

“Chilling effect” on a plaintiff or others not grounds for harm on an anti-SLAPP motion

Anti-SLAPP | Defamation | Litigation | Litigation & Dispute Resolution | Torts

12 June 2023

Since 2020, two Supreme Court of Canada cases have guided the analysis of anti-SLAPP motions in Ontario and British Columbia: [1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22](#) and [Bent v. Platnick, 2020 SCC 23](#). Although the guidance provided in these cases is clear, the barrage of anti-SLAPP motions that continue to be brought raise new issues that have again required intervention by the highest court in Canada.

In [Hansman v. Neufeld, 2023 SCC 14](#), the Supreme Court of Canada addressed whether a plaintiff could rely on the argument that the dismissal of his action would cause him harm as a result of restricting his freedom of expression and losing the opportunity to sue for damages.

The case involved two well-known local public figures who had become engaged in a war of words over political views expressed in connection with gender identity and sexual orientation.

The plaintiff was an elected official. The defendant was a teacher and a former teachers' union President.

In response to online statements made by the plaintiff criticizing provincial government initiatives to teach students about gender identity and sexual orientation, the defendant stated, among other things, that the plaintiff's views were bigoted, transphobic and hateful. The defendant was part of a chorus of critics against the views expressed by the plaintiff. The media frequently interviewed the defendant and published the defendant's statements.

The defendant had called for the plaintiff's resignation and claimed that he had violated his obligations as an elected official to ensure that students and staff had a safe and inclusive environment.

Although the plaintiff apologized for some of his own remarks, stating that he was not attacking individuals with his views but the provincial government's education resource, the war of words between the parties continued over the next year in the lead-up to the municipal election.

In a media article, the defendant was quoted as saying:

It is extremely problematic to have somebody who is running as a school trustee continuing to spread hate about LGBTQ people – especially trans people...

The defendant also stated that trustee candidates had “to commit to eradicating [racism and misogyny], not spreading hate and not spreading bigotry.”

Eventually, 8 days before the municipal election, the plaintiff sued the defendant for defamation.

The defendant brought an application to dismiss the plaintiff's action under British Columbia's [Protection of Public Participation Act, S.B.C. 2019, c. 3](#) (the “PPPA”). A chambers judge granted the application on the grounds that the plaintiff had not established grounds that the defendant had a valid fair comment defence.

The [British Columbia Court of Appeal](#) reversed the decision of the chambers judge. The appellate court found that the defendant's fair comment defence was not valid because several statements were based on fact. In addition, the chambers judge had erred in the assessment of malice.

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

“Chilling effect” on a plaintiff or others not grounds for harm on an anti-SLAPP motion

With respect to the public interest weighing analysis under [section 4\(2\)\(b\)](#) of the PPPA, the appellate court found that “the chilling effect on future expression” by the plaintiff or others needed to be considered. The appellate court explained that as part of the harm analysis, the court had to consider whether people might not opt to engage in public debate “for fear of being inveighed with negative labels and accusations of hate speech with no opportunity to protect their reputation.” The chambers judge had not taken this into account. Therefore, the chambers judge committed an error.

The later finding became the focal point of the Supreme Court of Canada’s decision.

The Supreme Court of Canada explained that [section 4](#) of the PPPA was nearly identical to Ontario’s anti-SLAPP legislation, more specifically, [section 137.1\(3\) and \(4\)](#) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 and that under [section 4\(2\)\(b\)](#) of the PPPA, the plaintiff was required to satisfy the court that the harm the plaintiff was likely to have suffered or likely to suffer because of a defendant’s expression outweighed the public interest in protecting that expression.

The Supreme Court of Canada rejected the British Columbia Court of Appeal’s view that under [section 4\(2\)\(b\)](#) the “chilling effect” on the plaintiff’s expression or fear of engaging in public debate due to the potential of being negatively labelled was a factor that had to be considered in the harm analysis.

The harm analysis required a plaintiff to provide evidence of harm of sufficient magnitude to outweigh the public interest in protecting a defendant’s expression and to show that the harm was causally linked to the defendant’s expression. The plaintiff provided insufficient evidence to do so.

With respect to the Court of Appeal’s reasoning that the potential for a “chilling effect” on a plaintiff’s or potential plaintiff’s expression had to be considered, the Supreme Court of Canada concluded that such a consideration ran counter to the language of [section 4\(2\)\(b\)](#) of the PPPA. The public weighing exercise under this section measured harm to a plaintiff caused by the expression of a defendant, not by anything the plaintiff might be prevented to express or do, including an inability to sue for damages. The “chilling effect” identified by the British Columbia Court of Appeal did not constitute a “harm”.

At [paragraph 78](#), the Supreme Court of Canada found that while the defendant had used words that could inflict serious reputational harm to the plaintiff, the public interest in allowing the plaintiff to continue his action had to be grounded in harm caused by the defendant’s words, “...not in the consideration of a ‘chilling effect’ on others if [the plaintiff] could not proceed with his defamation suit.”

With respect to the defendant’s fair comment defence, the Supreme Court of Canada also upheld the findings of the chambers judge.

The key takeaway from this decision is the Supreme Court of Canada’s findings on harm under the public interest threshold part of anti-SLAPP motion test. Plaintiffs are reminded that in order to meet the threshold they must lead evidence of serious harm. Although general damages in a defamation action are presumed and the presumption can establish the existence of harm, the presumption cannot establish serious harm. The plaintiff must do more, and also lead evidence that either establishes a clear causal link between the harm and a defendant’s expression or that permits a judge to infer a causal link between the plaintiff’s harm and the defendant’s expression.

Of note, despite the plaintiff’s allegation that he had suffered reputation loss because of the defendant’s statements, the plaintiff was successfully re-elected. A PDF version is available to download [here](#).

For more information please contact: **Stephen Thiele** at **416.865.6651** or sthiele@grllp.com

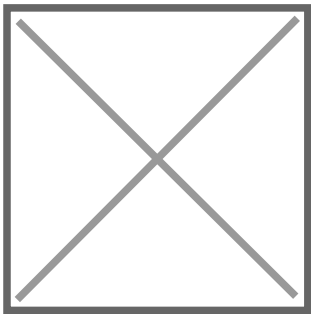
(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

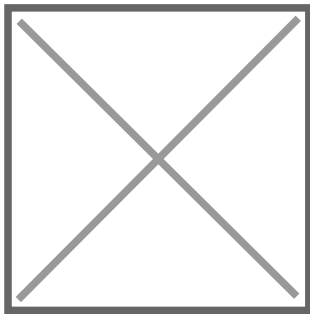
Authors



Stephen A. Thiele

Partner

416.865.6651
sthiele@grllp.com



Michael Lauricella

Associate

416.865.6670
mlauricella@grllp.com