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Affirming the “Burden”™ in the anti-SLAPP Threshold Burden

Earlier this week the Court of Appeal for Ontario released their decision in *Sokoloff v Tru-Path Occupational Therapy Services Ltd*. This appeal concerns the legislative framework set out in s. 137.1 of the Ontario *Courts of Justice Act* (“CJA”), colloquially known as the “anti-SLAPP” framework.

Notably, this decision marks the Court of Appeal’s first reported application of the “anti-SLAPP” framework as recently articulated by the Supreme Court of Canada in the paired decisions, *1704604 Ontario Ltd v Pointes Protection Association* (“*Pointes*”) and *Bent v Platnick* (“*Platnick*”) (a summary of which can be found here).

Background

The underlying issue in this case pertains to an action for libel. The Plaintiffs, a law firm and its senior partner (“Sokoloff”), and the Defendants (“Tru-Path”) were involved in a dispute over monies allegedly owed to the Defendants. Arising from this dispute, the individual Defendant stood outside of the Sokoloff law offices for several days with a poster which Sokoloff claims was defamatory. Sokoloff sued Tru-Path for libel.

Tru-Path unsuccessfully brought an anti-SLAPP motion in an attempt to have the action against them dismissed (*Sokoloff v Tru-Path Occupational Therapy Services Ltd*). The motion judge dismissed the anti-SLAPP motion on the basis that it did not satisfy the threshold burden of the ‘public interest hurdle’ under s. 137.1(3) of the CJA, which requires that the moving party satisfy the judge that the impugned expression “relates to a matter of public interest”. Tru-Path (now, the Appellants) appealed this decision to the Court of Appeal.

The Court of Appeal dismissed the appeal, affirming that Tru-Path’s expression did not relate to a matter of public interest, and that therefore the threshold burden under s. 137.1(3) was not satisfied.

Application of SCC Framework

The outcome of the Court of Appeal's application of the s. 137.1 framework, which affirms that the s. 137.1(3) threshold had not been met in this case, is particularly interesting given the broad and liberal interpretation urged by the Supreme Court of Canada with respect to s. 137.1(3) in *Pointes* and *Platnick*.

Recall, in *Pointes*, the Supreme Court strongly emphasized that for the purposes of s 137.1(3), a broad and liberal interpretation is warranted with respect to whether a proceeding "arises from" an expression, *and* whether an expression "relates to a matter of public interest" for the purposes of the threshold burden. The Supreme Court in *Pointes* further cautioned that this burden is not an onerous one, as if the bar is set too high at the threshold burden, the motion judge would never reach the crux of the inquiry, which lies at s. 137.1(4)(b).

Finally, however, the Supreme Court in *Pointes* (para 30) distilled the threshold inquiry at s. 137.1(3) as follows:

Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about. The animating purpose of s. 137.1 should not be forgotten: s. 137.1 was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that is public participation in democracy. [...]

This distillation of the threshold inquiry, what the impugned expression was *really* about, was the guiding question for the Court of Appeal in concluding that the threshold burden had not been met in this case.

On the appeal, Tru-Path argued that the impugned expression related to a matter of public interest as "[t]he manner in which a regulated profession such as a law firm renders service to its clients, including the arrangements it makes with health care providers whose services are incorporated into its clients' claims, is undoubtedly a subject that some members of the public have an interest in knowing about." It was Tru-Path's position that the fact that the expression stemmed from a private dispute was irrelevant.

The Court of Appeal noted that the context in which the impugned expression was made was the result of a dispute, where Tru-Path was pressuring Sokoloff to pay monies they claim they are owed by their mutual clients.

The Court of Appeal determined that while the public had an interest in the ethical conduct of lawyers, in context, the expression in question in this case was "really about a private commercial dispute between [Tru-Path] and [Sokoloff]", which

did not relate to the public interest just because Sokoloff happened to be lawyers. As such, the Court of Appeal held the motion judge did not err in concluding that the impugned expression did not relate to a matter of public interest, and the appeal was dismissed.

Conclusion

The Court of Appeal's treatment of the s. 137.1(3) threshold burden in this case will come as a welcome application for plaintiffs, who may have been left concerned that the already low bar for the threshold burden had been further lowered by the Supreme Court of Canada's articulation of the standard in *Pointes* and *Platnick*. Moving parties on a s. 137.1 motion should take note of this decision: while the s. 137.1(3) threshold burden is to be interpreted broadly and liberally, this does not mean just any expression will suffice.

Of final note in this decision is the Court of Appeal's treatment of the "indicia of a SLAPP". Recall, these indicia, which had been developed and commonly applied by the Court of Appeal, were *substantially* limited in use by the Supreme Court in *Pointes*, which held these indicia are only relevant to the extent that they are tethered to the text of the statute.

While some may have expected reliance on these indicia to diminish post-*Pointes* and *Platnick*, it appears the Court of Appeal has now breathed new life into their use. Within their decision on leave to appeal costs, the Court notes (para 46):

The [Supreme] court did not hold the traditional SLAPP indicia are irrelevant – they may bear on the analysis under s. 137.1(4)(b), provided the analysis remains tethered to the statutory criteria – and, in any event, the court said nothing about their relevance to the question of costs.

With this short statement, it can be expected that the role of the SLAPP indicia will be fodder for intense legal debate in every s. 137.1 motion on the merits, and s. 137.1 costs submission for years to come.