Supreme Court offers first insight into Ontario's anti-SLAPP legislation

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In *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22, the Supreme Court, for the first time, shed light and offered guidance on how to properly apply the statutory framework set out in section 137.1 of the Ontario *Courts of Justice Act* (CJA). This section provides a mechanism by which defendants may move to dismiss claims against them, which are strategic lawsuits against public participation (SLAPPs).

The Supreme Court described SLAPPs as follows: "lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs."

The legislation

The relevant portions of section 137.1 state:

> (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.
>
> (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.

Background

The defendant/respondent, Pointes Protection Association (Pointes), opposed a proposed subdivision development in Sault Ste. Marie by the plaintiff/appellant, 1704604 Ontario Ltd (170 Ontario). 170 Ontario obtained approval from the Sault Ste. Marie Region Conservation Authority (SSMRCA), which Pointes contested and brought an application for judicial review.

While that application was pending, 170 Ontario sought approval from the Sault Ste. Marie City Council, which was rejected. 170 Ontario subsequently appealed to the Ontario Municipal Board (OMB), which also granted Pointes standing to participate. While both applications were pending, the parties settled the judicial review proceeding by way of minutes of settlement (the Agreement). The Agreement imposed limitations on Pointes' future conduct, including, among other things, that they would not seek the same relief as they did in their judicial review application.

At the OMB hearing, 170 Ontario claimed that Pointes' president gave testimony to the effect that the proposed development would result in ecological and environmental damage to the region. The OMB subsequently dismissed 170 Ontario's appeal and refused the development plan.

170 Ontario initiated a breach of contract action against Pointes, arguing, among other things, that the testimony given by Pointes' president was settled (and precluded) by the Agreement. Pointes brought a motion pursuant to section 137.1 of the CJA to have the action initiated against them by 170 Ontario dismissed. The motion judge dismissed Pointes' motion and allowed 170 Ontario's action to proceed. On appeal, the Court of Appeal allowed Pointes' motion and dismissed 170 Ontario's action. 170 Ontario appealed to the Supreme Court of Canada.

Finding

The unanimous Supreme Court dismissed the appeal. The Court found that 170 Ontario's action lacked substantial merit and the harm likely to be, or have been, suffered by 170 Ontario and the corresponding public interest in allowing the proceeding to continue did not outweigh the public interest in protecting Pointes' expression. Prior to reaching this conclusion, however, the Court undertook an extensive review of section 137.1 of the CJA.

At the onset, the Court reiterated that section 137.1 places an initial burden on the moving party (a defendant in a lawsuit) to *satisfy* the judge that the proceeding *arises from* an expression *relating to a matter of public interest*. Once that is established, the burden shifts to the responding party (the plaintiff in the lawsuit) to satisfy the motion judge that there are grounds to believe that the proceeding has substantial merit, the moving party has no valid defence, *and* the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. If the responding

party cannot meet this burden, the section 137.1 motion is granted and the action is dismissed.

Moving party burden

The Court went on to analyze the terms of section 137.1 in order to explain how the moving party can "satisfy" their burden. The Court confirmed that the moving party is required to meet its burden on a balance of probabilities. The Court further clarified that proceedings "arising from" an expression proposes a causation question and, therefore, the expression must somehow be causally related to the proceeding.

In that respect, expressions are not limited to those *directly* concerned with expression, such as a defamation suit, but can arise in contexts similar to the within action – a breach of contract claim premised on an expression made by the defendant. Although "expression" is defined in the statute, the Court emphasized that it must be interpreted expansively. Finally, the expression that "relates to a matter of public interest" should be assessed "as a whole," and it must be asked whether "some segment of the community would have a genuine interest in receiving information on the subject".[1] That said, the fact that it must be "a matter of" public interest suggests that there is no qualitative assessment of the expression at this stage.

Responding party burden

Once the moving party has satisfied its burden, the burden shifts to the responding party to show that its underlying proceeding should not be dismissed. In that regard, the Court analyzed how the responding party must satisfy the judge that there are *grounds to believe* that the underlying proceeding has *substantial merit* **and** that the defendant has *no valid defence*.

In that respect, the Court emphasized that an anti-SLAPP motion serves a different purpose than a motion to strike or a summary judgment motion. Parties must put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that responds to the inquiry mandated under section 137.1. The assessment is also a subjective one and must be made from the motion judge's perspective. "Substantial merit," therefore, means there are grounds to believe that the underlying claim is "legally tenable" *and* supported by evidence that is "reasonably capable of belief such that the claim can be said to have a real prospect of success."

With respect to the second component – "no valid defence" – the Court clarified that the moving party must first put in play the defences it intends to present and *then* the responding party must show that there are grounds to believe those defences are not valid. Similar to the "substantial merit" interpretation, the Court concluded that the responding party must satisfy the motion judge that there are grounds to believe that the defences have no real prospect of success. However, the Court was careful to state that section 137.1(4)(a) "is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence."

The Court next moves on to the "crux" of the analysis – section 137.1(4)(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.

The Court emphasized that this section serves as a "robust backstop" for a motion judge to dismiss technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue.

At the outset, the Court emphasized that "harm" is "principally important" in order for the responding party to meet its burden. However, as the "harm" must be "as a result of" the moving party's expression, the responding party must provide evidence for the motion judge to draw an "inference of likelihood" with respect to the relevant causal link between the harm and the expression. In that respect, "harm" is not limited to monetary or non-monetary harm. Its existence, rather than its quantification, is important.

Once the harm has been established and shown to be related to the expression, the motion judge must then weigh the public interest in permitting the proceeding to continue against the public interest in protecting that expression. Here, such an exercise can be informed by the Court's section 2(b) of the *Charter of Rights and Freedoms*[2] jurisprudence. Additionally, and in no particular order, the Court also states the following factors that may also prove useful:

> the importance of the expression, the history of litigation between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the Charter or human rights legislation.

The Court emphasized, however, that the relevance of these factors must be tethered to the text of section 137.1(4)(b). In any event, the open-ended nature of this provision certainly allows the motion judge to scrutinize the case before them.

Takeaway

The Court's decision confirms the importance of protecting freedom of expression on matters of public interest. Until now, the Court of Appeal's decision in this same action was the leading decision in Ontario on the interpretation of the anti-SLAPP legislation. The Supreme Court decision largely upheld the framework established by the Court of Appeal. A plaintiff faced with an anti-SLAPP motion will now have to establish a "real prospect of success," which perhaps provides defendants bringing an anti-SLAPP motion with a slight advantage as compared to the previous framework.

[1] Citing *Grant v Torstar Corp.,* 2009 SCC 61.

[2] Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

By

Natalie D. Kolos, Samantha Bonanno

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749