MAY 25, 2023

Canada's Top Court Confirms Anti-SLAPP Motions Protect Speakers, Not Plaintiffs

Authors: Matthew Milne-Smith, Andrew Carlson and Rui Gao

The Supreme Court of Canada, in commenting on anti-SLAPP[1] legislation for the third time in the span of three years, has confirmed that even potentially meritorious claims must be dismissed if the public interest in the defendant's expression outweighs the public interest in allowing the proceeding to continue.

This decision, in *Hansman v Neufeld*, provides valuable guidance on the application of the anti-SLAPP framework in British Columbia, Ontario and other provinces.

This case also represents an important victory for the 2SLGBTQ+ community and other marginalized groups. By highlighting the value of defending such communities, the Court has paved the path for more robust and meaningful protections for speech defending marginalized groups in the future.

Key Takeaways

- **Meritorious claims may be dismissed purely on public interest grounds.** Anti-SLAPP motions are not limited to screening out frivolous or groundless claims. A court not only may, but must, dismiss the claim if the public interest in protecting the defendant's expression outweighs the public interest in remedying the harm done to the plaintiff – even if the claim has substantial merit and the defendant has no valid defence.
- **Any "chilling effect" on the plaintiff's speech arising from their inability to sue is irrelevant.** Instead, the relevant chilling effect that courts will consider on anti-SLAPP motions is the effect that permitting the lawsuit to continue would have on the speech of the defendant and like-minded individuals.
- **"High-quality" expression is afforded greater protection on anti-SLAPP motions.** An expression is of high quality if it lies close to the core values underlying the protection of freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.
- **Expression "motivated by a desire to promote tolerance and respect for a marginalized group" is entitled to significant protection.** Expression of this nature engages the core values of the equal worth and dignity of every individual underlying section 15(1) of the *Charter*.

Facts and Procedural History

Background

Mr. Neufeld was a public school board trustee in Chilliwack, British Columbia, who made online posts criticizing a government-led initiative aimed at fostering inclusion and respect for students who risked facing discrimination in British Columbia schools because of their gender identity or expression.

Mr. Neufeld's statements immediately attracted a public outcry. An especially vocal critic was Mr. Hansman. When contacted by various media outlets for comment, Mr. Hansman criticized Mr. Neufeld's views as, among other things, "bigoted," "transphobic" and "hateful."

A few months later, Mr. Neufeld sued Mr. Hansman for defamation. Mr. Hansman brought an anti-SLAPP motion to have the action dismissed under section 4 of British Columbia's *Protection of Public Participation Act*.

Lower Court Decisions

The chambers judge granted the anti-SLAPP motion and dismissed the defamation action. It was not disputed that Mr. Hansman's expression related to a matter of public interest. Instead, the case turned on (i) the assessment of the fair comment defence advanced by Mr. Hansman; and (ii) the weight of the public interest in protecting

Mr. Hansman's expression versus the public interest in remedying any harm suffered by Mr. Neufeld.

On appeal, the British Columbia Court of Appeal reinstated the defamation action, concluding that the motion judge had erred with respect to both issues.

Supreme Court of Canada Decision: The Defamation Action Should Be Dismissed

In a 6-1 decision (with Justice Coté dissenting), the Supreme Court of Canada restored the chambers judge's decision dismissing Mr. Neufeld's action.

Anti-SLAPP Framework

Anti-SLAPP legislation empowers courts to screen out SLAPPs, which are lawsuits that seek "not so much a legal as a political victory," by silencing critics and suppressing debate on matters of public interest.

Anti-SLAPP legislation has been passed in numerous jurisdictions, including Ontario, Québec, and British Columbia. Because the anti-SLAPP frameworks in British Columbia and Ontario are virtually identical, the Supreme Court of Canada specifically noted that the analytical framework set out in its seminal 2020 decisions in *1704604 Ontario Ltd. v Pointes Protection Association* and *Bent v Platnick*, which arose under Ontario's anti-SLAPP legislation, applied with equal force in British Columbia. Under this framework, an anti-SLAPP motion in these provinces involves the following analysis:

1. The onus is first on the defendant in the action to establish that the proceeding arises from an expression of the defendant that relates to a matter of public interest.
2. If the defendant meets this onus, the plaintiff must establish all of the following factors:
    a. the claim has substantial merit;
    b. the defendant has no valid defence in the proceeding, and
    c. the harm caused to the plaintiff by the defendant's expression is so serious as to outweigh the public interest in protecting that expression.

Public Interest Determinative in Anti-SLAPP Motions

The Supreme Court of Canada focused much of its analysis on the public interest weighing exercise (step 2(c) above). Indeed, the Court opined that the "core feature" of anti-SLAPP legislation is that it "instructs judges to deny claimants a day in court on a meritorious claim, given a more compelling social goal."

The Court also found that Mr. Neufeld did not successfully establish the lack of a fair comment defence by Mr. Hansman, relying on the Court's 2008 decision in *WIC Radio v Simpson*. Crucially, however, even if Mr. Neufeld had discharged that burden, his action would still have been dismissed as a result of the public interest weighing exercise.

The Public Interest Weighs in Favour of Dismissing the Defamation Claim

The Court emphasized that the public's interest in protecting expression will be greater in certain circumstances. The closer the expression lies to the core values furthered by the protection of expression under section 2(b) and other core values of the *Charter* (including those underlying section 15), the greater protection that expression deserves.

In assessing the public interest in protecting Mr. Hansman's expression criticizing Mr. Neufeld's statements, the Court found that the expression in question deserved significant protection. It amounted to "counter-speech" motivated by a desire to combat discrimination and to protect a vulnerable and marginalized group – namely, transgender youth in schools.

Turning to the countervailing public interest in remedying the harm suffered by Mr. Neufeld, the Court agreed with the chambers judge that Mr. Neufeld had failed to adduce sufficient evidence regarding both (i) the alleged harm; and (ii) the causal link between such harm and Mr. Hansman's expression. In particular, the Court rejected the notion that Mr. Neufeld could simply rely on the presumption of harm that ordinarily applies in defamation cases to succeed in the weighing exercise. This presumption can establish only the *existence* of harm, not that the harm is *serious* enough to outweigh the public interest in protecting the expression that caused it. Moreover, Mr. Neufeld could not establish a causal link between his alleged harm and Mr. Hansman's comments given that numerous parties had criticized Mr. Neufeld's comments.

The Supreme Court of Canada also disagreed with the Court of Appeal regarding its assessment of the chilling effects relevant to the anti-SLAPP motion. The Court of Appeal held that the motion judge should have considered the chilling effect that a dismissal of Mr. Neufeld's claim may have on others wishing to engage in debates on highly charged matters. Those individuals might refrain from engaging in those debates because they would be prevented from suing to protect their reputations if their comments drew criticism.

The Supreme Court of Canada held that finding a "chilling effect flowing from a plaintiff's inability to pursue a defamation claim turns the concept on its head... Simply put, there is no chilling effect in barring potential plaintiffs from silencing their critics and collecting damages through a defamation suit." Rather, the relevant harm is to the plaintiff's reputation as a result of the defendant's expression, not restrictions on the plaintiff's ability to sue.

In fact, the relevant chilling effect in the public interest weighing exercise is the effect *on the defendant*. Courts will consider the chilling effect that allowing the proceeding to continue may have on the defendant and like-minded individuals, who may be silenced for fear of being sued.

In the result, the Supreme Court of Canada Court upheld the chambers judge's findings, and dismissed Mr. Neufeld's defamation action against Mr. Hansman.

[1] SLAPP refers to Strategic Lawsuits Against Public Participation.

Key Contacts: Matthew Milne-Smith, Andrew Carlson and Louis-Martin O'Neill