

## Vexatious Litigation is Not a Protected Form of Expression

**Emily Vereshchak**  
**December 2020**

In [London District Catholic School Board v. Michail](#)<sup>[1]</sup>, the Ontario Superior Court of Justice considered a motion pursuant to s.137.1 of the *Courts of Justice Act* (commonly referred to as the “anti-SLAAP provisions”) within the context of an Application for a declaration of a vexatious litigant pursuant to s.140 of the *Courts of Justice Act*. The matter was heard via Zoom.

The takeaways from this decision include:

- Legal proceedings constitute a form of “expression” as defined in s.137.1(2) of the *Courts of Justice Act*;
- The Court will not deem vexatious litigation as a protected form of expression; and
- Proceedings brought under s.140 of the *Courts of Justice Act* are not caught by s. 137.1(3) of the *Courts of Justice Act*, as the relief sought pursuant to s.140 is procedural in nature, and is not capable of “gagging” or suppressing protected expression.

This decision is also among the first cases to rely on the recent decision of the Supreme Court of Canada in *1704604 Ontario Limited v. Pointes Protection Association et al*<sup>[2]</sup>, which interpreted the test under s. 137.1<sup>[3]</sup>.

### **Facts**

The applicant, the London District Catholic School Board (“LDCSB”), brought an Application for an Order declaring that the respondent, Ms. Michail, was a vexatious litigant pursuant to s.140 of the *Courts of Justice Act*. In response, Ms. Michail brought a motion pursuant to s. 137.1 of the *Courts of Justice Act*, alleging that LDCSB’s Application was a strategic lawsuit against public participation (a “SLAAP”).

Ms. Michail was formerly employed with LDCSB as a high school teacher. Between 2011 and 2019, Ms. Michail commenced numerous legal proceedings against or involving LDCSB, which included allegations of discrimination on the basis of a disability, the tort of intentional infliction of mental distress, and a breach of the duty of fair representation.

Ms. Michail's proceedings included union grievances, along with applications to the Ontario Human Rights Tribunal, the Ontario Labour Relations Board and the Workplace Safety and Insurance Board. She also brought several motions, applications, and appeals before the Superior Court of Justice, the Divisional Court, and the Court of Appeal, and pursued applications for leave to the Supreme Court of Canada. These proceedings formed the basis of LDCSB's Application.

On the Application, LDCSB sought an Order:

1. That no further proceedings be instituted or continued by Ms. Michail except with leave; and
2. Requiring that Ms. Michail deliver a copy of the vexatious litigant Order and any written decision arising from the Application to any person or body for whom she initiates or continues any complaint.

In light of Ms. Michail's s.137.1 motion, Justice Mitchell stayed LDCSB's Application, pending the determination of the motion.

### **Analysis**

Justice Mitchell reviewed the policy objectives on a s.137.1 motion, including the proper framework outlined by the Supreme Court of Canada in *1704604 Ontario Limited v. Pointes Protection Association et al*<sup>[4]</sup>. This provision contains a threshold test, which places the initial burden on the moving party to show that the proceeding arises from an expression made by the person that relates to a matter of interest.

On motions pursuant to s.137.1, the threshold burden must be met by the moving party before the Court can proceed to the later part of the test, and to the ultimate determination of whether the proceeding should be dismissed.

In relation to the proceedings before the Court in which LDCSB sought to declare vexatious, Ms. Michail argued that the various proceedings related to issues of public interest, which included the constitutional rights of unionized workers in Canada, the rule of law, and the maintenance and preservation of an open justice system.

In her submissions, Ms. Michail argued that LDCSB was attempting to unjustly silence her as a terminated employee and to intimidate and censor her expressions on public issues and participation in public affairs.

Justice Mitchell noted that Ms. Michail's proceedings demonstrated a pattern of litigation, as she had appealed every decision in which she had been unsuccessful, including a reconsideration of a decision to the Supreme Court of Canada.

In applying the definition of "expression" in s.137.1(2) of the *Courts of Justice Act*, Justice Mitchell determined that any legal proceedings brought by Ms. Michail (vexatious or otherwise) constituted a form of "expression". Further, Justice Mitchell stated that any vexatious legal proceedings brought by Ms. Michail were causally connected to the underlying Application brought by LDCSB.

Justice Mitchell concluded that Ms. Michail had failed to meet the threshold burden in s.137.1(3), which required Ms. Michail to satisfy the Court on a balance of probabilities, that vexatious litigation, as a form of expression, related to a matter of public interest.

Among her reasons, Justice Mitchell stated:

The court cannot be viewed as a proponent of vexatious litigation by deeming vexatious litigation a protected form of expression. Ms. Michail appears to conflate the expressions forming the basis of the proceedings she has brought to date – allegations relating to the constitutionality of legislation, breach of her Charter rights, discrimination on the basis of a disability and other human rights violations – with the expression sought to be "suppressed" by LDCSB in this application – the commencement and continuation of vexatious legal proceedings. The former is arguably protected expression while the latter clearly is not.

To include proceedings brought under s. 140 CJA as caught by s. 137.1(3) CJA, would render the protection granted by s. 140 and afforded to those against whom vexatious litigation is brought, meaningless. Relief granted on an application brought pursuant to the statutory authority in s. 140, is procedural (i.e., the appointment of the court as "gatekeeper") and, therefore, not capable of "gagging" or suppressing protected expression<sup>[5]</sup>.

On review of the evidence filed by LDCSB, Justice Mitchell noted that LDCSB had not prevented or attempted to suppress Ms. Michail's expressions. Instead, LDCSB's Application causally arose from the unsuccessful proceedings instituted by Ms. Michail.

It was not the expressions or allegations advanced by Ms. Michail adverse in interest to LDCSB that formed the grounds of the Application.

Justice Mitchell dismissed Ms. Michail's motion, making it unnecessary to proceed further with the analysis provided under s.137.1(4). However, Justice Mitchell left the success of LDCSB's Application for another day.

### ***Conclusion***

This decision suggests that where the relief sought in a proceeding is procedural in nature, such matters are not suitable for motions pursuant to section 137.1 of the *Courts of Justice Act*.

[1] 2020 ONSC 7331

[2] 2020 SCC 22.

[3] For a further discussion on the test on Anti-SLAAP motions provided by the *Courts of Justice Act*, click [here](#).

[4] 2020 SCC 22.

[5] At paragraph 21.