

Court of Appeal upholds dismissal of anti-SLAPP motion in trucking protest case (2110120 Ontario Inc. v. Buttar)

Defamation | Dismissed | Litigation | Litigation & Dispute Resolution | SLAPP Motion | Torts

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Last April, I wrote a blog about a motion judge's decision to dismiss an anti-SLAPP motion in a trucking protest case on the grounds that the dispute between the parties involved a private interest rather than a matter of public interest.

In *2110120 Ontario Inc. v. Buttar*, 2023 ONCA 539, the Court of Appeal for Ontario upheld the motion judge's decision, but on other grounds.

Briefly, while the Court determined that the issues in dispute between the parties involved a matter of public interest, it concluded that under [section 137.1\(4\)\(b\)](#) of the *Courts of Justice Act* ("CJA"), the harm suffered by the plaintiffs as a result of the alleged defamatory expressions of the defendants was sufficiently serious such that the public interest in permitting their action to continue outweighed the public interest in protecting the defendants' expressions.

In this case, the plaintiffs commenced an action against former truck drivers of the corporate plaintiff and an organization that supported the drivers. The former drivers were in a labour dispute with the company over alleged unpaid wages. Although proceedings had been commenced by the former drivers under the *Canada Labour Code* and orders had been made in favour of some of the drivers, the company had appealed the orders. As a condition of commencing the appeals, the company paid the amounts owing under the orders to the labour board.

At the time that the former drivers, assisted by the labour support organization, held public protests against the company and made various allegations against the individual plaintiffs, two of whom owned the company and two of whom worked in management positions for the company, the appeals had not yet been resolved and accordingly no monies were owing.

Nevertheless, among other things, the former drivers publicly asserted verbally and in signs and flyers distributed at protests and rallies, that one of the plaintiffs was a "wage thief", and that the drivers should be paid now. In addition, a banner with the photo of one of the plaintiffs was held up with the words "Chor Alert", Punjabi for "Thief Alert".

The protests and rallies were held at the company's business address and in front of the personal homes of the individual plaintiffs. The defendants also participated in a "phone zap". The "phone zap" involved hundreds of calls to the company's business during business hours and the online posting of numerous one-star Google reviews and negative comments about the company.

Eventually, the plaintiffs commenced an action for defamation, trespass, breach of privacy and intentional infliction of emotional harm against the defendants. The former drivers sought to have the action dismissed under Ontario's anti-SLAPP legislation, but were unsuccessful.

The former drivers contended that in reaching the conclusion that the legislation did not apply because the case was not a matter of public interest, the motion judge committed a legal error. The former drivers argued that the motion judge relied upon irrelevant factors in analyzing [section 137.1\(3\)](#) of the CJA by:

- a) considering their motive, the merit of their expression, and the manner in which it was made;
- b) failing to consider the subject matter of the expression as a whole and scrutinizing portions of the expression in isolation; and
- c) suggesting that their actions did not constitute expressions as defined under [section 137.1\(2\)](#).

The Court of Appeal agreed with the former drivers on this issue.

The Court noted that, among other guiding principles, the term “expression” was broadly defined under the [CJA](#) and that a court was obligated to adopt a “broad and liberal” and “generous and expansive” approach to whether an expression related to a matter of public interest. Furthermore, a court was obligated to apply a contextual approach and ignore a qualitative assessment of the expression at issue.

The motion judge erred in finding that the matter was a private interest by focusing on “motive, merit and manner”. The motion judge had found that the expressions were designed to deal with a collection dispute, and to ignore the labour process and pressure the company to pay the former drivers the amounts of their unpaid wages claims.

The appellate court concluded, however, that the expression at issue went beyond the resolution of a purely private dispute. The dispute raised issues about the company’s labour practices and, in general, fair labour practices in respect of vulnerable workers. This was a matter of public interest.

But this finding did not result in the reversal of the motion judge’s decision that the plaintiffs’ action was allowed to proceed. The appellate court was still required to determine if the action should be dismissed under [section 137.1\(4\)](#) of the [CJA](#).

In the result, the Court concluded that the plaintiffs’ had met the tests under [sections 137.1\(4\)\(a\)](#) and [\(b\)](#). Therefore, the action was allowed to proceed.

Under [section 137.1\(4\)\(a\)](#), the Court found that the plaintiffs’ action had substantial merit and the former drivers had no valid defence to the allegations of defamation.

While the former drivers submitted that in assessing the substantial merits of the plaintiffs’ action, a court was required to assess the potential merits of each cause of action pleaded in the statement of claim, the Court of Appeal disagreed. As determined in *Bent v. Platnick*, 2020 SCC 23 (CanLII), at [paragraph 88](#), a plaintiff was only required to establish that there were reasons to believe that “there is a single basis in the record and the law to support a finding of substantial merit.”

With respect to the defences, the former drivers relied on the defences of justification, fair comment and responsible communication on a matter of public interest.

The Court found that the allegations that the plaintiffs were wage thieves or had stolen money from the former drivers were not substantially true. For the purposes of the anti-SLAPP motion, it was reasonable to believe that the allegedly defamatory words imputed criminality against the plaintiffs. Accordingly, the defence of justification was not valid.

The Court also found that there was evidence that could support a finding of malice against the former drivers. This rendered the defences of fair comment and responsible communication not valid.

Malice has both subjective and objective aspects. It can be established by reckless disregard for, or indifference to, the truth, spite or ill-will, or any indirect or ulterior motive. The Court explained that there was evidence to support a finding that the protests had an ulterior motive to intimidate the plaintiffs to pay the alleged unpaid wages and that there was recklessness in regard to the fact that the wage orders issued by the labour authorities were under appeal and subject to an appeal process. The Court also stated that the tone of the former drivers’ message and the invocation of criminality in the alleged defamatory statements could support a finding of malice.

Under [section 137.1\(4\)\(b\)](#), a court is required to balance the harm to the plaintiff against the public interest in the defendant’s expression. The plaintiff is required to prove on a balance of probabilities that, as a result of the harm suffered or likely to be suffered by the plaintiff because of the defendant’s expression, the public interest in allowing the proceeding to continue outweighs the proceeding’s deleterious effects on expression and public participation: See *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at [paragraph 82](#).



Contrary to the submissions of the former drivers, the Court found that there was sufficient evidence to support a finding of substantial harm. The plaintiffs showed that, among other things, the company had suffered a reduction in the number of loads it carried, a decline in gross revenues, and a departure of a key employee. Some of the company's customers also expressed concerns about the dispute.

In contrast, the public interest in protecting the former drivers' expression was weak. As explained by the Supreme Court of Canada in *Pointes Protection*, even though "a statement that contains deliberate falsehoods" or "gratuitous personal attacks" can relate to a matter of public interest, the public interest in protecting that expression will be afforded little protection.

The expressions at issue were misleading and inflammatory, and included personal attacks and imputations of criminal conduct.

Lastly, the Court of Appeal found that the plaintiffs' action did not bear the hallmarks of a SLAPP action or that the action was motivated for a purpose other than to recover damages for real harm and to prevent future harm. There was evidence that the plaintiffs' action was started as a measure of last resort and only after the plaintiffs had attempted to prevent the expressions and conduct of the former drivers in the first place.

This matter will now proceed through the usual court process. A PDF version is available to download [here](#).

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

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Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



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