despite rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 56.09.

### **Where Available**

**56.01** (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

- (a) the plaintiff or applicant is ordinarily resident outside Ontario;
- (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
- (f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

### **Declaration of Plaintiff's or Applicant's Place of Residence**

**56.02** The lawyer for the plaintiff or applicant shall, forthwith on receipt of a demand in writing from any person who has been served with the originating process, declare in writing whether the plaintiff or applicant is ordinarily resident in Ontario and, where the lawyer fails to respond to the demand, the court may order that the action or application be stayed or dismissed. R.R.O. 1990, Reg. 194, r. 56.02; O. Reg. 575/07, s. 1.

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**56.03** (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend. R.R.O. 1990, Reg. 194, r. 56.03 (1).

(2) In an application, a motion for security for costs may be made only after the respondent has delivered a notice of appearance and shall be made on notice to the applicant and every other respondent who has delivered a notice of appearance. R.R.O. 1990, Reg. 194, r. 56.03 (2).

### **Amount and Form of Security and Time for Furnishing**

**56.04** The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court. R.R.O. 1990, Reg. 194, r. 56.04.

### **Form and Effect of Order**

**56.05** A plaintiff or applicant against whom an order for security for costs (Form 56A) has been made may not, until the security has been given, take any step in the proceeding except an appeal from the order, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 56.05.

### **Default of Plaintiff or Applicant**

**56.06** Where a plaintiff or applicant defaults in giving the security required by an order, the court on motion may dismiss the proceeding against the defendant or respondent who obtained the order, and the stay imposed by rule 56.05 no longer applies unless another defendant or respondent has obtained an order for security for costs. R.R.O. 1990, Reg. 194, r. 56.06.

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### **Security for Costs as Term of Relief**

**56.09** Despite rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 56.09.

### **Security for Costs of Appeal**

**61.06** (1) In an appeal where it appears that,

- (a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
- (b) an order for security for costs could be made against the appellant under rule 56.01; or
- (c) for other good reason, security for costs should be ordered,

a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just. R.R.O. 1990, Reg. 194, r. 61.06 (1); O. Reg. 465/93, s. 6.

(1.1) If an order is made under subrule (1), rules 56.04, 56.05, 56.07 and 56.08 apply, with necessary modifications. O. Reg. 288/99, s. 21.

(2) If an appellant fails to comply with an order under subrule (1), a judge of the appellate court on motion may dismiss the appeal. R.R.O. 1990, Reg. 194, r. 61.06 (2).

**DR. KULVINDER KAUR GILL et al.**  
Plaintiffs / Appellants

**-and- DR. ANGUS MACIVER et al.**  
Defendants / Respondents

Court of Appeal File No. C70498  
Court of Appeal Motion No.: M54554

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE MOVING PARTY, THE POINTER  
GROUP INCORPORATED**

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