

RECENT CASE TESTS ANTI-SLAPP PROVISIONS IN CONDO FORUM

by Carol Dirks

Condominium communities can certainly be a lively forum for negative and destructive comments. Board members and managers are frequently accused of "receiving kickbacks" or "being on the take," or "acting in bad faith" and engaging in "illegal" methods.

Condo bylaws typically contain a provision entitling directors to be indemnified by the corporation for damage or harm sustained to them in the course of carrying out their duties as directors. Previously, condo corporations have justified proceeding with a defamation action against owners on this basis.

However, since 2015, there have been a flood of court cases where "anti-SLAPP" provisions have been invoked to halt defamation claims at the outset.

In late 2015, the Ontario government passed the *Protection of Public Participation Act*. Its objective was to provide a mechanism to quickly identify and eliminate "strategic litigation against public participation," or "SLAPP" for short. The act seeks to preserve an individual's right to freedom of expression on issues of public interest without the fear of legal action.

SLAPP refers to a court action brought by a well-resourced litigant, such as a corporation, against an individual with the intent to silence or dissuade that individual from voicing an opinion in public. Because of the high costs of defending a lawsuit, the individual may be forced to capitulate and forego expressing their opinion as a result. The overall impact is to discourage or decrease public discourse, debate, and criticism.

One recent case shed light on how these newly available SLAPP provisions may apply in the condo context. Here is what boards of directors and their managers need to know:

How do the anti-SLAPP provisions work?

Section 137.1 of the *Ontario Courts of Justice Act* permits a defendant to a defamation action to bring a motion to a judge to dismiss the court action "if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest." The filing of the motion freezes any further steps in the action until the motion is heard.

The term "expression" is defined to mean "any communication, regardless of whether it is made verbally or nonverbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity."



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The Court of Appeal for Ontario recently clarified the appropriate interpretation of the test for an anti-SLAPP motion.

First, the onus is on the defendant (individual) to establish that the "expression" (whatever he or she said) relates to a matter of public interest. The Court of Appeal called this the "threshold requirement." If the defendant satisfies the threshold requirement, the onus then shifts to the plaintiff to clear a "merits based hurdle" and a "public interest hurdle." A failure by the plaintiff to clear both hurdles will result in a dismissal of the action.

The initial threshold requirement

The initial onus is on the defendant to prove that the action arose from an expression made by the defendant that "relates to a matter of public interest." The term public interest is not statutorily defined. The Court of Appeal confirmed that it must be determined "objectively, having regard to the context in which the expression was made and the entirety of the relevant communication."

There is no hard or fast rule as to what communications will qualify as being of "public interest." It may be enough that a segment of the community has a genuine interest in receiving the information. A curiosity interest is not enough.

Recently, in Small Claims Court, a condo owner brought a motion to dismiss a defamation action pursuant to section 137.1. In that case, a director of a condo corporation sent a series of emails to other board members containing false and damaging statements about property management. The board member argued that the management company's legal action was a SLAPP to prevent him from discussing legitimate and necessary condo matters in the public interest.

In that case (released before the Court of Appeal decisions), the court found that "communications related to matters involving the everyday affairs at the Condo" did not fall within the meaning of public interest as defined by section 137.1(1). It remains to be seen whether this viewpoint will be upheld in the higher courts. The statements at issue in that case appeared to be a personalized attack on management as opposed to broader criticisms about the corporation governance.

Merits based and public interest hurdles

Once the threshold requirement is satisfied, the plaintiff has to then satisfy the judge, on a balance of probabilities, that the action has substantial merit. The judge must look at the evidence filed on the motion and decide if there are reasonable grounds to find that a trial judge could accept the plaintiff's evidence.

In addition to showing the action has substantial merit, the plaintiff also has to show that there are reasonable grounds to believe that none of the defences asserted by the defendant would succeed.

Finally, the plaintiff must show that the harm suffered by it is sufficiently serious that the public interest of allowing the action to continue outweighs the public interest in protecting the individual's right of expression. The harm to the plaintiff can be monetary or non-monetary. The plaintiff is not required to "present a fully-developed damage brief." However, there should be some evidence to reasonably draw a connection between the defamatory statement and the damages claimed. The damage must not be nominal.

In one case where the individual had retracted the defamatory statements immediately thereafter and issued an apology letter, the court dismissed the action because "there is nothing to be gained by proceeding."

What if the action is dismissed?

If the defendant individual is successful on the motion and the action is ordered by the judge to be dismissed, the individual is presumptively entitled to their full indemnity costs of the motion. This means the plaintiff corporation has to pay all of the individual's legal costs for the motion, which could be thousands of dollars.

Even if the judge decides not to dismiss the action at this stage, there is a legal presumption that the plaintiff corporation is not entitled to any of its costs of having to defend the SLAPP motion. This means that there are no cost consequences to the individual bringing the SLAPP motion if he or she loses, and the corporation has to foot the bill for its own costs.

In special cases, if the defendant individual convinces the judge that the action was brought by the corporation in bad faith, the judge can also award payment of damages to the individual to effectively penalize the corporation for bringing the action in the first place.

What should boards of directors and managers take away from this?

As a result of section 137.1 of the *Courts of Justice Act* and the significant cost consequences to an unsuccessful plaintiff, it's extremely important that boards of directors consult with legal counsel before embarking on any legal action to address negative or defamatory statements made by an owner or resident.

In deciding whether it's appropriate to initiate legal action using condo corporation funds, all of the potential consequences will need to be carefully considered. Sometimes, as difficult as it may be, the best course of action might be to take the SLAPP in the face, and move on.

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