

Ford wins again! Court of Appeal for Ontario upholds dismissal of defamation action against him

Defamation | Litigation | Litigation & Dispute Resolution | SLAPP | Torts

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Section 137.1 of the *Courts of Justice Act* (the “CJA”) has made it harder for a plaintiff to maintain a defamation action against a defendant where the issue related to the expression involves a matter of public interest.

Earlier this year, a motion judge dismissed a defamation action brought against Premier Ford by former OPP Deputy Commissioner Brad Blair on the grounds that alleged defamatory statements made by the Premier were protected by the defence of fair comment and that the public’s interest in Mr. Blair’s ability to pursue his action did not outweigh the objective public interest in protecting Premier Ford’s expression.

Mr. Blair appealed the motion judge’s decision.

In *Blair v. Ford*, 2021 ONCA 841 (CanLII), the Court of Appeal for Ontario dismissed the appeal.

Factual background

Mr. Blair’s defamation action arose out of the political controversy that engulfed the provincial government when it announced in November 2018 that Toronto Police Superintendent Ron Taverner had been hired as the new Commissioner of the OPP. Mr. Blair had been a candidate for this position and had earlier that year been appointed by the provincial government as the OPP’s interim Commissioner.

The media reported that Supt. Taverner was a close family friend of Premier Ford and accordingly, in the world of politics, Premier Ford was accused of cronyism. This allegation was magnified when the media reported that the qualifications for the OPP Commissioner’s position had been allegedly lowered two days after the job was initially posted so that someone with Supt. Taverner’s rank would be allowed to apply for the job. As part of an Integrity Commissioner investigation into whether Premier Ford had breached the *Members’ Integrity Act, 1994*, this allegation was later shown to have been false. The initial qualifications for the job had initially been wrongly posted online by a government bureaucrat. The allegation that the qualifications had been changed to accommodate Supt. Taverner was simply untrue.

On December 11, 2018, Mr. Blair made a complaint to the Ombudsman of Ontario. In a 9-page letter, written on OPP letterhead, Mr. Blair alleged several improprieties in the OPP Commissioner appointment process. The sensationalized letter was the centerpiece of a media release prepared by Mr. Blair’s personal lawyers who held an immediate news conference in regards to the letter. The letter contained allegations that evidence later uncovered demonstrated to be wrong about a proposed “camper” van. As well, Mr. Blair who was at the time the highest ranking police officer in the Province, made other scandalous allegations of general misfeasance against Premier Ford in what Mr. Blair and his personal lawyers purported to be an official police communication.

The next day, the Ministry of the Attorney General prepared a Briefing Note which provided a legal opinion on the propriety of Mr. Blair’s letter. More specifically, the Briefing Note opined on whether the contents of Mr. Blair’s letter breached the Code of Conduct under the *Police Services Act* (“PSA”). The Briefing Note was provided to Premier Ford.

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On December 18, 2018, Premier Ford, in response to media questions about the letter and Mr. Blair's attempt to compel the Ontario Ombudsman to conduct an inquiry into the OPP Commissioner appointment process, stated that Mr. Blair had breached the PSA Code of Conduct.

A few days later, a retired police officer filed a complaint with the Office of the Independent Police Review Director (the "OIPRD") similarly alleging that in using his official position to air his personal grievances, Mr. Blair had breached the PSA Code of Conduct. The OIPRD is responsible for receiving, managing and overseeing all public complaints about municipal, regional and provincial police in Ontario.

The controversy over the appointment resulted in Ontario's Integrity Commissioner convening an inquiry into the issue resulting in a lengthy investigation and hearing and a detailed report which ultimately wholly exonerated Premier Ford of any wrongdoing.

On 14 January 2019, Premier Ford, in response to additional media questions about Mr. Blair's continued attempt to compel the Ontario Ombudsman to investigate the OPP Commissioner appointment process, again provided his opinion that Mr. Blair had breached the PSA Code of Conduct.

In early March 2019, as a result of additional misconduct unrelated to the original Letter, Mr. Blair was terminated as a Deputy Commissioner of the OPP. His appointment to this position under an Order-In-Council was also revoked.

A few weeks later, Mr. Blair sued Premier Ford for defamation.

Eventually, Premier Ford brought a motion to dismiss Mr. Blair's action under [section 137.1 of the CJA](#). This motion was successful.

The appeal

On his appeal, Mr. Blair contended that the motion judge's decision should be overturned on the grounds that he ignored certain factors in his analysis of [s. 137.1 of the CJA](#), applied the wrong test when assessing Premier Ford's "fair comment" defence and incorrectly found that the public interest in protecting the expression outweighed the public interest in permitting the proceeding to continue.

[Section 137.1 of the CJA](#) provides a mechanism for a pre-trial disposition of a defamation action. Although originally conceived to address strategic lawsuits involving matters of public participation brought by powerful entities to suppress or silence the expression of a vulnerable person, the section applies to any case in which an expression of public interest is at issue. This was affirmed by the Supreme Court of Canada in [1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22](#), wherein the court decided that [s. 137.1](#) was to be interpreted broadly and liberally and noted that the weighing exercise under the section was "...not simply an inquiry into the hallmarks of a SLAPP."

Findings on fair comment defence upheld

The motion judge had found that Premier Ford's statements about Mr. Blair were protected by the fair comment defence. He found that the alleged defamatory statements were an expression of opinion and that the statements were made without malice.

Mr. Blair challenged these findings and also contended that the motion judge had wrongly relied on a complaint made to the OIPRD by a retired police officer to support a finding that the comments made by Premier Ford could honestly be made by anyone on the proved facts. The appellate court rejected these challenges.

In particular, it found that the motion judge's rulings on whether the statements qualified as comment or opinion and whether the statements were made with malice were entitled to deference.

The appellate court also rejected Mr. Blair's argument that the motion judge misapplied the burden that was on him to prove that Premier Ford did not have a valid fair comment defence. Mr. Blair, relying on the Ontario Court of Appeal decision in [Bondfield Construction Co. v. The Globe and Mail Inc., 2019 ONCA 166](#), contended that he should have only been required to prove that a reasonable trier of fact could reject the defences relied upon by Premier Ford. This was an objective test. Instead, Mr. Blair argued that the motion judge had applied a subjective test.

The Court of Appeal for Ontario noted that the test established in [Bondfield](#) had been "refined" by the Supreme Court of Canada in [Pointes Protection](#). Accordingly, the appellate court disagreed with Mr. Blair's submission that the motion judge had used the wrong test or had somehow raised the threshold for Mr. Blair with respect to meeting his burden that Premier Ford did not have a valid "fair comment" defence.

Public interest weighing exercise finding upheld



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Although this was enough to dismiss the appeal, the appellate court also considered whether the motion judge had erred in weighing the two public interests under s. 137.1(4)(b) of the CJA.

Under this section, Mr. Blair was required to satisfy the court that the harm he suffered as a result of Premier Ford's alleged defamatory comments was sufficiently serious that the public interest in permitting his action to continue outweighed the public interest in protecting Premier Ford's expression.

To satisfy this burden, Mr. Blair, as set out by the Supreme Court of Canada in *Pointes Protection*, was required to show (i) the existence of some harm; and (ii) that the harm was caused by Premier Ford's expression.

The appellate court noted that the motion judge had found that Mr. Blair made only bald assertions of emotional or psychological harm and that there was no evidence of any resulting financial or economic harm. Furthermore, to the extent that there was harm, the motion judge had concluded that this was captured by Mr. Blair's proposed second "wrongful termination" claim against Premier Ford for \$15 million. On this point, the motion judge described:

...there is little to no public interest in permitting the defamation action to continue when the alleged loss or damage is the subject of another action that will shortly be proceeding in this court.

The findings under s. 137.1(4)(b) were discretionary and entitled to deference.

Cross-appeal on costs

The appeal of the motion judge's decision included a cross-appeal by Premier Ford on the issue of costs.

Among other grounds, Premier Ford argued that the motion judge had erred in making a costs award that tethered 50% of the amount awarded to a different action – effectively making an award of "costs in any event of another cause of action".

The appellate court observed that no reasons were given for the order requiring half of the costs to be paid immediately and the other half to be paid when Mr. Blair's "wrongful dismissal action is settled or finally adjudicated".

The appellate court found that the costs award was "extraordinary".

Accordingly, Premier Ford's cross-appeal was granted, in part, to provide that the entire amount of the costs that had been awarded to Premier Ford on his successful motion (\$130,000) be made payable in full as of the date of the motion judge's order, which was 1 February 2021.

Representations by Gardiner Roberts LLP

Premier Ford was represented on the appeal by Gavin Tighe and Alexander Melfi.

Mr. Tighe is a senior partner at Gardiner Roberts LLP and is a certified specialist in litigation by the Law Society of Ontario.

Mr. Melfi is a partner at Gardiner Roberts LLP as well. He practises litigation.

Mr. Tighe and Mr. Melfi were assisted in the preparation of the written arguments filed with the Court of Appeal of Ontario by Stephen Thiele, a partner and the Director of Legal Research at Gardiner Roberts LLP. A PDF version is available to download [here](#).

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