Cassels

Slappshot: SCC Clarifies Anti-SLAPP Picture

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On September 10, 2020, the Supreme Court of Canada (SCC) released two eagerly awaited decisions interpreting section 137.1 to 137.5 of the *Courts of Justice Act* (CJA), commonly known as Ontario's "SLAPP" (Strategic Lawsuit Against Public Participation) legislation. The decisions in *1704604 Ontario Limited v. Pointes Protection Association et al*., 2020 SCC 22 (*Pointes Protection*) and *Bent v. Platnick*, 2020 SCC 23 (*Platnick*) clarify that a judge hearing a motion to dismiss a defamation lawsuit on the basis that it is a SLAPP must conduct a subjective analysis of the evidence in order to determine whether a defendant has "no valid defence." It is not sufficient for a motions judge to simply perform a "theoretical assessment," as the Court of Appeal had essentially found.

The pair of decisions make it more likely that motions to dismiss defamation claims, on the basis of SLAPP, will succeed. Plaintiffs facing anti-SLAPP motions can anticipate spending significant time and money to show – on the evidentiary record - that there are grounds to believe the defences raised by the alleged defamer *are not valid*. But the *Platnick* decision shows that, in practice, it is still quite possible for a plaintiff to fend off an anti-SLAPP motion.

The Anti-SLAPP Regime

The anti-SLAPP provisions of the CJA were aimed at mitigating the harmful effects of SLAPPs launched as a tool to limit or deter individuals or organizations from speaking out on an issue of public interest.

A defendant may move at any time after a proceeding is commenced for an order dismissing the proceeding, and the motion judge must dismiss the proceeding if satisfied that the proceeding arises from an expression on a matter of public interest, subject to section 137.1(4).

Section 137.1(4) shifts the onus to the plaintiff to demonstrate that there are grounds to believe that

- the proceeding has substantial merit;
- the moving party has no valid defence in the proceeding; and
- the harm likely to be or to have been suffered by the plaintiff is sufficiently serious such that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression in issue.

A “Valid Defence” has a “Real Prospect of Success”

Pointes Protection and *Platnick* clarify that a defence is “valid” if it has a “real prospect of success.” To have a “real prospect of success,” a defence must be legally tenable, supported by evidence that is reasonably capable of belief, and have a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the person being sued.

According to the SCC, the Court of Appeal for Ontario incorrectly interpreted the requirement in section 137.1(4)(b) by removing the motion judge’s assessment of the evidence from the equation in favour of a theoretical assessment by a “reasonable trier.” Rather, the clear wording of s. 137.1(4) requires “the judge” hearing the motion to determine if there exist “grounds to believe,” based on the judge’s subjective assessment of the evidence.

Nevertheless, in *Pointes Protection*, the SCC dismissed the appeal by the plaintiff land developer. The Court of Appeal had previously granted the anti-SLAPP motion by the defendants Pointes Protection Association and six of its members.

Anti-SLAPP not a Foregone Conclusion

In *Platnick*, a majority of five SCC judges reached a different result than *Pointes Protection* on an appeal by lawyer Maia Bent which had sought to overturn the Court of Appeal’s dismissal of Bent’s anti-SLAPP motion. The Court found that the plaintiff, Dr. Platnick, satisfied the burden of showing that there is a sufficiently cogent basis in the record and the law to conclude “that the defence, or defences, put in play… can be said to have no real prospect of success.” There were grounds to believe that Bent’s defences of justification and qualified privilege were not valid.

The minority of four judges disagreed with the majority’s finding that Bent had “no valid defence,” finding that Bent had a “valid” defence of qualified privilege. The minority would have granted Bent’s anti-SLAPP motion and dismissed Dr. Platnick’s defamation action.
