

# Has the Court of Appeal made it harder to succeed on a SLAPP motion in a defamation case? (Benchwood Builders Inc. v. Prescott)

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

27 March 2025

For many years, I have written about defamation cases and SLAPP motions in which defendants have sought the early dismissal of defamation actions under section 137.1 of the *Courts of Justice Act* ("**CJA**") or under the equivalent British Columbia anti-SLAPP law. Although I have tried to simplify the procedure and shifting burdens of proof contained in the anti-SLAPP legislation, the verbiage and structure of the legislation continues to vex parties and courts, including the Court of Appeal for Ontario. The Court has now warned, in *Benchwood Builders, Inc. v. Prescott*, 2025 ONCA 171, that where it is not immediately clear that there is no valid defence in a defamation action, an anti-SLAPP motion should be resolved under the weighing exercise found under section 137.1(4)(b) of the CJA, even though prior jurisprudence has suggested that this step should not be necessary. In this respect, even though the comments of the court are *obiter dicta*, as will be discussed further below, the Court of Appeal may have made it harder for a defendant to succeed on a SLAPP motion in a defamation case.

This case involved a dispute between homeowners and a renovator and its principal (M). The homeowners were dissatisfied with the work provided to their home. After seeing that the renovator posted photographs of their home online for the purposes of attracting new customers, the homeowners began to post negative comments about the renovator on social media.

The renovator and M were displeased about the negative comments and sued the homeowners for defamation.

In turn, the homeowners brought a motion to have the defamation claim against them dismissed under section 137.1 of the CJA on the grounds that the claim was strategic litigation against public participation.

The motion judge agreed with the homeowners' position, finding that their comments related to a matter of public interest under section 137.1(3) of the CJA, and that, even though the defamation action had substantial merit under section 137.1(4)(a)(i) of the CJA, the renovator and M were unable to establish that the homeowners had no valid defence to the claim under section 137.1(4)(a)(ii) of the CJA.

The motion judge further found that the renovator and M had failed to establish that any harm allegedly suffered as a result of the homeowners' defamatory statements was serious. Accordingly, the motion judge concluded that the test under section 137.1(4)(b) of the CJA was not satisfied either.

The Court of Appeal overturned the motion judge's decision.

In doing so, the court criticized the structure of section 137.1 of the CJA for being poorly drafted and confusing. The court explained that the section's operation was Byzantine, obtuse and difficult to follow.

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Moreover, the appellate court found that [section 137.1\(4\)\(a\)\(ii\)](#) - the no valid defence requirement - had been given too much weight in the operation of the section to dismiss defamation proceedings when this provision should only apply to open and shut cases, which are rare.

In the appellate court's view, a SLAPP motion in a defamation case should be resolved on the assessment of whether the harm suffered by the plaintiff as a result of the defendant's defamatory expression was sufficiently serious that the public interest in permitting the defamation proceeding to continue outweighs the public interest in protecting the purportedly defamatory expression.

However, it is important to note that the comments made by the appellate court in this case about how to resolve SLAPP motions in defamation cases *is obiter dicta* because the court found that the homeowners' SLAPP motion did not pass the initial threshold of involving a matter of public interest. Therefore, [section 137.1](#) of the CJA was inapplicable.

The Court of Appeal found that the fact that the comments were made on social media and represented an online review of the renovator's business did not necessarily make the homeowners' comments a matter of public interest. In the circumstances, the homeowners' comments reflected nothing more than a bitter private dispute. The homeowners' comments were found to not engage some broader societal concern as in those cases where allegedly defamatory comments were found to involve matters of a public interest.

This was enough to overturn the motion judge's decision.

However, the Court of Appeal went on to find that the motion judge took a mistaken approach in the analysis of [section 137.1\(4\)\(a\)\(ii\)](#) of the CJA by dismissing the defamation action for the renovator's and M's failure to demonstrate that the homeowners had no valid defence to the claim.

In the appellate court's view, the motion judge effectively read [section 137.1\(4\)\(b\)](#) (the weighing exercise provision) out of the section, and ignored prior court decisions which stated that this provision should be the "fundamental crux" of the court's analysis.

The Court of Appeal explained that requiring a SLAPP motion for defamation to be determined under the weighing exercise contained in [section 137.1\(4\)\(b\)](#) of the CJA, permitted the competing interests of the parties to be more carefully assessed.

With respect to the public interest test under [section 137.1\(4\)\(b\)](#) of the CJA, the Court of Appeal noted that the motion judge had found that the renovator and M had failed to establish that any harm suffered as a result of the homeowners' defamatory statements was serious because there were "other factors that may have had an effect on [the renovator's] reputation."

The motion judge noted, for example, that the renovator had several negative events which preceded the posting of the customer's comments.

Yet, Court of Appeal concluded that the homeowners' comments did not involve a matter of public interest and included personal attacks against M and his subcontractors.

The homeowners posted that these individuals operated in a dishonest manner and that M was "a miserable con artist" and a "dirtbag".

The homeowners also accused M of threatening women and making false assault arrest charges against women. The Court of Appeal found these allegations to be particulars of malice.

The key takeaways from this decision are that the Court of Appeal appears to be concerned with the potential overuse of [section 137.1](#) of the CJA, and its potential unfairness to a plaintiff whose reputation has been lowered as a result of defamatory statements made by a defendant. However, a careful reading of this decision suggests that its application may be narrow because the Court of Appeal's primary finding was that the homeowners' statements were not a matter of public interest. In this regard, the decision may simply provide guidance to litigants as to when the posting of a negative business review is a matter of private interest versus when it is a matter of public interest. Although at one time it may have been accepted that a negative business review was a matter of public interest, this decision serves as a reminder that a customer's negative review or comments about a business are most likely matters of a private interest. A PDF version is available to download [here](#).

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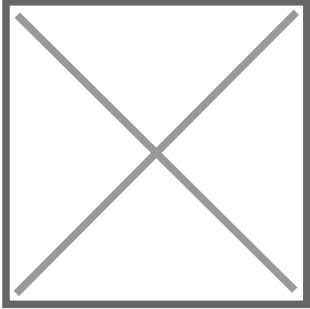
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