# Ontario Court of Appeal clarifies test under "anti-SLAPP" legislation

AUG 31, 2018 8 MIN READ

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On August 30, 2018, the Court of Appeal for Ontario released its long-awaited decisions in a series of appeals[1] addressing the limits of the province's "anti-SLAPP" legislation. This was the first appellate interpretation of s. 137.1 of the *Courts of Justice Act* (*CJA*), which provides a preliminary, pretrial procedure for a defendant to seek dismissal of a claim where the litigation arises out of a defendant's expression on a matter of public interest. In its decisions, the Court of Appeal clarified the appropriate interpretation of the test on an anti-SLAPP motion, and in doing so cleared up some uncertainties that had arisen out of the lower court decisions.

## Ontario's anti-SLAPP legislation

SLAPP suits – or Strategic Lawsuits Against Public Participation – are actions brought by persons subject to public criticism in an effort to silence or intimidate their critics (who are often of significantly lesser financial means). In 2015 – in an effort to address the growing number of these types of suits – the Ontario Legislature enacted the *Protection of Public Participation Act, 2015*, which in turn introduced sections 137.1 to 137.5 to the *CJA*. Section 137.1 provides an expedited, summary mechanism for defendants of SLAPP suits to seek to have those actions dismissed in a relatively expedient and less expensive manner.

## Section 137.1 of the *CJA*

Section 137.1 of the *CJA* allows a defendant to move at any time after a proceeding is commenced (even before they have filed a statement of defence) for an order dismissing the proceeding. To have the proceeding dismissed, the defendant must first "[satisfy] the judge that the proceeding arises from an expression made by the [defendant] that relates to a matter of public interest" (what the Court of Appeal called the "threshold requirement," s. 137.1(3)).

The onus then shifts immediately to the plaintiff, who must clear both of what the Court called a "merits-based hurdle" and a "public interest hurdle."

The merits-based hurdle requires that the plaintiff satisfy the judge that there are "grounds to be believe" that:

- the proceeding has substantial merit (s. 137.1(4)(a)(i)); and
- the defendant has no valid defence in the proceeding (s. 137.1(4)(a)(ii)).

The public interest hurdle requires a balancing exercise whereby the plaintiff must satisfy the judge that:

[T]he harm likely to be or have been suffered by the responding party [plaintiff] as a result of the moving party's [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))

A failure by the plaintiff to clear both hurdles will lead to a dismissal of its action.

## (a) The threshold requirement (s. 137.1(3))

The initial onus is on the defendant to prove on a balance of probabilities that the proceedings arose from an expression made by the defendant, and that the expression "relates to a matter of public interest." "Public interest" is not defined in the legislation. Justice Doherty (who wrote the unanimous decisions in all six appeals) noted that it is a "broad" concept, and that the determination must be made "objectively, having regard to the context in which the expression was made and the entirety of the relevant communication." He held that while "there is no exhaustive list of topics" that can be considered "public interest," certain topics (like the conduct of governmental affairs and the operation of the courts) inevitably will be. Justice Doherty emphasized that a matter of public interest has to be distinguished "from a matter about which the public is merely curious or has a prurient interest." The merits of the expression, the motive of the author or the size of the audience of the expression are irrelevant to the analysis (at least at the "threshold requirement" stage).

## (b) The merits-based hurdle (s. 1371.1(4)(a))

Once the defendant has cleared the threshold requirement, the onus shifts to the plaintiff to satisfy the judge that there are grounds to believe that: (i) the proceeding has substantial merit and (ii) the defendant has no valid defence. Justice Doherty cleared up some confusion in the underlying motion decisions by finding that the balance of probabilities is the appropriate standard of proof to be applied at this stage.

On the first prong of the merits-based hurdle, Justice Doherty cautioned against s. 137.1 motions becoming *de facto* summary judgment motions, and underscored that they are "screening" motions where judges do not generally make "findings of fact [...], credibility determinations, or any ultimate assessment of the merits." He held that the appropriate analysis only involved determining whether, on an examination of the motion record, "there are reasonable grounds to believe that a reasonable trier could accept the evidence." In so doing, he noted that "[b]ald allegations, unsubstantiated damages claims, or unparticularized defences are not the stuff from which 'grounds to believe' are formulated." However, he emphasized that "it is not for the motion judge to determine" whether "the claim has 'substantial merit,'" but only whether "it could reasonably be said, on an examination of the motion record, that the claim has substantial merit."

On the second prong, Justice Doherty held the plaintiff is not required to address *all* of the defendant's possible defences and prove that none have any validity. Instead, he interpreted that section as contemplating an evidentiary burden on the defendant to advance any proposed "valid defence" (in either its statement of defence or responding motion materials), which would then place an onus on the plaintiff to demonstrate only that there are "reasonable grounds to believe" that none of those defences would succeed. He held that "[i]f that assessment is among those reasonably available on the record, the plaintiff has met its onus."

## (c) The public interest hurdle (s. 137.1(4)(b))

If it clears the merits-based hurdle, the plaintiff must also satisfy the judge that the harm caused to the plaintiff by the defendant's expression is "sufficiently serious" that the public interest in allowing the claim to proceed outweighs the public interest in protecting the defendant's freedom of expression. Justice Doherty referred to this as the "heart of Ontario's anti-SLAPP legislation." He noted that the harm to the plaintiff can be monetary or non-monetary (e.g., reputational damage or infringement on personal privacy), although the plaintiff must provide some basis on which the harm or potential harm can be assessed. He held that the plaintiff is not "expected to present a fully-developed damages brief," but that assuming the plaintiff has cleared the merits hurdle, a "common sense reading of the claim, supported by sufficient evidence to draw a causal connection between the challenged expression and damages that are more than nominal will often suffice."

Justice Doherty envisioned scenarios where meritorious claims that otherwise met the merits-based hurdle could be dismissed under the public interest hurdle because the harm to the plaintiff had been "insignificant" (and thus, the public interest in protecting the expression would outweigh the public interest in seeing the plaintiff's claim continue). However, it appears clear that where a plaintiff is able to sufficiently demonstrate serious harm resulting from the expression (even at a preliminary stage), this hurdle will be cleared.

## (d) Costs regime

The Court of Appeal also addressed the novel costs regime provide for in s. 137.1(7) of the *CJA*. As Justice Doherty held, that section "creates a starting point" whereby, if a defendant is successful on the motion, the judge should "start from the premise that the defendant should receive costs on both the motion and in the proceeding on a full indemnity basis" (as opposed to a partial indemnity basis, which is the norm). He noted that the ultimate discretion on costs still rests with the motion judge, and that the overriding concern that costs be "fair and reasonable" still applied. However, the "full indemnity starting point" was a clear statement from the Legislature that SLAPP actions are to be strongly disincentivized.

## Takeaways

Ontario's anti-SLAPP legislation seeks to provide an appropriate balance between freedom of expression and the right to be able to defend and protect one's reputation. The legislation seeks to achieve the balance by providing a mechanism to screen out at an early stage unmeritorious claims designed to silence and intimidate, while allowing plaintiffs to continue with actions where they are able to meet the merits-based and public interest hurdles. The Court of Appeal's series of decisions helpfully clarify how courts are to apply the legislation in a manner that best seeks to achieve that balance. The underlying appeals largely turned on their own facts, but the Court's analysis is a welcome step to ensuring that all future cases will be determined on a consistent set of standards and rules.

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[1] The Court's substantive analysis of s. 137.1 was set out in its decision in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685. It released its reasons concurrently in five other decisions in *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA

686, *Platnick v. Bent*, 2018 ONCA 687, *Veneruzzo v. Storey*, 2018 ONCA 688, *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689 and *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690. While the other five decisions address specific arguments raised in those appeals, they do not repeat the rigorous s. 137.1 analysis in *Pointes*.