Ontario Court of Appeal Provides Guidance on the Interpretation of Anti-SLAPP Legislation

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In six decisions released simultaneously, the Court of Appeal for the first time interprets Ontario's Anti-SLAPP legislation. (s. 137.1 of the Courts of Justice Act). While the analysis is applied to the specific issues raised in the appeals, the decision in 1704604 Ontario Ltd. v. Pointes Protection Association, penned by Justice Doherty, provides the Court's interpretation of and guidance on s. 137.1, under which a defendant can bring a motion, even before they have filed a defence, to dismiss a purported defamation proceeding.

The Court notes in its decision that the purpose of the Anti-SLAPP legislation is "crystal clear": expression on matters of public interest is to be encouraged, and litigation of doubtful merit that unduly discourages and seeks to restrict free and open expression on matters of public interest should not be allowed to proceed beyond a preliminary stage.

The first requirement is that the expression made by the person relates to "a matter of public interest". The Court of Appeal provides the following guidance with respect to the meaning of a "matter of public interest":

When deciding whether an expression relates to a matter of "public interest", the motion judge is to apply the legal principles enunciated in Grant v. Torstar Corp. to the relevant circumstances of the case.
"Public interest" does not turn on the size of the audience, particularly in today's world: communications on private matters can be spread to large audiences, just as statements between two people can relate to matters with a strong public interest component.
The concept of "public interest" is a broad one that does not take into account the merits or matter of the expression, nor the motive of the author - even if the language used is harmful to the public interest – such as a statement that is demonstrably false – it can nonetheless be an expression relating to a matter of public interest.
Once the defendant has established the communication related to a matter of public interest, the burden shifts to the plaintiff to demonstrate there are "grounds to believe" that:

the proceeding has substantial merit; and
the moving party has no valid defence in the proceeding

"Grounds to believe" must be reasonable grounds: The Court notes that while the subsection of the legislation does not explicitly mention "reasonable" grounds to believe, the fact that the grounds must be reasonably is implicit. This is meant to provide a judicial screening or "triage device" designed to eliminate unmeritorious claims at an early stage. But the Court cautioned that motion judges should not allow Anti-SLAPP motions to slide into de facto summary judgment motions.

"Substantial Merit": The word "substantial" signals that the plaintiff must do more than simply show there is some chance of success: the claim must be shown to be legally tenable and supported by evidence, which could lead a reasonable trier of fact to conclude the claim has a real chance of success.

"No valid defence": The Court clarifies that the section contemplates an evidentiary burden on the defendant to advance any proposed valid defence, valid meaning "successful", in the pleadings or motion material. If the plaintiff cannot meet its burden under either the merit requirement or the "no valid defence" requirement, their claim will be dismissed – the motion judge has no obligation to address both.

The heart of Ontario's Anti-SLAPP legislation: On a motion, the judge must consider whether the harm suffered as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweigh the public interest in protecting that expression, a section which Justice Doherty calls "the heart of Ontario's Anti-SLAPP legislation". The plaintiff at this stage must both quantify the damages, and provide material to establish the causal link between the expression and the damages claimed. The Court notes that unlike the "matter of public interest" inquiry at the first stage, both the quality of the expression and the motivation of the speaker play an important role at this stage in measuring the extent to which there is a public interest in protecting that expression. This evaluation is not formulaic or mathematical, but rather is a qualitative and to some extent, subjective assessment.

Anti-SLAPP legislation is most commonly associated with defamation cases, but the Court of Appeal notes that there are other types of cases, such as where claims turn on the interpretation of language in a contract (as was the case in Pointes Protection), which do not fit neatly into the s. 137.1 analysis. For example, the Court notes there would be little public interest in protecting a defendant's right to make certain statements if the defendant bargained those rights away in a contract, and the merits analysis would focus largely on the allegation that the defendant breached the contract.

The clarification of the scope of Anti-SLAPP legislation by Ontario's highest court is an important step in triaging unmeritorious defamation cases moving forward.

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