SLAPP-back: Full indemnity costs awarded under B.C.’s anti-SLAPP legislation

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Overview

In a recent decision from the Supreme Court of British Columbia (*Mawhinney v. Stewart*, 2023 BCSC 419), Justice Baker awarded full indemnity costs to the defendant, who successfully brought an application to dismiss the plaintiffs’ action for defamation under British Columbia’s anti-SLAPP (Strategic Lawsuits Against Public Participation) legislation.

Key takeaway

If an action is dismissed under the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (PPPA), a successful defendant should receive costs on a full indemnity basis. That is the starting point, although the court maintains judicial discretion to make a different costs award in appropriate circumstances. In exercising this discretion, the court will consider the intention of the full indemnity starting point, which is to discourage strategic lawsuits against public participation (SLAPP suits).

Background

British Columbia’s PPPA creates a pre-trial procedure that allows a defendant to apply to the court for an order dismissing an action arising out of an expression of public interest. The PPPA was enacted in 2019. It is a legislative response to lawsuits brought for an improper purpose, namely to silence expression and financially punish one’s critics. Ontario and Québec have enacted similar laws, commonly known as anti-SLAPP legislation.

Section 7 of the PPPA expands the costs options available to the court on dismissal applications brought under the act. Under British Columbia’s *Supreme Court Civil Rules*, the court is not authorized to make full indemnity costs awards. However, s. 7 of the PPPA states that if the court makes a dismissal order, the successful defendant is entitled to costs on a full indemnity basis unless the court considers that assessment inappropriate in the circumstances.

The Hon. D. Eby discussed this costs provision in the PPPA at the committee stage:

> [T]here's a recognition within this bill, and generally around these kinds of lawsuits, of an imbalance of resources most typically in these kinds of lawsuits. In fact, typically, one of the defining features of these lawsuits is that imbalance of resources between the plaintiff and the defendant. So this recognizes that.
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> …
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> What we wanted to do with both of these provisions, subsections 7(1) and 7(2), was to give the court a presumption. The presumption is that if someone is successful in this application, they get full costs on an indemnity basis.

Mawhinney v. Stewart, 2023 BCSC 419

In *Mawhinney v. Stewart*, 2023 BCSC 419, members of the Non-Partisan Association (NPA), brought a defamation action against then mayor of Vancouver, Kennedy Stewart, in connection with a press release that made statements regarding the leadership and board of the NPA. Mr. Stewart successfully applied to dismiss the action under the PPPA. Subsequently, he brought an application for full indemnity costs.

The court awarded full indemnity costs to Mr. Stewart, which totaled more than $100,000. This is a noteworthy award because the court determined that the defamation claim against Mr. Stewart did in fact have substantial merit and did not have the usual hallmarks of a SLAPP suit. The NPA was not a large and powerful entity and Mr. Stewart was not a smaller and more vulnerable party.

However, the court found that the NPA and Mr. Stewart were clearly political competitors, and the filing of the defamation action did serve to limit Mr. Stewart's political expression. On that basis the action was dismissed, and the full indemnity costs award was made.

Conclusion

This case serves as a warning for would-be plaintiffs in actions designed to silence one's critics. Even if the contemplated claim has substantial merit, the action may be dismissed at an early stage, and if it is, a significant adverse costs award will likely be made.

BLG has acted for plaintiffs and defendants involved in anti-SLAPP applications in British Columbia and Ontario. For more information, please reach out to any of the key contacts listed below.

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