THE GR COURT DOCKET

Jurisdictional Door on the Small Claims Court Slammed Shut for Anti-SLAPP Motions

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Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Anti-SLAPP or section 137.1 of the *Courts of Justice Act* (**"CJA"**) motions for the early dismissal of claims involving issues arising from an expression related to matters of public interest are rapidly becoming a remedy of choice for defendants in defamation actions. However, many defamation claims do not seek significant damages and are brought in the Small Claims Court. The upper limit on a Small Claims Court action in Ontario is $35,000.

Although the Ontario Court of Appeal has already determined that a Deputy Judge of the Small Claims Court does not have jurisdiction to determine an anti-SLAPP motion, the recent case of *Laurentide Kitchens Inc. v. Homestars Inc.*, 2022 ONCA 48 exposed a potential crack in the Small Claims Court's jurisdictional door in connection with the ability to determine an anti-SLAPP motion with that court system. This door has now been slammed shut as the Court of Appeal firmly determined that the Administrative Judge of the Small Claims

Court does not possess jurisdiction to hear a section 137.1 motion.

This case involved two related Small Claims Court actions commenced by plaintiffs against the operator of a consumer review website. Negative reviews, which the plaintiffs alleged were defamatory, had been posted on the website. The defendant refused to remove the posts and the plaintiffs sued.

The defendant sought to strike the claims under section 137.1 of the CJA and scheduled the necessary motions with the court. However two and half months later, the Ontario Court of Appeal released the decision in *Bruyea v. Canada (Veteran Affairs)*, 2019 ONCA 599 determining that Deputy Judges did not have jurisdiction to hear such a motion. In Ontario, Deputy Judges hear all matters in the Small Claims Court system.

The defendant sought to have a Superior Court Judge assigned to the Small Claims Court to hear the motion. On an

attendance before the civil practice court, which is a scheduling court within the Ontario Superior Court of Justice system, a judge directed that the actions remain in the Small Claims Court system and that "an administrative judge of the Small Claims Court should hear these motions."

Ontario has only one Small Claims Court Administrative Judge. The position was created in 2017, two years after section 137.1 was added to the CJA.

On the motions to dismiss the actions, the Administrative Judge determined that she had jurisdiction to hear motions. The merits of the motions were not determined. The plaintiffs appealed.

The defendant contended that the Administrative Judge's assumption of jurisdiction was correct. Among other reasons, the defendant argued that section 24(2) of the CJA granted her the authority to make orders under section 137.1. This section provides in part that a proceeding in the Small Claims Court can be heard and determined by "the Small Claims Court Administrative Judge appointed under section 87.2." As well, the defendant submitted that *Bruyea* was limited to Deputy Judges and did not apply to the Administrative Judge.

The court rejected the defendant's positions for the three following reasons.

First, the Small Claims Court was not given any statutory authority to determine section 137.1 motions. Second, the Ontario Court of Appeal had already repeatedly determined that only Superior Court judges had jurisdiction to hear these motions. Third, the section 137.1 process was simply inconsistent with rules and procedures of the Small Claims Court.

With respect to statutory authority, section 137.1(3) expressly makes reference to a motion being made to a "judge". The Administrative Judge did not fall within the definition of "judge". The court noted that pursuant to section 87.2(1) of the CJA, the Administrative Judge is "deemed to be a provincial judge" for the purposes of compensation and that even though the position of Administrative Judge was created two years after section 137.1 was introduced into the CJA, the legislature made no change to the jurisdiction it had created under the section or the definition of "judge". The Ontario Court of Appeal held that this was "a marker of an intent to omit the jurisdiction".

Section 24 of the CJA also did not give the Administrative Judge authority to make orders under section 137.1 because Deputy judges were also referenced in the section. Therefore if the defendant's argument that the Administrative Judge had authority to make orders under section 137.1 was accepted, then this would mean that Deputy Judges would also have authority to make orders under section 137.1. However, the Ontario Court of Appeal had already repeatedly determined that Deputy Judges possessed no authority to hear section 137.1 motions.

As well, the Ontario Court of Appeal explained that if the Administrative Judge was viewed differently than a Deputy Judge and was given the authority to hear a section 137.1 motion, she then would have authority to grant injunctions and appoint receivers. These remedies, however, are beyond the jurisdictional authority of the Small Claims Court.

With respect to the rules and procedures of the Small Claims Court, the court recognized that they were inconsistent with the procedure

established under section 137.1 of the CJA. Section 137.1 was complex. It established a detailed process of shifting burdens with respect to merits, proportionality and public interest and the exchange of affidavits and cross-examinations. The Small Claims Court rules prohibit cross-examinations on affidavits and motions are discouraged.

As well, section 137.1 has certain cost presumptions and the costs of these motions are significant. The Small Claims Court limits costs on a motion to $100, unless there are special circumstances.

Lastly, among a few other remaining reasons, the appellate court noted that the Small Claims Court is intended to provide timely justice. The hallmark of this court is to provide affordable, expeditious and informal access to justice. Accordingly, the Ontario Court of Appeal concluded that the complexity of the section 137.1 motion process was contrary to these enshrined features of the Small Claims Court.

The _Laurentide_ decision will hopefully be the last time the Ontario Court of Appeal needs to deal with whether the Small Claims Court has jurisdiction to hear a section 137.1 motion. Litigants, particularly self-represented litigants, should be free to pursue defamation claims for a small amount of damages ($35,000 or less) in the Small Claims Court without worrying that the defendant will be able to tie-up their case with a costly motion for dismissal. Accordingly, slamming the door shut on the Small Claims Court's ability to hear a section 137.1 motion is a victory for access to justice.

Representation by Gardiner Roberts LLP
The plaintiffs/appellants in this case were represented by Gavin J. Tighe, a senior partner in

the Dispute Resolution Group at Gardiner Roberts LLP and a certified specialist in litigation.

Gavin was assisted at the hearing of the appeal by litigation associate, Daria Risteska.

Stephen Thiele, the firm's Director of Legal Research and a partner, assisted Gavin and Daria in the preparation of the written arguments used to support the appeals.

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