SLAPP Legislation And The Law Of Defamation: A Dissenting View

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The law of libel is continually evolving to strike and maintain a careful balance between the protection of reputation and the interests of free expression. This balance was most recently readjusted by the Supreme Court of Canada in its adoption of the new defence of Responsible Communication[1]. However, proposed legislation in Ontario will have the effect of disrupting this carefully crafted balance, which will ultimately be detrimental to litigants, the right to protect one's reputation and the overburdened Ontario justice system.

On June 4, 2013, the Minister of the Attorney General of Ontario introduced Bill 83, *Protection of Public Participation Act, 2013* ("Bill 83") with tri-partisan support[2]. This proposed legislation would allow a party sued in a strategic lawsuit, or a Strategic Lawsuit Against Public Participation ("SLAPP"), to file a preliminary motion to have the suit summarily dismissed. This legislation will be particularly relevant to defamation actions.

The proposed legislation is aimed at providing an early mechanism to weed out cases launched for the purpose of bullying. While this is a laudable goal, lost in this equation is the important principle of access to the courts, which will be eroded by this legislation, and the long recognized importance and value of one's reputation, and the right to protect it. Bill 83 is perhaps one of the most draconian pieces of legislation restricting access to the courts. Everyone agrees that SLAPPs should be discouraged, but this legislation terribly misses the mark.

Under this proposed legislation, once a defendant has shown that a statement published or broadcast to third parties was made "*in the public interest*" (a fairly low threshold), the Court "shall" dismiss the action, unless the plaintiff satisfies a three-part test. The plaintiff will bear the onerous task of showing:

a. The proceeding has "*substantial merit*";

b. The lack of a "*valid defence*" on the part of the defendant; and,

c. That the harm is sufficiently serious to outweigh the *public interest* in protecting the expression.

If the plaintiff fails to meet the three-part test the action "shall" be dismissed with punitive consequences. As such, a plaintiff is forced to prove its claim and that the defendant lacks a valid defence, without the benefit of full documentary production, examinations for discovery or oral evidence. If the defendant clears this hurdle, it will have to again prove its case at trial. In essence the defendant gets a "free kick at the cat" without any risk that judgment could be rendered in favour of the plaintiff.

In fact, even where the plaintiff succeeds in defending a SLAPP motion, the legislation provides that the plaintiff is not entitled to costs unless the judge orders otherwise. If the action is dismissed, the legislation provides for costs to be awarded on a full indemnity basis and allows the motion judge, if the court finds the action to have been brought in bad faith or for an improper purpose (i.e. a SLAPP), to order damages to be paid by the plaintiff to the defendant. While there has been much discussion about "libel chill", it is now time to start speaking about "litigation chill".

Defendants with financial resources or insurance, by virtue of this legislation, have been handed a tool with which they can bully a plaintiff.

The proposed legislation asks the Court to undertake what in most cases will be an impossible task. Except in the clearest of cases it is hopeful that Judges will decline to make orders under this legislation, notwithstanding the apparent mandatory nature of it. Amazingly, the legislation itself leaves no residual discretion for a motions Judge to decide that a trial is required in order to serve the interest of justice.

1 *Grant v Torstar Corp., 2009 SCC 61.*

2 *Bill 83, An Act to amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in order to protect expression on matters of public interest*, 2nd Sess, 40th Leg, Ontario, 2013 (first reading 4 June 2013)

If it is just, as the Ontario Court of Appeal has found[3], to only grant summary judgment in circumstances where it is clear that a trial is not required, how are motion judges going to decide on a summary basis whether a claim has *substantial merit*, whether the defendant lacks a *valid defence* and finally what the *public interest* is in any given dispute. This is particularly so in light of the limited rights of cross-examination and the absence of any right to call *viva voce* evidence on a Bill 83 motion.

The Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch* commented on the appropriateness of a summary disposition of a dispute as follows:

> "In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial."[4]

Bill 83 creates, in most circumstances, a situation where judges will be required by the legislation to make dispositive findings, which on the evidence before them, they will be incapable of making. Accordingly, the proposed legislation will not, in the words of the Court of Appeal, serve the "interest of justice."

In addition, while Bill 83 may have been introduced with the best of intentions, it is unnecessary, as the current laws of Ontario already provide a variety of tools, which in the right circumstances, will block and limit the effects of SLAPPs.

The existing tools to deal with SLAPPs include motions for summary judgment, the defence of Responsible Communication and a punitive award of costs.

Under current circumstances, this legislation, if enacted, will only create additional motions, at great expense to the parties, cause delay by virtue of the inevitable appeals from judgments dismissing alleged SLAPPs and further strain the limited resources of our court system. But most importantly it could prevent valid cases from proceeding to trial.

Motion for Summary Judgment

If the Court of Appeal is to be consistent, it is suggested that the only cases which will be dismissed pursuant to this proposed legislation are those cases that would similarly be dismissed on a motion for summary judgment.

In determining whether a case should be disposed of by way of a motion for summary judgment, the motion judge must apply a "full appreciation" test and ask whether the full appreciation of the evidence can be achieved by way of summary judgment, or whether a trial is required.[5] The motion judge is specifically empowered under Rule 20 of the *Rules of Civil Procedure* to weigh evidence, evaluate credibility and draw reasonable inferences. Only where a judge is satisfied that a claim has no merit may the claim be dismissed. If on a motion for summary judgment a Judge cannot dispose of the issues without a trial, it follows that a motion judge would be equally unable to determine, without the benefit of a trial, the issues to be decided on a SLAPP motion. Conversely, a SLAPP motion should only succeed where a motion for judgment would also succeed. Accordingly, the legislation is completely unnecessary, inherently flawed and will result in cases with merit being summarily dismissed.

Most defamation actions turn on questions of fact, including the important determination of whether the expressions complained of were made with malice. These issues do not lend themselves to resolution by way of summary judgment and as such most SLAPP motions should be doomed to failure as are motions for summary judgment on the same issues.

Defence of Responsible Communication

The defence of Responsible Communication was introduced into Canadian law by the Supreme Court of Canada in 2009[6]. This new defence specifically applies not only to journalists but to ordinary individuals as well. Essentially, the Supreme Court of Canada, after recognizing the competing interests of protecting one's reputation and freedom of expression in today's electronic world, created a new defence which is specifically stated to promote responsible dialogue on matters of public interest. The defence was created to allow for the free-flow of information important to public discourse and to prevent, as the Supreme Court put it, "libel chill" and prevent freedom of expression from being undermined. To protect a person's reputation the defence requires that the person making the statement act responsibly. As such, the law already expressly strikes a balance between these competing interests.

It would serve all members of the Legislature well to review the reasons of the Supreme Court of Canada in *Grant v. Torstar* before voting on Bill 83.

3 *Combined Air Mechanical Services Inc. v. Flesh*, 2011 ONCA 764, para. 51.

4 Supra, at para. 51.

5 Supra.

6 *Grant v Torstar Corp., 2009 SCC 61, at p*ara 2 and 57.

Costs

As a final consideration, it should be noted that in Canada there is a suitable remedy for spurious lawsuits. Unlike in the U.S., where SLAPP legislation is more common and it is rare to award costs, a cost remedy is readily available in Ontario. If the lawsuit is a SLAPP, then the plaintiff can be penalized and the defendant made whole by way of an award of costs on a full indemnity basis.

Conclusion

Arguably, instead of alleviating the alleged chill on free expression, Bill 83, if passed, will disturb the current balance between the right to protect one's reputation and freedom of expression. It will also restrict access to the courts and result in increased litigation, numerous and costly motions and appeals, and create greater delay in getting to trial, in what is already an overburdened judicial system.

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