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# Defamation action against Ontario Premier dismissed under *Courts of Justice Act*

By Gavin Tighe and Stephen Thiele

Early last year, the Premier of Ontario, Doug Ford, in a highly sensationalized lawsuit was sued for defamation by a former Deputy Commissioner and interim Commissioner of the Ontario Provincial Police for comments that the former officer had broken the *Police Services Act* (**"PSA"**). The damages sought by the then former Deputy Commissioner was $5 million. The commencement of the action was the subject of national media attention at the time, along with numerous other stories, between December 1, 2018 and April 1, 2019, related to an investigation by the Ontario Integrity Commissioner into whether the Ontario Premier had breached the *Members' Integrity Act* during the process to hire a new OPP Commissioner, a judicial review application brought the former officer against the Ombudsman of Ontario to compel the Ombudsman to investigate whether there was political interference in that hiring process and the termination of the officer.

Recently, the Ontario Premier brought a motion to have the former officer's defamation action dismissed under the relatively recently amended section 137.1 of the *Courts of Justice Act* (**"CJA"**) and what has colloquially become known as strategic litigation against public participation or anti-SLAPP legislation.

In a 16-page judgment, the Honourable Justice Belobaba dismissed the former officer's action (2020 ONSC 7100).

**The governing legislation**

Section 137.1 of the CJA was first introduced into Ontario law in 2015 under the *Protection of Public Participation Act, 2015*. The impetus for the provision was a desire to give the court the authority to dismiss primarily defamation actions in circumstances where the action had been started "against individuals or organizations that speak out or take a position on an issue of public interest." However, as recently stated by the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, the broader goal of the provision was "to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions."

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Accordingly, while initially some viewed this legislation as limited to stopping a well-funded litigant from commencing a defamation claim against a less well-funded party for the purpose of gagging their freedom of expression, the overarching purpose of the provision is far broader and designed to ensure that free speech on matters of public interest is not stifled by primarily tactical litigation. This broader purpose has significant implications in the political arena where litigation aimed at either sitting or aspiring politicians can be weaponized by political opponents or their surrogates to achieve political purposes.

Section 137.1(1) of the CJA expressly describes that the purposes of the entire section are:

> (a) to encourage individuals to express themselves on matters of public interest;
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> (b) to promote broad participation in debates on matters of public interest;
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> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
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> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

The section goes on to establish an elaborate test for a court to consider when a defendant seeks to have an action dismissed under s. 137.1. Pursuant to s. 137.1(3), the defendant must first establish that the proceeding at issue arises from an expression made by the defendant that relates to a matter of public interest.

Once this burden is met, the plaintiff then bears the onus to establish that there are grounds to believe that (i) the proceeding has substantial merit, and (ii) the moving party has no valid defence in the proceeding. Both parts of this test must be met.

With respect to the "no valid defence" test, as determined in *Pointes*, the moving party has the burden to show that there are grounds to believe "that the defences have no real prospect of success." This requires more than merely "some chance of success" or even "a reasonable prospect of success", but is less than a "likelihood of success".

In order for a plaintiff to respond to whether or not a defendant has "no valid defence", the defendant must put "into play" the defence or defences relied upon for the purposes of the s. 137.1 motion. Generally, there is a small category of well-established defences to a defamation action, for example, truth and justification, fair comment, qualified privilege, absolute privilege and responsible communication.

Under s. 137.1(4)(b), the plaintiff must also satisfy the court that the harm likely to be or have been suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. This section introduces a balancing test between the interests in the plaintiff being allowed to continue the claim against the right of freedom of speech as protected by the Canadian *Charter of Rights and Freedoms*.



With respect to the defences, for the purposes of his motion to have the action dismissed Premier Ford relied on the defences of fair comment and qualified privilege.

## Premier Ford's motion for a dismissal of the action

In applying the tests under s. 137.1, Justice Belobaba found that Premier Ford's burden to meet the test that the claim involved a matter of public interest was easily met and there was no dispute on this issue between the parties. This shifted the onus onto the plaintiff to meet his burdens under the section.

The issue of "substantial merit" was not argued as the court directed before the hearing of the motion that only the issues of "no valid defence" and the weighing exercise under s. 137.1(4)(b) required consideration.

Premier Ford contended that his alleged defamatory expression was protected by the "fair comment" defence because the expression represented his opinion, deduction, conclusion or judgment about the actions of the former officer. On December 11, 2018, the former officer had written a letter on OPP Letterhead, purportedly in both his capacity as then interim OPP Commissioner and his personal capacity, to the Ombudsman of Ontario complaining about political interference in the hiring process. The "Re" line to the letter said: "Request for review of potential political interference in the OPP Commissioner hiring process." That letter had been widely publicized and had been simultaneously released by his lawyer with a press release and ensuing media conference.

As described by Justice Belobaba, the letter detailed numerous deficiencies and improprieties in the job application and appointment process for the new OPP Commissioner which had just been finished at the end of November, discussed the police security detail for the Premier, alleged a serious financial irregularity in the Premier's request for a retrofitted vehicle and generally expressed concern about "political interference" and "inappropriate political influence". The truth of the contents of the letter were denied by members of the Premier's Office, and as confirmed in a subsequent internal OPP report, the front line officers who were actually the purported source of much of the content of the letter and who categorically denied the content of their purported discussion set out in the letter published by the then acting Commissioner of the OPP as being simply untrue. The next day lawyers for the Ministry of the Attorney General prepared a Briefing Note about the letter and whether its contents breached one or more of the provisions of the PSA, or, more specifically the Code of Conduct found under Ontario Regulation 268/10 of the Act. Four potential breaches of the Code of Conduct were identified and analyzed in the Briefing Note. The contents of the Briefing Note were brought to the attention of Premier Ford before he made any comments about the former officer.

These facts are important because one of the elements of the defence of fair comment requires that the protected comment must be based on fact. The other elements of the defence of fair comment as established by the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, are (a) that the comment must be on a matter of public interest, (b) the comment although it can include inferences of fact, must be recognizable as comment, (c) the comment must be one that any person could honestly make on the proved facts, and (d) the comment was not actuated by express malice.

Justice Belobaba concluded that all of the elements of the defence were met in the circumstances. His Honour noted that when Premier Ford spoke the impugned words, the letter, which had been widely published, and its contents were "facts" well-known to the audience. The comments also qualified as opinion because at the time the words were spoken no reasonable journalist or member of the public would have understood the Premier's words as definitive statements that the former officer had been tried and convicted of breaking the PSA. Such a finding would have been reported and even Premier Ford when he spoke stated that someone needed to hold the former officer accountable, which meant that he had not yet been held accountable meaning "charged and convicted". Accordingly, based on the distinction between a comment that is "fact" and a comment that is "comment" or opinion, which included, as found in *WIC Radio*, "deduction, inference, conclusion, criticism or judgment", and which was to be "generously interpreted", Justice Belobaba could not find that Premier Ford had no "real" prospect of showing at a trial that the impugned statements were reasonably recognizable as comment.

His Honour was also satisfied that Premier Ford held a reasonable honest belief in the comments, that the opinion expressed by Premier Ford was also shared by a retired police officer who had made a complaint about the letter to the Office of the Independent Police Review Director on the basis that there were potential Code of Conduct violations, and that there was no malice in the comments.

The dominant purpose of the comments was not to harm the former officer and Premier Ford's comments did not demonstrate a reckless indifference to their truth. While absolutely denied by the Premier, the former officer in his written argument had on at least five occasions stated that Premier Ford's primary motive in making the alleged defamatory statements was not to injure him but rather to "deflect" criticism away from the Government and that Premier Ford's reliance on the Briefing Note was neither unreasonable nor recklessly indifferent to what was said in it.

While Justice Belobaba's conclusion on the fair comment defence was enough to grant the motion, His Honour held, in the alternative, that the weighing of the two public interests under s. 137.4(b) also favoured Premier Ford.

There was no evidence of harm or causation to the former officer as a result of the impugned comments. There was no evidence that the former officer had been disciplined or that he had been suspended from his duties or lost any pay because of what Premier Ford said. Even if there was harm, Justice Belobaba found that the former officer was intending to proceed with a separate $15 million action for wrongful dismissal against Premier Ford and others and that in that action, the former officer was going to seek damages for, among other things, the exact same things he was seeking compensation for in the defamation action.

On the other hand, Justice Belobaba held that there was significant public interest in hearing what Premier Ford had to say about the letter and its contents. This justified fulsome expression and debate.

The former officer has appealed Justice Belobaba's decision. It is expected that the appeal will be heard later this year.

## Representation by Gardiner Roberts LLP

Premier Ford was represented by Gavin Tighe, certified specialist in litigation, and a partner at Gardiner Roberts LLP.

Mr. Tighe was assisted throughout by litigation associate Rojin Jazayeri, and Stephen Thiele, Director of Legal Research and a partner at Gardiner Roberts LLP.

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