CITATION: Core Insight Strategies Inc. v. Advanced Symbolics, 2019 ONSC 2109
Court File: CV-18-595693
MOTION HEARD: 20190402
REASONS RELEASED: 20191020

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

CORE INSIGHT STRATEGIES INC.

Plaintiff

and

ADVANCED SYMBOLICS (2015) INC.

Defendant

BEFORE: MASTER D. E. SHORT

COUNSEL:	Natalie Schernitzki -for moving plaintiff	F (416) 368-6068 nschernitzki@businesslawyers.com
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RELEASED:	September 20, 2019	

Reasons for Decision

> "The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry ."
>
> *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403

I. Overview

[1] This is a motion regarding the position of a citizen whom the plaintiff seeks to add as a defendant on account of his seeking information regarding actions of public organizations. In the above extract Justice Cory, writing for the majority at the Supreme Court, identified the balancing act that is required in a case such as this.

[2] In particular on this motion , the Plaintiff, Core Insight Strategies Inc. ("CIS"), asks for an Order granting leave to amend the Statement of Claim to add Dan Baril ("Baril") as a Plaintiff and Erin Kelly, Kenton White and Ken Rubin as Defendants to an already existing proceeding together with the appropriate amendments to the allegations as set out in the proposed, Amended Statement of Claim.

[3] The Proposed Defendant, Ken Rubin opposes the motion by the Plaintiff, based upon freedom of information related statutory provisions.

[4] The Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 19 , ("MFIPPA") provides:

> 1. The purposes of this Act are,
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
> (i) information should be available to the public,
> (ii) necessary exemptions from the right of access should be limited and specific, and
> (iii) decisions on the disclosure of government information should be reviewed independently of government; and
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[5] Quebec has similar legislation referred to as Quebec's Act Respecting Access To Documents Held By Public Bodies And The Protection Of Personal Information, CQLR c A-2.1 ("QAL4").

[6] Ontario's *Courts of Justice Act* was amended in 2015, to add Section 137.1, under the heading "Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)". It reads in part:

> *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. 2015, c. 23, s. 3.

[7] The interpretation of this provision, in part, turns on the definition of "expression" in subsection (c):

> "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.

[8] The subsequent subsections (3) & (4) provide for a judge to dismiss a proceeding against a "person". I interpret this provision is applying where an individual is included as a defendant in the originally issued Statement of Claim:

> (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..
>
> (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.

[9] The following subsection addresses the implementation of an automatic stay with respect to proceedings impacted by the statutory provisions:

> (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.

[10] In light of this provision I regard this action in its entirety as presently stayed until all available appeal rights have been exhausted.

[11] The subsequent portion of the Courts of Justice Act addresses possible subsequent attempts to amend 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.

[12] Section 137.1 concludes with a listing of the potential cost consequences flowing from the section:

> *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.

[13] I regard a pleadings amendment challenge as being similar to that contemplated by these 2015 amendments. To the extent necessary I rely upon rule 1.04 to as authority for my determining the issues before me:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg.
> (2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

II. Nature of main Action

[14] The Plaintiff, Core Insight Strategies Inc. ("CIS") carries on business in marketing and public opinion research and communications fields. CIS practices in a number of sectors including transportation/transit,.

[15] The Defendant, Advanced Symbolics (2015) Inc. ("ASI") is a corporation with a registered head office in Ottawa. ASI owns technology that relies on Machine Deep Learning and Artificial Intelligence ("AI Technology") to create random controlled samples of social media to query human behaviour and public opinion for use in descriptive, predictive and prescriptive analytics.

[16] These two corporations entered into arrangements to jointly provide services to various public transit providers. Those arrangements encountered disputes which ultimately resulted in claims by the plaintiff that the defendant had improperly taken opportunities that belonged to the plaintiff corporation.

[17] The defendants sought to obtain information from various transit authorities which might be of relevance in the defence of the plaintiff's claims. As these were public organizations, they retained Mr Rubin to assist in their investigations.

[18] A sample of the content of these allegations is seen in this paragraph from the proposed Amended Statement of Claim:

> 40. The malicious behavior continued when, on or about November 22, 2018, Mr. Rubin made a request under Quebec's *Act Respecting Access To Documents Held By Public Bodies And The*

Protection Of Personal Information ("OALA") for records between RTC and CIS including, but not limited to, emails between Mr. Mercier and Mr. Baril with respect to:

(a) contracts, discounts, benefits, trips, hospitality, entertainment and gifts; and

(b) problems with partnering and working with ASI including personal and work comments about ASI personnel including Ms. Kelly. (the "2nd Request")

III. Elements of Main Dispute on Motion

[19] This action is, at its core, a business dispute between Core Insight Strategies Inc. ("CIS") and Advanced Symbolics (2015) Inc. ("ASI") and their respective principals, Dan Baril ("Baril") of CIS, and Erin Kelly ("Kelly") and Kenton White ("White") of ASL. The proposed amendments involving these entities are not opposed by them.

[20] The resisting proposed defendant, Ken Rubin is "an Ottawa-based public interest researcher, citizens' advocate, author and consultant with over 50 years of experience." He is said to have "filed and analyzed thousands of requests for public and personal information".

[21] The factum filed by his counsel asserts that "His work has resulted in hundreds of media stories and improvements in freedom of information and privacy protection legislation in Canada."

[22] Apparently, Rubin also works as a freedom of information consultant, assisting individuals and businesses with filing and following up on access to information requests.

[23] On or about June 19, 2018, ASI retained Rubin to file routine contract requests in three cities under access to information legislation. Rubin made the following freedom of information requests (collectively the "FOI Requests"):

(a) August 13, 2018 Durham Municipality request under the MFIPPA;

(b) November 22, 2018 Quebec City request under QAIA;

(c) November 22, 2018 City of Ottawa request under MFIPPA;

(d) November 28, 2018 Durham Municipality second request under MFIPPA; and

(e) November 28, 2018 Durham Municipality second amended request under MFIPPA

[24] These FOI Requests form the sole basis for the Plaintiffs' amended allegations advancing the causes of action as against Rubin in defamation and intentional interference with economic relations.

IV. Plaintiffs' Position

[25] The Factum filed on behalf of Plaintiff CIS asserts the test for leave to add a defendant varies depending on whether the motion is (i) brought within the limitation period, or (ii) brought after the limitation period has 'presumptively' expired. The analysis for both scenarios is guided by Rule 5.04(2) of the Rules of Civil Procedure (the "Rules") which allows the Court to grant leave unless non-compensable prejudice would result. The factum with their emphasis added notes:

> 5.04 (2) At any stage of a proceeding the court ***may*** by order ***add***, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, ***unless prejudice would result that could not be compensated for by costs or an adjournment***.
>
> Furthermore, Rule 26.01 of the Rules states that the Court *shall* grant leave to amend a pleading unless non-compensable prejudice would result:
> 26.01 On motion at any stage of an action the court ***shall*** grant leave to amend a pleading on such terms as are just, ***unless prejudice would result that could not be compensated for by costs or an adjournment***.

[26] Where the motion for leave to add a party and amend the pleading is clearly brought within the limitation period, the test applied by the Court is strictly guided by the language of Rules 5.04 and 26.02 and is as follows:

> "To defeat a motion to amend, the party resisting the amendment must show that the non-compensable prejudice it relies on "would result" from the amendment."

[27] Accordingly, in a normal situation Rule 5.04(2) imposes a "reverse onus" on the proposed defendants to establish non-compensable prejudice and is in favour of granting orders to add parties. However, in my view the position of this proposed defendant is far from a normal situation.

[28] The plaintiff relies on *Schembri v. Way,* 2012 ONCA 620, a decision of the Ontario Court of Appeal, as authority for an "almost automatic right to leave to add defendants before the expiration of the limitation period". In that case the proposed defendants failed to raise any true allegations of prejudice. Therefore, the Court of Appeal overturned the motion judge's decision to deny leave with the following rationale:

> "There is neither an allegation of prejudice nor a limitation period issue here, and the action is at an early stage. The plaintiffs could commence a new action against the proposed defendants and then seek to join it with the existing action. The procedure of adding parties to the existing action circumvents the costly and time-consuming process involved in that procedure".

[29] I distinguish this case as there is now a potential overriding statutory provision in this case. For example, Belobaba J. in *Witham v. FCA Canada Inc.* 2018 ONSC7703. confirmed that:

> "The case law is clear that the "prejudice" referred to in the pleading rules: [is] something more than the prejudice of having to defend the action or incur additional costs. **The prejudice must be such that it would be unfair to now respond to the claim even if it would have been legitimate in the first instance** . . . The defendant must show that the amendment of the original pleading creates irremediable prejudice.

[30] However, none of the jurisprudence involved a clear, specific, statutory provision specifically directed at protecting the public from improper involvement in litigation which might be described as a "gag proceeding".

[31] The plaintiff's factum asserts:

> 46. The said requests falsely imply that CIS and/or Mr. Baril and the clients that they introduced to ASI have acted in contravention of the *Criminal Code*, namely, intentionally giving/receiving a benefit to a public official in consideration for influence on government contracts which is a fraud on government. They are also an attack on both CIS' and Mr. Baril's integrity and reputational value.

V. Conclusion

[32] I am not satisfied that requests of the nature filed by Mr. Rubin can be construed as any specific allegation of any wrong doing.

[33] In my view the degree of prejudice flowing from exercising rights under the existing, relatively new, statutory provisions justifies my refusal to permit the addition of a party such as Mr. Rubin.

[34] The Ontario Court of Appeal also held in *1317424 Ontario Inc. v Chrysler Canada Inc.,* 2015 ONCA 104, at para 7, that "[o]ne factor is that an amendment will not be allowed if it would have been struck out had it been originally pleaded" and "applying the analysis from *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, a claim will be struck out under rule 21.0l(l)(b) if it has no reasonable chance of success.

[35] Rubin does not contest that the FOI Requests refer to the Plaintiff or that the words complained of were communicated to at least one other person besides the Plaintiff (namely, the government officials processing the FOI Requests).

[36] Rubin *does* contest the allegation that the words complained of in the FOI Requests are capable of defamatory meaning, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

[37] If an expression tends to lower a person's reputation in the estimation of ordinary, reasonable members of society, or exposes a person to hatred, contempt or ridicule, it is defamatory.

[38] There is a two-step process in deciding whether a statement is defamatory.

[39] First, as a threshold question of law, the words complained of must be reasonably *capable* of a defamatory meaning. If that matter is decided in the affirmative, the second step is to decide whether a reasonable person would have understood the words in their defamatory sense.

[40] In *Bernstein v Poon,* 2015 ONSC 155, the court held that to determine the meaning of the words complained of, "all of the circumstances of the case may be considered, including (a) any reasonable implications the words may bear; (b) the context in which the words were used; (c) the audience to whom the words were published; and (d) the manner in which the words were presented."

[41] The Plaintiff alleges that the FOI Requests are defamatory, as the plain meaning and/or innuendo of the words used therein states or implies that the Plaintiff (and/or the additional proposed plaintiff, Baril) is "unethical, untrustworthy, lacking in credibility and engaged in improper and/or criminal conduct".

[42] I accept counsel's argument that in this case, "the threshold question of law - namely, whether the words complained of are capable of the defamatory meanings alleged - must be answered in the negative because:

> (a) the words complained of do not state or imply that particular conduct took place, they merely request documents that may or may not exist;
> (b) the context in which the words were used does not support the meaning advanced by the Plaintiff; and
> (c) the government officials processing the FOI Requests would not understand the words complained of to be defamatory. "

[43] In *Grand Financial Management Inc. v Solemio Transportation Inc.,* 2016 ONCA 17 5, at para 62 (leave to appeal refused, 2016 ONCA 175), the Ontario Court of Appeal held that the essential elements of the tort of intentional interference with economic relations are as follows:

> "[F]irst, the defendant must have intended to injure the plaintiffs economic interests; secondly, the interference must have been by illegal or unlawful means; and thirdly, the plaintiff must have suffered economic harm or loss as a result." (Internal citations omitted)

[44] I adopt the proposed defendant's counsel's submission that, "Allowing such unmeritorious allegations that raise issues not worthy of trial to proceed at this stage would not only be unjust given the seriously harmful effects on access to information and free expression ... but it would also be a waste of court resources, as they would be struck upon pleading."

[45] If those filing requests under access to information legislation were faced with the prospect of civil liability simply for making a request, the purpose of access to information legislation would be frustrated, the defences available to a defamation claim would be unduly limited, and the s. 2(b) Charter guarantee of freedom of expression would be impacted. These harmful effects would cause an injustice not compensable in costs.

[46] The purpose of access to information legislation would be frustrated if requesters were faced with the prospect of civil liability for filing a request. The legislation already provides checks and balances where disclosure of information might be harmful, or a request is frivolous or vexatious.

[47] The applicable legislation also provides an opportunity for third parties subject to requests to object to the disclosure of information which could be harmful to their commercial interests. Both regimes provide for notification to third parties where their commercial interests could be harmed if information were disclosed. Indeed, the Plaintiff/Baril received notification of Rubin's requests. Therefore, it was open to the Plaintiff and/or Baril to object to the disclosure of any information they considered commercially harmful in the FOI Requests, through the appropriate channels provided for in the legislation.

[48] Moreover, it would seem that, particularly in the context of a defamation claim, freedom of information requests assist journalists and those communicating on matters of public interest to substantiate claims and make out the defences of justification and responsible communication when facing a defamation claim.

[49] Freedom of information requests are necessarily made before the requester is in a position to substantiate or verify a statement. If a requester were required to have the facts necessary to substantiate or verify a potentially defamatory implication made in a freedom of information request, the defences available would be severely limited.

[50] In *Grant v. Torstar*, 2009 SCC 61, the Supreme Court of Canada held, at para.61. that the law of defamation must strike a balance between freedom of expression and reputation.

Allowing a defamation claim on the basis of a freedom of information request would tip the balance too far in favour of the right to protect individual reputation.

[51] I find persuasive counsel's submission:

> 43. Finally, the Supreme Court of Canada has repeatedly recognized that freedom of expression is intimately linked to access to information. The spectre of civil liability for simply filing freedom of information requests would have serious implications for s. 2(b) freedom of expression guarantee.

VI. Disposition

[52] The plaintiff's motion to amend its claim is granted with respect to the additional plaintiff and the defendants Kelly and White, without costs.

[53] Plaintiffs motion to add Ken Rubin is dismissed with costs.

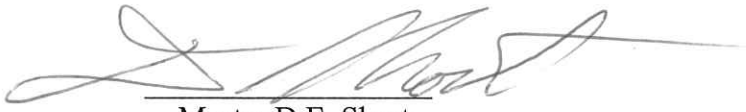
[54] Having regard to the various, possibly applicable, statutory provisions I am requesting that the parties provide written submissions as to the quantum and basis of awarding costs to Mr. Rubin.

[55] Counsel for Mr Rubin shall deliver a cost memo to plaintiff within 20 days. Plaintiff will have 20 days to respond. Any Reply shall be compiled with the other submissions and sent as group to Mr. Backes, my ATC.

[56] If nothing is received within 60 days, I will presume the parties settled the question of costs.

[57] I am obliged to all counsel for their assistance in this somewhat novel area.

R. 275/DS



Master D.E. Short