Defamatory statements against regulated professions may not attract public interest

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Background

In *Sokoloff Lawyers v. Tru-Path,* 2020 ONCA 730, an action arose from a dispute over payments claimed by Tru-Path Occupational Services (Tru-Path) for occupational therapy services. Sokoloff Law Firm (Sokoloff) regularly referred clients to Tru-Path where payment for service was collected from the client's insurance.

A dispute arose when Sokoloff began to question some of the charges made by Tru-Path, which ended the referral arrangement between the two corporations. By way of retaliation, the President of Tru-Path positioned himself outside the law firm, displaying large placards, airing the dispute between the parties. The placards claimed that Sokoloff seized over $1.3 million in fees and used the money to pay their clients' disbursements. Sokoloff brought an action in libel against Tru-Path, claiming the comments were defamatory.

Anti-SLAPP motions

Strategic Lawsuits against Public Participation (SLAPP) are actions brought by persons subject to public criticism in an effort to silence or intimidate their critics. Section 137.1 of the *Courts of Justice Act*[1] (CJA) allows defendants to dismiss such lawsuits if the subject is found to be a matter of public interest.

When determining whether an expression is a matter of public interest, the analysis does not turn on the merits or manner of the expression. Rather, the court will consider whether the public has a substantial concern with the subject matter because it affects the welfare of the citizens.[2]

Superior Court decision

In this case, Tru-Path brought a motion to dismiss the libel action under the anti-SLAPP provisions of the CJA. They argued the action was merely a means to silence Tru-Path and the ethical conduct of lawyers is a matter of public interest. Sokoloff in turn argued

this was a private matter unrelated to the regulation and ethical conduct of lawyers, and thus did not meet the threshold for dismissal under the CJA.

The motion judge found that the issue between the parties was of a private contractual nature and stated that although an expression may touch upon the field of law or legal ethics, it was not enough to meet the threshold of "public interest". The judge considered Tru-Path's motive, the merit of the expression and the manner in which it was made. He found that Tru-Path was not motivated by a broader public interest and that the statements seemed to be an attempt to embarrass Sokoloff. The motion was then dismissed.

Court of Appeal decision

The Court of Appeal agreed that the expression did not relate to a matter of public interest. However, the Court was critical of the motion judge for criticizing the manner in which Tru-Path chose to make its statements and its motivation for doing so. The Court cited the Supreme Court decision in *1704604 Ontario Ltd. v. Pointes Protection Association*[3] holding that "it is not legally relevant whether the expression is desirable, deleterious, valuable or vexatious…".[4]

The Court of Appeal acknowledged that the public has an interest in the ethical conduct of lawyers, but the fact that the parties were members of regulated professions did not make the dispute a matter of public interest. The proper analysis required the judge to determine what the expression is about, given the entire context of the expression. The Court of Appeal agreed that the issue was a private commercial dispute with an individual who happened to be a lawyer. As such, the context of the expression did not rise to the threshold of a matter of public interest, and the appeal was dismissed.

Commentary

The purpose of anti-SLAPP legislation is to protect the freedom of expression related to matters of public interest and public participation in democracy. Although certain professions and ethics surrounding those professions may attract public scrutiny, disputes that arise in the context of contractual agreements or commercial arrangements between parties will not rise to meet the public interest threshold.

For more information, contact any of the key contacts listed below.

[1] RSO 1990, c. C.43 (CJA)

[2] *Grant v. Torstar Corp*., 2009 SCC 61

[3] 2020 SCC 22.

[4] *Ibid.*, at para. 28.

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