

CITATION: London District Catholic School Board v. Michail, 2021 ONSC 240
COURT FILE NO.: 2208/19
DATE: 2021/01/11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: London District Catholic School Board, Applicant

AND:

Myriam Michail, Respondent

BEFORE: Mitchell J.

COUNSEL: E. Traynor and L. Ledgerwood, for the applicant (responding party)

M. Michail, self-represented respondent (moving party)

HEARD: In writing.

COSTS ENDORSEMENT

Overview

[1] This costs endorsement relates to the respondent’s motion brought pursuant to s. 137.1 of the *Courts of Justice Act* (“CJA”) seeking an order dismissing this application. In the motion, Ms. Michail alleged the underlying application is a strategic lawsuit against public participation (a.k.a., a “SLAPP”).

[2] By endorsement released November 27, 2020, I dismissed the motion.¹ With respect to the issue of costs of the motion, the Endorsement reads as follows:

[25] [the applicant] was successful on the motion and is, therefore, presumptively entitled to its costs. However, s. 137.1(8) CJA negates that presumption. Section 137.1(8) reads:

(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.

[26] However, if [the applicant] intends to pursue its costs of the motion, the parties shall adhere to the following timetable for filing submissions...

¹ 2020 ONSC 7331 (the “Endorsement”).

- [3] The applicant seeks its costs of the motion and filed written submissions on December 11, 2020. Ms. Michail responded with submissions filed December 21, 2020.

Positions of the Parties

- [4] The applicant seeks its costs of the motion on an “all-in” basis in the amount of \$10,000. A bill of costs was filed indicating the applicant’s full-indemnity costs of the motion, inclusive of fees, disbursements and HST, total \$23,166.59. The applicant submits that s. 137.1(8) *CJA* does not apply in the circumstances because the application has none of the characteristics of a SLAPP and the impugned expression is unrelated to a matter of public interest.
- [5] In response, Ms. Michail submits that no costs should be awarded relying on the presumption to this effect contained in s. 137.1(8) of the *CJA*. She says her motives in bringing the SLAPP motion were not improper and alleges that the applicant’s request for costs is another example of their unlawful practice of oppressive and high-handed conduct.²

Analysis

- [6] Section 137.1(8) *CJA* specifically addresses the issue of costs of an unsuccessful motion brought pursuant to s. 137.1 *CJA*. This section displaces the presumption that costs follow success with the presumption that there shall be no costs award in favour of the successful party unless the circumstances make an award of costs appropriate.
- [7] Presumably, the policy consideration at play in section 137.1(8) *CJA* is that individuals who pursue litigation in the public interest and for unselfish reasons should not be penalized for those efforts.
- [8] In this case, the underlying application which the respondent sought to have dismissed was brought pursuant to the authority provided under s. 140 *CJA*. S. 140 *CJA* statutorily authorizes the applicant to seek an order preventing Ms. Michail from commencing or continuing any vexatious proceeding. In support of the relief sought on the underlying application, the applicant relies on the history of proceedings between the applicants and Ms. Michail summarized in para. 5 of the Endorsement.
- [9] The applicant submits that the motion was simply “more of the same” vexatious litigation to which it has been subject over the course of the past 5 years. The applicant directed me to the decision in *Veneruzzo v. Storey*³ where the court upheld an award of costs award against an unsuccessful moving party on a SLAPP motion.

² The balance of the objections raised by Ms. Mikael in her responding submissions are not relevant to a determination of the costs issue and are properly issues to be raised in response to the underlying application.

³ 2018 ONCA 688 (“*Veneruzzo*”).

[10] In *Veneruzzo* at para. 39 the Ontario Court of Appeal wrote:

The purpose underlying the cost provisions in s. 137.1 disappears when the lawsuit has none of the characteristics of a SLAPP, and the impugned expression is unrelated to a matter of public interest. In those circumstances, it is not the initial lawsuit challenging the expression that represents a potential misuse of the litigation process, but rather the s. 137.1 motion. A costs order denying a successful respondent its costs on a s. 137.1 motion, even though the lawsuit was not brought for an improper motive and the claim did not relate to a matter of public interest, could be seen as encouraging defendants to bring meritless section 137.1 motions.

[11] In response, Ms. Michail directed me to the Supreme Court of Canada decision in *Bent v. Platnick*⁴ where at para. 179 Côte J. writing for the majority of the court stated:

With regard to costs, as I said in *Pointes Protection*, the legislature expressly contemplated a costs regime for [s. 137.1](#) motions. Indeed, s. 137.1(8) sets out a default rule that when a [s. 137.1](#) motion is dismissed, neither party shall be awarded costs, unless a judge determines that “such an award is appropriate in the circumstances”. Here, no such award would be appropriate: I do not take Ms. Bent’s [s. 137.1](#) motion to be an instance of frivolous motion practice to delay Dr. Platnick’s defamation claim against her; rather, Ms. Bent’s use of [s. 137.1](#) — especially given the substantial uncertainty due to the lack of judicial guidance at the time of serving the motion — was a *bona fide* use of this new mechanism. I would award no costs.

[12] *Bent* is distinguishable. The Supreme Court of Canada in *Bent* found that the moving party met her threshold burden under section 137.1(3) as her email constituted an expression that related to a matter of public interest and that the underlying defamation proceeding arose from that expression. That is not the situation here.

[13] On the SLAPP motion, Ms. Michail failed to meet her threshold burden under section 137.1(3) *CJA*. The court found that (i) the applicant did not bring the underlying application for any improper purpose; and (ii) Ms. Mikael’s SLAPP motion failed at the first stage as the underlying application did not involve expression relating to a matter of public interest.⁵

[14] Relying on the authority of *Veneruzzo*, I find that, in the circumstances of this case, the presumption in section 137.1(8) *CJA* has no application and, therefore, costs should follow success on the motion. Consequently, the respondent is entitled to its costs of the motion.

[15] I must now consider the appropriate quantum of costs to be awarded.

⁴ 2020 SCC 23 (“*Bent*”).

⁵ Endorsement, at para. 21.

[16] Section 131(1) of the *CJA* grants the court very broad discretion to award the costs of and incidental to a proceeding. To guide its discretion, the court must look primarily to the factors set out in r. 57.01(1) of the *Rules*. These are:

- the principle of indemnity;
- the amount that an unsuccessful party could reasonably expect to pay;
- the importance of the issues;
- the conduct of any party that tended to lengthen unnecessarily the duration of the proceedings;
- whether any step was improper, vexatious or unnecessary; and
- any other relevant matter.

[17] However, the primary guiding principle is that any costs award should be fair and reasonable in all of the circumstances.⁶

[18] Having regard to the factors in Rule 57.01, I make the following findings:

- (a) the hourly rates and time spent by applicant's counsel are fair and reasonable having regard to time spent and allocation of work relative to the experience of counsel who worked on the file;
- (b) the materials prepared and filed in response to this motion duplicate to great extent the evidence upon which the applicant will rely in the underlying application and any otherwise fair and reasonable cost award should be reduced to reflect the fact that the applicant retains the right to pursue, if successful, its costs of the underlying application including costs relating to preparation of these duplicative materials;
- (c) the issues on the motion were of significant importance to the applicant and it was appropriate to spend significant resources in responding to the motion so as to preserve the applicant's rights to pursue the underlying application; and
- (d) having found that Ms. Michail is not entitled to the protection of s. 137.1(8) *CJA*, the applicant is not now entitled to further compensation through an increased award of costs on the basis the motion was "ill-advised, unnecessary and ultimately unsuccessful" as alleged by the applicant.

[19] The applicant claims \$10,000 as compensation from Ms. Michail for its costs of responding to the motion - less than 50% of its aggregate out-of-pocket (full-indemnity) costs. I find

⁶ See *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.).

this amount is fair and reasonable; however, having regard to the fact that a significant portion of the time and efforts expended by applicant's counsel in responding to the motion will assist in prosecuting the application against Ms. Michail, a reduction in the amount claimed is warranted.

Disposition

- [20] Accordingly, having regard to the factors set forth in rule 57.01(1), Ms. Michail shall pay to the applicant its fair and reasonable costs of the motion in the all-inclusive amount of \$7,500.

"Justice A.K. Mitchell"
Justice A.K. Mitchell

Date: January 11, 2021