

Dentons represents BC coalition of women's rights groups in Supreme Court of Canada interventions: a focus on protecting the vulnerable against weaponized SLAPP suits

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On September 10, 2020, the Supreme Court of Canada released its reasons for two fiercely anticipated decisions on the interpretation and application of Ontario's anti-SLAPP legislation, namely, 1704604 *Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (*Pointes Protection*) and *Bent v. Platnick*, 2020 SCC 23 (*Platnick*). The decisions will undoubtedly have a profound effect on the interpretation of novel anti-SLAPP statutes that have cropped up across Canada in recent years.

In *Pointes Protection*, the Supreme Court fleshed out the test for bringing an application to dismiss a lawsuit intended to silence debate on a matter of public interest under Ontario's anti-SLAPP legislation. After setting out its fresh exposition of the test, a 5-4 split Supreme Court applied it to an intriguing set of facts involving allegations of altered doctor's reports and lawyer shoptalk on a confidential email Listserv.

David Wotherspoon and Rajit Mittal, partner and associate respectively in Dentons' Litigation and Dispute Resolution group in Vancouver, intervened in the decisions on behalf of a BC Coalition of women's rights groups including the West Coast Legal Education and Action Fund, the Atira Women's Resource Society, the B.W.S.S. Battered Women's Support Services Association, and the Women Against Violence Against Women Rape Crisis Centre. The BC Coalition made important submissions on how the Supreme Court's interpretation of anti-SLAPP legislation will impact marginalized groups' empowerment to report and disclose instances of gender based violence – a subject that remains mostly unseen by the collective consciousness of the legal profession in Canada.

This insight will discuss the importance of the two decisions on the interpretation and application of anti-SLAPP legislation in Canada, with a focus on the importance of protecting vulnerable communities from lawsuits aimed at silencing them. The BC Coalition's submissions to our highest court adds much needed nuance to the discussion on how the interpretation of anti-SLAPP legislation will impact marginalized communities, particularly those who have experienced gender based violence.

Strategic litigation against public participation, or "SLAPP", lawsuits are lawsuits intended to censor, intimidate, and silence critics on issues of public interest by burdening them with the cost of a legal defense until they abandon their criticism or opposition. They are a means for a financially dominant individual or corporate body to invoke the legal apparatus as a weapon against a critic and have the effect of preventing the critic from speaking out on topics of public interest, or making it very prohibitively expensive to do so.

The Supreme Court aptly named the "public interest" hurdle "the crux" and "the core" of the analysis. The Supreme Court noted that this hurdle is more than a mere balancing exercise – the CJA specifically requires that one consideration outweigh the other, and not simply that the considerations be balanced against one another. In other words, the plaintiff must show that the harm caused by the expression outweighs the public interest in protecting the expression.

The Supreme Court specifically identified the possibility that an expression or a claim might provoke hostility against

an identifiably vulnerable group as a factor that can assist courts in weighing the harm suffered and the public interest in protecting the underlying expression. This is where the approach of the BC Coalition came to light in the Supreme Court's reasoning – vulnerability, and the category of “identifiably vulnerable groups”, is not limited to groups protected under Section 15 of the Canadian *Charter*. Instead, the Supreme Court recognized that the realm of vulnerability is broader in such cases.

The BC Coalition made invaluable submissions on this point and how SLAPP lawsuits are weaponized against complainants alleging gender based violence, including sexual assault and sexual harassment.

The BC Coalition highlighted the specific vulnerabilities of marginalized groups comprised of individuals whose identities intersect with various personal and collective attributes including race, ethnic origin, Indigeneity, gender identity, sexual identity, and socio-economic status. These intersectional identities make individuals susceptible to SLAPP lawsuits, and evermore vulnerable to being harmed by them.

The BC Coalition took the position that anti-SLAPP legislation should be read in a manner that empowers survivors of gender based violence to report, disclose, and seek support without fear of being sued or otherwise silenced by the legal system, as the reporting and disclosure of sexualized violence are expressions relating to matters of public interest. The BC Coalition made this argument in the context of a legal system pervaded with pre-existing and long-standing barriers to disclosure of sexualized violence.

Furthermore, the BC Coalition argued that suing a survivor of gender based violence for reporting, disclosing, or seeking basic assistance and support should be recognized as a SLAPP lawsuit at first blush. It further argued that reporting and disclosing gender based violence should be recognized as an express category of qualified privilege under the merits based hurdle. At the balancing stage, the BC Coalition argued that there should be a superordinate public interest in promoting and facilitating the reporting, disclosure, and discussion of gender based violence, such that it will rarely be outweighed by purported reputational harm to the plaintiff.

Given the barriers survivors face in accessing the justice system, as well as the pervasiveness and grave harms of gender based violence, the BC Coalition reasoned that it is critical that survivors have networks of support and avenues to share information to keep themselves safe. Therefore, notwithstanding the seriousness of an allegation of gender based violence, of greater public importance is facilitating the reporting, disclosure, and discussion of gender based violence against women, particularly Indigenous women, and trans and gender diverse people.

There is greater individual and societal benefit from encouraging survivors of gender based violence to report, than accepting a plaintiff's plea for reputational rehabilitation. The proper administration of justice will benefit from courts facilitating the reporting and disclosure of gender based violence.

Thank you to Tomasz Cerazy for his contributions.

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