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City politicians succeed in getting defamation claim against them dismissed

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Politics can be a rough profession, particularly where the issues being debated attract diametrically opposed views. Some social issues often bleed into steadfastly held religious views. When these issues and views collide within the political arena sometimes bitter wars of words erupt in which statements are made that strike at the heart of a person's reputation. This, unfortunately, is the nature of politics because politicians are tasked with responding to issues and developing policies that are in the best interests of everyone. Meanwhile, the public has an inherent democratic right to hear what their elected representatives have to say about issues, including those issues that are controversial or those issues where there are passionately articulated opposing views. In these circumstances, it is not surprising that politicians who are sued for defamation by a person who feels that a politician's statement has allegedly harmed their reputation will be compelled to utilize the "anti-SLAPP" provision (section 137.1) of the *Courts of Justice Act* (the **"CJA"**) to seek the dismissal of the defamation claim.

In *Volpe v. Wong-Tam*, 2022 ONSC 3106, the defending Toronto City Councillors and Catholic School Board trustees, among others, succeeded in bringing a section 137.1 motion to dismiss the plaintiffs' action, which included a defamation claim.

The case arose out of comments made by the individual plaintiff (**V**) in a series of articles published in an ethnic language newspaper about positions that had been taken by the trustees in connection with the LGBTQ2+ community. The articles accused the trustees of being "virtue-signalling thugs", a "rat pack", "terrorists" and "buffoons". V published comments about the LGBTQ2S+ community and on January 8, 2021 published an article criticizing the defendant trustees for their support of a link to the Lesbian Gay Bi Trans Youth Line website from the Toronto Catholic District School Board (the **"TCDSB"**) website (the **"Youthline Article"**).

Initially, the TCDSB removed the link. This decision was criticized. Five days after the Youthline Article was published,

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the link was restored.

Various politicians responded to the Youthline Article. One of the defendant councillors (**W-T**) made statements on Twitter which accused V of "go[ing] after progressive TCDSB trustees brave enough to stand up to [V's] *homophobic and transphobic ramblings*" and that "*the @ cityoftoronto should not be spending any public dollars advertising in any media that promotes homophobia, transphobia or any other form of discrimination and hate*."

A motion was brought before Toronto City Council to require the ethnic language newspaper in which the articles were published to comply with the City's Human Rights and Anti-Harassment/ Discrimination Policy and to sign a "Declaration of Compliance with Anti-Harassment/ Discrimination Legislation & all other related City policies." The defendant trustees wrote a joint letter supporting the motion. A virtual Press Conference was held to support the motion.

The views expressed by the defendant councillors and trustees, including statements that the V and the newspaper were "homophobic", "transphobic" and "anti-LGBTQ2S+". An article published on Yahoo stated that V had "well documented anti-LGBTQ+ views."

The series of articles also resulted in a restaurant franchise chain withdrawing its advertising from the ethnic language newspaper on the grounds that the views expressed in the articles were not in accordance with the beliefs of the business

The plaintiffs sued the defendants for defamation, misfeasance in public office, inducing breach of contract and wrongful interference with economic relations. Among personal damages for loss of reputation, the plaintiffs contended that the ethnic language newspaper lost advertising revenue as a result of the comments and the City's motion, and that advertising contracts were cancelled.

The defendants relied on various defences, including, with respect to the defamation claim, fair comment, qualified privilege, justification and responsible communication. The City Councillors also relied on section 391 of the *City of Toronto Act, 2006* (**"COTA"**) which provides them with immunity for acts done in good faith in the course of their duties.

All of the defendants contended that their comments were made in good faith and without malice, and that there was no intent to injure the individual plaintiff or the newspaper.

In the Reasons for Decision, the court found that all of the impugned expressions fell within section 137.1(3) of the CJA. The impugned expressions related to a matter of public interest.

More specifically, with respect to the comments made by the Councillors, the court explained that:

> (i) the expressions related to preventing and addressing harassment and discrimination, and respecting the dignity and right of the LGBTQ2+ community;
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> (ii) the expressions related to the City's use of taxpayers' money;
>
> (iii) residents had a genuine interest in receiving information about the subject matter of the expressions; and
>
> (iv) the matter at issue was not private in nature.

With respect to the comments made by the trustees, the treatment of LGBTQ2S+ students was a matter of public interest. The trustees' comments were consistent with their role as public officials to protect their students and to fulfill their role under the *Education Act*, the TDCSB Code of Conduct, Pastoral Guidelines and inclusionary TDCSB policies.

As a result of establishing that the comments related to a matter of public interest, the burden shifted to the plaintiffs to satisfy that their case had substantial merit and that there were grounds to believe that the defendants had no valid defence in the proceeding. This is a conjunctive test.

If the plaintiffs were able to meet this test, then they were required to demonstrate that the harm likely to be suffered by them as a result of the defendants' expressions was sufficiently serious that the public interest in permitting the proceeding to continue outweighed the public interest in protecting that expression.

The court found that only the plaintiffs' claim in defamation had substantial merit because the impugned statements could be viewed as causing them to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem: see *Vander Zalm v. Time Publishers*, 1980 CanLII 389 (B.C.C.A.). Read collectively, the impugned comments of all of the defendants accused the plaintiffs of being homophobic, transphobic and anti-LGBTQ2S+.

With respect to the various defences, the court first considered the fair comment defence and found that all of the elements of the defence could be satisfied by the defendants.

As a matter of principle, the court disagreed with the plaintiffs' contention that a statement about a person being homophobic, transphobic or anti-LGBTQ2S+ could not be a comment. Other court cases had found that accusations about a person being an "anti-Semite", a "neo-Nazi symphatizer" or "homophobic" qualified as commentary rather than factual statements.

The court also found that there was no evidence of subjective malice on the part of the defendants or evidence that malice was the dominant intent in making the impugned statements.

With respect to the qualified privilege, the court explained that this defence protects statements made by public officials on matters of public interest and communications between community members and city officials on matters of public interest: see *Lane v. Nanaimo-Ladysmith School District No. 68*, 2006 BCSC 129 at paragraph 87 and *Lemire v. Burley*, 2021 ONSC 5036 at paragraph 78.

As well, in order for the defence to apply an impugned statement must be "reasonably appropriate to the legitimate purposes of the occasion."

If the privilege is established, it can be defeated by malice. However, the burden of proving malice is on the plaintiff. The plaintiff must either show that malice was the "dominant motive" of the impugned statement or that the impugned statement was made with reckless indifference to its truth.

In the circumstances, the court concluded that the plaintiffs were unable to establish a real prospect of success that the statements made by the Councillors -- the Tweets, the Motion and the statements made at the Press Conference -- exceeded the scope of the qualified privilege.

Similarly, the statements made by the trustees

fell within their duties as elected representatives and their constituents and the members of Toronto City Council had a corresponding entitlement to hear their views. Accordingly, the trustees did not exceed their privilege and there was no evidence of malice.

With respect to statutory immunity, it has been held that a councillor performing his or her duties in good faith is statutorily protected from a defamation claim: see *McLaughlin v. Maynard*, 2018 ONSC 3605.

Since the facts demonstrated that the impugned statements made by the councillors were made in good faith in the performance of their duties and there was no evidence of malice, they had a valid protection under section 391 of COTA. The plaintiffs, again, were unable to establish that there was a real prospect of success that the defence of statutory immunity would not be valid.

With respect to the responsible communication defence, *Grant v. Torstar*, 2009 SCC 61 establishes the elements of this defence. In this case, the Supreme Court of Canada stated:

> The defence of public interest responsible communication is assessed with reference to the broad thrust of the publication in question. It will apply where:
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> A. The publication is on a matter of public interest, and
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> B. The publisher was diligent in trying to verify the allegation, having regard to:
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> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
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> (d) the status and reliability of the source;
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> (e) whether the plaintiff's side of the story was sought and accurately reported;
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> (f) whether the inclusion of the defamatory statement was justifiable;
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> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
>
> (h) any other relevant considerations.

The court found that the evidence supported the validity of the defence because, among other things, there was an issue of public importance at stake, there was urgency in reporting on the matter, reputable sources were reviewed and relied upon, and readers were provided to consider V's views for themselves through links provided in the impugned Yahoo article.

Although unnecessary, the court also considered whether the plaintiffs were able to satisfy the test under section 137.1(4)(b) of the CJA on a balance of probabilities. The plaintiffs relied on the British Columbia Court of Appeal decision

in *Neufeld v. Hansman*, 2021 BCCA 222, for which leave to appeal to the Supreme Court of Canada has been granted, 2022 CanLII 693 (CanLII), to contend that the court had to consider the "potential chilling effect" that dismissing their defamations claim would have on the future expression of others. In response, the defendants argued that the weighing approach adopted by *Neufeld* was inconsistent with the approach established by the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Assoc.*, 2020 SCC 22 (CanLII), which requires a weighing of the harm caused to the plaintiff against the countervailing factor in protecting the defendant's expression.

The court did not decide which approach was determinative, but found that even if the court accepted that the *Neufeld* approach should be accepted there was no evidence that the freedom of others was at any risk. In the circumstances, none of the defendants had taken any steps to prevent the plaintiffs from expressing their views.

There was also no evidence of damages and no evidence establishing a causal link between the impugned statements and any loss. Indeed, the court noted that the restaurant chain had withdrawn its advertising before any of the impugned statements had been made. In contrast, the elected officials had a history of activism in the public interest. The court explained that it was their role to take public positions and that the law recognized that they had to be afforded the freedom of speech necessary to properly state, persuade, explain, and justify their positions to the public: see *Prud'homme v. Prud'homme*, 2002 SCC 85 (CanLII) at paragraph 53.

In assessing what was "really going on" in this case, the court concluded that the plaintiffs were attempting to chill the free speech of elected officials. The plaintiffs entered the public arena on the issues of the LGBTQ2S+ community and therefore permitting their action to continue would stifle public debate.

Similarly, it was found that the media defendant should be free to report on an ongoing public debate in the circumstances.

This case is similar to the recent decision of the court in *Blair v. Ford*, 2020 ONSC 7100 (CanLII) in which a motion judge, upheld by the Court of Appeal for Ontario, leave to appeal refused by the Supreme Court of Canada, also dismissed a defamation action against a public official, the Premier of Ontario. In that case, the plaintiff had also entered the public arena and then sought hefty damages against Premier Ford for comments he made in response to allegations publicly raised by the plaintiff. Like the *Ford* case, this case demonstrates that politicians who respond to issues of public importance will enjoy strong protection under section 137.1 of the CJA and have a good chance to dismiss actions brought against them for defamation, especially where there is no bad faith or malice.

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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