CITATION: Contrans Tank Group GP Inc. v. Chen, 2024 ONSC 5441
COURT FILE NO.: CV-22-127
DATE: 20241001
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2024 ONSC 5441 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Contrans Tank Group GP Inc., Plaintiff

AND:

Zhuo Chen, Defendant

BEFORE: Justice R. Raikes

COUNSEL: D. Rawlinson - Counsel, for the Plaintiff

Edward Zhou - Counsel, for the Defendant

HEARD: May 24, 2024

ENDORSEMENT

History of Litigation

[1] The defendant, Mr. Chen, was employed as a truck driver by the plaintiff from September 11, 2020 to June 17, 2021. The parties disagree whether Mr. Chen was fired, or he quit.

[2] On June 30, 2022, Mr. Chen issued a notice of action in Court File No. CV-22-77 claiming damages for wrongful dismissal and discrimination (the Chen action"). A statement of claim was prepared but, according to Contrans, his pleadings in the Chen action were not properly served.

[3] Rather than deliver a statement of defence and counterclaim in that action, Contrans commenced this action by statement of claim issued October 5, 2022. The statement of claim was served on Mr. Chen on October 22, 2022.

[4] In its statement of claim in this action, the plaintiff seeks, *inter alia*, damages for defamation and injunctions prohibiting Mr. Chen from,

a. any form of communication with the plaintiff's current and/or former employees and/or contractors that includes discussion or dissemination of information in respect of the defendant and its business;

b. making any use of the personal contact information of the plaintiff's current and/or former employees and/or contractors, which was obtained in the course of the defendant's employment; and

c. disseminating information on the plaintiff's financial details, including particulars of how employees and/or contractors are paid.

[5] The defendant in this action served a notice of intent to defend on November 7, 2022. He has never delivered a statement of defence. He has not been noted in default.

[6] On June 16, 2023, the defendant served a notice of motion pursuant to s. 137.1 of the *Courts of Justice Act* seeking to dismiss the plaintiff's action under the anti-SLAPP provision, damages under s. 137.1(9), and costs. The motion was originally returnable December 7, 2023.

[7] On December 7, 2023, Justice Heeney adjourned the motion and awarded costs of $8,000 to the defendant. A schedule was set for the steps for the motion.

[8] On March 15, 2024, the parties conducted cross examinations on the affidavits filed on the s. 137.1 motion.

[9] On April 12, 2024, counsel attended to confirm that the motion was ready to proceed as scheduled on May 24, 2024.

[10] On May 7, 2024, the defendant delivered his revised factum which was the last step required of the defendant before oral argument of the motion.

[11] On May 8, 2024, the plaintiff served and filed a notice of discontinuance of the action without costs.

[12] The motion came before me for argument at a special appointment on May 24, 2024. Following oral argument, I requested further written submissions on the issue of whether the notice of discontinuance should be set aside as an abuse of process. Counsel provided their submissions on July 31, 2024, as requested.

[13] The plaintiff contends that it had an absolute right under Rule 23.01(1)(a) to discontinue this action without costs by serving a notice of discontinuance and filing same with proof of service. Consequently, the defendant's motion to dismiss under section 137.1 is moot. As the underlying action is discontinued, the motion by the defendant cannot proceed.

[14] The defendant contends that the notice of withdrawal is ineffective as it is a "step in the proceeding" prohibited by subsection 137.1(5) and/or should be stayed pending determination of the defendant's motion including his claim for damages and costs. Alternatively, he submits that it should be set aside as an abuse of process.

Anti-SLAPP Provisions

[15] Section 137.1 of the *Courts of Justice Act* was enacted to protect expressions on matters of public interest and to discourage litigation as a means to limit such expression: *Volpe v. Wong-Tam*, 2023 ONCA 680, at para. 2, (leave to appeal refused, [2023] S.C.C.A. No. 516).

2024 ONSC 5441 (CanLII)

[16] Section 137.1 states:

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.

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.

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.

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.

No further steps in proceeding

2024 ONSC 5441 (CanLII)

2024 ONSC 5441 (CanLII)

(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.

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.

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.

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.

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.

Notice of Discontinuance

[17] The plaintiff served its notice of discontinuance without costs on May 8, 2024, 16 days before scheduled argument of the defendant's motion.

[18] Subsection 137.1(5) prohibits "any further step in the proceeding by any party" until the motion is determined. "[S]tep in the proceeding" is not defined in either the *Courts of Justice Act* or the *Rules of Civil Procedure*.

[19] Rule 23.01(1)(a) of the *Rules of civil Procedure* permits a plaintiff to discontinue all or part of an action against defendant before the close of pleadings by serving on all parties served with the statement of claim a notice of discontinuance and filing the notice with proof of service. Consent of the other party and/or leave of the court is not required where the notice of discontinuance is served and filed before the close of pleadings.

[20] There is no dispute that the notice of discontinuance herein was served before the close of pleadings.

2024 ONSC 5441 (CanLII)

[21] The defendant relies on the express and unambiguous words in s. 137.1(5) – "any further step in the proceeding by any party". He submits that the statute overrides Rule 23 to the extent there is any inconsistency which, in this case, there arguably is. He also relies on the decision of Myers J. in *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555.

[22] In *Canadian Thermo Windows*, the plaintiffs sued the defendants for defamation because they posted very negative customer reviews on Internet review sites concerning their experiences with the plaintiff's business. The defendants sought dismissal of the defamation action based on section 137.1 of the *Courts of Justice Act*. They also sought costs on a full indemnity basis and damages under subsection 5.

[23] The plaintiffs argued that when faced with the defendant's threat to bring the anti-SLAPP motion, they properly discontinued the action. They argued that the motion was not "made", a precondition to the stay, because it lacked a specific return date. In Toronto that is obtained in Civil Practice Court. The notice of discontinuance was served before then. Accordingly, the defendants could not bring the motion and the court had no jurisdiction to award enhanced costs or damages.

[24] As acknowledged by Justice Myers, the procedural history of the motion was convoluted and complicated. At para. 39, he rejected the plaintiff's argument that he had allowed the notice of discontinuance with prejudice while preserving their rights to argue costs under section 137.1. He noted that in an earlier endorsement, he plainly allowed the plaintiffs to proceed as if they had withdrawn their notice of discontinuance to deal with a costs issue.

[25] Justice Myers wrote that the intention of anti-SLAPP motions under section 137.1 is to provide "a quick and inexpensive mechanism to end lawsuits being used to stifle public debate on the topic of public interest": see para. 71. In that context, he then wrote at paras. 72-74 with respect to the intent of subsection (5):

> [72] The purpose of the stay under s. 137.1(5) is self-evident. It prevents a plaintiff in a defamation suit from taking any steps in the lawsuit to prejudice the defendant, to run up costs, or otherwise, until the court determines if the claim survives scrutiny under s. 137.1.
>
> [73] If, for the purposes of s. 137.1(5), the motion is not "made" until the notice of motion is served after the return date has been obtained at Civil Practice Court, a plaintiff could know that an anti-SLAPP motion is coming under s. 137.1 and take all manner of untoward steps before the CPC attendance. The plaintiff could demand a statement of defence and note the defendant in default. It could move for summary judgment if a statement of defence has already been filed. It could move for an interlocutory injunction to seek to prohibit defamation pending trial. The steps might not bear fruit ultimately. But they would subject the defendant to potentially expensive proceedings.

> [74] The whole point of s. 137.1 is to prevent plaintiff from inflicting substantial costs on defendants in order to chill their participation in expressions on matters of public interest. Without the stay under s. 137.1(5), the full panoply of expensive procedural steps under the Rules of Civil Procedure would remain open to a plaintiff who knows that an anti-SLAPP motion is being scheduled in Civil Practice Court. An interpretation allowing that outcome risks frustrating the intention of section 137.1.

2024 ONSC 5441 (CanLII)

[26] At para. 84, he found that the notice of discontinuance delivered by the plaintiffs was ineffective because, when delivered, the case was already stayed under s. 137.1(5). The anti-SLAPP motion was already before the court.

[27] There is no suggestion by plaintiff's counsel in the case before me that the motion was not "made" when the notice of discontinuance was served. I take from Justice Myers decision that subsection (5) operates to prevent the plaintiff from taking any step in the proceeding including delivery of a notice of discontinuance. That seems to me consistent with the intent of s. 137.1 and, in particular, the availability of relief under subsection (9). If it is otherwise, a plaintiff could obtain the short term chill the defamation action brings and leave the moving party defendant with no remedy after it has incurred significant costs. Its claim for damages under subsection (9) would be forfeit. That strikes me as antithetical to the intent of those provisions.

[28] The plaintiff relies on the decision in *Ontario College of Teachers v. Bouragba*, 2023 ONSC 367 (Div. Ct.) for the principle that subsection (5) does not bar a notice of discontinuance. It bars steps taken to advance the litigation, not a step taken to end the litigation such as a notice of discontinuance.

[29] The facts in *Bouragba* are likewise procedurally complicated and certainly distinguishable from the case before me. In *Bouragba*, the College commenced a defamation action against Mr. Bouragba in 2016. In March 2018, Mr. Bouragba moved to dismiss the action under s. 137.1. The motion was dismissed in 2018. Mr. Bouragba appealed successfully to the Court of Appeal which remitted the motion back to the Superior Court for a fresh hearing before a different judge.

[30] After the Court of Appeal decision was released, the College decided that it no longer wished to pursue the action as against Mr. Bouragba. It sought his consent to discontinue which he refused to give. The College then brought a motion for leave to discontinue. [A statement of defence was delivered in that case which meant court approval was required if not on consent.] Mr. Bouragba then sought to schedule the s. 137.1 motion.

[31] On September 3, 2020, an unreported endorsement was made by Justice O'Brien that the motion for leave to discontinue be argued first before a Master (as they were then known). The endorsement further directed that the s. 137.1 motion would proceed thereafter before a judge if the action was not discontinued.

[32] Mr. Bouragba appealed to the Court of Appeal from the order of Justice O'Brien directing that the motion to discontinue proceed first. The College brought a motion to quash the appeal. On January 4, 2021, the Court of Appeal quashed the appeal on the basis that the order appealed from was interlocutory and, as such, the appeal lay to the Divisional Court, with leave.

[33] Following quashing of the appeal, the College moved forward with its motion for leave to discontinue which was heard by the Master on January 12, 2021. Mr. Bouragba opposed the motion on its merits – leave to discontinue should not be granted – and argued that s. 137.1(5) precluded the motion until the fresh hearing of his motion to dismiss under s. 137.1 was heard.

[34] The Master rejected Mr. Bouragba's objections and granted leave to discontinue. Mr. Bouragba appealed that decision to the Divisional Court where Justice Corbett, sitting as a single judge of the Divisional Court, upheld the Master's decision.

[35] At para. 12. Justice Corbett wrote:

> [12] Mr. Bouragba argues that the motion for leave to discontinue was a "further step in the proceeding". It is precluded by s. 137.1(5). The provision is an absolute prohibition, it is statutory, and the court has no discretion to dispense with it (see *United Soils Management Ltd. v Katu Mohamed*, 2017 ONSC 904, per Penny J.). The Master found that the prohibition in s. 137.1 applies to any step "to advance the litigation", but that the prohibition does not apply to a motion seeking "to bring the entire proceeding to an end." I agree with the Master's conclusion on this point in the context of a motion for leave to discontinue the entire action, with prejudice.

[36] At para. 16, Justice Corbett wrote:

> [16] The proper goal of an anti-SLAPP motion is to obtain a dismissal order. Discontinuance of the proceeding, with prejudice, has the same effect, at considerably less cost and delay. As a matter of simple common sense, it cannot be the case that the legislature intended to preclude discontinuance when it precluded "further steps" pending decision on the anti-SLAPP motion. The Master did not error in concluding that *CJA*, s. 137.1(5) was no bar to the motion for leave to discontinue, on appropriate terms.

[37] I pause to note the following:

1. Justice O'Brien ordered the motion for leave to discontinue be argued first. The appeal from that order to the Court of Appeal was quashed on jurisdictional grounds – because it was an interlocutory order.

2. So far as I can discern from the Divisional Court decision of Corbett J., Mr. Bouragba did not seek leave to appeal Justice O'Brien's order to the

2024 ONSC 5441 (CanLII)

Divisional Court after his appeal was quashed. Instead, Mr. Bouragba argued before the Master the effect of subsection (5).

3. The appeal heard by Justice Corbett was from her final order granting leave to discontinue.

4. If I am correct in that regard, when the motion for leave to discontinue came before the Master, the order of O'Brien J. was in full force and effect. Accordingly, the argument that subsection (5) operated to stay the motion for leave to discontinue was a collateral attack on Justice O'Brien's order from which there was no appeal and no motion for leave to appeal as required.

5. The Master's rationale for rejecting the argument advanced by Mr. Bouragba in that context is *obiter* because Justice O'Brien's order, right or wrong, was binding.

6. Justice Corbett's approval of the Master's finding on this issue was likewise unnecessary because there was no appeal of O'Brien J.'s order.

2024 ONSC 5441 (CanLII)

[38] In *United Soils Management*, the defendant was granted leave to serve and file his statement of defence and counterclaim after he served his s. 137.1 motion. The Master allowed the pleading to be filed over the objection of the plaintiff on the basis that even though it was a further step in the proceeding, it was a necessary and desirable one for determination of the s. 137.1 motion. The plaintiff appealed that interlocutory order. Justice Penny concluded that the filing of the pleading was prohibited on the plain and unambiguous wording of subsection 137.1(5). He wrote at para. 16:

> [16] Section 137.1 is plain enough. Once the anti-SLAPP motion is brought, no party may take any further step in the proceeding until the motion is finally disposed of. The prohibition makes good sense given the purpose of the legislation, as it prevents the use of "extraneous tactical steps" that might be used to undermine the efficiency of the intended process. <u>The provision contains no exceptions and, importantly, the court is afforded no power to grant relief from the prohibition in any circumstances</u>. [Underling added.]

[39] Justice Penny's interpretation of the effect of section 137.1(5) is entirely consistent with that of Myers J. in *Canadian Thermo Windows* (see above).

[40] I agree with the interpretation of Justices Myers and Penny. Section 137.1(5) precludes any further step in the proceeding pending determination of the anti-SLAPP motion. There is no exception for motions for leave to discontinue, nor for delivery of a notice of discontinuance where leave is not required because the pleadings are not yet closed.

[41] In my view, the decision of Corbett J. in *Bouragba* does not alter the effect of s. 137.1(5) in the circumstances of the case before me. The *Bouragba* decision is factually distinguishable: there is no motion for leave to discontinue nor is there an un-appealed order that directs that the issue of discontinuance be decided first. The reasons expressed

for rejecting or limiting the application of subsection (5) in the decisions of the Master and Justice Corbett on appeal are *obiter*. In the case before me, it was plain and obvious to plaintiff's counsel at all material times that the defendant sought damages under s. 137.1(9). Allowing the plaintiff to unilaterally discontinue after significant costs were incurred for the motion and so soon before argument of the motion unfairly deprives the defendant of the remedy sought.

2024 ONSC 5441 (CanLII)

[42] Given my finding as to the effect of s. 137.1(5), it is unnecessary for me to consider whether to set aside the notice of discontinuance as an abuse of process: *Kawaguchi v. Kawa Investments Inc.*, 2021 ONCA 770, see para.28. I observe, however, that this is not a case where, for example, the plaintiff seeks to file a notice of discontinuance with the intent of pursuing another action against the same defendant seeking the same or similar relief arising from the same facts.

[43] For the above reasons, I find that the notice of discontinuance filed by the plaintiff in this action is ineffective. Section 137.1(5) operates to stay any further steps which includes the plaintiff's notice of discontinuance. The motion under s. 137.1 of the *Courts of Justice Act* should be determined on its merits first.

Anti-SLAPP Motion

[44] Section 137.1 is a pre-trial screening procedure designed to weed out SLAPP actions – litigation brought that unduly limits expression on matters of public interest: *1704604Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 2, at para. 16; *Hansman v. Neufeld*, 2023 SCC 14, at paras. 49-50.

[45] There are two parts to the test under s. 137.1. At stage one (s.137.1(3)), the moving party defendant must establish that the action arises from an expression that relates to a matter of public interest. If that threshold is met, the responding party plaintiff must establish that there are grounds to believe that (i) the proceeding has substantial merit, and (ii) the moving party defendant has no valid defence to the action, and the harm to the plaintiff as a result of the expression is sufficiently serious that the public interest in permitting the action to continue outweighs the public interest in protecting the expression: s.137.1(4); *Marcellin v. London (Police Services Board)*, 2024 ONCA 468, at para. 3.

[46] A judge hearing the motion should not do a "deep dive" into the record. It is not a motion for summary judgment. The motion judge should do only a limited weighing of the evidence having regard to the stage of the litigation and the purpose of the motion: *Pointes Protection*, at para. 52. The motion is not the time or place for an ultimate adjudication of the issues raised by the action: *Pointes Protection*, at para. 38; *Hansman*, at para. 55.

[47] The evidentiary burden on the responding party (plaintiff) is lower than a balance of probabilities. The plaintiff need only establish "grounds to believe" – some basis in the record or law – for finding that the proceeding has substantial merit and the moving party

has no valid defence: *Marcellin*, at para. 10 citing *Bent v. Platnick*, 2020 SCC 23, at para. 103; and *Mondal v. Kirkconnell*, 2023 ONCA 523, at paras 30, 51, and 56.

[48] In *Marcellin*, at para. 11, van Rensburg J.A. summarized the weighing stage as follows:

> [11] The bar at s. 137.1(4)(a) cannot be set too high because the public interest weighing stage at s. 137.1(4)(b) is the fundamental crux of the analysis. At the weighing stage, the focus of the inquiry is "what is really going on" in the case: *Pointes Protection*, at paras. 18, 30 and 81. It is intended to optimize the balance between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public importance: *Pointes Protection*, at para. 18. The responding party 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 harm and the relevant causal link: *Pointes Protection*, at para. 71; *Hansman*, at para. 67.

2024 ONSC 5441 (CanLII)

Does the action arise from an expression that relates to a matter of public interest?

[49] Although the defendant has not filed a statement of defence, he has filed an affidavit on the motion which includes a draft statement of defence as an exhibit thereto.

[50] Mr. Chen deposes that he is a Chinese immigrant. He worked as a truck driver for Contrans. During his employment, he noticed irregularities in his pay cheques; specifically, Contrans unilaterally reduced his hours and layovers reported on his time sheets submitted to the company. This happened repeatedly.

[51] Mr. Chen brought the irregularities to the attention of management but the problem of shorting him on his pay continued. The company reimbursed him the shortfalls but not without much effort by Mr. Chen. He made inquiries of other drivers and came to believe that immigrant drivers were more likely to experience these inappropriate reductions. He believed that this was a systemic and intentional practice at Contrans. In addition, Mr. Chen contends that he was required to work Christmas because he was Chinese and an immigrant.

[52] When he brought the issue to the attention of fellow drivers, one employee suggested that he go back to whatever he did before taking a job as a truck driver to fast track his citizenship. Management was aware of the xenophobic message and did nothing.

[53] The constant stress of dealing with the alleged improper pay reductions and discrimination in the workplace had a significant effect on him. He alleges that the plaintiff's actions affected his mental health and as a result, he was forced to resign.

[54] When he left Contrans, he was owed $1,683.88 in unpaid wages. In August 2021, the company took the position that it had resolved all issues surrounding pay reductions and refused to make any further adjustment. Mr. Chen retained a paralegal and sent a demand letter to Contrans. At that point, he was paid the $1,683.88 but nothing for his legal expense.

[55] In September and October 2021, Mr. Chen exchanged email correspondence with Contrans' in-house counsel. On October 21, 2021, Mr. Chen sent an email to Jinxing Wang and Lyndsay Hone in which he wrote:

> Tell your boss know: I DON'T CARE will win or little lost [sic] the lawsuit with Contrans, my responsibility is let your drivers, your customers and public know Contrans isn't a honest company with serious potential safety problem!
>
> Attached letter will send to Contrans, Lailaw and TFI drivers by message, Internet, media etc., you have 3 business days to review if there is any information incorrect and reminds me ASAP, this message will send it to your drivers at October 25, 2021 night.
>
> Another messages send to your customers and newspapers are the same similar contents and details, also will let you review first as respect!
>
> [There are numerous spelling and grammatical mistakes throughout the various emails.]

[56] In the proposed letter sent with the email, Mr. Chen indicated that Contrans insisted he sign a new agreement in order to get his pay which was unfair to him. He intended to pursue a lawsuit to push the defendant to "become an honest company".

[57] Certainly, in the September and October 2021 emails, Mr. Chen threatened to communicate with all or substantially all the plaintiff's drivers, with newspapers, with customers, with competitors and more. Mr. Chen wanted satisfaction in the form of a letter of reference, an apology, and compensation.

[58] In its pleading, the plaintiff points to emails sent by Mr. Chen in September and October 2021 in which they assert that he threatened to share his story with all their drivers, to share his story on Facebook, and Twitter and newspapers. They plead that they have no knowledge that he did so. I observe that the September and October 2021 emails referred to by the plaintiff predate the commencement of this action by nearly a year.

[59] There is no evidence on this motion that Mr. Chen actually sent the threatened letters, emails, messages or made the social media posts referred to in his September and October 2021 correspondence with Contrans.

[60] Almost a year later, on July 20, 2022, Mr. Chen issued a notice of action seeking damages for constructive dismissal and legal fees.

[61] On July 24, 2022, Mr. Chen sent an email to several former co-workers in which he advised them of what he believed to be the plaintiff's payroll reduction practices. He had a list of all co-workers' email addresses from earlier group emails sent by management to drivers. In the email, he asked them to check their payrolls to see whether they were also victims of improper pay reductions. He told these former co-workers about the action he had commenced and recommended they do likewise if they were also victims.

2024 ONSC 5441 (CanLII)

[62] In a second email dated July 24, 2022, Mr. Chen emailed a copy of the notice of action to two former coworkers.

[63] He wrote a third email on July 28, 2022 in which he reiterated the issue of improper pay reductions and that Contrans had refused to pay his legal costs incurred while contacting Contrans and had refused to provide him with a letter of reference.

[64] In his affidavit on this motion, Mr. Chen deposed, *inter alia*:

1. His wage was calculated based on his timesheets which he provided to Contrans before each pay cycle (para. 4). At the end of each pay period, he discovered that his pay cheques did not reflect the time sheets he submitted (para. 5).

2. He sent about 30 emails to Contrans management during his 9 months of employment to address the reductions to his pay (para. 7). Contrans management failed or refused to address the issues promptly even when they acknowledged the improper pay reductions (para. 8). The problem of improper pay reductions continued despite management promises to address the problem (para. 9).

3. He was underpaid $4,531.61 as a result of the improper pay reductions (para. 10). He spent hours each week reviewing his paycheques and time sheets and trying to get management to correct the underpayments (para. 11).

4. At paras. 12 and 13, he deposed:

    > 12. As a result of the frequency and repetitiveness of the improper pay reductions, I believe that Contrans intentionally reduced my pay with Improper Pay Reductions.
    >
    > 13. Further, I do not believe that the Improper Pay Reductions are the result of a few of Contrans' employees' mistakes. I believe that the improper pay reductions were orchestrated by Contrans as a whole to intentionally and systematically target immigrants and other minority groups.

5. At paras. 14-19 of his affidavit, Mr. Chen set out why he believed that he was subjected to discrimination as an immigrant at Contrans and at para. 19, he deposed:

    > 19. After speaking with other employees of Contrans, I further discovered that employees belonging to ethnic minorities were subject to more instances of Improper Pay Reductions than their counterparts not belonging to ethnic minorities. As such, I believe that Contrans is systematically discriminating against its employees who are ethnic minorities.

2024 ONSC 5441 (CanLII)

[65] Mr. Chen does not identify the other employees with whom he spoke, nor does he provide any documentation to show that other employees likewise experienced improper pay reductions.

[66] Contrans' counsel sent a 'cease and desist' letter on July 28, 2022. It followed that warning shot with the statement of claim in this action.

[67] Are the July 2022 emails an expression on a matter of public interest?

[68] Section 137.1 defines "expression" as follows:

> "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.

[69] The expression need not be one that is of interest of the world at large to be a matter of public interest. It is enough that some segment of the community would have a genuine interest in the subject matter of the expression: *Pointes Protection*, at para. 62.

[70] The emails in question from July 2022 are clearly expressions – they are communications to several ongoing drivers for Contrans.

[71] I am satisfied that the communications were made on a matter of public interest. Other drivers at Contrans and other drivers who may be considering going to work for Contrans would presumably be interested to know whether the company correctly calculates wages owing and whether it engages in systemic and intentional practices that unfairly and inappropriately reduce driver income. The defendant has satisfied its burden for part one of the analytical framework per *Pointes Protection*.

Does the proceeding have substantial merit?

[72] There must be a basis in the record and the law to find that the underlying proceeding has substantial merit and there is no valid defence: *Pointes Protection Ltd.*, at para. 39. "Grounds to believe" has been equated in other contexts with requiring "something more than mere suspicion, but less than … proof on the balance of probabilities": para. 40. The assessment is subjective and is based on the motion judge's perspective: para. 41.

[73] Justice Cote summarized the applicable test as follows:

> [42] Taking all of the foregoing together, what s. 137.1(4)(a) asks, in effect, is whether the motion judge concludes from his or her 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 plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

[74] With respect to what is meant by "substantial merit" in s. 137.1(4)(a)(i), Justice Cote wrote at para. 49:

2024 ONSC 5441 (CanLII)

> [49] … for an underlying proceeding to have “substantial merit”, it must have a real prospect of success - in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe”, this term means that the motion judge needs to be satisfied that there is a basis in the record and the law - taking into account the stage of proceeding - for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

2024 ONSC 5441 (CanLII)

[75] The substantial merit standard is higher than “some chance of success” or “a reasonable prospect of success”. A claim with merely some chance of success will not meet the substantial merit test: *Pointes Protection Ltd.*, at para. 50. The plaintiff must show more than an arguable case, but the substantial merit standard lies below a “strong *prima facie* case” or the test on a motion for summary judgment: *Pointes Protection Ltd.*, at para. 51.

[76] Justice Cote cautioned against diving too deeply into the assessment of credibility and the evidence. At para. 52, she wrote:

> [52] … As a result, the motion judge deciding a s. 137.1 motion should engage in only 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, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing an assessment of the evidence adduced. This might also include a preliminary assessment of credibility - indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage of the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgment motion, which would be insurmountable at this stage of the proceedings.

[77] With respect to the requirement that the plaintiff show that there are grounds to believe that the defendant has no valid defence, the following principles emerge from *Pointes Protection Ltd.*:

1. If there is any defence that is valid, the plaintiff has not met his burden and the claim should be dismissed (para. 58).

2. The motion judge should engage in a limited assessment of the evidence to determine the validity of the defence (para. 58).

3. The inquiry under s. 137.1(4)(a)(ii) mirrors that under (i) (para. 59).

4. The motion judge must ascertain whether the plaintiff has shown that the defence(s) put in play are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success (para. 59).

5. "Substantial merit" and "no valid defence" are constituent elements of the overall assessment of the prospect of success of the underlying claim.

[78] A statement is defamatory if it tends to lower the reputation of the plaintiff in his or her community in the estimation of reasonable persons: *Crookes v. Newton*, 2011 SCC 47, at para. 39; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at para. 62.

[79] For a publication to be defamatory, the court must be satisfied that:

1. The impugned words are defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

2. The words, in fact, referred to the plaintiff; and

3. The words were published: *Health Genetic Center Corp. o/a Health Genetics Center v. New Scientist Magazine*, 2018 ONSC 7224, at para. 43; *Grant v. Torstar Corp.*, 2009 SCC 61, at para. 28.

[80] To prove the publication element of defamation, a plaintiff must establish that the defendant has, by any act, conveyed defamatory meaning to a single third party who received it: *McNichol v. Grandy*, [1931] S.C.R. 696, at p. 699. In general, the form that the defendant's act takes, and the manner used to cause the defamatory content to reach a third party are irrelevant: *Crookes*, at para. 16.

[81] Once the plaintiff proves a defamatory publication on a balance of probabilities, the onus shifts to the defendant to advance a defence to escape liability: *Grant*, at para. 29.

[82] The defendant sent emails to former co-workers advising that:

- There is a huge payroll shortage at Contrans.
- That shortage is deliberate.
- Contrans lied to Mr. Chen in email correspondence.
- Contrans lied about the payroll shortage.
- Contrans "plays games" with payroll.
- The payroll shortages cause drivers to feel hopeless which affects the safety of their driving.

2024 ONSC 5441 (CanLII)

- Mr. Chen experienced a $4,500 shortage which is about $500/month.
- Drivers should check their payroll, "you will be rich".
- The payroll shortage is discriminatory or results in decreased compensation for all drivers.
- "Lots of drivers" payroll has been reduced by "several hundred dollars monthly".

[83] There is little question that the allegations made by Mr. Chen are defamatory of the plaintiff employer. It signals that Contrans is dishonest in its dealing with its drivers. The emails are written communications that would undoubtedly lower Contrans standing in the eyes of its employees, prospective employees, and the community at large. The substance of the communication is that Contrans is deliberately underpaying drivers what they are entitled to; that this is an ongoing problem that is widespread in the company and has been for some time. It alleges discriminatory practices which would likewise have the same effect on the plaintiff's standing in the community and industry.

[84] Mindful of the low evidentiary bar and the admonition not to do a deep dive into the merits of the action, I conclude that the statements made by the defendant are, on their face, defamatory. There are grounds to believe that the claim has substantial merit.

Are there grounds to believe that the defendant has no valid defence to the claim?

[85] The defendant has not yet pleaded into the action but has raised the following defences in his draft pleading and motion materials: 1) truth/justification, 2) fair comment, and 3) qualified privilege.

Truth/Justification

[86] In *Health Genetic Center Corp.*, Justice Lederer succinctly summarized the applicable legal principles for the defences advanced by the defendant in the case before me. With respect to the defence of truth, or justification as it is sometimes called, he wrote at paras. 50-52:

> 50. …I start with justification:
>
> > Defamatory words are presumed to be false. The onus is on the defendant to displace the presumption of falsity by establishing the truth of the defamatory words as a matter of fact [Peter A. Downard, *Libel, Third Edition, supra* (fn. 33) at p. 105 referring to *Littleton v. Hamilton*, [1974] O.J.No. 1955, 4 O.R. (2d) 283 (Ont. C.A.) at 286 leave to appeal to S.C.C. refused (1974), 4 O.R. (2d) 283n (S.C.C.); *Govenlock v. London Free Press Co.*, [1915] O.J. No. 15, 35 O.L.R. 79 (Ont. C.A.) at 83; *Jameel v. Wall Street Journal Europe SPRL (No.3)*, [2005] EWCA Civ 64 (Eng. H.L.] at

2024 ONSC 5441 (CanLII)

> para. 4 rev'd on other grounds (2006), [2007] 1 A.C. 359 (Eng. H.L.).

> 51. No matter how damaging or disparaging it may be to the plaintiffs, the truth can never be actionable. A plaintiff has no right to shield his or her character or reputation from an imputation that is not false [Raymond Brown, *Brown on Defamation (Canada, United Kingdom, Australia, New Zealand and United States), Second Edition* (Toronto: Thomson Reuters Limited) at ch. 10, para. 10.2]. The defence of justification or "Truth" is a complete defence. If the facts which comprise the defamatory material are true, a defendant cannot succeed … [*Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656 (Ont. S.C.J.) at para. 92].
>
> 52. Truth is not absolute. Where an allegedly defamatory statement of fact is "substantially true" the defence of justification will apply [*Grant v. Torstar*, at para. 32]:
>
> > What is required to be proven is not the truth of each and every word or the literal truth of the statement, but rather the truth of the substance of the allegation or the sting of the charge … [*Cimola v. Hall*, 2005 BCSC 31 at para. 172].

[87] Where the gist or sting of the charge is proven to be true, minor inaccuracies do not defeat the defence of justification … Conversely, if the overall impression of the publication is false, the defence fails even if some or even all of the literal words are proven to be true. Half-truths can be just as damaging as outright falsehoods, and their effect may be even more severe because they can be more difficult to explain ... [*Cimola v. Hall* at para. 173 referring to *Hodgson v. Canadian Newspapers Co.* (1998), 39 O.R. (3d) 235 (Ont. Gen. Div.) …] N

[88] The gist or sting of the defendant's July 2022 emails is: Contrans intentionally and systematically underpaid drivers, especially immigrants and/or ethnic minorities. In doing so, it was acting dishonestly, fraudulently, and/or unfairly and discriminating against ethnic minorities and immigrants. Drivers were unaware of these payroll shortages. The shortages had a negative impact on driver health and performance thereby putting others at risk.

[89] I have carefully read the affidavit of Mr. Dierick, sworn in response to the defendant's motion. At para. 16 of his affidavit, Mr. Dierick deposed simply: "The October 2021 Statements and the July 2022 Statements are false and offensive." That is the full extent of his evidence as to whether Contrans was intentionally and systemically improperly reducing driver pays, whether it targeted immigrants and ethnic minorities, and whether Mr. Chen was discriminated against. He does not depose, for example, that Mr. Chen's pay experience was an anomaly, that he was always treated fairly and without discrimination. He provides no evidence that, for example, the problems experienced by

2024 ONSC 5441 (CanLII)

Mr. Chen have not been the subject of complaints by other employees. That information lies at this stage within the exclusive domain of the plaintiff.

[90] The evidence of Mr. Chen is consistent with a recurrent problem with the calculation of his pay during his employment. He provides anecdotal evidence as to how he was treated by management. His evidence that other immigrant or ethnic minority employees experienced similar issues is far from satisfactory but suggests that there are other employees that he knows who were similarly affected.

[91] This motion comes very early in the procedural life of this litigation. Pleadings are incomplete. Affidavits of documents have not been exchanged. No examinations for discovery have been conducted. Documentation and information that might prove or disprove the presence of a systemic practice of underpaying drivers or targeting immigrants and ethnic minority employees has not been compiled, produced, or analysed.

[92] On the very limited information available to me, I am not satisfied that the defence of justification or truth cannot succeed. Put another way, I find on the evidence that there are grounds to believe that the defendant has a valid defence – justification or truth. Given that finding, the plaintiff has failed to show that there are grounds to believe that the defendant has no valid defence. It has not met its burden. The claim for defamation is dismissed.

[93] It is unnecessary for me to consider whether the same result would follow for the defences of fair comment and qualified privilege.

[94] Therefore, for the reasons indicated, the defendant's motion is granted. The plaintiff's action is dismissed subject to costs and damages claimed under subsection (9), which I will address now.

Was this action brought by the plaintiff in bad faith or for an improper purpose?

[95] The court may award damages under subsection 137.1(9) where the "action has been brought in bad faith or for an improper motive such as punishing, silencing or intimidating the defendant rather than any pursuit of a legal remedy": *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, at paras. 35 and 36. Where the action is a reprisal for the defendant speaking out, damages may be warranted: *Mazhar v. Farooqi*, 2021 ONCA 355, at paras. 28 and 29.

[96] In assessing whether an award of damages is warranted, the court must take into account the presumption that costs will be awarded on a full indemnity basis: *United Soils Management Ltd. v. Mohammed*, at para. 37. Punitive damages are not available: *United Soils Management Ltd. v. Mohammed*, at para. 38.

[97] I find it to be clear on the evidence filed that the plaintiff commenced this action to silence and/or intimidate the defendant. Contrans did nothing in 2021 when Mr. Chen threatened to communicate with employees, competitors, and newspapers, and to post on

2024 ONSC 5441 (CanLII)

social media because they had no information that he carried through on those threats. That changed in July 2022 when he began doing so.

[98] The prayer for relief in the statement of claim includes requests for injunctive relief to silence Mr. Chen. The whole tenor of the statement of claim was to dissuade Mr. Chen from talking to others about the alleged improper pay reductions and how he was treated. The plaintiff did not bring a motion for injunctive relief in the roughly 8 months after it issued the statement of claim and before he brought this motion. I find that it did not do so because the pleading had exactly the effect intended – Mr. Chen pulled back.

[99] Moreover, the plaintiff maintained its aggressive approach well after Mr. Chen brought this motion and until all steps necessary to prepare for the motion were complete. The plaintiff, faced with prospect of having to justify its action, delivered its notice of discontinuance without costs slightly more than two weeks before the return date for the special appointment. After putting Mr. Chen to the expense and stress of this litigation, it tried to pull the proverbial rug out from under him and thereby leave him with no remedy and his unpaid costs.

[100] I am mindful that the defendant is presumptively entitled to his costs on a full indemnity basis: s. 137.1(7). In my view, an award full indemnity costs does not adequately recognize the understandable stress and anxiety Mr. Chen experienced in these circumstances.

[101] There is no obligation for Mr. Chen to produce medical evidence to support his claim for damages, nor did he provide same. He is an individual inexperienced in litigation. It is reasonable to expect that he would suffer stress and anxiety from the tactics employed by the plaintiff.

[102] The conduct of the defendant in this case is not as egregious as in *Farooqi* where the plaintiff threatened the defendant's mother with litigation and threatened the defendant with complaints to the university, the College of Family Physicians, hospital boards, and medical boards. In *Farooqi*, the defendant was awarded damages under s. 137.1(9) of $10,000.

[103] In *United Soils Management Ltd. v. Mohammed*, the plaintiff pursued the defamation action despite the defendant having retracted and apologized before the action was commenced. The action was a punishment. There, the motions judge awarded $7,500 which was upheld on appeal.

[104] In this case, I find that an appropriate measure of damages is $5,000. It strikes me as a fair amount having regard to the seriousness of the plaintiff's conduct and its effect on Mr. Chen.

[105] I further find that the defendant shall have his full indemnity costs of the motion and the proceeding. If the parties cannot agree on the quantum for same, they may make written submissions not exceeding three (3) pages within 15 days hereof.

2024 ONSC 5441 (CanLII)

Justice R. Raikes

Date: October 1, 2024
Corrected Released: October 8, 2024

2024 ONSC 5441 (CanLII)

Corrigendum

Paragraph [93] – The second sentence of this paragraph should have been deleted. Therefore, the paragraph now reads:

> "It is unnecessary for me to consider whether the same result would follow for the defences of fair comment and qualified privilege."