

Counterclaim for breach of fiduciary duty in wrongful dismissal action dismissed under anti-SLAPP legislation

Anti-SLAPP | Courts of Justice Act | Defamation | Litigation | Litigation & Dispute Resolution

10 April 2023

While defamation lawsuits continue to receive the most judicial attention under Ontario's anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation, the statutory remedy has also proven to be a useful remedy for litigants facing other types of tactical claims. Under section 137.1 of the *Courts of Justice Act*, the court may dismiss a proceeding if the moving party satisfies the court that "the proceeding arises from an expression made by the person that relates to a matter of public interest". The preliminary issue is therefore whether the claim against the moving party "arises from" an expression they have made on a matter of public interest.

The Ontario Court of Appeal has affirmed that "arises from" should be given a broad and liberal interpretation within the overall context of what is really going on in the proceedings at issue: *Boyer v. Callidus Capital Corporation*, 2023 ONCA 233 (CanLII).

The appellant in the case was a Vice President with the respondent firm, Callidus, a lender to distressed businesses in Canada and the United States. The appellant was responsible for underwriting new loans, assessing potential borrowers, and making recommendations on lending to the firm's credit committee.

In July 2015, the appellant gave 18 months' notice of his intention to retire at the end of 2016, due in part to personal health reasons as well as concerns over the direction Callidus was taking. Over the next year, he claimed to have experienced verbal abuse and criticism, including threats. By July 2016, all of his files had been transferred from him. He left the company the following month, four months earlier than planned.

In February 2017, the appellant commenced an action for wrongful dismissal seeking vacation pay, stock options and the value of lost benefits. Fifteen days later, Callidus issued a counterclaim for \$150 million alleging that the appellant had breached his fiduciary obligations by failing to provide honest and transparent reporting to Callidus concerning three borrowers.

The appellant moved for summary judgment of his claim while seeking to dismiss the counterclaim on the basis that it was a proceeding limiting freedom of expression on matters of public interest under s. 137.1 of the *Courts of Justice Act*.

A motion under s. 137.1 places an initial burden on the moving party to establish that the proceeding arises from an expression relating to a matter of public interest. If met, the burden then shifts to the responding party to satisfy the motion judge (i) that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and (ii) that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at para. 18.

The motion judge found that the appellant cleared the initial burden by showing that the statements pleaded in his claim concerning a "poisoned workplace" at Callidus qualified as an expression within the meaning of s. 137.1(2). The business practices of Callidus related to a matter of public interest since Callidus was once among Canada's most influential publicly traded companies and its business practices had attracted national news coverage.

However, the motion judge found that Callidus's counterclaim did not "arise from" the appellant's expressions since there was no causal connection between the claim and the counterclaim. In the motion judge's view, the counterclaim was premised on Callidus' allegations of misconduct, breach of fiduciary duty, and resignation without adequate notice, and was not brought to silence the appellant's expressions.

Since the appellant did not clear this threshold hurdle, the motion was dismissed without addressing the remainder of the s. 137.1 test. The summary judgment motion was deferred because Callidus had claimed a right of set-off against any damages awarded.

On appeal, the Court of Appeal found that the motion judge erred by interpreting "arises from" too narrowly. The threshold burden is not intended to be onerous. The Supreme Court of Canada had previously affirmed that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework: *Pointes* para. 24. While "arises from" implies an element of causality, many different types of proceedings can arise from an expression.

In the Court of Appeal's view, the allegations in pleadings could not be narrowly compared without considering the context in which the counterclaim was issued. Within the overall context in which the counterclaim was made, it arose from the expressions in the appellant's claim.

In that regard, once the allegations of a toxic work environment were made public by the appellant, Callidus immediately responded with a claim for \$150 million without any underpinning for the quantum of damages. The counterclaim was based on bald allegations with no itemization or explanation of loss suffered. It was based on events that Callidus had known about for years and never mentioned before.

Based on this assessment, the counterclaim did "arise from" the appellant's expression for the purposes of the initial threshold test. Callidus was therefore required to satisfy the court that the counterclaim had substantial merits, which involves an assessment of the evidentiary basis for the claim (*Pointes*, at para. 50).

Callidus did not meet this burden as it failed to plead either the required elements at law or the details of fact to support the claim of breach of fiduciary duty, which requires that there must be an undertaking, either express or implied, that the fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her: *Galambos v. Perez*, 2009 SCC 48. Callidus never pleaded any sort of undertaking on the appellant's part, express or implied, to act in Callidus' best interests, which was fatal to the counterclaim.

Further, the appellant had pleaded valid defences regarding his role in the loan transactions raised in the counterclaim. Callidus had not shown that these defences are not valid and thus has not discharged its burden under s. 137.1(4)(a)(ii).

Lastly, the Court of Appeal considered the public interest hurdle and determined that Callidus had failed to satisfy the court that the harm suffered as a result of the appellant's expression was sufficiently serious that the public interest in permitting the proceeding to continue outweighed the public interest in protecting the expression. The factors that tilted the balance in favour of granting the appellant's motion included the financial imbalance between the parties, the apparent punitive or retributory purpose in bringing the counterclaim, and the chilling effect the counterclaim would have.

In the Court of Appeal's view, when the overall context was scrutinized, what was "really going on" with the counterclaim was an attempt to silence a former employee seeking recovery in his wrongful dismissal claim and to create a chilling effect for other employees.

The criteria in s. 137.1 were therefore satisfied and the counterclaim was dismissed, with the appellant's summary judgment motion to be determined at a later date.

Based on the decision, it appears that courts hearing an anti-SLAPP motion will be required to examine the overall context of the proceedings in issue rather than narrowly focusing on what is pleaded by the parties. While a counterclaim against an employee suing for wrongful dismissal could be made in appropriate circumstances, it was clear that the Court of Appeal viewed the counterclaim in issue as a tactical attempt to silence the appellant's expression on a matter of public interest. A PDF version is available to download [here](#).

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