ONTARIO COURT OF APPEAL PROVIDES GUIDANCE ON BRINGING ANTI-SLAPP MOTIONS

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Introduction

In *Sokoloff v. Tru-Path Occupational Therapy Services Inc*.[1], the Ontario Court of Appeal (the "**OCA**") applied recent jurisprudence from the Supreme Court of Canada[2] (the "**SCC**") interpreting the anti-Strategic Lawsuits Against Public Participation ("**anti-SLAPP**") provision contained in s. 137.1 of Ontario's Courts of Justice Act. The decision provides welcome guidance as to how courts should approach anti-SLAPP motions brought by defendants, and in particular, what courts should (and should not) consider when assessing whether an expression relates to a matter of public interest.

Background on the Anti-SLAPP Provision

Ontario amended the *Courts of Justice Act*[3] (the "**CJA**") in 2015 to include an anti-SLAPP provision. The purposes of the provision are stated expressly in s. 137.1(1) of the CJA and include: encouraging expression on matters of public interest; promoting participation in debates on such matters; discouraging litigation that limits expression on matters of public interest; and reducing the risk that public participation on matters of public interest will be hampered by fear of litigation.

Basically, under s. 137.1(3) of the CJA, a judge shall (subject to s. 137.1(4)) dismiss a proceeding against a defendant if satisfied that the impugned expression "relates to a matter of public interest". If a defendant satisfies this threshold test, the onus then shifts to the plaintiff to show under s. 137.1(4) 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) that the harm flowing 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.[4] At this second stage of the test, courts assess the value of the expression and motivations underpinning the suit in question. In weighing harms, courts will take into account, *inter alia*, the importance of the expression, chilling effects on other expression, disproportionate resources between the parties and whether the lawsuit is motived by a "punitive or retributory purpose".[5]

The Facts in *Sokoloff*

The plaintiff, Sokoloff Lawyers ("**Sokoloff**"), is a personal injury law firm that had a relationship with the defendant occupational therapy company, Tru-Path Occupational Therapy Services Ltd. ("**Tru-Path**") for several years. Sokoloff referred clients needing occupational therapy to Tru-Path, who provided those services as approved by the clients' insurance companies. Sokoloff would hold the insurance funds in trust until the clients authorized payment to Tru-Path. The relationship between the parties broke down when Sokoloff started questioning some of Tru-Path's fees and charges, which ultimately led Tru-Path to terminate the relationship and to commence (ongoing) proceedings against Sokoloff seeking payment of monies it claimed to be owed.

It was in this context that the president of Tru-Path ("**Campbell**"), as part of his effort to get Sokoloff to pay monies he claimed were owing to Tru-Path, started picketing outside Sokoloff's office. He stood on two occasions outside Sokoloff's office holding signs stating, among other things, "Sokoloff lawyers used our company's rehab services to help many of their clients AB claims but won't pay" and "Over $1.3 million of our rehab company's payment is being seized by Sokoloff lawyers".

Sokoloff sued Tru-Path and Campbell for defamation, who responded by moving under s. 137.1 of the CJA to dismiss the action on the basis that it was an attempt to prevent them from commenting on a matter of public interest. The motion judge dismissed their motion, holding that the defendants' expression did not relate to a matter of public interest (but instead related to a private contractual dispute between the parties). In doing so, the motion judge considered the manner with which the defendants expressed themselves as well as their motives for doing so. Among other things, the motion judge noted that Campbell acknowledged on cross-examination that he was not making the expressions because he was concerned about the ethical conduct of lawyers holding funds in trust (about which Campbell colourfully testified, "I really don't give, you know, any nasal snots about that").[6] The motion judge also ordered the defendants to pay Sokoloff's costs of responding to the motion.

The defendants appealed to the OCA. They argued that the motion judge erred by: 1) considering irrelevant factors when finding that their expression did not relate to a matter of public interest; and 2) awarding the law firm its costs of the motion despite the default position in s. 137.1(8) that a successful respondent to such a motion is not entitled to costs.

The Ontario Court of Appeal's Decision

The OCA found that while the motion judge erred by taking into account irrelevant considerations in determining whether the impugned expression related to a matter of public interest, his conclusion that it did not should be upheld and, accordingly, dismissed the appeal (thereby permitting Sokoloff's defamation action to proceed).

The OCA began by noting that in Pointes the SCC recently affirmed that, when considering if an expression relates to a matter of public interest, the expression is to be assessed as a whole and the question is whether "some segment of the community would have a genuine interest in receiving information on the subject".[7] In *Pointes*, the SCC held that it is not "legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest".[8] Acknowledging that the analysis under s. 137.1(3) should be both "broad and liberal" and "generous and expansive", the OCA observed that not everything relates to a matter of public interest.[9] The OCA confirmed that whether an expression relates to a matter of public interest must be informed by the purpose of s. 137.1: which is to safeguard the fundamental value that is public participation in democracy.[10] The OCA noted that the enquiry is contextual in nature and that the question at the heart of s. 137.1(3) is: "Understood in its context, what is the expression really about"?[11]

The OCA then ruled that the motion judge erred by considering several factors that are irrelevant to the threshold question of whether the impugned expressions relate to a matter of public interest. The OCA held that the motion judge improperly considered (and criticized) the manner by which Campbell expressed himself as well as the merits of the expression (the motion judge described Campbell's street protest as lacking in decorum and "an unseemly attempt to embarrass" Sokoloff that "serve[d] no public interest").[12] The OCA further held that the motion judge improperly considered Campbell's subjective *motives* for making the expressions, finding that Campbell was indifferent to the public interest when doing so.[13] The OCA repeated the point made in *Pointes*: "Motive, merit and manner are irrelevant in determining whether expression relates to a matter of public interest".[14]

The OCA concluded, however, that although the motion judge erred in considering irrelevant matters, he reached the correct result. The OCA found that Mr. Campbell's expressions occurred in the context of him attempting to pressure Sokoloff to pay monies he claimed it owed to Tru-Path. Understood in that context, the OCA held that the impugned expressions are really about a private commercial dispute between the parties. Campbell's expressions neither raised any general concerns about the ethical conduct of lawyers nor were they directed at members of the public interested in such matters. While the public has an interest in the ethical conduct of lawyers, it does not follow that every lawyer's transactions are a matter of public interest.[15] Citing to *Pointes* again, the OCA concluded that "only expression *relating* a matter of public interest" attracts protection under s. 137.1, and "expression that simply makes reference to something of public interest" does not.[16]

Accordingly, the OCA held that the defendants failed to satisfy the threshold test of establishing that the impugned expressions relate to a matter of public interest under s. 137.1(3) of the CJA, thereby permitting Sokoloff's defamation action to continue.[17]

Key Take-Aways

Sokoloff is the first appellate decision to explore s. 137.1 of the CJA since the SCC rendered its decisions in the *Pointes* and *Platnick* cases in September, 2020. The key take-aways from Sokoloff are:

- When considering whether an impugned expression "relates to the public interest" under s. 137.1(3) of the CJA:
  - the expression is to be assessed as a whole and in context, having in mind the purpose of s. 137.1, and the question is whether some segment of the community would have a genuine interest in receiving information on the subject;
  - the analysis should be both broad and liberal and generous and expansive, but not everything relates to a matter of public interest. Simply because professionals are the subject of the expression does not automatically make the expression in the public interest;
  - only expressions that relate to a matter of public interest, and not those that simply make reference to something of public interest, attract protection;
    the question at the heart of is: Understood in its context, what is the expression really about? and
  - it is irrelevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest. Motive (being the subjective reason as to why an expression was made), merit and the manner of the speech are also irrelevant. Such qualitative assessments should only occur under the s. 137.1(4) stage of analysis, if the expression is properly characterized as satisfying s. 137.1(3).
- Section 137.1(8) (which provides that if a judge does not dismiss a proceeding under this section, the plaintiff is not entitled to costs on the motion unless the judge determines costs are appropriate in the circumstances) has strong policy reasons behind it: to ensure that such motions are accessible and that litigation is not used by powerful parties to silence criticism. That said, where the expression is allegedly defamatory and relates to a private commercial dispute between sophisticated parties, those policy reasons do not apply and cost immunity is not warranted.

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[1] 2020 ONCA 730 ("**Sokoloff**").
[2] *1704604 Ontario Ltd v Pointes Protection Association* ("**Pointes**"); 2020 SCC 22; *Bent v Platnick*, 2020 SCC 23 ("**Platnick**").
[3] RSO 1990, c C43.
[4] *Ibid* at s 137.1(4)(a) and (b).
[5] *Pointes*, *supra* note 2 at para 78.
[6] *Sokoloff*, *supra* note 1 at paras 7 – 9 and 14.
[7] *Ibid* at para 17.

[8] *Pointes*, *supra* note 2 at para 28.
[9] *Ibid* at paras 18 – 19.
[10] *Ibid* at para 19.
[11] *Ibid* at para 20.
[12] *Ibid* at paras 21 – 22.
[13] *Ibid* at paras 23 – 24.
[14] *Ibid* at para 25.
[15] *Ibid* at paras 30 – 31.
[16] *Ibid* at para 32.
[17] *Ibid* at paras 35 – 36. The OCA went on to deny Tru-Path's request for leave to appeal the motion judge's cost award of $75,000 on the basis that there were no grounds to override the motion judge's exercise of his discretion to do so.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.