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Court Refuses To Dismiss Claims That Did Not Engage SLAPP Provisions

By Stephen Thiele

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[Section 137.1 of the Courts of Justice Act](#) (the “CJA”), which permits the dismissal of actions related to an expression made with respect to a matter of public interest, continues to receive judicial comment as parties test the scope and limits of the provision.

In [Schwartz v. Collette, 2021 ONSC 2138](#), the court, which had ruled last year that a number of defamatory allegations should be dismissed because they involved expressions related to a matter of public interest, was required to determine whether a remaining allegedly defamatory comment and a claim for harassment/intentional infliction of mental/emotional suffering that were not related to any public interest matter could proceed or also needed to be dismissed because of the earlier finding.

The Plaintiffs’ remaining claims alleged that the Defendant had made “in an unsolicited conversation with an unidentifiable gentleman” in a location where the Plaintiff carried on business that “RLO is where you go for rape

lessons” and had, on multiple occasions, yelled at him and acted in an aggressive manner towards him.

The Defendant denied the allegation about the “rape lessons”, but conceded that such an expression, if made, did not relate to a matter of public interest. He argued that even though the remaining issues did not relate to any public interest matter, once a party had satisfied the test under [s. 137.1\(3\)](#) of the CJA, all claims in an action needed to be dismissed based on the meaning of the word “proceeding” used therein.

More specifically, [s. 137.1\(3\)](#) provides:

On a 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.

The Defendant submitted that the word “proceeding”, which was not defined in the CJA, referred to an entire action and not merely separate claims within an action. The Defendant contended that such an interpretation was supported by a purposive and contextual reading of all the provisions of [s. 137.1](#) and was supported by the Ontario Court of Appeal decision in [Veneruzzo v. Storey, 2018 ONCA 688](#) wherein it was suggested that a court should not look at a parties’ claims in isolation when dealing with a SLAPP motion.

In contrast, the Plaintiffs argued that [s. 137.1](#) did not create an “all or nothing” situation. The word “proceeding” should not be interpreted so broadly as to permit the dismissal of an entire action where separate claims were not related to expressions involving matters of a public interest. The Plaintiffs relied on [Rizvee v. Newman, 2017 ONSC 4024](#).

Although there were various decisions which supported a broad interpretation as advocated by the Defendant, there were also decisions which supported a narrow interpretation of the word as advocated by the Plaintiffs.

Among other things, the court also recognized that the dictionary definition of the word “proceeding”, particularly the definition in *Black’s Law Dictionary*, also favoured a broad interpretation and that the Supreme Court of Canada in [1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22](#) and the Court of Appeal in [Subway Franchise Systems of Canada Inc. v. Canadian Broadcasting Corp., 2021 ONCA 25](#) made clear that a liberal and flexible approach was to be taken in interpreting and applying the provisions of [s. 137.1](#).

However, the court rejected that the word “proceeding” should be interpreted as broadly as

the Defendant suggested. The court simply did not have the authority to dismiss an entire action where there were specific claims that did not engage the public interest component of [s. 137.1\(3\)](#) of the CJA.

The court reasoned that:

- (i) a plaintiff with a legitimate claim was not to be deprived of the opportunity to pursue it;
- (ii) a court should avoid any attempt to characterize the nature of a proceeding as a whole when dealing with a [s. 137.1](#) motion;
- (iii) it was unlikely the Legislature intended for the courts to embark on an inquiry into the impetus for a plaintiff’s entire action;
- (iv) it was unfair for a plaintiff to demonstrate substantial merit and the grounds to believe there were no valid defences for claims which were not grounded in an expression on a matter of public interest;
- (v) directions from the Supreme Court of Canada precluded a motion judge from considering any harm that does not flow from an expression on a matter of public interest, as would be the case with any truly separate and distinct claims; and
- (vi) the section was intended to protect clear expressions, not harmful acts of a purely personal and private nature.

Accordingly, the court held, at [paragraph 53](#), “... where there are claims that are clearly separate



and distinct from claims that do engage [s. 137.1](#), the court cannot dismiss the remainder of the action by resort to those same provisions simply because it concludes, as is the case here, that ‘most’ of the action pertains to public interest expression.”

This decision demonstrates that plaintiffs should not be discouraged from mixing claims that involve expressions on matters of a public interest with those involving matters that are not of public interest. Requiring a plaintiff to bring two separate actions would be contrary to a multiplicity of proceedings.

This decision also demonstrates that where a plaintiff has brought mixed claims, a defendant may wish to seriously consider bringing both a motion under [s. 137.1](#) of the CJA to dismiss those claims that fall within the scope of the section and a summary judgment motion to dismiss the remainder of the claims that do not fall within the scope of the section.

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