

William C. McDowell
416-865-2949
wmcdowell@litigate.com

September 11, 2020

Supreme Court of Canada Provides First Guidance on the Test for an Anti-SLAPP Motion

The Supreme Court of Canada has released its highly anticipated pair of decisions, *1704604 Ontario Ltd v Pointes Protection Association* and *Bent v Platnick,* which consider the anti-SLAPP framework set out in s 137.1 of the Ontario *Courts of Justice Act ("CJA")* for the first time.

S 137.1 of the *CJA* sets out the framework for a pre-trial summary dismissal motion commonly known as an "anti-SLAPP" motion, which stands for "Strategic Litigation Against Public Participation" and is intended to function to screen out proceedings that unduly limit expression on matters of public interest at an early stage.

The pair of decisions released by the Supreme Court of Canada both turn on the interpretation of the anti-SLAPP framework created under ss 137.1(3) and 137.1(4) of the *CJA,* and the standard applied at each stage of the analysis.

In *1704604 Ontario Ltd v Pointes Protection Association ("Pointes")* the Court unanimously articulated a detailed framework for a s 137.1 motion, and clarified the standard to be met at each stage of the analysis. While this framework is largely consistent with that previously articulated by the Ontario Court of Appeal, these decisions do provide some anxiously anticipated insight into how the Supreme Court views each stage of the test on a s 137.1 motion.

Threshold Burden

Under ss 137.1(3) of the *CJA*, known as the "threshold burden", the moving party initially has the burden of proof.

> **Order to dismiss**
>
> 137.1 (3) On 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.

In *Pointes*, the Supreme Court affirmed that the use of the word “satisfies” in s 137.1(3) means that the moving party must satisfy its burden on a balance of probabilities. (*Pointes* at para 23)

The Supreme Court further clarified 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.

While the burden at this stage is not an onerous one, the Supreme Court did caution that an expression must not simply *make reference to* a matter of public interest, and instead a contextual inquiry must be undertaken to ask what the expression is really about.

Shifting of the Burden to the Responding Party

If the threshold burden is met, the burden then shifts to the plaintiff, the responding party, who must satisfy the judge that s 137.1(4)(a) and s 137.1(4)(b) of the *CJA* are met in their entirety for their proceeding to be allowed to continue:

> **No dismissal**
>
> 137.1 (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
>
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

The Merits-Based Hurdle

The Supreme Court held that s 137.1(4)(a) as a whole is “fundamentally concerned with the strength of the underlying proceeding”. (*Pointes* at para 60)

The Supreme Court affirmed that the standard the responding party must meet under s 137.1(4)(a) is “grounds to believe”, not a balance of probabilities like under s 137.1(3), stating:

> […] “grounds to believe” requires that there be a basis in the record and the law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence. (*Pointes* at para 39)

The “grounds to believe” standard requires more than mere suspicion, but less than a balance of probabilities.

Notably, the Supreme Court parted ways with the Ontario Court of Appeal in concluding that the s 137.4(a) assessment is a subjective determination that depends on the motion judge’s determination – not a theoretical assessment of what a “reasonable trier” could conclude at a future trial. This means that the motion judge must conclude from their own subjective assessment of the record that there is a basis in fact and in law — taking into account the context of the proceeding — to support a finding that the responding party has satisfied s 137.1(4)(a).

Substantial Merit

The Supreme Court articulated the standard the responding party must meet to discharge its burden under s 137.1(4)(a)(i) as follows:

> To discharge its burden under s. 137.1(4)(a)(i), the plaintiff must satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success. (*Pointes* at para 54)

In attempting to situate this standard within existing frameworks, the Supreme Court held that the substantial merit standard is *more demanding* than the standard on a motion to strike which requires some chance of success under the “plain and obvious” test, or requiring that the claim have a reasonable prospect of success, but *less demanding* than a standard of a demonstrated “likelihood of success”, the standard of a strong *prima facie* case, or the test for summary judgment.

No Valid Defence

The Supreme Court notably held that while the responding party has the burden under s 137.1(4)(a)(ii), the subsection operates as a “*de facto* burden-shifting provision in itself” requiring that the moving party must first put in play the defences it intends to present before the onus returns to the responding party to show that there are grounds to believe that those defences are not

valid. (*Pointes* at para 56)

When applied, this means that the responding party is simply required to show that there is a basis in the record and the law — taking into account the stage of the proceeding — to support a finding that the defences the moving party has put in play do not tend to weigh *more* in their favour. (*Bent v Platnick*, 2020 SCC 23 at para 103).

The Court further clarified that the "no valid defence" prong under s 137.1(4)(a)(ii) mirrors the "substantial merit" prong, requiring the responding party to show that there are grounds to believe that the defences have no real prospect of success.

Public Interest Hurdle

S 137.1(4)(b), a weighing exercise which engages with the public interest concerns that the anti-SLAPP legislation seeks to address, was strongly affirmed by the Supreme Court as the "crux" or "core" of the s 137.1 analysis.

At this stage of the analysis, the Supreme Court held that the burden is on the responding party to show on a balance of probabilities that:

- it likely has suffered or will suffer harm (either monetary or non-monetary);
- that such harm is a *result* of the expression established under s 137.1(3); and
- that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation.

The Supreme Court was clear that harm at this point of the analysis relates only to the "*existence* of harm, not its quantification". This clarification by the Court helpfully solidifies that the plaintiff is not required to submit a fully developed damages brief to meet their burden at this stage of the analysis, stating:

> […] the plaintiff need not prove harm or causation, but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link. (*Pointes* at para 74)

With respect to public interest weighing, the Supreme Court clarified that the public interest at issue must be relevant to permitting the proceeding to continue and protecting the impugned expression, emphasizing "[…] not just any matter of public interest will be relevant. Instead, the quality of the expression, and the motivation behind it, are relevant here." (

Pointes at para 74)

Notably, while not entirely rejecting the “indicia of a SLAPP”, which have been commonly recognized and applied by lower courts, the Supreme Court seriously limited their use in the analysis, holding they are *only* relevant to the extent that they are tethered to the text of the statute:

> [T]he s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP. Therefore, for this reason, the only factors that might be relevant in guiding that weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression. (*Pointes* at para 79)

Implications

Ultimately, while these decisions were anxiously anticipated by the litigation bar, they have largely affirmed existing interpretations and have not moved the goalposts in any significant way. Clarity remains elusive, and the application of s 137.1 of the *CJA* will likely continue to be subject to hot debate for years to come.