COURT OF APPEAL FOR ONTARIO

CITATION: 40 Days for Life v. Dietrich, 2023 ONCA 379
DATE: 20230524
DOCKET: M54191 (COA-22-CV-0306)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

40 Days for Life

Plaintiff (Respondent)

and

Brooke Dietrich, John Doe, Jane Doe and Persons Unknown

Defendants (Appellants)

Andrew Bernstein, Sarah Whitmore, Julie Lowenstein, and Anna Matas, for the appellant Brooke Dietrich

Philip H. Horgan and Raphael T.R. Fernandes, for the respondent 40 Days for Life

Zohar R. Levy and Rachel Laurion, for the proposed intervener Canadian Civil Liberties Association

Heard: in writing

REASONS FOR DECISION

Overview

[1] This is a motion for leave to intervene as a friend of the court, pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in an appeal from an order dismissing the appellant's anti-SLAPP motion pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*").

[2] The respondent, 40 Days for Life ("40 Days"), is a Texas-based group. One of 40 Days' activities is conducting vigils outside of abortion clinics. The appellant, Ms. Dietrich, often engages online with social justice issues, including pro-choice rights and reproductive freedom.

[3] Ms. Dietrich posted a series of videos online relating to 40 Days and their protest activities. In some of the videos, she encouraged false sign-ups to the vigils (i.e. encouraging individuals to sign up for the vigils, but not attend). In other videos, she makes statements about 40 Days that they allege are false and defamatory.

[4] 40 Days commenced an action for damages for libel, internet harassment, breach of contract, inducement of breach of contract, fraud, and/or conspiracy. In response, Ms. Dietrich brought an anti-SLAPP motion under s. 137.1 of the *CJA*. The motion was dismissed.

[5] Prior to Ms. Dietrich bringing her s. 137.1 motion, 40 Days obtained two interim injunctions against Ms. Dietrich and the other defendants (other

unidentified individuals alleged to have engaged in tortious conduct on social media). The defendants have appealed, with leave, those injunctions to the Divisional Court. The CCLA has been granted leave to intervene in the Divisional Court.

[6] In this court, Ms. Dietrich appeals the dismissal of her s. 137.1 motion.

[7] The CCLA seeks leave to intervene in this appeal. The appellant consents to the CCLA's intervention. The respondent opposes the motion. All agree that this motion can be heard in writing.

[8] In determining this motion, I must consider the nature of the case, the issues that arise in the case, and the contribution that the CCLA can make in resolving the issues before the court, without doing an injustice to the parties: *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), at para. 22; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167. Typically, in an appeal involving private actors, the proposed intervener must meet a stringent standard, one that can bend somewhat where issues of public policy arise: *Tsige*, at para. 23.

Nature of the Case and Issues on Appeal

[9] The appellant seeks an order allowing their appeal and dismissing the respondent's action in its entirety pursuant to s. 137.1(3) of the *CJA*. The appellant also seeks $50,000 in damages pursuant to s. 137.1(9) of the *CJA*.

[10] First, the appellant argues that the motion judge erred in finding that 40 Days had established substantial merit for its claims of internet harassment and conspiracy without finding grounds to believe that 40 Days had suffered the requisite harms. She also argues that the motion judge failed to adequately consider the context of the counter-protests and their connection with the public debate over abortion access in Canada, and thus failed to appreciate that the appellant's counter-protests were expressive activities worthy of protection.

[11] Second, the appellant argues that the motion judge erred in conducting the balancing exercise under s. 137.1(4)(b) of the *CJA* by determining that the public interest in permitting the claims to continue outweighed the public interest in protecting the appellant's expression.

[12] Though this case involves a private dispute, the issues involve broader public policy considerations that extend beyond the parties. This court will be called upon to decide issues that engage with public policy dimensions, including the public interest in protecting freedom of expression in a virtual environment. The case will necessarily engage with whether and to what extent online protests should be considered analogous to in-person protests and how online activity intersects with the freedom of expression. Therefore, while this is a private dispute, the resolution of that dispute will, to some extent, engage with a public policy dimension.

Will the CCLA Make a Useful Contribution Without Doing an Injustice to the Parties?

[13] The CCLA seeks to intervene to make submissions on two issues:

1. The application of the current jurisprudence regarding location of protest to expressive activity that occurs online or in a virtual environment; and
2. How the tort of internet harassment should develop in light of the freedom of expression jurisprudence.

[14] On the first issue, the CCLA proposes to provide a roadmap for applying the existing traditional jurisprudence on the location of expressive activity (i.e. the principle that whether the speech takes place in a private as opposed to a public forum is important to assessing whether to restrain the speech) to the virtual environment. While protests have traditionally occurred “in the streets”, protest activity is increasingly moving online. The CCLA wishes to provide insight about whether, and to what extent, freedom of expression ought to be protected within the online world and the appropriate way to consider the location of expression when courts are dealing with motions to restrain expression, as with s. 137.1 motions.

[15] On the second issue, the CCLA proposes to make submissions about how the new tort of internet harassment should develop in light of freedom of expression. Though the *Charter of Rights and Freedoms* does not apply to private

disputes, the Supreme Court has indicated that the development of the common law should be consistent with Constitutional values: *RWDSU Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, at para. 19. For example, the tort of defamation developed with regard to freedom of expression and s. 2(b) of the *Charter*: see *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 43-57. The CCLA proposes to situate the new tort of internet harassment in the context of the existing freedom of expression jurisprudence.

[16] 40 Days opposes the intervention on the basis that:

1. This is a private tort claim unsuitable to intervention. The appeal is largely fact-specific and the appellant is entirely able to advance the submissions that the CCLA wishes to make.
2. The CCLA will end up repeating the appellant's submissions as Ms. Dietrich already addresses the impact of the applicability of freedom of expression jurisprudence to online activity such as took place in this case.
3. The CCLA's intervention will cause prejudice because the appeal is already perfected. Quite simply, they should have brought their motion earlier.
4. The CCLA is really attempting to intervene to support a "pro-choice cause". Their submissions will not be helpful on appeal.
5. The CCLA overstepped their appropriate role as an intervener in the Divisional Court and it is likely they will do the same here. The alleged overstepping

relates to the fact that the CCLA is said to have improperly taken a position on the facts of the appeal in the Divisional Court.

Discussion

[17] The CCLA is a well-recognized group with strong expertise in the area of freedom of expression. There is no question they have made useful contributions on many cases in this court (and others) in the past.

[18] If the CCLA, or any intervener for that matter, were to step beyond the bounds of a proper intervener, then there are remedies for that, ones that can be pursued at the point where any overstepping occurs. What the respondent asks is that this court anticipate that, if the CCLA is granted intervener status, that it will breach the order allowing for the intervention by exceeding the boundaries of that order. I do not operate on that assumption. To the contrary, I operate on the assumption that the CCLA knows well the appropriate role of an intervener and that the CCLA will comply with any order made.

[19] I make no comment on what has or has not transpired in the Divisional Court. Any grievance on the part of the respondent for the work done by the CCLA in the Divisional Court should be raised in that court. The remedy is not to ask this court to, in essence, adjudicate on the matter and then grant a remedy which is to exclude the CCLA from intervention in this court.

[20] In addition, I see no basis for the allegation that the CCLA has the motivation alleged by the respondent. There is simply no evidence to support this claim. And, in any event, interveners do not need to be entirely disinterested in the outcome of a legal issue. To the contrary, interveners are frequently aligned with a party in terms of the outcome of a legal issue. It is the outcome of the case that they must remain distanced from.

[21] Therefore, this motion really comes down to whether the CCLA has something useful to contribute to the appeal beyond what the appellant has already set out in her materials and whether prejudice will arise from an intervention at this stage.

[22] In my view, the CCLA has something useful to contribute. Having reviewed the appellant's factum, it barely touches upon the arguments that the CCLA wishes to advance. Even if Ms. Dietrich were to expand on these issues during the oral hearing of this matter, there is nothing wrong with the CCLA building upon the existing issues and offering fresh perspectives on how to approach them: *R. v. Doering*, 2021 ONCA 924, at para. 25. Any risk of overlap here can be mitigated by narrowing the terms of the intervention.

[23] This leaves the issue of prejudice for resolution. This motion has been brought at a fairly late stage. The appeal is listed to be heard eight weeks from now. Even so, with a tight timeline for filing, I am satisfied that there is enough time

for the CCLA to file a factum and for the parties to file reply factums should they wish to do so.

Disposition

[24] The motion for leave to intervene is granted on the following terms:

1. The CCLA is granted leave to intervene as a friend of the court.
2. The CCLA will not raise new issues or lead new evidence and will make reasonable efforts to avoid duplicating the submissions of the parties.
3. The CCLA shall file a factum of up to 15 pages in length by June 6, 2023.
4. Each party may file a supplementary factum of up to 8 pages in length responding to the intervener by June 27, 2023.
5. The CCLA may make oral submissions not exceeding 15 minutes at the hearing of the appeal.
6. No costs shall be awarded in favour of or against the CCLA.

“Fairburn A.C.J.O.”