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Canada's Top Court Provides Guidance on SLAPPs

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Overview

Strategic lawsuits against public participation (SLAPPs) are lawsuits that are intended not to seek justice, but instead to intimidate and silence critics. Regardless of the merits of its underlying claim, a well-heeled plaintiff is often able to drag the critic through costly and time-consuming litigation. In 2015, Ontario's legislature enacted sections 137.1 to 137.5 of the *Courts of Justice Act* (CJA) in an effort to curtail SLAPPs. The legislation operates as a powerful pretrial screening mechanism, allowing our courts to dismiss lawsuits that unduly limit free speech. The Supreme Court considered this new anti-SLAPP legislation in its decisions in *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22 (*Pointes*), and *Bent v Platnick*, 2020 SCC 23 (*Platnick*), and provided helpful guidance concerning the interpretation of these provisions.

The key takeaways from the decisions can be summarized as follows:

- **The test for anti-SLAPP motions has been settled.** The Court has set out the test on an anti-SLAPP motion. It requires the judge to assess the preliminary merits of the case, the harm suffered by the plaintiff and the public interest in allowing the case to proceed.
- **Anti-SLAPP motions are not limited to claims for defamation.** The Court held that the legislation encompasses any proceeding "arising from" an expression.
- **Parties should carefully consider when to bring an anti-SLAPP motion.** The evidence on the motion is evaluated with reference to the stage of proceedings. Parties must assess what evidence is available, and what evidence they expect to obtain, as they consider if and when to bring an anti-SLAPP motion.
- **Evidence must link the harm to the expression.** For the suit to survive the motion, the plaintiff must show causation between the defendant's expression and the harm the plaintiff has suffered. This will be of particular importance when there are other factors that may have caused the harm.

Practical Implications

Most importantly, the Court in *Pointes* stressed the need to interpret Ontario's anti-SLAPP legislation "broadly," and made clear that the legislation provides motion judges with "the ability to scrutinize what is really going on in the particular case before them."

A plaintiff with a bona fide claim arising from a defendant's expression should be prepared, at the earliest stages of the proceeding, to show harm and to justify why the public interest in allowing its suit to proceed outweighs the public interest in protecting the defendant's right to free speech. Conversely, those who believe they are, or will be, subject to a SLAPP suit should be ready to move quickly to have the case dismissed, especially if the opposing party is missing crucial pieces of evidence.

The Facts of *Pointe* and *Platnick*

The underlying action in *Pointes* was brought by 1704604 Ontario Ltd. (170 Ontario), a property development company that sought approval for a proposed subdivision. The defendant, Pointes Protection Association (Pointes Protection), opposed the development.

Following a series of legal disputes, the parties entered a settlement agreement that constrained Pointes Protection's ability to oppose the development (the Settlement Agreement).

After entering into the Settlement Agreement, the president of Pointes Protection testified before the tribunal that was considering whether to approve the subdivision, and claimed that the development would cause ecological and environmental damage. Ultimately, the development was not approved. 170 Ontario then sued Pointes Protection, alleging that the president had breached the terms of the Settlement Agreement by giving this testimony.

Pointes Protection did not file a statement of defence and immediately moved under section 137.1 of the CJA to have the action dismissed as a SLAPP suit.

Platnick arose out of a defamation lawsuit brought by a medical doctor (Platnick) who was often retained by insurance companies to assess the injuries suffered by victims of motor vehicle accidents and to review the assessments of other medical specialists. The suit was brought against a lawyer (Bent) who regularly acted for accident victims. Bent had sent an email to a list of members of the Ontario Trial Lawyers Association, alleging that Platnick had altered doctors' reports and changed a doctor's decision regarding the level of impairment of an accident victim. The email was anonymously leaked and later published in a magazine.

Platnick sued Bent and her law firm for defamation. After filing a statement of defence, Bent moved to dismiss the suit under section 137.1.

The Court in *Pointes* ruled unanimously in favour of Pointes Protection, granted its section 137.1 motion and dismissed 170 Ontario's action.

The Court in *Platnick* ruled five to four in favour of Platnick, dismissed the section 137.1 motion and allowed the lawsuit in defamation to continue.

The Anti-SLAPP Framework

The lead decision that contained the bulk of the Court's legal analysis was *Pointes*, where it set out the three-part legal framework applicable to anti-SLAPP motions.

The first part requires the party bringing the motion (i.e., the defendant in the underlying proceeding) to show that (i) the lawsuit "arises from an expression" it has made; and (ii) the expression relates to a matter of public interest. Significantly, the Court held that the anti-SLAPP provisions are not limited to claims for defamation. As an example, the case against Pointes Protection was for breach of contract and the Court found that it "arose from" the testimony given before the tribunal.

The second part of the framework requires the party responding to the motion (i.e., the plaintiff in the underlying proceeding) to show that (i) there are grounds to believe that the underlying lawsuit has substantial merit; and (ii) the party bringing the motion has no valid defence to the lawsuit. The evidence at this step is assessed based on the stage of the proceeding at which the motion is brought.

The questions of whether a claim has "substantial merit" and whether a defence is "valid" mirror one another. For both, the judge must be convinced that, based on the evidence available at the time the anti-SLAPP motion is heard, the claim or defence has a "real prospect of success." When determining these issues, the judge may engage in limited weighing of evidence, including by making assessments of credibility. The plaintiff must disprove *all* defences, the corollary being that if *any* defence is valid, the underlying lawsuit will be dismissed.

At the third and final part of the framework the plaintiff must initially show that it has suffered monetary or reputational harm caused by the defendant's expression. Evidence of a nexus between the expression and harm will be especially important if factors other than the expression at issue could have caused the harm.

If these requirements are met, the judge will consider whether the harm and public interest in allowing the proceeding to continue outweighs the public interest in protecting the defendant's expression. This assessment is qualitative, and the gravity and magnitude of the harm are given full weight. The judge will also consider the quality of, and motivation for, the expression. Expression will hold greater public interest when it is close to "core values" that underlie freedom of expression, such as searching for truth, participation in political

decision-making and self-fulfillment. Conversely, expression motivated by animus or vendetta, such as gratuitous personal attacks, will be deserving of less weight.

Application of the Framework

In *Pointes*, the Court found that 170 Ontario's action for breach of contract did not have "substantial merit" because the action was based on an inaccurate interpretation of the Settlement Agreement. The Court found that the terms of the agreement did not prohibit giving testimony before the tribunal, contrary to 170 Ontario's allegations.

The Court also noted that 170 Ontario had not established that the testimony given before the tribunal had caused it any harm. By contrast, the Court found a strong public interest in protecting expression that relates to environmental protection and in protecting testimony given openly before adjudicative tribunals. Therefore, the harm suffered by 170 Ontario was found to fall on the "very low end of the spectrum," whereas the public interest in protecting Pointes Protection's expression was significant and fell at the "higher end of the spectrum.

The majority of the Court in *Platnick* found that Platnick had shown that the proceeding had substantial merit and that all of Bent's defences were invalid. Next, the majority found that the reputational harm suffered by Platnick and corresponding public interest in permitting the proceeding were at the high end of the spectrum, whereas Bent's email communication was a personal attack that was less deserving of protection. The public interest in Bent's expression was high, as it pertained to the administration of justice, but low where it referred specifically to Platnick and so, when considered as a whole, fell somewhere in the middle of the spectrum. The interests therefore weighed in favour of Platnick.

The minority found that Bent had put forward a valid defence of qualified privilege, a conclusion that would have been sufficient to dispense with the motion. The minority would have also ruled in favour of Bent at the public interest stage, finding a strong public interest in advising other lawyers to be cautious in their dealings with insurers' experts and warning against a chilling effect on professionals who have experienced misconduct.

Concluding Comments

While *Pointes* and *Platnick* dealt specifically with Ontario's anti-SLAPP legislation, similar laws have been passed in Québec and British Columbia, and the Supreme Court's decisions will no doubt inform the interpretation of these statutes as well. The decisions aim to strike a careful balance between the competing public interests at play, and to give motion judges a broad ambit to scrutinize the particular case before them. It now falls to lower courts to provide further guidance as to how these interests will be weighed.

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