

Well SLAPP me Silly! Resolute Forest Products vs. Greenpeace

Authors: John Stefaniuk, K.C.

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“‘Greenpeace’ is a global fraud.” So begin the allegations in the colourful preliminary statement of the Complaint filed in 2016 in the U.S. District Court in Georgia on behalf of Resolute Forest Products, Inc. in a \$300 million anti-racketeering action against Greenpeace International and others. This followed the commencement by Resolute of an action against Greenpeace Canada in 2013 in the Ontario Superior Court of Justice. The (kinder, gentler) Canadian Statement of Claim seeks \$7 million in general and punitive damages for “defamation, malicious falsehood and intentional interference with economic relations”.



This all started with a very public 2012 campaign by Greenpeace Canada against Resolute’s forestry practices in Canada. Among other things, Greenpeace Canada’s publications alleged that Resolute was in breach of its environmental protection obligations. Resolute presented its facts to Greenpeace Canada, and obtained a retraction and apology. According to Resolute’s claim, that did not stop Greenpeace Canada from continuing its campaign. Resolute alleges that it suffered direct losses due to Greenpeace Canada contacting its customers to pressure them to stop buying fibre from Resolute.

In its Statement of Defence and on-line, Greenpeace Canada describes Resolute’s action as a SLAPP (an acronym for “strategic litigation against public participation”) action. SLAPP is used to describe a court action, or threatened action, that is intended to pressure or intimidate critics, especially public interest groups. In its U.S. defence, Greenpeace International describes some of the allegedly defamatory statements as being merely “criticism and heated rhetoric” or made without intending to be strictly literal or scientifically precise.

Ontario and Quebec both have what has come to be known as “anti-SLAPP laws”. These are procedural protections intended to protect those who participate in legitimate public protest or discourse from frivolous law suits designed to stifle opposition. British Columbia had such a law on its books, but it lasted less than a year before it was repealed. It should be noted that anti-SLAPP laws in Canada protect “expression” in the context of communication, not things like blockades or property damage.

In October of 2015, Ontario passed the Protection of *Public Participation Act*. It amended the *Courts of Justice Act* to create a new section 137.1, which allows a party to apply to the Court to protect itself against an alleged SLAPP. After hearing an anti-SLAPP motion, the judge may dismiss the claimant's court action against a person if the judge is satisfied, on the evidence, that "the proceeding arises from an expression made by the person that relates to a matter of public interest". Merely making an anti-SLAPP motion freezes the court proceedings until the motion is dealt with.

Under the Ontario law, a judge cannot dismiss the claimant's action if the claimant is able to demonstrate to the Court grounds to believe that: the proceeding has substantial merit; and the defendant has no valid defence in the proceeding. The judge also has to be convinced that the harm suffered by the claimant (or likely to be suffered) is serious enough such that allowing the court proceeding to continue outweighs the public interest in protecting the expression that gives rise to the claim. The stakes are higher than the typical motion - - - an unsuccessful claimant will be responsible for all of the successful defendant's legal costs. The cost consequence alone should give pause to anyone considering even a legitimate claim arising out of someone else's expression if there is a public interest argument.

These criteria go beyond the Court's traditional jurisdiction to control abuse of process. Depending on how they are interpreted, they could pose a significant barrier to otherwise legitimate defamation claims. On the plus side, the Ontario law requires an expeditious hearing (likewise on any appeal).

Despite Greenpeace Canada's public position and its characterization of the Resolute claim in its statement of defence, Ontario's anti-SLAPP legislation is not retroactive and does not apply to the case. In a 2016 decision of the Ontario Divisional Court on a procedural matter, the Court questioned the appearance of these anti-SLAPP arguments in the Greenpeace Canada defence, but also noted that Resolute did not seek to strike them out.

So far, the experience in Ontario on the use of the anti-SLAPP law is limited. In October 2016, the *Toronto Star* reported that two motions were in the works; one a defamation claim by a former municipal council member against an individual who, among other things, likened the councillor to Snoop Dogg; another a defamation claim by an unsuccessful candidate for Parliament against a freelance journalist/blogger.

The Canadian Civil Liberties Association cites Quebec cases in which section 54.1 of the *Quebec Code of Civil Procedure* has been successfully applied by defendants in court actions. Several involve citizens who were publicly critical of businesses engaged with government. On the natural resources side, a \$350,000 defamation action brought by Pétrolia Inc. against a spokesperson of an anti-mining coalition who was critical of Quebec policy that suspended royalty payments during the exploration phase was dismissed as an abuse of the court process.

All courts have the ability to control cases that they consider to be an abuse of process. The courts have also encouraged disposition of matters at a preliminary stage through summary judgement, where one party is able to establish that there is no genuine issue for trial.

The Resolute action is worth following for more than just its entertainment value. The case has the potential to test the rules for determining the boundaries between legitimate public discourse and the liability of the disseminators of information for damages when making defamatory statements. It may also have an impact on courts and legislatures in other provinces that do not yet have anti-SLAPP legislation. Stay tuned. In the meantime, if you are contemplating taking a court action against a troublesome opponent, carefully consider the range of possible outcomes. If the opponents believe that they are being subjected to SLAPP, they might do more than just turn the other cheek.

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