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Furthering Expression in the Public Interest: SCC Provides Interpretation of Ontario's Anti-SLAPP Legislation

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Case Commented On: *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 (CanLII)

Last month, the Supreme Court of Canada (SCC) released their decision in the *Pointes Protection* case, dismissing 1704604 Ontario Ltd.'s appeal and upholding the Ontario Court of Appeal's (ONCA) decision. This commentary follows up our first post regarding the ONCA's decision on *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685 (CanLII). In our previous post, we advocated for the enactment of a similar provision in Alberta as exists in Ontario, relying on the analysis set out by Justice David Doherty and the arguments made by various interveners as to the necessity of anti-SLAPP (Strategic Litigation Against Public Participation) legislation. For background on the previous proceedings, please see our other post titled "Is Now the Time to Consider Anti-SLAPP Legislation in Alberta? A Reflection on *Pointes Protection*".

Here, we continue to recommend the introduction of similar anti-SLAPP legislation in Alberta. In *Pointes Protection*, the SCC provides a detailed analysis of Ontario's anti-SLAPP legislation, perhaps expecting that this decision may guide the development of similar legislation in other provinces and territories. In this post, we will examine the test as interpreted by the SCC, and how this framework presents a novel opportunity for adoption of anti-SLAPP legislation to the Alberta legislature.

The SCC, in the *Pointes Protection* decision, affirmed the importance of anti-SLAPP legislation for the preservation of freedom of expression of individuals and groups fighting for public interest causes. The Court extensively discussed the background of the *Courts of Justice Act*, RSO 1990, c C.43, section 137.1 framework – specifically Ontario's Anti-SLAPP Advisory Panel and the report that came out of it – and considered them to be persuasive authorities for the purpose of statutory interpretation (at para 14). The Court discussed the fact that the legislators purposefully included section 137.1 – the purpose clause (discussed on page 3 of our first blog post) – and therefore, it should "be given considerable interpretative authority" (at para 11). The purpose clause was strategically put in the beginning of section 137.1 to ensure that judges, when being asked to consider section 137.1 motions, would have the purpose of the legislation on the forefront of their mind.

In this appeal, the SCC was asked to "offer guidance on how to properly apply the framework set out in section 137.1 of the *Courts of Justice Act*" (at para 5). In doing so, the Court conducted a

robust statutory interpretation analysis in order to determine the appropriate test as set out in section 137.1, in light of the intention of the Legislature when the provision was enacted.

Analysis of Section 137.1 Framework

Justice Suzanne Côté, writing for a unanimous Court, interpreted sections 137.1(3) and 137.1(4), breaking the analysis down into a functional test for lower courts in Ontario to apply. This test followed a similar breakdown to the analysis Justice Doherty conducted at the ONCA. However, it provided greater clarification on how to interpret the test in light of the legislative history, as well as further elucidating specific aspects of how motion judges are to consider the facts before them.

The SCC's main goal in this appeal was to clarify the appropriate way to apply the test set out in section 137.1 of Ontario's *Courts of Justice Act*. In our first blog post, we discussed in detail the proposed interpretations of the test from both the appellant and respondent. The appellant (the plaintiff of the original action), 1704604 Ontario Ltd, advocated for an "Essential Character" test, as they were concerned a broad interpretation of section 137.1 would create an overreaching effect the anti-SLAPP provisions were not intended to have, therefore consequentially excluding valid litigation as SLAPPs. The appellant cited concerns about misuse of the legislation at the hands of defendants, especially if it were too easy to invoke. In contrast, the respondent (the defendant of the original action), the Pointes Protection Association, advocated for a broad interpretation of the test set out in section 137.1. As SLAPP suits can be difficult to identify, the respondent was concerned that if the test did not have a broad reach, SLAPP suits would continue to slip by unimpeded. The respondents advocated for an interpretation in line with the Advisory Panel Report recommendation: 1) a broad scope of protection for public participation; 2) a broad definition of expression; and 3) SLAPP proceedings should be judged by their effect, not their purpose or the motive of the plaintiff.

As the majority of the SCC *Pointes Protection* decision is the outlining of the proper test for section 137.1, we have worked to summarize it here. In clarifying the entire test required by section 137.1, Justice Côté engaged in statutory interpretation, relying on the debates of the Ontario Legislature and background material to provide context to the test set out.

The starting point for a section 137.1 motion places the burden on the defendant named in an alleged SLAPP lawsuit to satisfy the judge that the proceeding has risen from an expression made in the public interest (at para 18). The defendant is therefore the moving party in a section 137.1 motion and the plaintiff is the responding party. Once the defendant has met the above threshold burden, the burden shifts to the plaintiff to satisfy that the proceeding has substantial merit and the defendant has no valid defence (at para 18). The plaintiff must also prove to the motion judge that the public interest in allowing the proceeding outweighs the public interest in protecting the expression (at para 18). The SCC emphasized that the final weighing exercise of section 137.1(4)(b) "is the fundamental crux of the analysis … balancing and [ensuring] proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest" (at para 18). This post will now discuss the two stages of the test in greater detail.

Part A – Section 137.1(3) of the *Courts of Justice Act* – Threshold Burden on the Defendant (Moving Party)

The first part of the framework of a section 137.1 motion puts the threshold burden on the defendant of an alleged SLAPP lawsuit.

Section 137.1(3) of Ontario's *Courts of Justice Act* reads:

> (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 (emphasis added).

The defendant has the initial onus to satisfy the judge that the alleged SLAPP proceeding brought by the plaintiff arises from an expression made by the defendant that relates to a matter of public interest. If the defendant is not successful at proving these two elements, they have been unsuccessful with a section 137.1 application and the initial proceeding is allowed to continue.

According to the Court, "satisfies" in section 137.1(3) requires the defendant to meet its burden on a balance of probabilities (at para 22). "arises from" implies an element of causality but must be interpreted broadly and liberally which allows for many different types of proceedings to be seen as arising from an expression (at para 24): "proceedings arising from an expression [as in section 137.1] are not limited to those *directly* concerned with expression, such as [in] defamation suits" (at para 24). "Expression" is defined broadly under section 137.2, and is informed by the recommendations of the Anti-SLAPP Advisory Panel Report (at para 25). Lastly, "relates to a matter of public interest" must be given a broad and liberal interpretation which is consistent with the legislative purpose of section 137.1(3) (at para 26).

The Court defined "public interest" expression for the sake of section 137.1(3) as expression that "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'" (at para 27, citing *Grant v Torstar Corp*, 2009 SCC 61 (CanLII) at paras 101-102). Hence, the expression is "public interest" in nature if the public has a genuine stake in the matter, and this is not something that should be narrowly interpreted (at para 27). Furthermore, it must only be a *matter* of public interest, which means there is no qualitative assessment happening at this stage of the test: "the question is only whether the expression pertains to any matter of public interest, defined broadly" (para 28).

SUMMARY: The threshold burden created by section 137.1(3) is not very high. On a balance of probabilities, the defendant must show the plaintiff's proceeding against the defendant has arisen from an expression related to a matter of public interest (at para 31).

Part B – Section 137.1(4) of the *Courts of Justice Act* – Burden Shifted to the Plaintiff (Responding Party)

Once the defendant has successfully passed the threshold burden in section 137.1(3) by showing the motion judge that the proceeding arose from an expression that relates to a matter of public interest, the burden shifts to the plaintiff of an alleged SLAPP lawsuit.

Section 137.1(4) of Ontario's *Courts of Justice Act* reads:

> (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.

Justice Côté notes that section 137.1(4)(a) "as a whole is fundamentally concerned with the strength of the underlying proceeding" (at para 60).

(1) Section 137.1(4)(a) of the* Courts of Justice Act *— Merits-Based Hurdle

In section 137.1(4)(a), referred to by the Court as the "Merits-Based Hurdle", the motion judge must first be satisfied there are "grounds to believe." This requires that "there be a basis in the record and law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence" (at para 39). This standard means a motion judge must find something above mere suspicion, but it is a standard below the balance of probabilities (at para 40). It should be noted this is a subjective standard, and relies on the motion judge's determination (at para 41).

(a) Section 137.1(4)(a)(i) — Substantial Merit

According to the SCC, the use of "substantial" before "merit" functions differently than if the legislature had instead put in "*some* merit, *any* merit, [or] just *merit* absent a qualifier" (at para 45, emphasis in original). "Merit", in the context of a section 137.1 motion, "is a determination of the prospect of success of the underlying proceeding… [and it] refers fundamentally to the strength of the underlying claim, as a stronger claim corresponds with a weaker justification to dismiss the underlying proceeding" (at para 46). While the plaintiff need not definitively demonstrate that its claim is more likely than not to succeed, the claim must nonetheless be sufficiently strong that terminating it at a preliminary stage would not undermine the

legislature's objective of ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim (at para 48).

Importantly, the substantial merit standard is more demanding than the one applicable for a motion to strike, which requires the claim have some chance of success under the "plain and obvious" test (at para 50, citing *Hunt v Carey Canada Inc*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959). The substantial merit standard requires "an evidentiary basis for the claim" (at para 50) made by the plaintiff; the plaintiff must therefore have a case with some strength, a case that has a real prospect of success (at para 50). The plaintiff responding to a section 137.1 motion therefore faces a tougher burden in meeting the substantial merit standard than they would in responding to a motion to strike action, and this standard differentiates section 137.1 motions from motions to strike. The necessity of such a standard for section 137.1 is apparent when we look at the purpose of anti-SLAPP legislation: to encourage expression that relates to matters of public interest without the fear of the opposing party's potential to sue. The plaintiff with the alleged SLAPP lawsuit, therefore, has a higher burden to establish merit in their claim than they would under a motion to strike claim because "too low a standard risks defeating the purpose of the distinct process for dismissal established by s. 137.1" (at para 51).

In light of the existence of a record, the substantial merit standard calls for an assessment of the evidentiary basis for the claim — this is why the claim must be supported by evidence that is reasonably capable of belief (at para 50).

(b) Section 137.1(4)(a)(ii) — No Valid Defence

The next stage of the analysis requires the plaintiff to show the defendant has no valid defence in the proceedings (at para 55). This part of the analysis requires that the defendant must first "put in play" the defences they intend to rely upon, and the plaintiff must then show "there are grounds to believe" that the defences raised are not valid (at para 56). The motion judge must be able to conduct a limited assessment of the evidence available to determine the validity of the defences raised (at para 58).

The word "no" in "no valid defence" is absolute, which means "if there is any defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed" (at para 58). "Validity" under section 137.1(4)(a)(ii) can be found by the motion judge's assessment of the strength of the claim or of any defences "as part of an overall assessment under s. 137.1(4)(a) of the prospect of success of the underlying claim" (at para 59).

This part of the framework, according to the Court, must be seen as an extension of the "substantial merit" assessment. It is the second part of an overall assessment of the prospect of success of the underlying claim (at para 59). The motion judge "must first determine whether the plaintiff's underlying claim is legally tenable and supported by evidence that … can be said to have a real prospect of success, and must then determine whether the plaintiff has shown that the defence[s] … are not legally tenable or supported by evidence … that they can be said to have no real prospect of success" (at para 59).

SUMMARY: In order to adequately meet the burden under the first part of the "Merits-Based Hurdle" of a section 137.1 motion, the plaintiff must be able to satisfy the court that the underlying claim is supported by evidence which shows that the claim has a real prospect of success (at para 54). This is known as the "Substantial Merit" prong of the test. In the second part of the "Merits-Based Hurdle" test, the burden shifts from the plaintiff to the defendant to demonstrate there is no valid defence. Here, the defendant must present any potential defences. The burden then shifts again, and the plaintiff is required to show none of the defences raised are valid (at para 60).

It is ultimately the plaintiff's burden in a section 137.1 motion to show that the defendant has no valid defences available, that the defences have no chance of success, and that the plaintiff's proceeding against the defendant indeed does have substantial merit.

(2) Section 137.1(4)(b) of the Courts of Justice Act *— Public Interest Hurdle*

Throughout the *Pointes Protection* decision, the SCC emphasizes the importance of the final weighing exercise under section 137.1(4)(b). This aspect of the test was also emphasized by Justice Doherty in the ONCA decision. In the SCC decision, Justice Côté states that balancing both sides of the public interest is "the fundamental crux of the analysis" (at para 18). It is this aspect of the test which "engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications … it serves as a robust backstop for motion judges to dismiss even 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 para 62).

In order to aid the weighing exercise at this point of the section 137.1 framework, the plaintiff must show the existence of harm suffered "as a result of the moving party's [defendant's] expression" (at para 68). Once the plaintiff has been able to establish harm has occurred, section 137.1(4)(b) requires that the harm, combined with the public interest in allowing the proceeding to continue, be weighed against the public interest in protecting the expression (at para 73). Unlike the previous mention of public interest, in this weighing exercise, the type and quality of expression matters, and the motivation behind the expression is a relevant consideration in determining the public interest in both allowing the proceeding and protecting the expression (at para 74).

Essentially, in the "Public Interest Hurdle" part of the test, the motion judge should consider the harm suffered by the plaintiff (or potential suffering), the public interest in allowing the proceeding to continue, and the public interest in protecting the concerned expression (at para 79).

This portion of the analysis will be informed by jurisprudence which has reflected on section 2(b) of the *Charter* (at para 77). In performing this exercise, the motion judge may look to the core values of freedom of expression as set out by the SCC, such as "the search for truth, participation in political decision making, and diversity in the forms of self-fulfillment and human flourishing" (at para 77). While it is not necessary to do so, the Court notes that considering the additional factors may prove useful in this weighing exercise:

> [T]he 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 of 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 group protected under s. 15 of the *Charter* or Human Rights legislation (at para 80, emphasis in original).

We note that it appears as though these additional factors seem to go to the heart of why it is in the public interest to prevent SLAPP suits, and why it is necessary to examine the nature of the proceeding, instead of entirely weighing this portion of the test based off of the expression made. However, Justice Côté emphasizes that the consideration of these additional factors must be "tethered to the text of section 137.2(4)(b)" (at para 80).

SUMMARY: The burden under section 137.1(4)(b) rests on the plaintiff to demonstrate that they have, or will likely, suffer harm as a result of the expression made by the defendant, as established under section 137.1(3), and "that the corresponding public interest in allowing the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation" (at para 82, emphasis in original).

Anti-SLAPP Legislation in Alberta

As we discussed in our previous post, Alberta does not yet have anti-SLAPP legislation in place. Although the Alberta Rules of Court set out procedures for summary judgements (sections 7.2 and 7.3), as well as motions for abuse of process or improper purpose (sections 1.4(2)(ii) and 1.4(2)(iii)), Justice Côté provided reasoning as to why anti-SLAPP legislation can be distinguished from these procedures (at para 38). Although both tools would still be available for use in a proceeding, section 137.1 of Ontario's legislation fulfills a different purpose than these alternate motions (at para 38). First off, a section 137.1 motion will be made at an earlier stage in the proceedings, and a motion judge should be "acutely conscious of the stage in the litigation process at which a section 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgement motion, which would be insurmountable at this stage" (at para 52). A section 137.1 motion "contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that lends itself to the inquiry mandated under section 137.1(4)(a)" (at para 38). An inquiry under a section 137.1 motion will go beyond the pleadings of each party and consider the contents of the record (at para 38).

The detailed way Justice Côté broke down the test found in Ontario's new anti-SLAPP legislation could perhaps be an indication that the Court is expecting other provinces to adopt similar provisions. The test to be applied for Ontario's anti-SLAPP legislation is clear. It upholds freedom of expression in matters of public interest, while ensuring that viable and legitimate lawsuits continue through the Court system. If Alberta chooses to enact a provision identical to

Ontario's section 137.1 of the *Court of Justice Act*, it would likely signal to the Courts here that they should take direction from this decision.

Conclusion

This recent SCC decision analyzing Ontario's anti-SLAPP legislation provides an excellent framework that is ripe to be picked up and implemented in Alberta. The Court has set out a workable test that balances the public interest to the right to freedom of expression, while ensuring that parties still have access to the Court system when a legitimate claim arises.

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