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Toronto City Councillor knocks out defamation action

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Although politicians continue to be targets of defamation actions, politicians also continue to knock them out under Ontario's anti-SLAPP legislation. Section 137.1 of the *Courts of Justice Act* has become an extremely powerful tool in the lawyers' toolbox, particularly when defending a politician in a defamation action.

In *Hotspot Auto Parts v. Thompson*, 2022 ONSC 3637, a Toronto City Councillor successfully used section 137.1 to dismiss the plaintiff's $2 million defamation action.

The plaintiff operated an auto parts warehouse in the east end of Toronto. On December 3, 2019, Scarborough Community Council held a meeting at which three members of a local Legion Hall made submissions about difficulties they were having with the plaintiff. The members stated that the plaintiff was leaving construction equipment, garbage and other refuse on the Legion Hall's property. As well, the members stated that the plaintiff's principal was engaging in profane interactions with the Legion Hall's female members and guests. The members reached out to the defendant Councillor for his help, but the issues went unresolved.

At the Community Council meeting, the members spoke. Reference was made to the neighbourliness of the plaintiff. The defendant Councillor also then made comments in which, among other things, he said that the plaintiff was a "bad neighbour" and that the plaintiff had "disrespect for the community". The City Councillor said that the plaintiff business "moved into the area [and] had done everything that they can to do whatever they wish illegally."

The plaintiff's principal filed a complaint with the City's Integrity Commissioner over the statements the City Councillor had made at the Community Council meeting. The complaint was dismissed. In doing so, the Integrity Commissioner stated that the Councillor's remarks were

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not "unparliamentary" and that they were not discriminating, harassing or bullying.

The plaintiff then commenced his defamation action. A few months later, the plaintiff commenced a second action against the Councillor, the city and two other defendants alleging malice, misfeasance in public office, and bad faith.\

In these circumstances, the defendant Councillor brought a section 137.1 motion to strike the defamation action.

Section 137.1 applies to expressions that relate to a matter of public interest.

Under the section, the moving party or defendant must establish that the plaintiff's action arises from an expression related to a matter of public interest. What constitutes a matter of public interest is given a broad and liberal interpretation.

The motion judge rejected the plaintiff's contention that the matters in dispute were of a private nature on the grounds that the impugned expressions were made during a public community council meeting in response to deputations made by Legion Hall members. Those members treated the issues in dispute as a matter of public interest that members of the public had an interest in receiving information about. Also, some of the impugned comments were related to whether the plaintiff had complied with City rules and by-laws.

The motion judge's findings on the issue of public interest, shifted the burden to the plaintiff to demonstrate that its claim had substantial merit and that the City Council did not have any valid defence, and that allowing its action to continue outweighed the public interest in protecting the defendant's expression.

The court found that the plaintiff's action had substantial merit because it was reasonably capable of proof. The three elements of the tort of defamation were satisfied.

However, the plaintiff was unable to demonstrate that there was no valid defence to its claim.

The defendant relied on the defences of qualified privilege, fair comment, justification and statutory immunity under section 391 of the *City of Toronto Act, 2006* (**"COTA"**).

With respect to qualified privilege, the motion judge explained that qualified privilege was a defence for defamatory remarks spoken on a privileged occasion and that the defence applied to meetings of municipal council and its committees: see *Gulowski v. Clayton*, 2014 ONCA 921 at paragraph 6.

The plaintiff contended that qualified privilege ought not to apply because the defendant Councillor's statements were made with malice. However, there was no evidence of ill-will between the parties and the Councillor's remarks were made in response to issues raised by Legion Hall members.

Accordingly, the motion judge found that the plaintiff had failed to satisfy its burden to show that the defence of qualified privilege had no real prospect of success.

The motion judge analyzed the defences of fair comment and justification together. The defendant Councillor argued that the impugned comments were based on facts and that his statements were recognizable as comments. As

the Supreme Court of Canada found in *WIC Radio Ltd. v. Simpson, 2008 SCC 40 (CanLII), [2008] 2 SCR 420, at para 26,* , comment is considered to be "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof."

The motion judge explained that the defendant qualified many of his statements, with phrases such as "I think", "I find it", "to me" and "seems to."

As well, there was no malice involved in the statements.

Accordingly, the motion judge concluded that the plaintiff failed to satisfy its burden to show that the defences of fair comment and justification had no real prospect of success.

Lastly, the motion judge was also satisfied that the plaintiff had failed to establish that the defence of statutory immunity had no reasonable prospect of success. Although the plaintiff contended that the Councillor's comments were not made in good faith, the Integrity Commissioner had found that the defendant Councillor conducted his duties in accordance with the Code of Conduct and that there was no basis for the complaint of the plaintiff's principal.

Section 391(1) of COTA states:

> No proceeding for damages or otherwise shall be commenced against a member of city council, an officer, employee or agent of the City or a person acting under the instructions of the officer, employee or agent for any act done in good faith in the performance or intended performance of a duty or authority under this act or a by-law passed under it or for any alleged neglect or default in the performance in good faith of the duty or authority.

With respect to whether the interest in allowing the plaintiff's action to proceed outweighed the public interest in protecting the defendant's expression, the motion judge also found in favour of the defendant, even though it was unnecessary to consider this issue.

Under the weighing exercise found in section 137.1(4)(b) of the *Courts of Justice Act*, the motion judge explained that based on *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, the plaintiff was required to provide sufficient evidence of likelihood of harm and a causal link between the defendant's comments and the harm.

The motion judge also noted that based on *2504027 Ontario Inc. o/a S. Trip! v. Canadian Broadcasting Corp.*, 2021 ONSC 3471, the general presumption of harm in a defamation action was weaker where the plaintiff is a corporation. The plaintiff in this case was a corporation.

The plaintiff led no evidence of specific economic harm. There was no evidence that it suffered a negative impact on its business, including a decline in revenue, sales or customers, as a result of the defendant's comments.

On the other hand, the motion judge stated that there was a strong public interest in protecting the defendant's expression. In *Prud'homme v. Prud'homme*, 2002 SCC 85, the Supreme Court of Canada recognized the importance of protecting a municipal politician's freedom of expression, stating as follows:

> In a defamation action against an

> elected municipal official, freedom of expression takes on singular importance, because of the intimate connection between the role of that official and the preservation of municipal democracy. Elected municipal officials are, in a way, conduits for the voices of their constituents: they convey their grievance to municipal government and they also inform them about the state of that government…Their right to speak cannot be limited without negative impact on the vitality of municipal democracy.
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> The councillor's freedom of expression is a crucial instrument for achieving effective participation in and transparent management of municipal affairs.

In the circumstances, the motion judge was satisfied that there was a high public interest in the defendant being able to state his position on the issues raised about the plaintiff at the community council meeting.

The motion judge also noted that the plaintiff had issued a second action against the defendant, and therefore was using litigation or the threat of litigation against the defendant to silence him.

This case once again demonstrates that a plaintiff will have significant difficulty using a defamation action or an action that involves any expression on a matter of public interest to silence a politician. These actions are extremely vulnerable to being struck at an early stage under Ontario's anti-SLAPP legislation even if a plaintiff is able to demonstrate that the action has substantial merit. Politicians will be able to rely on a variety of defences and, more importantly, will be protected by a strong interest in preserving freedom of expression on matters of public interest. Accordingly, a plaintiff must proceed cautiously when bringing these kinds of actions against a politician because a defendant who succeeds under a section 137.1 motion is presumptively entitled to full indemnity costs.

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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