# Focus

CIVIL LITIGATION

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# New law allows defamation claim

First test of strategic litigation against public participation provision sides with politician

**Mark Shapiro**

In one of the first decisions to deal with the anti-SLAPP (strategic litigation against public participation) provisions in s. 137.1 of the *Courts of Justice Act* (CJA), a deputy judge has refused to dismiss the defamation claim of a politician in respect of statements posted online by an individual affiliated with a political advocacy group.

The anti-SLAPP provisions were enacted in late 2015 to address the concern that claims were being instituted by deep-pocketed plaintiffs intending to suppress public expression and participation, often in connection with real estate development projects.

Section 137.1(1) of the CJA specifically sets out its purpose as follows:

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(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.

In *Hughes v. Truyens* (Barrie small claims court File No. SC-15-1183-00), the mayor of Oro-Medonte, Harry Hughes, commenced a claim for defamation against an individual who had made statements about the mayor in online posts. The statements were made in the context of a temporary use bylaw in respect of which the mayor declared a conflict of interest and declined to participate in debate or vote on the issue. The impugned statements included the following: "what a weasel"; "doesn't have a conscience"; "phony conflict of interest"; "sold us out"; and "gravely violated our trust."

In response to the mayor's claim, the defendant moved to dismiss pursuant to subsection 137.1(3) of the CJA which provides that "a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arise from an expression made by the person that relates to a matter of public interest." Accordingly, if the expression is found to relate to "a matter of public interest," the proceeding must be dismissed unless, pursuant to subsection 137.1(4):

(a) there are grounds to believe that:

(i) the proceeding has substantial merit; and

(ii) the defendant has no valid defence to the proceeding; and

(b) the harm likely to be suffered by the plaintiff as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

In dismissing the motion, deputy judge Brian Kinnear found that the defendant's posts "went beyond what could be characterized as the comments of a citizen, intended to express his or her views on a matter of public interest." In referencing s. 137.1, the court raised its concern "about a very powerful and significant tool being offered to a defendant to have a claim with arguable merits thrown out before trial on the basis that it amounts to an underhanded attempt to intimidate citizens from participating in public issues." The court referred to and quoted from the decision in *1704604 Ontario Ltd. v. Pointes Protection Assn.* 2016 ONSC 2884, which was at the time the only reported case to have dealt with a motion under section 137.1 and wherein the motion's judge stated "[i]n my view, the threshold for the responding party to meet the tests in section 137.1(4)(a)(i) and (ii) of the *Courts of Justice Act* must be a low one, given the significant remedies in section 137.1 and the protection of litigants to bring legitimate claims before the court."

Applying subsection 137.1(4) and a low threshold, the court in *Hughe*s found that the plaintiff was able to satisfy all parts of the test set out in subsection 137.1(4). In particular, in weighing the potential harm suffered by the mayor against the public interest in protecting expression, the court found that "the harm likely to be suffered by the plaintiff/responding party, as a result of the expression of the defendant, is 'sufficiently serious' to outweigh the public interest in protecting the defendant's expression."

It appears that the unintended consequence of the introduction of the anti-SLAPP provisions is the use of these provisions as a shield against bona fide defamation claims commenced by public officials. Like in *Hughes,* defendants in a number of cases that are winding their way through the courts of Ontario have sought to do just that. *Hughes* represents the first known decision to specifically address the issue in this context, and would appear to be a clear indication that the anti-SLAPP provisions, and their purpose to foster public participation and expressions in matters of public interest, will not be permitted by the courts to go so far as to protect a defendant in respect of the otherwise indefensible defamation of a public official.

***Mark Shapiro is a commercial litigator with Dickinson Wright LLP in Toronto and was retained by Mayor Harry Hughes to respond to the anti-SLAPP motion. He can be reached at: MShapiro@dickinson-wright.com.***