Case In Point

Supreme Court of Canada Considers Ontario's "Anti-SLAPP" Legislation

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The Supreme Court of Canada recently released companion decisions interpreting Ontario's "anti-SLAPP" legislation. The decisions, *Bent et al. v. Platnick, et al.* and *1704604 Ontario Ltd. v. Pointes Protection Association, et al.* were the first to consider the new statutory regime under s. 137.1 of the *Courts of Justice Act*.

The anti-SLAPP ("strategic litigation against public participation") legislation is aimed at discouraging matters that have the harmful effect of chilling individuals and organizations from speaking out on matters of public interest.

Bent et al. v. Platnick, et al. involved a medical doctor who alleged that a lawyer had treated him in a defamatory manner. The lawyer had sent an email to 670 members of the Ontario Trial Lawyers Association, identifying the doctor and alleging that he had misrepresented and altered medical reports. This email was later provided to an insurance industry magazine, which published the full email in the article. The doctor sued the lawyer for defamation (harm to his reputation) and sought over $16 million in damages and lost income. The lawyer took the position that the lawsuit was a "SLAPP."

To successfully dismiss a SLAPP suit, the moving party has to show that the matter is of public interest. The Court will then consider whether there is a valid defence, and weigh the harm to reputation against the potential of chilling public interest expression.

The Supreme Court, in a 5-4 decision, held that the doctor's lawsuit was not a SLAPP and should be permitted to continue. This has no bearing on whether the doctor would be successful in his action, but simply that the action should be allowed to continue.

The doctor's claim was found to be legally tenable with a reasonable prospect of success. Further, the statements that the lawyer had made regarding the Doctor's actions may not have been entirely accurate, and were not defensible through qualified privilege. The defence of qualified privilege will be defeated if the purpose of the communication exceeds the purpose of privilege and is motivated by malice. The doctor was able to show that the lawyer's email was a personal attack and seriously impacted his reputation and livelihood. Accordingly, in balancing freedom of expression and reputation, the harm to the doctor was more important to the public interest than protecting the lawyer's freedom of expression, in this particular case.

In *1704604 Ontario Ltd. v. Pointes Protection Association, et al.*, the numbered company (a land developer) sued the not-for-profit Pointes Protection Association and six of its members for $6 million for breach of contract. The company and Association had an alleged agreement whereby the Association would not disclose specific information about the environmental impacts of the company's actions. The Association said the company was trying to silence criticism about an important public issue, and classified the breach of contract lawsuit as a SLAPP.

The Supreme Court unanimously held that the company's lawsuit was a SLAPP. It found that any harm to the company was slight and the public interest in the Association's right to speak in relation to the environment outweighed any hardship to the company.

What are the key take-aways from these decisions?

First, in these cases it is evident that the Supreme Court will continue to balance freedom of expression against the right to sue over damage to one's reputation.

Second, while anti-SLAPP suits will most frequently apply to defamation cases, they can be used in any proceeding that invokes the public interest, even breach of contract claims.