

# THE LITIGATOR

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## Statements to Securities Commission are protected by absolute privilege

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In his decision this Fall in *Fraleigh v. RBC Dominion Securities*, Ontario Superior Court Justice Newbould summarily dismissed an action brought by John Fraleigh against RBC Dominion Securities and one of its employees. The action was brought for allegedly false statements and testimony given before the Ontario Securities Commission claiming unusual trading activity in his RBC trading accounts – information that was later published in media reports. In dismissing Fraleigh's action, Justice Newbould found that the claim arose entirely from testimony and other related communications to the OSC; communications that are protected by absolute privilege.

Absolute privilege is a form of immunity for communications incidental to judicial or quasi-judicial proceedings. Long recognized as protecting people who testify in court, absolute privilege has been expanded in recent years to protect persons from being sued for testimony and other information they provide to quasi-judicial regulatory bodies in the course of an investigation or regulatory proceeding.

In the past, courts have cited absolute privilege to dismiss actions brought against individuals who have given allegedly false information and testimony to bodies that regulate accountants, dentists, lawyers and other professionals. Unlike other defences to claims against the makers of false statements, absolute privilege is a complete defence in all circumstances. It applies regardless of whether the maker of a false statement acted with malice and it covers information and testimony given to a quasi-judicial body before, during and after an actual regulatory proceeding is commenced.

It remains to be seen how the courts will treat other types of statements to securities regulators that are not made in the context of an existing or pending regulatory proceeding. For example, investment dealers and mutual fund dealers are required by their respective self-regulatory organizations<sup>1</sup> to file notices, called Uniform Termination Notices (UTNs), whenever they terminate the employment of a registered person such as an investment advisor or mutual fund salesperson. Such notices are required to show the reason for the dismissal and an indication of dismissal for cause on a UTN can have serious detrimental effects on an advisor's future employment prospects, even if it does not lead to regulatory proceedings.

It remains an open question what protections such statements have from being the subject of civil defamation lawsuits. In particular, do investment dealers and mutual fund dealers have protection from being sued by advisors they dismiss for statements made within a UTN that are alleged to be defamatory?

The short answer is that such statements are likely to be protected by privilege, but not absolute privilege. The defence of qualified privilege is a well-recognized defence to actions for defamatory statements and applies to situations where the maker of the statement has a duty to make the allegedly defamatory statement and the recipient has a corresponding interest in receiving it. This is certainly the case with disclosures by dealers to

<sup>1</sup> For investment dealers, the Investment Industry Regulatory Organization of Canada ("IIROC") and, for mutual fund dealers, the Mutual Fund Dealers Association of Canada ("MFDA").

their regulators regarding the conduct and status of advisors and salespersons. If a statement is made in circumstances where qualified privilege applies, its maker will be protected from liability even if it is false – unless it can be proven that the false statement was made maliciously, i.e. with the malicious or improper intent to harm the subject of the statement.

In summary, statements made to the OSC or other investment industry regulators in the context of pending or existing regulatory proceedings are protected by absolute privilege – which means that the maker of such statements cannot be held liable even if the statements were false and motivated by malice. Other statements to regulators not in the context of quasi-judicial proceedings are probably protected by qualified privilege – which means they

are protected unless they were motivated by malice. In either situation, it is fair to say that statements made in good faith to a regulator pursuant to a duty to report conduct that may have been in breach of regulatory or industry standards are very unlikely to lead to liability on the part of the maker of those statements, even if they prove to be false.



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