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Anti-SLAPP motion fails to stop Canadian Tire's claim against alleged perpetrators of fraudulent after-sales service program

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Motions under section [137.1](#) of the Ontario *Courts of Justice Act* (*CJA*) are typically brought to dismiss defamation claims involving expressions on matters of public interest. However, while the legislation is commonly referred to as anti-SLAPP (Strategic Lawsuit Against Public Participation), the section is actually titled "dismissal of proceeding that limits debate" and cases have established that the statutory remedy is not limited to defamation claims. For example, in *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, [2021 ONCA 25 \(CanLII\)](#), the Ontario Court of Appeal used section [137.1](#) of the *CJA* to dismiss a negligence claim that related to the defendant university's test results used in a CBC television broadcast.

On such motions, the court will take a close look at the subject matter of a lawsuit in determining whether it can be properly addressed under section [137.1](#) of the *CJA*.

In *Canadian Tire Corporation, Limited v. Eaton Equipment Ltd.*, [2022 ONSC](#)

[6672 \(CanLII\)](#), the Ontario Superior Court of Justice considered a motion to dismiss a claim for fraud and related torts under section [137.1](#) of the *CJA*.

The proceeding involved a claim by Canadian Tire Corporation against Servantage Dixie Sales Canada Inc. (Servantage), Eaton Equipment Ltd. (Eaton) and various other defendants. Servantage was Canadian Tire's vendor for the administration of its "After Sales Service Program" which allowed customers to return defective products for repair and parts replacement.

In the lawsuit, Canadian Tire alleged that Servantage appointed Eaton as an authorized service centre to perform repairs and parts replacements under the program and that they and other defendants perpetrated a fraudulent scheme by receiving payment for work Eaton had not performed by using phony receipts and invoices to create the illusion that legitimate repairs were taking place when they were not. Canadian Tire claimed damages for

fraud and other relief and sought to recover all proceeds received by the defendants from the alleged fraudulent scheme.

In response, the defendants pleaded, amongst other things, that Canadian Tire's was initiated to further an improper purpose and was maliciously intended to harm them by discrediting and bankrupting them, such that they would be prevented from going public or communicating to relevant authorities about their knowledge of Canadian Tire's sales of defective products and/or its illegal conduct in violating regulatory and consumer protection laws.

The defendants sought to dismiss Canadian Tire's action against them under section [137.1](#) of the *CJA* on the basis that it was an anti-SLAPP proceeding that arose from their expressions at and surrounding the presentation to Canadian Tire regarding its faulty products and its contraventions of safety laws and regulations. Essentially, the defendants claimed that Canadian Tire was seeking to neutralize them as potential whistleblowers or witnesses.

Under section [137.1\(3\)](#) of the *CJA*, the moving party defendants had an initial onus of showing that Canadian Tire's action "arises from an expression made by the person that relates to a matter of public interest."

The motion judge referred to the Supreme Court of Canada's decision in *1704604 Ontario Ltd. v. Pointes Protection Association*, [2020 SCC 22](#), which confirmed that a proceeding "arises from" an expression if it is somehow causally related to the proceeding. Since many different types of proceedings can arise from an expression, proceedings arising from an expression are not limited to defamation or other claims that are directly concerned with expression.

In the *Subway* and *Pointes* decisions, the Ontario Court of Appeal explained the requirement that the proceeding arise from an expression is met where the expression at issue "grounds" the claim or the claim "targets" the expression at issue. The primary consideration is whether the subject of the action appears to focus on silencing an expression that relates to a matter of public interest.

The alleged motive of a claimant for bringing a proceeding in question is not a relevant consideration at the threshold stage of the analysis on a motion under s. [137.1](#) of the *CJA*. Rather, the court will look at the facts grounding the claim but not to the extent that the court should be attempting to assess motive. If the facts underlying the claims were not grounded in public interest expression, the anti-SLAPP legislation will not provide for a dismissal of the claims.

In *Subway*, the defendant university met the onus of showing that the negligence claim arose from an expression on a matter related to the public interest because it concerned the university's knowledge that it was doing food testing to provide information to be broadcast by the CBC and the university's communication of, about, and based on, its test results.

Conversely, the facts underlying Canadian Tire's claim in the pleading at issue were not premised or grounded on any expressions made by the defendants. Indeed, Canadian Tire's claim did not target an expression made by any of the defendants. Rather, the claim sought recovery for fraudulent transfers of funds that were allegedly misappropriated from Canadian Tire. Since the proceeding was not focused on expression or limiting debate, there was no basis to dismiss it under [137.1\(3\)](#) of the *CJA*.

The motion judge further commented that the action had none of the traditional characteristics of a SLAPP lawsuit. The moving parties had filed considerable evidence in relation to Canadian Tire's alleged motive for the action, none of which was relevant to the threshold question raised on the motion. The court had made a similar ruling in an earlier decision quashing a summons served by the defendants to examine various witnesses of Canadian Tire on the basis that they failed to show that the persons to be examined may be able to give evidence that was relevant to issues at the threshold stage of the motion to be brought under section 137.1 of the *CJA*.

As the failed motion had caused considerable delay in the advancement of the action, the court determined that it was appropriate to award costs to Canadian Tire on a partial indemnity basis of \$25,906.

The decision shows that while section [137.1](#) of the *CJA* is not limited to defamation claims, it will be necessary for a moving party to show that the substance of the claim relates to the limiting of public expression or debate without resorting to evidence of motive or other facts that may not be evident in the pleadings. The limited focus of the motion is not the opportunity for defendants to obtain a full assessment of the merits or motives for the claims being made against them.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **James Cook**, at 416.865.6628 or jcook@grllp.com.

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