WeirFoulds LLP

Commercial Litigation Insights: Costs in Anti-SLAPP Applications: How much is too much?

February 21, 2024

By Adam Varro

Litigants involved in defamation proceedings will be familiar with anti-SLAPP[1] applications, a remedy available in Ontario to defendants under s. 137.1 of the *Courts of Justice Act* (CJA)[2] which can result in an early dismissal of legal proceedings that unduly limit free expression on matters of public interest. Costs awarded to successful defendants on these sorts of applications can be significant – in recent years they have routinely exceeded $100,000.[3]

This is because section 137.1(7) of the *CJA* provides that the moving party on an anti-SLAPP application is entitled to "its 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."[4] The onus lies with the plaintiff to prove that anything less is appropriate.

When ordering costs on anti-SLAPP applications, judges will also refer to the *Rule* 57.01(1) factors in conjunction with s. 137.1(7) of the CJA. However, notwithstanding the text of s. 137.1(7) of the CJA, a 2023 decision of the Ontario Court of Appeal held that successful moving defendants should not always expect to be awarded their full indemnity costs.

In *Park Lawn Corporation v Kahu Capital Partners Ltd*.[5], the Ontario Court of Appeal suggested that the costs of a successful anti-SLAPP application "should not generally exceed $50,000 on a full-indemnity basis". The rationale was in part to "dampen the enthusiasm… to over-litigate an anti-SLAPP motion" because these applications are meant to be efficient and inexpensive.[6] This exhortation was not intended to be absolute, however, as the Court noted that the motion judge will always have the discretion to award less, more or nothing as they see fit in the circumstances of each case."[7]

Since its release, *Park Lawn* has not been uniformly followed, even by the Ontario Court of Appeal. Shortly after it was released, in *Boyer v. Callidus Capital Corporation,* the Ontario Court of Appeal declined to apply *Park Lawn* and, instead, upheld the lower court's costs award to the defendant in excess of $270,000, noting that the claim in that action was for $150M, with "bald and unsubstantiated" allegations of breach of fiduciary duty.[8]

Since the decision in *Boyer,* the Ontario Superior Court of Justice has been divided on its application of *Park Lawn*: some judges have followed *Park Lawn* without much discussion [9]; others have focussed on the "unavoidably complexity" of the motion before them that justified awarding costs in a more substantial amount.[10]

One judge acknowledged that the principles to be applied when ordering costs on successful anti-SLAPP motions "are unclear" given *Park Lawn*'s mixed treatment.[11] To date, more decisions have not applied the *Park Lawn* guideline than have followed it. Time will tell when and how *Park Lawn* will be followed.

It is clear, though, that inconsistent treatment of *Park Lawn* will result in plaintiffs and defendants arguing for significantly disparate costs awards. A common thread across recent anti-SLAPP costs decisions, whether following *Park Lawn* or not, is the recognition that

anti-SLAPP applications are not an invitation to over-lawyer a process that is intended to result in efficiency.

Defendants considering bringing an anti-SLAPP motion should carefully consider the factors that could impact a costs award if successful. Anti-SLAPP proceedings are an effective tool to screen out abusive claims, but only to the extent they do not become "trials in a box"[12]; if they do, there is a real risk that their costs will not be recoverable.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] SLAPP is an acronym for "Strategic Lawsuit Against Public Participation". A SLAPP is regarded as a lawsuit commenced by a plaintiff (often well-funded) that is intended to intimidate/ silence its critics by imposing costly litigation on them.

[2] *Courts of Justice Act*, R.S.O. 1990, c. C.43 s. 137.1(1).

[3] See, for example, *Boraks v. Hussen*, 2023 ONSC 6420 (CanLII) at para 29.

[4] *Courts of Justice Act*, R.S.O. 1990, c. C.43 s. 137.1(1).

[5] *Park Lawn Corporation v Kahu Capital Partners Ltd*., 2023 ONCA 129, at para 39 (CanLII) (application for leave to the Supreme Court of Canada dismissed in *Park Lawn Corporation, et al. v. Kahu Capital Partners Ltd.,* 2023 CanLII 100618 (SCC))

[6] *Park Lawn*, para 40

[7] *Park Lawn,* para 39.

[8] *Boyer v. Callidus Capital Corporation*, 2023 ONCA 311 (CanLII) at paras 4 and 5.

[9] *Teneycke v McVety*, 2023 ONSC 3428 (CanLII) at para 11.

[10] *Boraks v. Hussen*, 2023 ONSC 6420 (CanLII); *Canadian Frontline Nurses v Canadian Nurses Association*, 2023 ONSC 3529 (CanLII)

[11] *Canadian Frontline Nurses v Canadian Nurses Association*, 2023 ONSC 3529 (CanLII) at para 35.

[12] *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555 (CanLII) at para 97.

For more information or inquiries:

Adam Varro

Toronto
416.947.5085

Email:
avarro@weirfoulds.com

Adam Varro is an Associate in WeirFoulds' Commercial Litigation Group, practising in the areas of aviation, media and defamation, and asset recovery litigation.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035