

### no holds barred: absolute privilege for judicial proceedings

The law of defamation prohibits unfounded or false attacks against a person's reputation. However, as recently confirmed by the Ontario Divisional Court in *1522491 Ontario Inc. v Stewart, Esten Professional Corporation et al.* ("*Stewart Esten*"),<sup>1</sup> judicial proceedings are occasions where speech is protected by an absolute privilege against defamation actions. Regardless of whether participants in judicial proceedings have been motivated by malice or an ulterior motive, or have otherwise made statements in bad faith, their speech is protected by an absolute privilege to ensure that the judicial search for truth is not hindered or compromised by the threat of a defamation action.

#### background facts

1522491 Ontario Inc., operating as Pine Hill Estates ("**Pine Hill**"), commenced a defamation claim against the law firm, Stewart, Esten Professional Corp., and the individual lawyer, William J. Leslie. Pine Hill was a real estate development company that had been engaged in a contractual dispute with another developer, Vespra Country Estates Limited ("**Vespra**"). The defendant lawyers had been retained by Vespra in connection with the dispute.

The alleged defamation occurred when the defendant lawyers sent a letter to the local town planner. Attached to the letter was a draft of Vespra's statement of claim against Pine Hill – a claim that was issued the day after the letter was sent. Pine Hill alleged that the letter contained false and defamatory statements and that the letter had been sent with the malicious intention of misleading the town planner to swear an affidavit for use by the defendant lawyers on a motion for a certificate of pending litigation ("**CPL**"). Based on the letter, the town planner signed an affidavit in support of Vespra's motion for a CPL.

The defendant lawyers moved by way of motion to strike out Pine Hill's claim and dismiss its action on the grounds that the letter was protected by an absolute privilege and could not form the basis of a defamation claim.

The motions court judge dismissed the lawyers' motion finding that absolute privilege for judicial proceedings did not apply to the letter at issue because the communication (i) occurred before the commencement of litigation, (ii) was irrelevant to the legal action, and (iii) was aimed at procuring false testimony rather than obtaining information from a potential witness. The defendant lawyers appealed to the Divisional Court.

<sup>1</sup> 2010 ONSC 727, 100 O.R. (3d) 596 rev'g [2008] O.J. No. 4872 (Ont. S.C.) and [2009] O.J. No. 53 (Ont. S.C.).

## divisional court decision

The Divisional Court allowed the appeal, reversing the decision of the motions court judge. The Divisional Court held that the lawyers' letter was for the purpose of, or preparatory to, litigation, and therefore protected by an absolute privilege, making the contents of the letter immune from a defamation claim.

The Court emphasized that absolute privilege applies even if the communication is malicious and the statements made are knowingly false. It does not matter if there is misconduct or an ulterior motive behind the communication, whether the communication was made in bad faith, or whether there is a lack of any justification or excuse for the conduct. It is the occasion of a judicial proceeding itself (as opposed to the specific communication) that is protected by the absolute privilege. All actions and communications that fall within the scope of this occasion are immune from a defamation claim.

The Court came to this conclusion without disputing that the lawyers' letter was misleading, malicious, and in bad faith, or disputing the findings of the motions court judge that the letter was "gratuitously defamatory" towards the plaintiffs, "clearly irrelevant" to the case, and used for procuring "perjured or merely factually false testimony."

## implications

The Divisional Court's decision demonstrates its commitment to protecting citizens' access to the judicial process, and those supporting that process, from claims of defamation – even where such participants may, in fact, be wrongdoers. Those believing that participants in judicial proceedings have wrongfully impugned their reputations or integrity through such proceedings may be compelled to keep their powder dry until it is time to make submissions on costs within the judicial process.

by Jason J. Annibale and Ahsan Mirza, Student-at-Law

For more information on this topic, please contact:

Toronto      Jason J. Annibale      416.865.7912      [jason.annibale@mcmillan.ca](mailto:jason.annibale@mcmillan.ca)

For further information or advice in relation to our Litigation practice, please contact:

Calgary	Peter Major	403.531.4725	<a href="mailto:peter.major@mcmillan.ca">peter.major@mcmillan.ca</a>
Toronto	Dan MacDonald	416.865.7169	<a href="mailto:dan.macdonald@mcmillan.ca">dan.macdonald@mcmillan.ca</a>
Montréal	Emmanuelle Saucier	514.987.5053	<a href="mailto:emmanuelle.saucier@mcmillan.ca">emmanuelle.saucier@mcmillan.ca</a>

## a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2010