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The Anti-SLAPP Sequel: Updates from the Court of Appeal on s. 137.1 of the *Courts of Justice Act*

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By Megan Mah

On August 30, 2018, the Ontario Court of Appeal released six unanimous decisions, providing the first appellate interpretation of s. 137.1 of the *Courts of Justice Act* (the "**Act**"), introduced by Ontario's "anti-SLAPP" legislation.[1] The Court of Appeal clarified that the purpose of s. 137.1 is to encourage expression on matters of public interest and to curtail litigation of doubtful merit that unduly discourages or seeks to restrict free and open expression on such matters.

Section 137.1 of the Act provides that a proceeding shall be dismissed on a motion by the defendant if the judge is satisfied that the following test has been met:

1. the defendant must establish that the proceeding "arises from an expression made by the person that relates to a matter of public interest" (s. 137.1(3) of the Act);

2. the onus then shifts to the plaintiff. The proceeding will be dismissed unless the plaintiff establishes on a balance of probabilities that:

a. there are grounds to believe that the proceeding has "substantial merit" (s. 137.1(4)(a(i));

b. there are grounds to believe that the defendant "has no valid defence in the proceeding" (s. 137.1(4)(a)(ii)); and

c. the harm suffered by the plaintiff as a result of the defendant's expression is "sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression" (s. 137.1(4)(b)).

The Ontario Court of Appeal has now provided further clarity with respect to the test under s. 137.1(4)(a)(ii) (no valid defence criterion) in three decisions released in late February and early March 2019.

New Dermamed Inc v Sulaiman

In *New Dermamed Inc v Sulaiman*, 2019 ONCA 141, the Court of Appeal clarified the requirement that the plaintiff establish that the defendant has no valid defence in the proceeding pursuant to the second branch of the test under s. 137.1 of the Act.

In this case, the respondent wrote and published four different reviews on a website associated with, and maintained by, Google, after obtaining laser resurfacing treatment on her cheeks from the appellant. The respondent complained that she had experienced volume loss and that her face looked "saggier" and had "melted off". The appellant threatened to sue the respondent if she did not permanently delete her comments. The appellant eventually commenced an action for libel, and the respondent brought a motion to dismiss the action under s. 137.1 of the Act.

The motion judge heard and decided the motion before the Court of Appeal released its judgments in *1704604 Ontario Ltd v Pointes Protection Association* and its related cases. The motion judge concluded that the comments made by the respondent were expressions on a matter of public interest, and held that the appellant failed to establish that the respondent's defence of fair comment was invalid under s. 137.1(4)(a)(ii) of the Act. Accordingly, the motion judge dismissed the action.

The Court of Appeal upheld the motion judge's conclusion that the comments made by the respondent in her reviews were expressions on a matter of public interest. However, the Court held that the motion judge erred in interpreting the onus on the appellant under s. 137.1(4)(a)(ii) as requiring the appellant to show that the defence of fair comment could not succeed. The Court cited its decision in *Pointes*, and stated that "the onus on the appellant was not to show that there was no possibility that the defence of fair comment could succeed but, rather, just that it was reasonably possible that a trier could conclude that the defence would not succeed."

The Court found that its conclusion did not lead to a different result in terms of the dismissal of the action, as the appellant did not satisfy the balancing exercise under s. 137.1(4)(b). Specifically, the appellant did not provide any quantification of its losses or identify how the losses related to its overall business. Therefore, it had not established that it suffered any harm that was sufficiently serious that the public interest in permitting the proceeding to continue outweighed the public interest in protecting the expression.

Lascaris v B'nai Brith Canada

In *Lascaris v B'nai Brith Canada*, 2019 ONCA 163, the Court of Appeal further clarified the scope of the responding party's burden pursuant to the test under s. 137.1. Specifically, the Court stated that the responding party did not need to show that a given defence has "no hope of success", but simply that it is possible that the defence would not succeed.

The appellant in this case was a lawyer who had retired from private practice and served as the Justice Critic in the Green Party's shadow cabinet, despite not securing a seat in Parliament. Among other things, the appellant advocated for Palestinian rights, and had criticized certain actions taken by Israel.

In 2016, the appellant visited Israel to meet with and interview Eritrean refugees connected to a legal case. During his visit, the appellant met with a lawyer and author in East Jerusalem, who wanted to discuss a human rights matter involving his son. After the meeting, the appellant conducted some research into what the lawyer had told him, and posted two Facebook comments on May 1, 2016, stating that the lawyer's son had been killed extrajudicially, and posted a link to an article supporting this narrative. Upon his return to Canada in May 2016, the appellant advanced a policy resolution, calling on the Green Party to support the use of peaceful boycott, divestment and sanctions ("BDS") to bring an end to Israel's occupation of Palestinian territories.

The respondent published multiple articles and one tweet stating that the appellant had used social media to advocate on behalf of terrorists. Shortly thereafter, the appellant served notice regarding the respondent's defamatory publications. The respondent subsequently brought a motion to dismiss the action under s. 137.1 of the Act.

The motion judge granted the respondent's motion and dismissed the appellant's action, finding that there was no doubt that the respondent's expressions related to matters of public interest, and stating that she was prepared to assume that the appellant's claim had substantial merit within the meaning of s. 137.1(4)(a)(i) of the Act. With respect to s. 137.1(4)(a)(ii) of the Act, which requires the plaintiff to prove that the respondent has no valid defence in the proceeding, the motion judge stated that this required the appellant to demonstrate that none of the defences raised by the respondent "could possibly succeed". The motion judge considered the defences raised by the respondent, and found that the appellant faced an "insurmountable hurdle" with respect to the defence of fair comment. As a result, she did not deal with the respondent's remaining defences, and did not consider the "balancing" stage of the test set out in s. 137.1(4)(b) of the Act. The motion judge concluded that the appellant had not met the burden of demonstrating under s. 137.1(4)(a)(ii) that no valid defence exists.

On appeal, the Court noted that the motion judge heard and decided the motion before the Court of Appeal released its judgments interpreting s. 137.1 in *Pointes* and its related cases. The Court reiterated its observations in *Pointes* that s. 137.1 is "not to be used as a surrogate for summary judgment", but is intended to be brought "at the outset of the proceeding before either the plaintiff or defendant has had the opportunity to marshal the type of evidence that they would for a trial".

The Court further noted that the action had none of the recognized indicia of a SLAPP lawsuit, including (1) a history of the plaintiff using litigation or the threat of litigation to silence critics; (2) a financial or power imbalance that strongly favours the plaintiff; (3) a punitive or retributory purpose animating the plaintiff's bringing of the claim; and (4) minimal or nominal damages suffered by the plaintiff.

The Court found that the motion judge erred with respect to the burden of the appellant under s. 137.1(4)(a)(ii). Specifically, the burden is "not to show that a given defence has no hope of success", as this would risk turning a motion under s. 137.1 into a summary judgment motion. Rather, "all that the appellant need show is that it is possible that the defence would not succeed."

The Court found that a reasonable trier could conclude that the defence of fair comment would not succeed, and that any other defence of justification would not succeed. The Court then considered the balancing requirement under s. 137.1(4)(b), and found that the balance clearly favoured the appellant, as the damages to which the appellant would be entitled if the appellant was ultimately successful could be significant. The Court expressly noted that "[a]ccusing any person of supporting terrorists is about as serious and damaging an allegation as can be made in these times", and that that reality was sufficient to establish the seriousness of the harm to the appellant. As a result, the Court allowed the appeal and remitted the matter to the Superior Court of Justice.

Bondfield Construction Company Limited v The Globe and Mail Inc.

In *Bondfield Construction Company Limited v The Globe and Mail Inc.*, 2019 ONCA 166, the Court of Appeal again clarified that a party responding to a motion under s. 137.1 is only required to show that it is possible that a defence would not succeed, instead of showing that a defence has no hope of success.

The respondents published a series of articles about the appellant's successful bid on a $300 million contract to build a new critical care facility at St. Michael's Hospital in Toronto. The appellant sued the respondents for $125 million, claiming that the respondents' articles falsely alleged a corrupt connection between the appellant's president and a senior executive at St. Michael's Hospital. The respondents advanced various defences and brought a motion under s. 137.1 of the Act, asserting that the lawsuit was brought to silence the respondents on matters of significant public importance. The motion judge allowed the motion and dismissed the action.

The motion judge found that the topic of the articles was a matter of public interest, and that there was reason to believe that the appellant's claim had substantial merit. However, with respect to the "no valid defence" requirement in s. 137.1(4)(a)(ii), the motion judge found that the appellant must establish that the respondent "has no valid defence whatsoever". Despite dismissing the claim on the basis that the appellant had not cleared the "no valid defence" hurdle, the motion judge considered the balancing of public interests, and concluded that the balancing of public interests would have favoured proceeding with the appellants' claim.

Similar to the decisions in *New Dermamed Inc v Sulaiman* and *Lascaris v B'nai Brith Canada*, the Court recognized that the motion was decided before the Court of Appeal released its judgments interpreting s. 137.1 in *Pointes* and its related cases. The Court held that s. 137.1(4)(a)(ii) imposed a significantly less onerous burden on the appellant to show that the respondent did not have a valid defence than the burden set out by the motion judge. The Court specifically stated that a determination that a defence "could go either way", in the sense that a reasonable trier could accept or reject it, was a finding that a reasonable trier could reject the defence. Therefore, the motion judge erred in law in holding that the appellant was required to show that the respondents had no valid defence whatsoever. The appellant was only required to show that a reasonable trier could reject the defences advanced by the respondents.

The Court engaged in a *de novo* balancing of the competing public interests, as required by the last stage of the test under s. 137.1, and came to the same conclusion as the motion judge with respect to the public interest favouring proceeding with the appellants' claim. The Court allowed the appeal, set aside the dismissal of the action, and remitted the matter to the Superior Court.

Conclusion

In revisiting the anti-SLAPP provision, the Court of Appeal has reiterated that s. 137.1 is not to be used as a "surrogate for summary judgment", and that motions under s. 137.1 are intended to be brought at the outset of a proceeding. Accordingly, once the first branch of the test under s. 137.1 has been met, and the burden has shifted to the plaintiff, the plaintiff faces a relatively low threshold for establishing that the defendant has no valid defence in the proceeding. The plaintiff does not need to show that a defence has no hope of success, or that there is no possibility that the defence could succeed. Rather, the plaintiff only needs to show that it is possible that a defence would not succeed. A reasonable prospect that the defence could fail is enough to get a plaintiff past the "no valid defence" hurdle.

[1] *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685 [*Pointes*]; *Fortress Real Developments Inc v Rabidoux*, 2018 ONCA 686; *Veneruzzo v Storey*, 2018 ONCA 688; *Platnick v Bent*, 2018 ONCA 687; *Able Translations Ltd v Express International Translations Inc*, 2018 ONCA 690; and *Armstrong v Corus Entertainment Inc*, 2018 ONCA 689. See Lia Boritz's Commercial Litigation Insight blog post entitled "Anti-SLAPP Legislation Tested at the Court of Appeal" (September 6, 2018) for further detail.

For more information or inquiries:

Megan Mah

Toronto
416.947.5098

Email:
mmah@weirfoulds.com

Megan Mah has a diverse practice that focuses on human rights, employment, civil litigation, administrative and constitutional law.