CITATION: B.W. (Brad) Blair v. Premier Doug Ford, 2020 ONSC 7100
COURT FILE NO.: CV-19-616339
DATE: 20201215

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

B.W. (BRAD) BLAIR

Plaintiff

and

PREMIER DOUG FORD

Defendant

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Gavin J. Tighe and Rojin Jazayeri* for the Moving Party/Defendant

Julian Falconer, Asha James and Akosua Matthews for the Responding Party/Plaintiff

HEARD: December 4, 2020

Defendant's 'Anti-SLAPP' Motion

[1] This motion relates to a defamation action that was filed in March 2019 by the plaintiff, Brad Blair, former interim Commissioner of the Ontario Provincial Police, against the defendant, the Hon. Doug Ford, current Premier of Ontario.

[2] Mr. Blair alleges that his good name and reputation were damaged by public statements made by the Premier that Mr. Blair had breached the *Police Services Act.*

[3] Premier Ford says the plaintiff's defamation action is "strategic litigation against

public participation" and brings this motion to dismiss the action under s. 137.1 of the *Courts of Justice Act*[1] ("CJA"), often referred to as the "anti-SLAPP" law.

[4] As I explain below, the plaintiff's defamation action is not, strictly speaking, a SLAPP suit. The plaintiff is not a large and powerful entity that is using litigation to intimidate a smaller and more vulnerable opponent and silence their public expression. Nonetheless, because the impugned public statements relate to a matter of public interest, the analysis in s. 137.1 of the CJA is engaged.

[5] For the reasons set out below, the s. 137.1 analysis favours the defendant and, as a result, the plaintiff's defamation action must be dismissed.

[6] I hasten to add that this decision does not extinguish the plaintiff's core allegation that his reputation was damaged because of the impugned public statements. The decision to dismiss the defamation action is based solely on this court's application of the statutory analysis set out in s. 137.1 of the CJA.

Background

[7] The dispute between the parties was widely reported in the media in the fall and winter of 2018 and early 2019. Only a portion of the background narrative is needed for this s. 137.1 motion. The facts that are relevant are these.

[8] The plaintiff was hoping to become the next Commissioner of the OPP and reasonably believed that this could happen. As it turned out, this didn't happen. Another candidate was appointed who allegedly had close ties to the defendant.

[9] On December 11, 2018 the plaintiff, in both his official capacity as interim OPP Commissioner and in his personal capacity, sent a letter ("the Letter") on official police letterhead to the provincial Ombudsman asking for an immediate and independent review of what had just transpired. The Letter's "Re" line said this: "Request for review of potential political interference in the OPP Commissioner hiring process."

[10] The plaintiff made clear that he was writing not for himself (he had accepted that he would not be the Commissioner of the OPP) but to ensure continuing public confidence in the OPP as an independent policing agency. In the nine-page Letter, the plaintiff detailed what he believed were numerous deficiencies and improprieties in the application and appointment process that had just concluded, discussed the police security detail assigned to the defendant, alleged a serious financial irregularity in the

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[1] *Courts of Justice Act*, R.S.O. 1990, c. C.43.

defendant's request for a retrofitted "camper-type" van and generally expressed concern about "political interference" and "inappropriate political influence".

[11] Later the same day, the plaintiff and his counsel released the Letter to the media. Not surprisingly, the contents of the Letter were widely reported.

[12] The next day, December 12, 2018, lawyers at the Ministry of the Attorney General prepared a Briefing Note relating to this Letter. The MAG Briefing Note concluded that "certain aspects" of the plaintiff's "complaint letter" to the Ombudsman "could arguably be construed in a way that could constitute a breach of one or more of the provisions [of the *Police Services Act Code of Conduct*."[2]] The Briefing Note listed four potential breaches of the PSA's Code of Conduct: (i) corrupt practices; (ii) breaches of confidence; (iii) deceit: and (iv) discreditable conduct. The defendant says he was "made aware of the contents of the Briefing Note" sometime before December 18, 2018.

[13] We now come to the impugned public statements.

[14] On three occasions when questioned or interviewed by the media - once on December 18, 2018 and twice more on January 14, 2019 – the defendant stated that the plaintiff had breached "the Police Act." By this he meant, the *Police Services Act Code of Conduct* as discussed in the MAG Briefing Note. Here is what was said:

(i) December 18, 2018:

> **Premier Ford:** You know my friends this is gonna move forward. I could sit here and give you all the items that weren't accurate in that Letter and there's endless ones. I could give you a list of all the…the Police Act that was broken throughout that whole Letter, but none of you want to report on that.
>
> So, what I'm gonna do, I'm taking the high road. I'm gonna take the high road and let the review go through.

(ii) January 14, 2019:

> **Reporter:** …[the] Ron Taverner story in the Globe today – what are the optics like of those photographs of you and Mr. Taverner just before his appointment?

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[2] O. Reg. 268/10, enacted under the *Police Services Act*, R.S.O. 1990, c. P-15.

> **Premier Ford:** Well, I am not surprised that Global has asked me at an automotive show like this. But anyways run through the proper process and Ron Taverner was the person they choose, and I was thoroughly disappointment (sic) with uh Brad Blair uh you know the way he has been going on. Breaking the Police Act numerous times is disturbing to say the least.

(iii) January 14, 2019:

> **Reporter**: ... You probably heard the motion got dismissed today to get that ombudsman process expedited. What's your reaction today to today's decision in court?
>
> **Premier Ford**: It's unfortunate that one person has sour grapes, and it is very disappointing actually, and reacting the way he's been reacting and breaking the Police Act numerous times. Someone needs to hold him accountable I can assure you of that.

[15] In the days that followed, nothing more was said on this topic. On March 15, 2019 the plaintiff commenced the defamation action seeking $5 million in damages. The defamation action was confined to the defendant's public statements that the plaintiff had breached the PSA.

[16] There are two more facts that are relevant to the issues in this motion. One, the plaintiff's employment with the OPP was terminated on March 4, 2019 because he allegedly included confidential information in his judicial review proceeding against the Ombudsman. And two, the plaintiff is ready to proceed with a fully drafted $15 million wrongful dismissal action that includes, amongst other things, the same defendant and the same impugned public statements and related damage claims. Because the wrongful dismissal action is, or will shortly be, proceeding in this court,[3] I will confine my analysis and commentary to the four corners of the "anti-SLAPP" motion that is before me.

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[3] Mr. Falconer for the plaintiff advises that the plaintiff "absolutely" intends to pursue the $15 million wrongful dismissal action. However, argues Mr. Falconer, this action is not relevant to the s. 137.1 analysis because it has been side-lined pending the outcome of the plaintiff's constitutional challenge to the "leave of the court" requirement in the new *Crown Liability and Proceedings Act,* 2019, S.O. 2019, c. 7, Sched. 17. Not so says Mr. Tighe for the defendant. The evidence shows that the Crown has already advised the plaintiff by letter that leave of the court is not required for the wrongful dismissal action and if it is, the Crown consents to leave being granted and also waives this requirement (as it can under the CLPA). In other words, the wrongful dismissal action has not been derailed and is *de facto* alive and ready to proceed. I will return to this point later in the analysis.

The so-called "anti-SLAPP" law

[17] Courts have struggled for years to find the right balance between free expression and the protection of private reputation, especially in areas of public controversy.[4] As the Supreme Court of Canada noted in 2008 in *WIC Radio*:

> The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. … When controversies erupt, statements of claim often follow as night follows day, not only in serious claims … but in actions launched simply for the purpose of intimidation. Of course, "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements. [5]

[18] In 2015, the provincial legislature stepped in to provide some guidance. The so-called "anti-SLAPP" law is now set out in s. 137.1 of the CJA.[6] This statutory provision is primarily designed to deal with genuine SLAPP suits – that is "lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest."[7] As the Supreme Court recently explained in *Pointes Protection:*

> SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs[8]

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[4] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, at paras. 14-15.

[5] *Ibid.*, at para. 15.

[6] *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23, adding ss. 137.1 to 137.5 to the CJA.

[7] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at para. 2.

[8] *Ibid*.

[19] But the reach of s. 137.1 of the CJA is not confined to SLAPP suits. Indeed, neither this particular acronym nor its longer form version is even mentioned in this legislation. The Supreme Court noted in *Pointes Protection* that the Advisory Panel's Report to the Attorney General "explicitly discouraged the use of the term 'SLAPP' in the final legislation in order to avoid narrowly confining the s. 137.1 procedure … and the legislature obliged."[9] The broader concern of the anti-SLAPP provisions is to provide a statutory mechanism "to screen out *lawsuits that unduly limit expression on matters of public interest* through the identification and pre-trial dismissal of such actions."[10]

[20] So it is that Mr. Blair's defamation action falls within the reach of s. 137.1 of the CJA. Mr. Blair is not a powerful entity that is suing the Premier to gag his public expression but a genuinely aggrieved individual trying to vindicate what he reasonably believes is a *bona fide* defamation claim. Nonetheless, because the impugned public statements made by the defendant relate to a matter of public interest, the s. 137.1 analysis is engaged.

[21] For ease of reference, I have set out s. 137.1 in its entirety in the Appendix. For the purposes of this motion, it is sufficient to summarize the gist of this statutory provision as follows (using P for plaintiff and D for defendant):

> The court shall dismiss P's action if D can satisfy the court that D's impugned expression relates to a matter of public interest;
>
> **UNLESS**
>
> P can satisfy the court of three things, namely that:
>
> - There are grounds to believe that P's action has substantial merit;
> - There are grounds to believe that D has no valid defence; *and*
> - That the harm suffered by P as a result of D's expression is sufficiently serious that the public interest in permitting P's action to continue outweighs the public interest in protecting D's expression.

[22] The initial burden is on D to satisfy the court that the impugned expression relates to a matter of public interest. If D can't do this, then the analysis ends, D's s. 137.1

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[9] *Ibid.*, at para. 24.

[10] *Ibid.*, at para. 16 (Emphasis added).

motion is dismissed and P's action continues. If D can satisfy the court that the impugned expression relates to a matter of public interest, then the burden shifts to P to satisfy the court of each of the three specified requirements. Any failure on any of the three specified requirements and P's action must be dismissed.[11]

[23] When conducting the s. 137.1 analysis, "the motion judge should engage in only a limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage."[12] The s. 137.1 analysis is not an adjudication of the underlying proceeding.[13]

The two issues

[24] Here, there is no dispute about the first requirement: the plaintiff agrees that the impugned public statements relate to a matter of public interest. As for the "substantial merit" point, I initially assumed that the plaintiff would prevail on this point. Based on my preliminary review of the motion record, I advised counsel before the hearing to focus on the "no valid defence" requirement in s.137.1(4)(a)(ii) and the weighing of the public interests in s.137.1(4)(b). During the hearing, however, as the evidence was more carefully examined, it became apparent that the "substantial merit" hurdle also posed significant difficulties for the plaintiff.

[25] Nonetheless, in keeping with the directed focus of the hearing, I will confine my analysis to the "no valid defence" requirement and the weighing of the public interests. The plaintiff fails on both requirements. And, as already noted, a failure on either requirement is sufficient to dismiss the action.

[26] I will deal with each in turn.

Analysis

(1) The plaintiff cannot show that the defendant has "no valid defence"

[27] Recall that in this step of the analysis the plaintiff must satisfy the court that there are grounds to believe that the defendant has no valid defence to the action. In *Pointes Protection*, the Supreme Court paraphrased this requirement as follows: the plaintiff has

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[11] *Ibid.*, at para. 33.

[12] *Ibid.*, at para. 52.

[13] *Ibid.*, at para. 52.

the burden to show that there are grounds to believe "that the defences have no real prospect of success."[14]

[28] The Supreme Court explained that a "real prospect of success" is less than a "likelihood of success" but more than merely "some chance of success" or even "a reasonable prospect of success."[15] In my view, the addition of the word "real" suggests a *solid* prospect of success – more than just a chance or even a reasonable chance, but less than probability. Again, if the court concludes that even one of the defences has a real prospect of success, that is enough to dismiss the plaintiff's action.

[29] Counsel for the defendant has advised the court that for the purposes of the s. 137.1 motion, only two defences are being advanced – fair comment and qualified privilege (and not justification).

[30] As I explain below, the plaintiff has not shown that the defence of fair comment has no real prospect of success. This alone is enough to dismiss his defamation action.

[31] There are five elements to the defence of fair comment: (i) the comment must be on a matter of public interest; (ii) the comment must be based on fact; (iii) the comment, although it can include inferences of fact, must be recognizable as comment; (iv) the comment must be one that any person could honestly make on the proved facts; and (v) the comment was not actuated by express malice.[16]

[32] I will consider each of these elements in turn.

[33] The first two elements, *a matter of public interest* and *based on fact* are not really in issue. There is no dispute that the impugned public statements made by the Premier of the province about the then interim Commissioner of the OPP are a matter of public interest.

[34] There is also little to no basis for the plaintiff's submission that these statements lacked a factual backdrop. To qualify as comment, the background facts must be well known and already understood by the audience.[17] The listeners' knowledge or

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[14] *Ibid.*, at para. 60.

[15] *Ibid.*, at para. 50.

[16] *WIC Radio Ltd., supra*, note 4, at para. 28.

[17] *Ibid.*, at paras. 31 and 34.

understanding of the factual backdrop allows them to make up their own minds on the merits of the defendant's comment.[18]

[35] When the defendant made the impugned statements about the plaintiff breaching the PSA, the plaintiff's Letter had been widely published. The contents of the Letter and its release to the media were "facts" that were well-known when the defendant made the impugned statements. In other words, the 'background facts' requirement is easily satisfied.

[36] The remaining three elements of the fair comment defence require a bit more analysis.

[37] *Recognizable as comment.* The case law provides the following guidance. Words that may appear to be statements of fact may, in pith and substance, be properly construed as comment.[19] What is comment and what is fact must be determined from the perspective of a "reasonable viewer or reader."[20] The notion of "comment" includes "deduction, inference, conclusion, criticism or judgment"[21] and is "generously interpreted."[22]

[38] The plaintiff says that the words "breached the PSA" could only mean that the plaintiff had already been found guilty of breaching this law – and because this hadn't happened, the impugned statements were untrue and injurious factual statement.

[39] I do not agree with the plaintiff's characterization of what was said.

[40] In my view, no reasonable journalist or member of the public would have taken the defendant's statements that the plaintiff "broke the Police Act" as meaning that in actual fact the plaintiff had already been tried and convicted of breaking this particular law. This simply could not have happened in the few days between the release of the Letter and the defendant's public statements. And, it would have been reported. In any event, the defendant himself added in one of the two January 14 statements that "someone needs to hold him accountable" which means that the plaintiff had not yet been

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[18] *Ibid.,* at para. 31.

[19] *Ibid.,* at para. 26.

[20] *Ibid.,* at para. 27.

[21] *Ibid.,* at para. 26.

[22] *Ibid.,* at para. 26.

held accountable – that is, had not yet been charged and convicted for the (alleged) breaches of the PSA.

[41] I cannot, in short, find on the evidence before me that the defendant has no real prospect of showing at trial that the impugned statements were reasonably recognizable as comment.

[42] *Could honestly be made by any person.* As the Supreme Court noted in *WIC Radio,* "The common law judges long ago decided that the *gravamen* of the defence of fair comment [was] whether the comment reflected honest belief."[23] Honest belief requires "the existence of a nexus or relationship between the comment and the underlying facts."[24] There must be a linkage or connection.

[43] The defendant's uncontroverted evidence is that he reasonably relied on the MAG Briefing Note when he made the impugned public statements – that it was his honest opinion based on this Briefing Note that the plaintiff had breached the PSA. This is, to be sure, compelling evidence of the required linkage or connection.

[44] However, the case law goes on to explain that the best measure of the honest belief component is to ask if someone else could have honestly made the same comment on the same known facts as the commentator.[25] Here, as it turns out, there is such evidence. A retired police officer filed a complaint with the Ontario Independent Police Review Director in the same time period accusing the plaintiff of breaching the PSA and asking for an investigation.[26] The complainant, among other things, referred to the same *Code of Conduct* provisions as the MAG Briefing Note, namely "corrupt practices", "breaches of confidence", "deceit" and "discreditable conduct".

[45] I therefore cannot find on the evidence before me that the defendant has no real prospect of showing at trial that the impugned statements could honestly have been made, and indeed were made, by other people as well.

[46] The last element is *absence of malice.* The defence of fair comment can be defeated by evidence of malice.[27] On the facts herein, malice can be established in two

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[23] *Ibid.,* at para. 37.

[24] *Ibid.,* at para. 40.

[25] *WIC Radio, supra,* note 4, at paras. 40, 41 and 49-51.

[26] The complaint was dated December 22, 2018. The name of the retired police officer is redacted from the exhibit.

[27] *WIC Radio, supra* note 4, at para. 63.

ways: (i) by showing that the defendant's dominant purpose in making the impugned statements was to injure the plaintiff; or (ii) by showing that the defendant made the impugned statements knowing they were not true or did so with reckless indifference to their truth.[28]

[47] There is no credible evidence to support either of these two prongs of possible malice. There is no evidence that the defendant's dominant purpose in making the impugned statements was to harm the plaintiff. To the contrary, the defendant's uncontroverted evidence is that he has never met or interacted with the plaintiff and harbored no personal ill-will; and that his statements about the plaintiff "breaching the PSA" were genuinely based on the legal opinions set out in the MAG Briefing Note.

[48] The videos of the three media events show that the defendant spoke calmly and without apparent emotion. There is no evidence of any retaliation or reprisal relating to the plaintiff's Letter and its release to the media. Despite the defendant's opinion of the plaintiff's conduct, the plaintiff continued on as Deputy Commissioner for many more weeks until March 2019 when he was terminated for other reasons.

[49] It is also important to note that the plaintiff himself undermines his 'dominant purpose' submission. He points out, no less than five times in his factum, that the defendant's primary motive in making the impugned statements was to "deflect" criticism away from the "rigged" OPP Commissioner hiring process that was very much in the news.

[50] I agree with counsel for the defendant that if indeed the main reason for the impugned statements was to deflect criticism away from the Premier's office and the OPP hiring scandal (rather than injure the plaintiff), then any harm sustained by the plaintiff was at best collateral to this other, more dominant purpose.

[51] Suffice it to say, for the reasons just stated, the "dominant purpose" prong of the malice test does not succeed on the record before me.

[52] The plaintiff next argues that the defendant's statements, based as they were on the Briefing Note, were recklessly indifferent to what was actually said in this Note and were thus made with malice. The plaintiff argues that the Briefing Note was couched in

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[28] *Ibid.* Also see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para 145–147 and *Canadian Standards Association v. P.S. Knight Co. Ltd*., 2019 ONSC 1730, at para 104.

tentative and equivocal language – that the plaintiff "may" or "could arguably" have breached one or more of the *Code of Conduct* provisions. The Briefing Note also cautioned that more evidence would be needed to rebut the plaintiff's likely defence that he had acted in good faith.

[53] Given this highly tentative and non-conclusionary language, says the plaintiff, the defendant's conclusionary interpretation of said Briefing Note was recklessly indifferent to what was stated in its contents. I do not agree. Most legal opinions are couched in the language of probability and routinely use words such as "may" and "could arguably". The defendant's interpretation of the Briefing Note – and the legally permitted "deduction, inference, conclusion … or judgment"[29] as based on this Note – was neither unreasonable nor recklessly indifferent to what the MAG lawyers were saying.

[54] Consider the following. The MAG Briefing Note stated that the plaintiff's Letter was arguably in breach of four PSA *Code of Conduct* provisions: corrupt practices, breaches of confidence, deceit and discreditable conduct. However, the Briefing Note said this about the "breaches of confidence" provision.

> The Interim Commissioner *clearly disclosed confidential information related to the OPP*, including most notably: (i) details about the process by which Commissioner Taverner was selected; and (ii) details about matters related to OPP security arrangements for the Premier. *These disclosures could be construed as a breach of section 2(1)(e)* if they were not made with proper authority. (Emphasis added).

[55] The Briefing Note went on to state that, in the context of the "breaches of confidence" prohibition, evidence that the breaching party was acting in good faith or for some other motive "would not seem to be relevant".

[56] In sum, the Briefing Note advised the reader that the plaintiff had "clearly disclosed confidential information", that these disclosures "could be construed" as breaches of the *PSA Code of Conduct* and that no further evidence (about acting in good faith) was needed. This was not tentative or equivocal language and the defendant's interpretation of this language was neither reckless nor in any other way malicious.

[57] I conclude the "no valid defence" analysis by noting again that this analysis does not require a finding on the merits of the fair comment defence. Only a finding on whether the plaintiff has satisfied the requirement of showing that the fair comment defence has no real prospect of success.

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[29] *Supra*, note 21.

[58] The plaintiff has not done so.

[59] On the contrary - given the contents of the Letter, the MAG Briefing Note, the defendant's reasonable reliance on this Briefing Note in forming his own opinion and making the impugned statements, the evidence that another police officer filed a complaint expressing the same opinion, and the absence of any evidence of malicious purpose or reckless interpretation – I find that the fair comment defence has a real prospect of success.

[60] This alone is enough to dismiss the defamation action.

[61] However, if I am wrong about the fair comment defence, then the s. 137.1 analysis moves to the last step - weighing the two public interests. But here again, as I explain below, the defendant prevails.

(2) The weighing of the two public interests favours the defendant

[62] The final step under s. 137.1(4)(b) requires the plaintiff to satisfy the court that the harm suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that the public interest in permitting the plaintiff's action to continue outweighs the public interest in protecting that expression.

[63] In *Pointes Protection,* the Supreme Court noted that before the weighing exercise begins, the plaintiff must show two things: (i) the existence of some harm and (ii) that the harm was caused by the defendant's expression.[30]

[64] The defendant submits that there is no evidence of either harm or causation. That is, the plaintiff has led no evidence of any personal or economic harm or any damage to his reputation as a result of the defendant's public statements that he had "breached the PSA."

[65] I agree with the defendant.

[66] There is nothing in the record that supports the plaintiff's bald assertions of emotional or psychological harm. There is also no evidence of any resulting financial or economic harm. There is no evidence that the plaintiff was disciplined by the OPP for "breaching the PSA" or that he was suspended from his duties because of these allegations or that he lost any pay. The claim of a lost job opportunity because of the defendant's PSA allegations is also without credible support in the evidence.

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[30] *Pointes*, *supra*, note 7, at para. 68.

[67] I agree with the defendant that any harm that was actually sustained by the plaintiff flows out of his termination which occurred in March 2019, weeks after the defendant's impugned statements and for reasons unrelated to these statements.

[68] In short, the plaintiff has not cleared the threshold of showing harm and causation.

[69] Even if it were otherwise, and some evidence of resulting harm had been presented, this court would have to consider the $15 million wrongful dismissal action. As I have already noted, the plaintiff intends to proceed with this action. This action names the defendant and specifically claims damages for, among other things, the intentional infliction of mental suffering and the loss of reputation allegedly caused by the impugned statements.[31]

[70] In my view, there is little to no public interest in permitting the defamation action to continue when the alleged loss or damage is the subject of another action that will shortly be proceeding in this court. The dismissal of the defamation action does not mean that the plaintiff will be denied his day in court. The public interest in allowing the plaintiff's defamation action to continue in parallel with a wrongful dismissal action that covers the same claims and alleged losses is little to none.

[71] On the other hand, there is a significant public interest in hearing the defendant's comments about the Letter and its allegations of impropriety and political interference in the appointment of the Commissioner of the OPP. I agree with the defendant that these are matters of considerable public interest that justify fulsome expression and debate in the public forum.

[72] The importance of freedom of expression cannot be overstated. One quote from the case law is sufficient. Free expression is "the matrix, the indispensable condition of nearly every other form of freedom … and [is] … little less vital to man's mind and spirit than breathing is to his physical existence."[32]

[73] An individual's right to vindicate their good name and reputation is of course important and should be accorded reasonable protection. It should not be treated as "regrettable but unavoidable roadkill on the highway of public controversy." However, there will be cases, as the Supreme Court of Canada noted in *WIC Radio*, when concerns about personal reputation must give way to a greater public interest:

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[31] See the Statement of Claim at paras. 116, 121(a) and (c), 127, 136, 140(a) and 144.

[32] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at para. 105

> An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest.[33]

[74] I conclude that the weighing of the two public interests clearly favours free expression and public debate. Tracking the language in s. 137.1(4)(b), the plaintiff has not satisfied the court that the harm suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that the public interest in permitting the plaintiff's action to continue outweighs the public interest in protecting that expression.

Conclusion

[75] The plaintiff's defamation action is dismissed on two grounds: the real prospect of a defence of fair comment and the weighing of the two public interests. As I have already noted, either ground is sufficient.

[76] A final comment – best made by the Court of Appeal in *Armstrong v. Corus Entertainment:*

> [T]he message to be taken from the enactment of s. 137.1 is that not every foot over the defamatory foul line warrants dragging the offender through the litigation process. By enacting s. 137.1, the Legislature acknowledged that, in some circumstances, permitting the wronged party to seek vindication through litigation comes at too high a cost to freedom of expression.[34]

[77] This is such a case.

Disposition

[78] The defendant's s. 137.1 motion is granted. The plaintiff's defamation action is dismissed.

[79] If the parties cannot agree on costs, I would be pleased to receive brief written submissions – within 14 days from the defendant and 14 days thereafter from the plaintiff. Submissions relating to the costs that were deferred in the plaintiff's unsuccessful productions and cross-examination motions should also be included.

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[33] *WIC Radio, supra,* note 4, at para. 2.

[34] *Armstrong v. Corus Entertainment*, 2018 ONCA 689, at para. 90.

[80] I am obliged to counsel on both sides for their assistance.

Signed: *Justice Edward P. Belobaba*

Notwithstanding Rule 59.05, this Judgment [Order] is effective from the date it is made, and is enforceable without any need for entry and filing. In accordance with Rules 77.07(6) and 1.04, no formal Judgment [Order] need be entered and filed unless an appeal or a motion for leave to appeal is brought to an appellate court. Any party to this Judgment [Order] may nonetheless submit a formal Judgment [Order] for original signing, entry and filing when the Court returns to regular operations.

Date: December 15, 2020

Appendix

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 137.1

Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(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. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(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. 2015, c. 23, s. 3.

No dismissal

(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. 2015, c. 23, s. 3.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

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