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What's a SLAPP? The Supreme Court of Canada weighs in on anti-SLAPP legislation for the first time

AUTHORS


Andrew Bernstein


Sarah E. Whitmore


Lara Guest


Alicja Puchta

On September 10, the Supreme Court of Canada (SCC) released companion decisions considering Ontario's anti-SLAPP legislation: *Bent et al. v. Platnick, et al*. and *1704604 Ontario Ltd. v. Pointes Protection Association, et al*. This is the first time the Supreme Court of Canada has considered the new statutory regime that has been enacted in many provinces. The regime is aimed at mitigating the harmful effects of SLAPPs—Strategic Lawsuits Against Public Participation—that have the effect of chilling individuals or organizations from speaking about matters of public interest.

What you need to know

- The SCC confirmed that the anti-SLAPP regime may be invoked in any proceeding that arises from public interest expression and that its application is not limited to defamation suits. It could therefore apply to expression that is in breach of a contract.
- The Court also generally confirmed the test for dismissing SLAPPs set by the Ontario Court of Appeal in *1704604 Ontario Ltd. v. Pointes Protection Association, et. al.* with the important exception that it held that the inquiry should be from the motion judge's own subjective perspective on the actual motion record and not from that of the "reasonable trier" at a hypothetical, eventual trial.
- Consistent with the Court of Appeal's jurisprudence in applying Ontario's anti-SLAPP regime, the Supreme Court confirmed that "balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest" was the key legislative objective and thus the "fundamental crux of the analysis" is the public interest weighing branch of the court's inquiry.
- In assessing whether a defamation suit should proceed, the Court instructed that the values underlying freedom of expression, such as the need to encourage the interchange of ideas to foster a pluralistic and healthy democracy, ought to guide the motion judge's determination. The closer the expression is to these core values, the greater the public interest in protecting it.

- Courts may similarly look to the motivation behind the allegedly defamatory comments in determining whether the claim is a SLAPP; comments that are considered unnecessary "personal attacks" may relate to a matter of public interest but courts are more likely to find that the public interest weighs in favour of allowing the plaintiff to have their day in court.

The test established by the SCC

In *1704604 Ontario Ltd. v. Pointes Protection Association, et al.*, the Court established the framework for resolving a motion to dismiss a SLAPP under s. 137.1 of the *CJA*. At the outset, the Court confirmed that the motion judge should "be wary of turning his or her assessment into a *de facto* summary judgment motion". The motion judge should only engage in a limited weighing of the evidence and should defer to the ultimate trier of fact assessments of credibility and other questions requiring a deep dive into the evidence. The evidence filed on the motion should not be taken at face value, nor will bald allegations suffice, but the motion judge should only engage in a limited weighing of evidence and limited assessments of credibility.

On a motion to dismiss a SLAPP, the threshold burden on the moving party is to show that the underlying proceedings arise from a matter of public interest expression. The Court confirmed that the principles established in *Grant v. Torstar Corp.*, 2009 SCC 61 apply to determining what constitutes a "matter of public interest". Public interest is to be given a broad interpretation. It is irrelevant at the threshold stage whether "the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest".

Once the moving party meets the threshold public interest test, the burden shifts to the plaintiff in the litigation (the respondent on the motion) to demonstrate both that there is: 1) substantial merit to the proceeding and no valid defence; and 2) that the public interest in vindicating the plaintiff's claim through court outweighs the potential for quelling public interest expression.

The Court described the substantial merit and no valid defence branches of the inquiry (section 137.1(4)(a)(i)(ii)) as "constituent parts of an overall assessment of the prospect of success of the underlying claim". The plaintiff must satisfy the motion judge that the claim is legally tenable and supported by evidence that is reasonably capable of belief. To show that the claim has substantial merit requires establishing more than is involved on a motion to strike but less than is required to meet the "strong *prima facie* case" standard. The plaintiff must also show that there must be grounds to believe that the defences, put in play by the defendant, have no real prospect of success.

Finally, the Court considered section 137.1(4)(b)—"the heart of the legislation at issue and anti-SLAPP legislation generally"—the public interest weighing. The Court explained that this branch of the test permits the motion judge to "scrutinize what is really going on in the particular case before them". Harm that is causally connected to the moving party's expression is principally important at this stage of the analysis. However, the Court emphasized that harm is not limited to monetary harm as one's reputation is one's most valuable asset.

In assessing whether the public interest weighs in favour of permitting the plaintiff's lawsuit to proceed or in protecting the expression by dismissing the claim, the Court explained the importance of assessing the value of the expression and the motivation of the lawsuit. Expression that is more closely connected with the principles enshrined by section 2(b) of the *Charter* will weigh more heavily in favour of dismissal as will lawsuits motivated by "punitive or retributory purpose". By contrast, expression that contains vitriol, deliberate falsehoods or gratuitous personal attacks will weigh in favour of allowing litigation to proceed as will proceedings brought to vindicate one's reputation.

Bent v. Platnick

The first appeal considered by the Supreme Court, *Bent v. Platnick*, involved a medical doctor who claimed defamation against a lawyer who sent an email to a group of 670 lawyers and law students through the Ontario Trial Lawyers Association listserv. In the email, the lawyer alleged that the doctor had intentionally altered other doctors'

reports in the context of litigation. The email was leaked and published in an insurance trade magazine. The doctor sued the lawyer and her firm for defamation. The lawyer then brought a motion under the anti-SLAPP legislation, asking the Court to dismiss the defamation claim against her.

The Supreme Court of Canada, in a 5-4 decision, upheld the decision by the Court of Appeal for Ontario dismissing the lawyer's anti-SLAPP motion, confirming that the doctor's claim may proceed. Justice Côté, writing for the majority, found that the doctor's claim was "legally tenable" and had a "real prospect of success". There was also some evidence to suggest that the doctor may not have altered the report, and what the lawyer had written in her email was not necessarily true. Her email constituted a "personal attack" by mentioning the doctor's name and seriously threatened his reputation and his livelihood.

1704604 Ontario Ltd. v. Pointes Protection Association

The Supreme Court reached the opposite conclusion in the second appeal, *1704604 Ontario Ltd. v. Pointes Protection Association*. The Pointes Protection Association was formed to protest a developer's plans to build a suburb in Sault Ste. Marie, Ontario. After a series of proceedings concerning the development, Pointes Protection allegedly agreed that it would stop claiming that a decision to allow the development to proceed was illegal. However, at a subsequent hearing, the president of Pointes Protection testified the development would cause a significant loss of coastal wetlands leading to serious environmental damage. The developer sued him and Pointes Protection for $6 million in damages in defamation and breach of contract.

The Supreme Court of Canada dismissed the developer's suit as a SLAPP suit. Justice Côté, writing for a unanimous court, emphasized the public interest in the SLAPP legislation, noting that the case was "about what happens when individuals and organizations use litigation to quell such expression, which, in turn, quells participation and engagement in matters of public interest". The Court concluded that the impugned testimony, which focused on the environmental impact of a private development, was a matter of public interest because it was about the environmental impacts of the development.

To discuss these issues, please contact the author(s).