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Watchdog's defamation action against municipality allowed to continue: SLAPP motion dismissed

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The law of defamation in the political arena has a long history. Passionate sparring between political opponents and the tendency to attack an opponent's policies and character has seen politicians end up in court either as plaintiffs seeking damages for reputational harm or as defendants protecting their words or ability to speak freely. One of the most infamous defamation cases involving politicians was *Douglas v. Tucker*, 1951 CanLII 54 (SCC), which was ultimately decided by the Supreme Court of Canada in 1951. In today's era of multi-media communications, particularly the explosion of internet and social media communications, the law of defamation and politics is colliding more frequently. As a defamation action has the ability to curb free speech, legislation in Ontario and a few other provinces, permits the early dismissal of an action arising from expressions on matters related to the public interest.

However as recently seen in the case of *Paul v. Madawaska Valley (Township)*, 2021 ONSC 4996 (CanLII), this legislation will not always protect public officials in connection with their expression on matters involving the public interest even where the expression is in the form of a municipal resolution or confirming by-law.

The individual plaintiffs in this case were the owners of a small local newspaper. In late 2019, they commenced an action against the defendant Township and elected officials over comments made by two council members at two separate council meetings, comments contained in a legal opinion letter received by the Township and a resolution and confirming by-law which directed that all communications from the individual plaintiff, RP, be vetted by council. The action claimed damages for defamation and misfeasance in public office.

The plaintiffs had branded themselves as the "watchdog" of the Township and had been involved in a previous human rights tribunal proceeding with the Township and an appeal to the Privacy

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Commissioner over a request for information that had been made by the individual plaintiff, DP. The plaintiffs had learned that in defending the human rights proceeding, the Township had incurred approximately $60,000 in legal fees. After the human rights proceeding was settled, RP sent an unsolicited letter dated August 18, 2019 to the Township complaining that the incurrence of substantial legal fees was unnecessary. RP also indicated that he had practiced civil litigation for almost 30 years and he recommended that the Township bring a claim against its previous lawyer to recover the fees.

RP's letter prompted the Township to obtain a legal opinion. The legal opinion questioned RP's claim to having practised law and recommended that all future communications from RP be directed by staff to council because of the history of "voluminous correspondence" received from him by Township staff. The Township had a small staff and only 4,000 ratepayers.

The Township waived solicitor-client privilege over the opinion letter at a council meeting, provided a copy of the opinion letter to RP, and passed a resolution to accept the recommendation made in the letter about whether to bring an action against the Township's prior lawyer to recover legal costs and to direct that all future correspondence from RP be forwarded to council for consideration at regular council meetings to decide on what public resources should be allocated thereto.

The plaintiffs published seven articles about these issues and ultimately commenced their action for damages. The plaintiffs claimed that RP had been called derogatory names by one councillor and told by another council member that he should apologize to ratepayers and personally write a cheque for $60,000, that the opinion letter questioning RP's legal credentials was an attack on his reputation, and that the Township's resolution wrongly portrayed RP as a nuisance.

The defendants sought to dismiss the claim under s. 137.1 of the *Courts of Justice Act* ("CJA"). With respect to the plaintiffs' defamation action, the defendants raised the defences of justification, qualified privilege and absolute privilege. The defendants also argued that the opinion letter was subject to solicitor-client privilege. With respect to the plaintiffs' claim for misfeasance in public office, the defendants argued that the Township and the council had the authority to pass the resolution in dispute and that they were acting lawfully when they obtained and accepted the legal opinion with its recommendations. The defendants submitted as well that the resolution and confirming by-law were passed to manage communications received from RP for the benefit of the entire community.

Under s. 137.1 of the CJA, the initial burden rests on the moving party to demonstrate on a balance of probabilities that the plaintiff's action involves an expression on matters involving the public interest. This is a low hurdle to meet.

Once this burden is met, the onus shifts to the plaintiff to satisfy the court that there are grounds to believe the action has substantial merit, and that the defendants have no valid defence. If these two criteria are established, the plaintiff must further satisfy the court that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. To satisfy this burden, the plaintiff must establish the existence of harm caused by the defendant's expression.

In the Decision on Anti-Slapp Motion, the court found that although the expressions involved matters of public interest, the plaintiffs satisfied the court that their action had substantial merit and that the defendants had no valid defences, and that the public interest in permitting the proceeding to continue outweighed the public interest in protecting the impugned expressions.

As determined in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (CanLII) at paragraph 24, the word "expression" as used in s. 137.1 of the CJA has an expansive meaning and the phrase "arising from" is entitled to a broad and liberal interpretation. Accordingly, the court found that the impugned statements directed to RP by the councillors, the opinion letter and resolution and confirming by-law qualified as "expressions".

The court was also satisfied that these expressions related to matters of public interest because a segment of the public had a genuine interest in knowing about the expression. Even though some of the expressions were allegedly derogatory and false, the Ontario Court of Appeal in *Pointes* found that published information can be a matter of public interest even where it is demonstrably false and the language used is intemperate: see paragraphs 55.

Accordingly, the burden shifted to the plaintiffs.

With respect to whether the action had substantial merit, the plaintiffs needed to demonstrate that it was "legally tenable and supported by evidence that [was] reasonably capable of belief such that the claim [could] be said to have a real prospect of success."

This burden was met for both the alleged defamation and misfeasance in public office claims.

The defamation claim satisfied the test because the three elements to prove a defamation were present: (i) the impugned words were defamatory (or could be considered defamatory for the purposes of the s. 137.1 analysis), in that they would tend to lower the plaintiffs' reputation in the eyes of reasonable people; (ii) the words referred to the plaintiffs; and (iii) the defendants published the words to a third party.

The misfeasance in public office claim satisfied the test because the court found that there was evidence that could be capable of belief that the defendants had an intention to act beyond their powers and thereby abused their authority. There was evidence of *animus* between the parties and ill feelings. While the defendants argued that the resolution and confirming by-law were duly passed, the plaintiffs argued that the resolution and confirming by-law were "targeted" and could be characterized as "reprisal conduct", such that they constituted an abuse of power.

The court accepted the plaintiffs' arguments that the defendants had "no valid defences" as well.

The defendants had not adduced evidence showing that the impugned expressions were substantially true, that the opinion letter was protected by solicitor-client privilege given that privilege had been waived, that the defence of qualified privilege did not weigh more in favour of the defendants, and that absolute privilege had not been made out. Although the Ontario Court of Appeal has held in *Gutowski v. Clayton*, 2014 ONCA 921 that absolute privilege can be extended to council meetings, there must be proper legislative controls over council proceedings in order for this privilege to apply.These controls include codes of conduct and the appointment of integrity commissioners. The defendants led no evidence that these controls were in place.

With respect to misfeasance in public office, the defendants argued that they were protected by the statutory immunity provided under section 448 of the *Municipal Act, 2001* and that the plaintiffs had taken no steps to quash the resolution or confirming by-law under section 273 of the Act. The court reasoned that the plaintiffs were not obligated to seek to quash the by-law and found that there was evidence that the defendants did not act in good faith.

Lastly, the court held that the plaintiffs satisfied the test under section 137.1(4)(b) of the CJA. Although the plaintiffs' evidence of financial damages was not supported by specific evidence, the court accepted that the individual plaintiffs were very involved members of the small local community and that the alleged actions of the defendants would significantly affect their reputation. There was a temporal connection between this harm and the impugned expressions as well.

The potential serious harm to the plaintiffs outweighed the public interest in protecting the defendants' expression considering, among other things, that the plaintiffs alleged that they were targeted by the defendants and that the impugned expressions included derogatory statements. As found by the Supreme Court of Canada in *Pointes*, at paragraph 75, although statements which contain deliberate falsehoods, gratuitous personal attacks, or vulgar and offensive language can still qualify as expressions related to a matter of public interest, the public interest in protecting this kind of expression will be less than would have been the case if the same message had been delivered without the lies, vitriol and obscenities.

At the time of this writing, it is understood that the defendants have appealed the dismissal of their section 137.1 motion.

Subject to the results of the appeal, this case demonstrates that a section 137.1 motion will not always result in the dismissal of defamation or other action based on an expression where the defendants are politicians or government. The mantle of "elected representative" does not excuse a politician from directing allegedly derogatory comments at a ratepayer or enacting resolutions that target a person in such a manner that will cause reputational or other harm. Indeed, no government official, elected or not, has the authority to directly target an individual or corporation and cause him or her harm. Although it is unknown whether the plaintiffs will ultimately succeed in their action against the defendants, section 137.1 of the CJA is not intended to be a deep dive into the merits of action. Accordingly where the factual circumstances of a case demonstrate a tenable claim, animosity between the parties and alleged intentional and malicious conduct on the part of a defendant that could seriously harm a plaintiff, this case shows that a plaintiff will more likely than not be permitted to vindicate their rights and that a section 137.1 motion to dismiss such a claim will likely be dismissed.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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