COURT OF APPEAL FOR ONTARIO

CITATION: Gill v. Maciver, 2024 ONCA 126
DATE: 20240222
DOCKET: C70498

Roberts, Paciocco and Monahan JJ.A.

BETWEEN

Dr Kulvinder Kaur Gill* and Dr. Ashvinder Kaur Lamba

Plaintiffs (Appellant*)

and

Dr. Angus Maciver*, Dr. Nadia Alam*, André Picard*, Dr. Michelle Cohen, Dr. Alex Nataros, Dr. Ilan Schwartz, Dr. Andrew Fraser*, Dr. Marco Prado, Timothy Caulfield, Dr. Sajjad Fazel, Alheli Picazo*, Bruce Arthur, Dr. Terry Polevoy, Dr. John Van Aerde, Dr. Andrew Boozary, Dr. Abdu Sharkawy, Dr. David Jacobs, Tristan Bronca, Carly Weeks, The Pointer, The Hamilton Spectator, Société-Radio Canada, the Medical Post

Defendants (Respondents*)

Jeff Saikaley and Albert Brunet, for the appellant, Dr. Kulvinder Kaur Gill

Howard Winkler and Eryn Pond, for the respondent, Dr. Angus Maciver

Andrew MacDonald, for the respondents, André Picard and Carly Weeks

George Pakozdi, for the respondent, Alheli Picazo

Heard: December 12, 2023

On appeal from the order of Justice Elizabeth M. Stewart of the Superior Court of Justice, dated February 24, 2022, with reasons reported at 2022 ONSC 1279, and from the costs order, dated October 31, 2022, with reasons reported at 2022 ONSC 6169.

Monahan J.A.:

[1] The appellant, Dr. Kulvinder Kaur Gill, commenced proceedings against 23 individual and corporate defendants (the “Original Defendants”), seeking aggregate damages of approximately $12,000,000 for defamation, conspiracy, and negligence.[1]

[2] The motion judge dismissed the claim against the Original Defendants on the basis of s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990 C. c.43 (the “*CJA*”), which permits the dismissal of proceedings that limit debate on matters of public interest.[2] Finding that the plaintiff’s proceedings were “precisely of the kind that s. 137.1 is designed to discourage and screen out”, the motion judge awarded costs to the Original Defendants that totaled over $1.1 million dollars.

[3] Although the appellant initially appealed the motion judge’s order in its entirety, she subsequently abandoned her appeal of the dismissal of her claim against 19 of the Original Defendants. Thus, the present appeal deals only with the dismissal of the claim against Dr. Angus Maciver (“Maciver”), Andre Picard (“Picard”), Carly Weeks (“Weeks”) and Alheli Picazo (“Picazo”) (collectively, the “Remaining Defendants”). The appellant also seeks leave to appeal the motion judge’s costs orders in relation to the Remaining Defendants.

---

[1] The co-plaintiff, Dr. Ashvinder Kaur Lamba (“Lamba”), commenced proceedings against two of the same defendants, claims that were also dismissed by the motion judge. Although Dr. Lamba initially appealed the motion judge’s order, she subsequently abandoned her appeal, making it unnecessary to consider her involvement in this proceeding any further.

[2] The motion judge found that the claims in conspiracy and negligence were in substance mere restatements of the claims in defamation and therefore also dismissed those claims on the basis of s. 137.1.

[4] For the reasons that follow, I would dismiss the appeal of the motion judge's order dismissing the claim against the Remaining Defendants, and refuse leave to appeal the associated costs orders.

A. BACKGROUND

(1) Subject matter of the Appellant's claim

[5] The appellant's claim against the Remaining Defendants arises from two separate matters.

[6] The claim against Maciver arose from Twitter statements he made in September 2018 in which he criticized the appellant for having previously blocked him on Twitter, thereby preventing him from responding directly to attacks that the appellant had made against the Ontario Medical Association ("OMA").

[7] The appellant's claim against Picard, Weeks and Picazo arose from Twitter statements they made in August and October 2020 in which they criticized the appellant's position on the government response to the COVID-19 pandemic.

[8] The appellant's claim against the individual defendants (including the Remaining Defendants) seeks general damages of $4 million, aggravated damages of $1 million and punitive damages of $1 million, all on a joint and several basis.

(2) The claim against Maciver

[9] The appellant is a medical doctor and has been a member of the OMA Governing Council. She is also a founding member and leader of Concerned Ontario Doctors (“COD”), which operates in part as a platform for the expression of her views, including her criticisms of the OMA.

[10] Maciver is an elderly physician who, although holding no leadership position in the OMA, is a supporter of the OMA and its leadership.

[11] Prior to the impugned statements made by Maciver, the appellant had publicly and repeatedly attacked what she described as the OMA’s “toxic culture of misogyny, bullying and intimidation”. The appellant claimed in various Twitter posts that the leadership of the organization was “vermin”, “corrupt”, hypocrites, a threat to patient care, engaged in bullying and intimidation, and had committed fraud.

[12] In October 2017, Maciver tweeted his disappointment in the fact that the COD was “continuing to fragment the profession in Ontario”. As a result, the appellant blocked him from engaging with her Twitter account. The appellant had similarly blocked the Twitter accounts of other physicians who dissented from her attacks on the OMA.

[13] Because he had been blocked by the appellant, Maciver became increasingly frustrated over the fact that he was not able to respond directly to the

appellant's attacks on the honesty and integrity of the OMA leadership. On September 4, 2018, he tweeted that the appellant (and others in COD) were "corksoakers" and "twats" who had blocked him. In three subsequent tweets posted shortly thereafter, Maciver criticized the appellant and other members of COD for lacking "the qualities we all expect in a physician, let alone a colleague" and for being "an intolerant bunch".

[14] On September 7, 2018 the appellant posted a statement on Facebook in which she claimed that Maciver had called her and Lamba "cock sucking cunts", denounced him for his "racist, sexist and misogynistic comments", and criticized the OMA for "turning a blind eye to such disgusting behaviours". In a September 9, 2018 post on Facebook, the appellant repeated her criticisms of the OMA for failing to take action against Maciver, whom she described as a "harasser" who had engaged in "professional misconduct."

[15] Beginning on September 8, 2018 and on multiple occasions thereafter, Maciver apologized to the appellant both publicly and privately. Those apologies were published throughout the physician community at large, including by Dr. Nadia Alam, the OMA President, in comments that were reported in a September 10, 2018 article in the Medical Post entitled "Physician apologizes for

vulgarity in Twitter comments about COD doctors."[3] Maciver also removed the impugned tweets from his Twitter account on or before September 18, 2018. Moreover, as a result of proceedings instituted by the appellant, in January 2020 the College of Physicians and Surgeons of Ontario (the "CPSO") disciplined Maciver for his September 2018 tweets, with the CPSO disciplinary decision being posted online.

(3) The claim against Picard, Weeks and Picazo

[16] Following the outbreak of the COVID-19 pandemic in March 2020, the appellant became a vocal critic of the manner in which governments and agencies such as the World Health Organization (the "WHO") had responded to the threat posed by the virus.

[17] On August 4, 2020, the appellant posted a tweet stating that "we don't need a vaccine" for COVID-19, and that those who had not figured this out were "not paying attention". In a second tweet, she stated that society could "safely return to normal life now", with what she referred to as humanity's existing effective defences against COVID-19, identified by her as "The Truth", "T-cell Immunity" and hydroxychloroquine ("HCQ").

[18] Picard, the senior health columnist for The Globe and Mail, tweeted that he

---

[3] I note that the appellant originally included Dr. Alam and the Medical Post as defendants in this proceeding as a result of these statements. The claim against these defendants was dismissed by the motion judge, and the appellant has abandoned her appeal of that aspect of the motion judge's order.

found it “quite shocking” that the appellant would publicly state such opinions that were so contrary to the prevailing consensus among medical professionals, scientists, and public health officials.

[19] The appellant then attacked Picard in a tweet stating that she found it “quite shocking that a journalist with absolutely no medical training is attacking an MD for stating scientific facts”. The appellant commented that this was “not surprising”, given that Picard is a Pierre Trudeau Foundation Mentor and a member of a committee whose purpose was “to drive the political WHO narrative”.

[20] A flurry of Twitter activity, described by the motion judge as a “Twitter Storm”, followed the appellant’s attack on Picard. The Twitter activity included tweets about the controversial use of HCQ to treat COVID-19, and others attacking Picard or expressing support for him. Picard also posted three further tweets in which he stated, amongst other things, that he “would prefer that people focus not on trolls but on my initial concern, that a Canadian pediatrician is saying we do not need a coronavirus vaccine.”

[21] One of those expressing support for Picard was Weeks, a health reporter for the Globe and Mail. Weeks described Picard as “one of the finest health communicators – anywhere – [who] has done more to help the public understand #COVID-19 than anyone in the country.” Weeks also expressed her gratitude for Picard’s “no-nonsense takes and the fact he does not hesitate to call out BS when

he sees it."

[22] Picazo, who is a freelance writer who primarily covers the topics of politics and healthcare, also intervened in the "Twitter Storm" surrounding the exchanges between Picard and the appellant. In one tweet, Picazo commented that the appellant's behaviour throughout the pandemic has been "grossly irresponsible, to say the least. I would have no faith in her as a doctor for anything". In further tweets Picazo described the appellant's tweets as "unprofessional" and criticized her for promoting "Covid denialism… bad science and fringe theories."

B. DECISION OF THE MOTION JUDGE

(1) Dismissal of claim against Maciver

[23] The motion judge found that the impugned tweets by Maciver were on a matter of public interest, namely, the public debate about the OMA sparked by the appellant on Twitter, and her blocking on Twitter of physicians who dissented from her "inflammatory" views.

[24] Given this initial finding, the motion judge then dismissed the appellant's claims against Maciver on two grounds.

[25] First, the motion judge found that the offensive language used by Maciver in his impugned tweets was not defamatory. The motion judge noted that there is an important distinction in the law of defamation between words that are actionable for being defamatory and words that merely contain insults and are not actionable.

The motion judge acknowledged that some of the language used by Maciver may have been unprofessional and ill-advised, but involved pure name-calling and was therefore not defamatory.

[26] Second, the motion judge found that the appellant had offered no evidence of any harm caused to her reputation as a result of the impugned tweets, other than “vague, unparticularized statements.” Therefore, even if the words complained of were defamatory, and some general damage to the appellant’s reputation is therefore to be presumed, any such damage is likely to be assessed as being merely nominal.

[27] Section 137.1(4)(b) of the *CJA* provides that if the impugned expression giving rise to a proceeding relates to a matter of “public interest”, the proceeding shall be dismissed unless the plaintiff satisfies the judge that the harm they have suffered, or are likely to suffer, is “sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.”

[28] Given the at most nominal damages suffered by the appellant as a result of the impugned tweets by Maciver, the motion judge found that the public interest in protecting Maciver’s right to speak out on a matter of public interest outweighs any considerations that might otherwise favour allowing the appellant’s defamation action against him to continue.

(2) Dismissal of claim against Picard, Weeks and Picazo

[29] The motion judge found that the impugned tweets by Picard, Weeks and Picazo all related to matters of significant public interest, namely, the development of effective treatments for COVID-19, whether a vaccine is needed, and whether HCQ is an appropriate treatment for COVID-19.

[30] This finding led the motion judge to dismiss the claim against Picard, Weeks and Picazo on two separate grounds.

[31] First, s. 137.1(4)(a)(ii) of the *CJA* provides that if the impugned expression giving rise to a proceeding relates to a matter of public interest, the proceeding shall be dismissed unless the plaintiff satisfies the motion judge that there are grounds to believe that the defendant has no valid defence in the proceeding.

[32] The motion judge found that the impugned tweets by Picard, Weeks and Picazo were in the nature of "fair comment" on statements made by the appellant regarding COVID-19. "Fair comment" is a well-recognized defence within the law of defamation. Therefore, the appellant, according to the motion judge, had failed to discharge her burden of showing that Picard, Weeks and Picazo had no valid defence to her defamation claim. Accordingly, her claim against them should be dismissed on the basis of s.137.1(4)(a)(ii) of the *CJA*.

[33] The motion judge also found that the claim against Picard, Weeks and Picazo should be dismissed pursuant to s. 137.1(4)(b) of the *CJA*, because the

appellant had failed to provide evidence showing that she had suffered any harm from the impugned tweets by Picard, Weeks or Picazo. The appellant's claims of harm were completely undifferentiated and were not linked to any of the impugned statements by these three defendants. In any event, even if the appellant's reputation had been harmed, it may well have been self-inflicted, resulting from professional and public criticism received from numerous commentators over her controversial positions on COVID-19.

[34] The motion judge further found that there was an intense public interest in protecting the expression of these three defendants on these issues. If the appellant's claim against them were allowed to proceed, it could well have a chilling effect, deterring journalists and other members of the public from engaging in public discourse about potential misinformation on matters of public health. In fact, the motion judge found that the appellant's allegations appear to be part of a "larger tactical campaign in opposition to COVID-19 public health measures, designed to benefit from the publicity of the claim to promote public health and policy views and to silence those who express views contrary to those of the Plaintiffs".

(3) Costs

[35] Section 137.1(7) of the *CJA* provides that if a judge dismisses a proceeding under s. 137.1, the moving party is entitled to costs on a full indemnity basis unless the judge determines that such an award is not appropriate in the circumstances.

The motion judge relied upon this statutory presumption and awarded costs to all of the Original Defendants on a substantial indemnity basis. In her view, these costs awards were consistent with the purpose of s. 137.1(7), which is to discourage those who would seek to use the legal process improperly to shut down debate on matters of public interest.

C. APPLICABLE STATUTORY FRAMEWORK

[36] The purpose of s. 137.1 is to provide a mechanism to prevent strategic lawsuits against public participation ("SLAPPs"): *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, [2020] 2 S.C.R. 587, at paras. 16, 38, 62 and its companion case, *Bent v. Platnick*, 2020 SCC 23, [2020] 2 S.C.R. 645, at para. 74. A SLAPP is a lawsuit that has been initiated as an indirect tool to limit the expression of others, rather than in order to vindicate a *bona fide* claim.

[37] Section 137.1 places an initial burden on the moving party, the defendant in a lawsuit, to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party, the plaintiff, to satisfy the motion judge that there are grounds to believe that the proceeding has substantial merit, that the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression: *Pointes Protection*, at para. 18.

[38] As Côté J. emphasized in *Pointes Protection*, the final weighing exercise in s. 137.1(4)(b) is the "fundamental crux of the analysis" since it enables the motion judge to determine "what is really going on in the case before them": *Pointes Protection*, at para. 18. The burden is on the plaintiff to satisfy the motion judge that the harm that they have or are likely to suffer from 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.

[39] Three points bear emphasis in the consideration of the weighing exercise under s. 137.1(4)(b).

[40] First, the plaintiff is required to show, not merely the existence of harm, but harm that is "serious". The presumption of damages in a defamation action may be sufficient to establish the existence of harm but this will not show that it is "serious": *Hansman v. Neufeld*, 2023 SCC 14, 73 B.C.L.R. (6th) 173, at para. 67; *Pointes Protection*, at paras. 70-71; *Bent*, at para. 144. Serious harm requires the plaintiff to provide evidence from which an inference can be drawn that the harm is of a magnitude sufficient to outweigh the public interest in protecting the defendant's expression.

[41] Second, the plaintiff must show a causal link between the defendant's expression and the serious harm they claim to have suffered. Such evidence is particularly important where there may be sources other than the defendant's

expression that may have caused the plaintiff harm: *Pointes Protection*, at para. 72.

[42] Third, assuming the motion judge applied the correct legal test and did not misapprehend the evidence, a motion judge's determination on a s. 137.1 motion, including findings regarding the harm suffered by the plaintiff, are entitled to deference on appeal: *Bent* at para. 77; *Levant v. DeMelle*, 2022 ONCA 79, 79 C.P.C. (8th) 437, at para. 31.

D. GROUNDS OF APPEAL

[43] The appellant alleges that the motion judge made three errors in dismissing her claim against the Remaining Defendants:

(i) the motion judge erred in finding that the impugned statements by Maciver and Picazo were not defamatory;

(ii) the motion judge erred in finding that the defence of fair comment was *prima facie* available to Picard, Weeks and Picazo; and

(iii) the motion judge erred in the weighing exercise she engaged in under s. 137.1(4)(b).

[44] As I explain below, I need not analyze issue (i) to resolve this appeal. This is because the motion judge did not commit errors (ii) or (iii) and, on this basis alone, the appeal of the motion judge's dismissal of the claims against all four of the Remaining Defendants must be dismissed.

E. DISCUSSION

[45] It is important to recognize at the outset that the appellant does not appeal the motion judge's finding that the impugned statements by the Remaining Defendants related to matters of public interest, pursuant to s. 137.1(3) of the *CJA*. This is significant because it shifts the burden onto the appellant to satisfy the motion judge regarding the criteria set out in s. 137.1(4)(a) & (b) of the *CJA*. If the appellant is unable to satisfy even one of the relevant criteria, the proceeding must be dismissed: *Pointes Protection*, at para. 33.

(1) The motion judge did not err in finding that the defence of fair comment was *prima facie* available to Picard, Weeks and Picazo

[46] Section 137.1(4)(a)(ii) of the *CJA* requires the plaintiff to satisfy the motion judge that the defendant has no valid defence in the proceeding. The motion judge found that the appellant had failed to satisfy this requirement in respect of Picard, Weeks and Picazo, because the defence of "fair comment" was *prima facie* available to each of them.

[47] The fair comment defence is premised on the idea that citizens must be able to openly declare their opinions on matters of public interest without fear of reprisal in the form of actions for defamation. For the fair comment defence to be successful, a defendant must prove the following: (i) the comment must be on a matter of public interest; (ii) be based on fact; (iii) be recognizable as a comment;

(iv) satisfy an objective test (could any person honestly express that opinion on the approved facts?); and (v) the speaker cannot be actuated by express malice: *Hansman*, at para. 96. To satisfy a motion judge that a defendant has no valid defence of fair comment, the plaintiff must demonstrate that there is no *prima facie* basis for finding that one or more of these elements of the fair comment offence to be satisfied: *Hansman*, at para. 97.

[48] The appellant claims that the motion judge made two errors in her analysis of whether the "fair comment" defence was available to Picard, Weeks and Picazo. First, the motion judge failed to consider whether the comments made by these three defendants were based on "proven facts", namely, that the statements made by the appellant were in fact untrue or, alternatively, that the statements made by Picard, Weeks and Picazo were true. Second, the motion judge failed to consider whether Picard, Weeks and/or Picazo were motivated by malice.

[49] There is no merit to either of these objections.

[50] As the Supreme Court of Canada made plain in *Hansman* at paras. 99-100, the requirement that the defendant's statements be "based on fact" does not mean that the defendant must prove that the statements they made were true. If this were so, it would collapse the distinction between the defences of "fair comment" and justification. All that is necessary to satisfy the "based on fact" element of the fair comment defence is that the defendant identify the factual foundation upon which

the impugned statement is based, so that the reader can "make up their own minds as to its merits": *Hansman*, at para. 99.

[51] In this case, Picard, Weeks and Picazo all expressly identified the specific statements of the appellant with which they took issue, and their basis for making those statements. Nothing further was required in order to satisfy the "based on fact" requirement of the fair comment defence.

[52] Nor has the appellant advanced any basis for finding that the motion judge erred in finding that Picard, Weeks or Picazo were not motivated by malice. The motion judge made clear findings, based on the record, that all three of these defendants were motivated by concerns that the appellant's public statements had the potential to mislead or misinform the public, thereby creating a potential risk to public health. Not only were these findings open to the motion judge, but the appellant has also failed to adduce any credible evidence to the contrary.

[53] In my view, the motion judge did not err in finding that the defence of fair comment was *prima facie* available to Picard, Weeks and Picazo. This in itself is fatal to the appellant's claims against these three defendants. However, because the "fair comment" defence was not available to Maciver, I will proceed to consider additional grounds relied upon by the motion judge in dismissing the claim against all four Remaining Defendants

(2) The motion judge did not err in finding that the public interest in allowing the appellant's proceeding against the Remaining Defendants to continue did not outweigh the public interest in protecting their expression

[54] The appellant argues that the motion judge made three errors in considering whether the public interest in permitting her proceeding against the Remaining Defendants to continue outweighed the public interest in protecting their expression, pursuant to s. 137.1(4)(b): first, the motion judge erred by focusing on "damages" instead of "harm"; second, she erred in requiring the appellant to establish a causal link between the harm she had suffered and the particular impugned statements made by the Remaining Defendants; and third, the motion judge erred by not considering the "quality" of the Remaining Defendants' expression.

[55] In my view, the motion judge made none of the errors alleged.

[56] Considering the first objection, the motion judge did not erroneously require the appellant to adduce evidence of damage, as distinct from harm. The motion judge simply found that the appellant had failed to adduce any evidence of actual harm, apart from the appellant's bold, conclusory assertion that her reputation had been damaged by the statements made by the Remaining Defendants. Moreover, even this conclusory statement was contradicted by her further claim that she

remains a highly regarded member of the medical profession.

[57] Nor did the motion judge err in requiring the appellant to provide evidence of a causal link between the impugned statements and any alleged harm she may have suffered. In fact, this requirement is expressly mandated by s. 137.1(4)(b) and has been emphasized on numerous occasions by the Supreme Court of Canada as well as by this court, as repeatedly noted above in these reasons: see, for example, *Pointes Protection* at paras. 71-72. The appellant's allegations of harm were completely undifferentiated, without any evidence linking the impugned statements to harm she might have suffered. I see no error in the motion judge's finding that the plaintiff had failed to provide evidence of the necessary causal link between the impugned statements and the alleged harm suffered.

[58] Nor do I agree that the motion judge failed to appropriately consider the "quality of the expression" by the Remaining Defendants in the weighing exercise.

[59] With respect to the impugned statements made by Maciver, the motion judge acknowledged that he had used insulting, unprofessional and ill-advised language in referring to the appellant. But as the Supreme Court of Canada noted in *Pointes Protection*, at paras. 75-76, even speech that contains "deliberate lies or gratuitous personal attacks" may nevertheless be entitled to some modest level of protection, and courts should be wary of descending into a "moralistic taste test" in the weighing exercise under s. 137.1(4)(b).

[60] The motion judge found that, despite the insulting words used by Maciver, his purpose was to point out that the appellant was preventing him from responding directly to her very serious attacks on the honesty and integrity of the leadership of the OMA. It was open to the motion judge to find that there was some degree of public interest in protecting Maciver's right to speak out on this issue, despite the fact that the language he used to communicate his message was insulting. Since the appellant had failed to adduce any evidence of "serious harm" resulting from Maciver's statements, it necessarily followed that she had failed to meet her burden of showing that she had suffered serious harm that outweighed the public interest in protecting Maciver's right to speak on the issue.

[61] Turning to the impugned statements made by Picard, Weeks and Picazo, the motion judge found that there was an extremely high public interest in protecting their right to speak out on the statements made by the appellant regarding COVID-19. As the motion judge pointed out, questions surrounding the development of effective treatments for COVID-19, including the need for vaccines, were matters of great public interest to the medical profession and the public at large. Nor did the language used by any of them in describing the appellant include the use of insults or vitriol. I see no basis for interfering with the motion judge's finding that the public interest in protecting the speech of Picard, Weeks and Picazo far outweighed the appellant's interest in continuing her claim.

(3) Conclusion

[62] The motion judge found that the appellant's defamation claim against the critics of her unorthodox views on effective treatment for COVID-19 was intended to silence those critics. As the motion judge found, correctly in my view, this is precisely the type of proceeding that s. 137.1 was designed to foreclose.

[63] It is unclear why the appellant included the unrelated allegations against Maciver in the proceeding that was otherwise focused on issues related to COVID-19. Maciver had a limited social media profile, his criticisms of the appellant were taken down shortly after they were posted, he apologized publicly and privately to the appellant, and he was subsequently disciplined by the OMA for his comments. The appellant waited nearly two years before commencing a proceeding against Maciver and yet was unable to produce any evidence of reputational or other harm resulting from his tweets. The motion judge did not err in dismissing the appellant's claim against him pursuant to s. 137.1(4)(b) of the *CJA*.

[64] As noted above, these findings are dispositive of the appeal against the Remaining Defendants, making it unnecessary to consider whether the statements made by Maciver and/or Picazo were defamatory.

(4) The appellant should not be granted leave to appeal the costs award

[65] The appellant seeks leave to appeal the motion judge's costs order, principally on the ground that she awarded what the appellant describes as a

“staggering” amount of approximately $1.1 million. The appellant argues that this award is inconsistent with the “guidance” provided in *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, 165 O.R. (3d) 753, at para. 39, to the effect that costs on a s. 137.1 motion should “generally” not exceed $50,000 on a full indemnity basis.

[66] The circumstances in this case are clearly distinguishable from those in *Park Lawn.* This proceeding involved 23 separate defendants, each of whom was being sued based on different statements made in different circumstances. As the motion judge explained in her costs endorsement, in order for the defendants to properly pursue these motions, it was necessary for extensive affidavit material to be filed and cross-examinations to be conducted. Presence of counsel was required for the cross-examinations as well as all other necessary steps leading up to the hearing of the motions themselves. The issues were of great importance to the parties and submissions were required to be tailored to the specific fact situations bearing on the claims brought against them by the appellant.

[67] It was the appellant’s choice to commence a proceeding against 23 different defendants, one, moreover, that has now been found to be without merit. Given that this proceeding is precisely the kind of action that s. 137.1 is designed to prevent, the motion judge was fully justified in applying the presumption of full indemnity costs set out in s. 137.1(7).

[68] In any event, the costs landscape has changed significantly as a result of the appellant's abandonment of her appeals against 19 of the Original Defendants. The costs awarded to those 19 Original Defendants, which the appellant now no longer contests, total over $900,000. As such, the only costs orders which the appellant now seeks leave to appeal are those made in favour of the Remaining Defendants, as follows: $90,562.89 to Picard and Weeks; $33,281.26 to Picazo; and $88,247.24 to Maciver.

[69] These costs awards are less than a number of the awards made to some of the other of the Original Defendants which are no longer in issue. I see no basis for granting leave to appeal the costs awards to the Remaining Defendants, when they are indistinguishable from other awards in the same litigation for larger amounts which are no longer in issue.

[70] I would therefore deny leave to appeal the costs awarded to the Remaining Defendants.

F. DISPOSITION

[71] For the reasons set out above, I would dismiss the appeal against the Remaining Defendants and deny leave to appeal the associated costs awards.

[72] The parties have agreed on the appropriate costs of the appeal. In accordance with that agreement, I would award costs of: $5,000 to Picazo; $12,500 collectively to Picard and Weeks; and $15,000 to Maciver, in each case

on an all-inclusive basis, payable within 30 days.

Released: February 22, 2024 L.B.R.

P.J. Monahan J.A.

I agree. Roberts J.A.

I agree. [illegible] J.A.